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SPEAKERS

Anthony Sanders, Anya Bidwell, Audience member, David Gonzalez, Gus Bova, Jason Buch

A

Anthony Sanders 00:17

Hey everybody, we've got a special treat for you on Short Circuit this week. So last week from when I'm recording this, the Institute for Justice and the Texas Observer teamed up for an event in Austin, Texas on the First Amendment, local government, and retaliation. It involved our very own, Anya Bidwell, but it was moderated by Gus Bova of the Texas Observer. And we also had Jason Buch, who is a local reporter, and David Gonzalez, who is a Texas defense attorney. So they discuss ins and outs of local government and retaliation. I think you'll really enjoy the conversation, and whether you're viewing it on YouTube or listening on our podcast, I think you'll like what they have to say. So we'll move on to the show. But first, I want to remind you to get engaged.

G

Gus Bova 01:16

Hi everyone. Thank you for coming tonight. This event here is hosted jointly by the Texas Observer and the Institute for Justice. I'm Gus Bova, The Observer's interim Editor in Chief. We're here at the Parker Jazz Club in downtown Austin, but if you're not here, you can listen on IJ's Short Circuit podcast platform as part of IJ's Short Circuit Live series. Hence the second microphone. We're here to discuss an issue tonight that's a bit technical, it's a bit complicated, but it's one that should concern Texans from across the political spectrum, left and right. Basically, in the Trump era, in this era that we sometimes call the alternative facts era, we've seen a politicization and a polarization of conversations about the power held by law enforcement in our republic. Liberals, at times uncritically, have cheered on any and every investigation of Donald Trump, who, in turn, has treated any inquiry into him as a personally motivated witch hunt. Some of this may sound familiar to those of you who follow Texas politics. As politicians increasingly caricature legitimate prosecutions as persecutions, they risk creating a self fulfilling prophecy. If it's all just politics, then why shouldn't local government officials abuse their power to go after critics, be they electoral opponents or be they members of the press? This is a complicated conversation, but neither IJ or The Observer shies away from complicated conversations. So, what the hell? Let's have one tonight. (That was a good line that you got in there for me). Right here in Austin, the workplace of one of the biggest self proclaimed victims of political witch hunts himself, the current Attorney General Ken Paxton. On

tonight's agenda: How big is the problem of law enforcement overreach? Why is it possible? Why is it so corrosive, and what should be done about it? Joining me tonight are Jason Buch, right there, a freelance investigative reporter who writes for The Observer and other publications. His reporting, which he'll discuss tonight, has focused on government officials silencing speech and punishing critics with no meaningful mechanisms for checking their power. David Gonzalez, a prominent Texas defense attorney who's been appointed a special prosecutor in numerous complicated matters ranging from elected public official prosecutions to officer involved shootings. David also teaches at the UT Law School and represents victims of criminal offenses through the civil justice system. And Anya Bidwell, senior attorney at IJ who argued one of the cases that Jason discusses in his reporting before the US Supreme Court. Anya also leads IJ's Project on Immunity and Accountability, which is dedicated to ensuring that doctrines like qualified immunity do not stand in the way of compensating victims of unconstitutional abuse. So we'll start with Anya. Anya, in some cases of local retaliation, you've observed reluctance from local media to cover the story. Why is that, and how prevalent is the problem of sham arrests and investigations?

A

Anya Bidwell 05:00

Well, first of all, it's great to be here. I see so many dear friends in the audience. Thank you so much for coming and to those listening to the podcast, welcome. I'm sorry you can't be here tonight—Parker Jazz Club is a really cool venue. Anybody who lives in Austin, I highly recommend that you should come and listen to some great music here. In terms of media being reluctant to cover it, I think it's really kind of two-pronged. On the one hand, we do have too many politicians crying wolf. You mentioned Trump and Paxton, but you also have, on the other side, somebody like Bob Menendez, right, where there were gold bars found in his closet, and he's coming out after the jury verdict against him and saying this is a witch hunt. There was also criticism by Democrats of Robert Hur after his declination letter, where he called the President a well-meaning elderly man—and how people engaged with this, how Democrats engaged with this, was they just said, it's a witch hunt. Robert Hur is engaging the witch hunt. So it's not helpful when you have that kind of discussion. And of course, when we come with our cases to the media, often they roll their eyes because they're basically saying it's another instance of a local politician crying wolf, and we're not going to cover it. But the other reason, I think, is that it's actually very difficult for a local journalist to be critically engaging with his mayor, or with his police chief. They have to work with them all the time, and it's much easier to report on a warrant that was issued for an arrest. Nobody's going to fault you for that, but it's much harder to then go on and investigate whether there is actually a story on the other side, whether the warrant was actually used as a pretext. You guys have probably heard of the Marion County Record newspaper. There, the newspaper was raided after journalists looked into the mayor of the town and also the police chief, and the next thing you know, there is a warrant for a raid for an unauthorized use of a computer. And again, a lot of media coverage very much focused on that warrant, rather than on what actually is going on behind the raid. So I think journalists are reluctant to cover powers that be, especially on the local level. And Sylvia Gonzalez is a good example of it. Sylvia, if you could get up, I know everything is very dark here, but here's... [Applause]

G

Gus Bova 07:55

Well, on that topic of reporters taking up stories like this or not, Jason for the May/June issue of the Texas Observer—there's stacks of those magazines over on that table, please take them

with you, if you would—you did write about Ms. Gonzalez's case. Why did you decide to do it? And also, just what has your experience generally been like covering these issues?

A

Anya Bidwell 07:55

Sylvia's story is a perfect example of this. She was the first Hispanic Councilwoman to be elected to the Castle Hills City Council. And two months after she was elected, she was arrested: orange shirt, handcuffs, all that stuff, had to be in Bexar County Jail, and at first she didn't even know what she was being arrested for. Turns out, it was for that time where she put what she thought was a copy of the petition—that she herself championed to remove a city manager—into a folder, and that was called tampering with a government record. They said that Sylvia was trying to steal that petition, the very petition she presented. Now here's the thing about Sylvia. Even if you think that she tampered with the government record, even if you think there's probable cause for that, at the time, she was 72 years old, she had no criminal record, she was wanted for a non-violent misdemeanor. Bexar county jails are overcrowded. So you tell me whether the reason she was arrested rather than processed through a courtroom or processed through summons, whether the reason for that was because she "tampered with the government record" or because she criticized the city manager. It seems like a pretty straightforward answer, but when we reached out to members of the media in Castle Hills and in San Antonio, they did not want to cover it. They basically said, listen, there was a warrant for her arrest. And the rest of it is just politics, and we don't want to get on the bad side of the powers that be. And so it's very difficult, and part of the reason for this event is we want to encourage reporters and lawyers to be more like Jason here and to actually engage with these stories and look beyond the warrant, look beyond the allegations of probable cause and things of this nature, because those kind of stories are pretty common. At IJ, I'd say it's an area where we get the most potential cases. People call us about government retaliation on a weekly basis. It's the kind of thing that's not a needle in a haystack. And I'm using that term deliberately because one of the government lawyers, he actually said, "the kind of thing that you guys are complaining about is a needle in a haystack." And it is not. Just in the last year, I can name you at least four instances of serious retaliatory abuse, starting with the Marion County Record raid on that newspaper. And I can go on, but I really want others to talk more about this. But really it's not a needle in the haystack, and it's important that reporters cover it, but I do understand why it is difficult for them to do so.

J

Jason Buch 11:12

Yeah, so this kind of goes back to 2017 when I was a reporter for the San Antonio Express News. I wrote about a citizen journalist in Laredo, she goes by the name La Gordiloca, and her name is Priscilla Villarreal. She's this sort of social media personality, big personality who posts these kind of foul-mouthed rants on Facebook, but also talks a lot about goings-on in Laredo and is critical of local officials. And so in 2017 I wrote about her because she was arrested under the state's misuse of official information law, and that makes it a crime when someone, quote, "solicits or receives from a public servant information that has not been made public," and does so quote "with intent to obtain a benefit." So basically, she called a police source and tried to confirm the name of someone who died by suicide in a very public incident. Now, journalistically, most news organizations handle that type of reporting in a very different way than she did, but when you boil it down to its basic elements, calling a police source to confirm something is kind of a basic part of daily journalism. So I wrote about this saga for a little while

for the Express News. Her charges were thrown out, the law was declared unconstitutionally vague by a state district court judge in Webb County, that decision is limited to Webb County. And then fast forward to last year, she had a civil case against the county and city officials who were involved in her arrest, and it was going to oral arguments. The Fifth Circuit was going to hear it en banc, and I just tuned in one day, and I was struck by the position being espoused at oral arguments by Judge Edith Jones. She put forward a view at oral arguments that ultimately ended up in her majority opinion that I thought was pretty newsworthy because it really departed from our traditional understanding of the interaction of public information laws and the First Amendment. And I'll read a real quick quote from her opinion. She wrote, "If citizens possess some overarching constitutional right to obtain information from the government, laws like the Texas Public Information Act and the Freedom of Information Act would be superfluous." Traditionally, we've seen the public information laws, the FOIA laws as sort of like the government saying, the legislative branch saying, here's what the government must release, here's what the government may release, and here's what the government may not release. It hasn't really had much bearing on individuals and their free speech rights. And here she was saying that this kind of journalistic behavior could be criminalized. The circuit ended up granting qualified immunity in that case, and the majority signed on to that viewpoint. So I wrote a piece in the Texas Observer and Palabra, which is the news magazine run by the National Association of Hispanic Journalists. We collaborated on that, and afterward, one of Anya's colleagues at IJ reached out to me, who I'd quoted in that story, and said, you really should look at this Castle Hills case—you might be interested in it. And so we wrote about Ms. Gonzalez and another feature story in the Observer, because you once again had a case where you had a civil suit alleging that police were being used to silence government critics, and you had the Fifth Circuit, once again, being fairly deferential to the government. And so since then, this has sort of become a little beat for me at the Observer. I did a piece earlier this year for them about the history of speech on Texas public university campuses and how that's at odds with the state's posture toward the pro-Palestine protests. But I think in general, what the reporting showed is that governmental bodies in Texas are becoming quite bold about using police to punish disfavored speech, and the courts are wrestling with how to respond to this. And frankly, earlier this week, I was reading some records out of a case in Maverick County where the county judge had ordered a government critic arrested for "contempt of Commissioners Court"—which a US district judge in Del Rio said is not a thing, denied qualified immunity and allowed the pro se litigant's lawsuit to continue against the county. That's been appealed to the Fifth Circuit. But I think an important takeaway for Texas is that in the Gordiloca case, the Fifth Circuit created this idea that if you don't request information from the public information office, or through a Texas Public Information Act request, it can be criminalized. The TPIA is so complex that the public information office of most governmental bodies doesn't actually handle those requests. It's just handed off to their legal department because there are so many exceptions to it and it's so difficult to navigate. The current attorney general's office is very deferential to government bodies trying to withhold information, as is the Texas judiciary and these public information offices or the communications offices for governmental bodies that really function like in-house PR firms, basically trying to convince the taxpayers who are paying them that they're doing a very good job. And so it's going to be a very difficult landscape for journalists going forward if we're forced to go through those avenues to get information from the government.

A

Anya Bidwell 17:23

And Texas is not the only offender, right? For example, just recently, I heard of this case in Escambia County, Alabama, where a newspaper publisher and a reporter were arrested. And by

the way, the newspaper publisher, she was in her 80s. So it's a pattern, Sylvia. She was in her 80s. They were arrested for using confidential sources when they reported on the mismanagement of Covid-19 funds by a superintendent. And turns out the superintendent was friends with the sheriff and with the police chief. And I could go on. There are examples in Ohio, in Florida, in Kansas, just this year. So I don't want to just pick on Texas. Though, you know, Texas is a part of the problem. [Laughter]

G

Gus Bova 18:18

So, these retaliatory actions are being taken by city council members or county-level elected officials, law enforcement officials. Surely the courts, though, should be a check on abuses by these elected executive branch officials. So, David, maybe we could talk about the state courts in particular. Why is it difficult for them to act as a check on this phenomenon?

D

David Gonzalez 18:46

I'm not convinced that the statutes can get to the type of conduct at issue when you use words like coercion or improper influence or abuse of office. Those are the three statutes that you can look at for the prosecution of public servants. And the problem, I think, is that we just have always operated in criminal law as, well, corruption and bribery, those are easy to prove, just like possession of drugs, or those things that have a pretty clear harmful act. When you start getting into a robust First Amendment and you start to debate what's "allowable coercion," that's how the Court of Criminal Appeals looked at the Perry case. And when, if you think back to a decade ago to just the chaos that our local district attorney's office was in when Rosemary Lehmborg was arrested for DWI, what is so difficult about coercion is that just the mere issuance of the threat allows the recipient to then internalize and do the dirty work of the harm. And what I mean is that at that point, Governor Perry had said if you don't agree to give up public integrity funds, I'm going to veto those, or I'm going to cut those, or you need to resign. And so then there's this internal fight: do the folks in Austin or Travis County get to vote for the DA or does the governor get to say, if you don't resign, I'm going to cut your funds. And the schism that happened within that DA's office, for those that practice here, was significant. You had half the office mad that Ms. Lehmborg wouldn't resign against half that said, but you can't do that. It's the voters that get to vote, and when you look at what the statute was related to coercion of a public servant, Mr. McCrum and I thought, and I think a grand jury agreed, that that met the context of what it was to coerce a public official into taking an act that otherwise really only the voters have. Can you force someone by saying you must resign? But the point was, the harm occurred just with the statement. You didn't actually need to go through with the veto for the office to implode, and for it to be a really tough place for prosecutors to work for years and years and years. Fast forward, two of the three folks that wrote that majority opinion—and it's a very well reasoned opinion, and we were on the other side of it, but I understood—said the word coercion is so broad that when the legislature intended that, maybe they meant for other types of display and not a lawful use of your ability to use the bully pulpit. When there was a constitutional interpretation of whether the attorney general has independent ability to prosecute voter or election fraud, or must that come from a local DAs office, an overwhelming majority of that court said, look, if you look at the Constitution, we're just reading the statute here. It's not an activist decision, it's just a statutory interpretation. It looks like the AG can only come in with the request of a local prosecutor. And then very quickly, after that opinion on that interpretation, there were some very public statements saying you should vote those three justices out of office. And they all three were voted out. But I think Mr. Paxton has a First

Amendment right to say this is who I think you should vote for. I think Judge Slaughter, and I know Presiding Judge Keller had said, it's just so tough to hear this label. I've been a conservative jurist for 20 something years. It's so hard to hear me being called an activist judge. And I think Judge Slaughter had said, I'm not activist if I just disagree with your statutory interpretation. But I think in answer to your question, what's so hard for the judicial branch, or for even the legal system, about getting into these disputes is they're just kind of political fights about what you do or don't, and I guess the question is, why would the electorate assume that the judiciary is going to be the person to be able to figure out what this was? I just think a lot of those statutes are so broad, just like you've got the breach of computers, there's so many different offenses, and yes, a grand jury is a check to them, but a court can only make a decision on the facts in front of it for this case, and they don't make policy. So oftentimes they are limited just to this case and to whether that's an offense. And I just think I'm not convinced that our toolkit in the statutes are always amenable to address those kind of problems.

G

Gus Bova 23:38

Basically, the fact that they're elected, the fact that our judges are elected, that's the root of what you're saying, basically.

D

David Gonzalez 23:44

Well, you're right. I mean, so Paxton wasn't prosecuted or investigated for saying, I want candidates to run against these three folks. They ran. They had to win in the primaries. They won in the partisan primaries, and that's it, right? So, the 15th court, that just came online, has a little bit different of a view. That's an appointment system, but no, it's the voters, and so at that point, if the voters choose to follow the Attorney General's recommendations as to who to vote for in the Court of Criminal Appeals, nothing to criminalize there.

G

Gus Bova 24:19

Any, at the federal level, of course, the judges are not directly elected, but a lot of these issues come up and are handled different ways. How does it come up at the federal level that you see?

A

Anya Bidwell 24:31

Yeah, at the federal level, it comes up when somebody like Sylvia Gonzalez—after she goes through all that trouble of being arrested, of the orange shirt shot being splattered all across TVs in her community—when she is actually brave enough to say, you know what, I'm not just going to take it laying down. I'm going to file a federal constitutional lawsuit and try to clear my name by forcing these officials who arrested me to explain themselves. And this is the kind of thing that doesn't even happen very often, because just like members of the media, even more so members of the community where you live, if it happened to you, you kind of just try to go away, because you think others think you're a criminal, so you're just gonna go back to your house and try to pretend that it never happened. But some people do stand up and they go to court, the federal judiciary. It is very difficult to be able to proceed with a lawsuit in that type of

a situation, especially when it comes to things like being arrested or things like being prosecuted. And there are really several reasons why the federal judiciary is reluctant to do that. I think one of the biggest reasons is this institutional reason, this belief that at common law you couldn't turn around and sue your tormentor if there was probable cause for your arrest or if there was probable cause for your prosecution. So when there is a warrant for your arrest, that's pretty much a blank check. But things are very different from the ways of common law. First, probable cause used to be a much higher standard at common law. Today, probable cause is a very low barrier. Even innocent conduct can constitute probable cause. So for example, in Sylvia's case, you have the tampering with the government record statute. And if you read that statute, it is extremely broad, where you could say merely by taking this petition, placing it in the binder, just the act of wanting to take this piece of paper and put it in the binder, you are essentially concealing a government record. You don't even need to know that it's a government record. So that kind of innocent conduct can constitute probable cause for your arrest. Now, it would be very difficult for the government then to prove the case, but she was already arrested. The damage was already done to her, and it already sent the chills in her community so people not know not to mess with the mayor. So again, probable cause is a very low standard through which you essentially can launder your bad retaliatory motive. And also at common law, we didn't have nearly as many crimes. We have people here from the TPPF, the Texas Public Policy Foundation. They have this group called Right on Crime, and they've done terrific research on that so I want to give them a shout out. But really the idea is that crimes are just continuing to grow. Between 2010 and 2015 for example, South Carolina enacted 60 new crimes per year. In Minnesota, 46 new crimes per year. Michigan, 45. North Carolina, 34. I can go on, and those crimes can be ridiculous. Did you guys know that in Texas, if you walk by a pecan tree and you thrash it, you can spend six months in jail? And really, if you end up in jail because you thrashed the pecan tree, chances are you're a government critic. In Alabama, you can't ride bicycles on the sidewalk. I kind of get the concept, but still, you can end up in jail for that. And the question is, did you end up in jail because you rode the bicycle on the sidewalk, really peacefully, really slowly, and it was an electric bike—or you were a government critic? Justice Gorsuch just wrote a book called *Overruled*, and there he mentions how 70% of adult Americans today have committed a felony. So there you have it. And that's a conservative estimate. There is this other study by Harvey Silverstein. He talks about how we all commit, on average, three felonies a day. So there are so many opportunities. Probable cause is very low. There are a lot of crimes to choose from. So the situation is very different from the way it used to be at common law, and probable cause shouldn't be functioning as a laundering mechanism for government officials to punish their critics. But unfortunately, that's how it's working, and that's exactly why it is so very difficult to turn to federal judiciary after unsuccessfully trying state judiciary to sue for violations of your constitutional rights.

G

Gus Bova 30:11

Legislatures, they need an editor, basically, to get into these law books and strike out some of the redundant ones and kill some darlings...anywho.

A

Anya Bidwell 30:21

Kill the darling, very important.



G

Gus Bova 30:25

David: the federal courts, they don't want to overstep here to the point that law enforcement and prosecutors can't do their jobs, right? This is something you understand having been a special prosecutor—what is the need for the breathing room that the prosecutors need?

D

David Gonzalez 30:44

Well, I mean, I think if you look at RICO, if you look at any kind of the federal statutes, you need things that are broad enough to incorporate a wide range of conduct, but narrow enough to still give notice. And I know at least you use a federal grand jury for that reason—a lot of it's information gathering, far more robust than you typically do in state cases. In a federal case, it's a much longer process of investigation prior to presentation, versus in the state where, for a misdemeanor, all it takes is a piece of paper and maybe a public official's belief that there's probable cause, or the idea that you can present that to the grand jury. The only reason I have a unique perspective is that many years ago, one of my mentors, when I had received a grand jury subpoena (for me to be a grand juror, not that I was in trouble) I had asked, you know, what do I do? Like this is a three month commitment, do I just stop practicing law for three months? And she had said, yes, you do. Because when are you ever going to learn how the grand jury operates besides getting to be on it? And I will tell you, it was a remarkable experience of learning that this separate branch of government exists where there are no rules, and it's interesting that we can say, well, we'd like to investigate that, or we would like to possibly return an indictment on something different than you presented us. And in the idea that we've heard that a prosecutor can get a grand jury to indict a ham sandwich, I do think that, at least in Austin and the Western District, you have so many lawyers per capita that you end up having lawyers on grand juries in states and the federal system. I do think that plays a large role. The other thing too, I think, that's difficult when we start talking about political retaliation is—as Dean Chesney wrote in this really beautiful article called "The Liar's Dividend," which is in the wake of AI and misinformation, the ability for folks to say that's a lie, you can't prove it—the courts retain this monopoly on truth. You can say whatever you want on the courthouse steps, but once you get in the courtroom, we have a different standard of integrity and requirements of truth speaking, which is why you see state bars across the nation start imposing sanctions for false statements in pleadings in ways that we probably can't do on the courthouse steps. And the reason is that you have this problem where two branches of the government get to speak directly to the people and spend a lot of time doing that work, and this other branch has to refrain from speaking in order to have integrity. And that's why I think it's been difficult. When more decisions get attacked and more judges get attacked, the last thing we expect to see is a news conference where they're coming to you to say, let me tell you about why my decision was so fair and so good, because that undermines the very fairness and neutrality of that decision. And we just keep seeing that more and more where one of the branches has to keep fighting with the hand behind its back. And I'm not convinced that, whether it's state or the federal courts, we do that. We just kind of rely on the federal courts to be above that fray, that they're appointed and they have that respect. They don't have to keep trying to suggest to the voters that are more tough on crime and more likely to follow according to whatever that party registration is.

G

Gus Bova 34:17

Now, Jason, however the courts end up handling any of these individual cases—sometimes the person who's retaliated against prevails. of course—but in your reporting. what have you seen

as far as the consequences that happen, just starting with the arrest of these individuals?

J Jason Buch 34:35

Right, so I think for just about everyone I've written about the criminal charges were eventually dismissed, whether it was the DA who didn't want to touch it, or the one where there was a habeas corpus writ and a state district judge dismissed the charges. But there's this concept of "you can beat the rap, but you can't beat the ride." Going through this process is humiliating for people. It's expensive. They have to hire a lawyer to represent them in court. And, you know, going to jail is a traumatizing experience. And so while they tend to prevail in the criminal cases, ultimately, there is a cost. And so I think for the First Amendment advocates I've talked to for this story, they're concerned government critics are going to not want to speak out. They're concerned that journalists are going to be prosecuted for reporting on leaked information. And there's a temptation to think of this as happening at like, the small town level. I think most of the cases that we've discussed so far have been smaller communities. But I'll point out a few other examples. Earlier this year, a video of the Dean of Students at the University of Texas at San Antonio came out where she was telling student protesters, if you chant from the river to the sea, you'll be "referred to law enforcement," is how she put it. That's a fraught chant, and the university presumably has some administrative power to punish students for speech that they believe is antisemitic. But this idea that the default is to go to the police is a fairly new one, even for abhorrent speech on public university campuses. We've seen a willingness from the government, at the federal level, to attack the media. Earlier this year, there was a motion by the U.S. Attorney's office in Detroit asking a judge to limit the release of pretrial evidence in a counterterrorism case and the AUSA wrote, "Unlike news articles, which are often brief, cautious and offer a superficial examination of an event, documentaries are powerful vehicles for presenting a narrative, evoking strong emotions and creating a long lasting impression of the subject matter. Documentaries, especially ones made through the lens of only one side of a dispute may present a biased or one sided view, focusing on a specific perspective and leaving out important information." So you're seeing this federal prosecutor making an argument about the release of evidence based on what a particular journalist might do with that evidence. And I mean, the rest of the motion had more traditional arguments about why you might keep evidence sealed pretrial. But you had this prosecutor really just taking a swipe at a reporter, presumably because they thought this would be an effective argument in front of the judge. You also have the Julian Assange case, where he pleaded guilty to unlawfully obtaining and disclosing classified documents relating to national defense. You can have an argument about whether he can be called a journalist. I'm not particularly interested in that argument, because First Amendment protections are not limited to the media, but at its most basic level, what he did is not dissimilar to what the Post and the New York Times did during the Pentagon Papers. And so we're seeing the courts, in some cases, acting as a bulwark on this. In other cases, we see them acting willing to indulge these attacks on speech. So I'll go back to the Fifth Circuit opinion in *Gordiloca*: "Mainstream, legitimate media outlets routinely withhold the identity of accident victims or those who committed suicide until public officials or family members released that information publicly. Villarreal sought to capitalize on others' tragedies to propel her reputation and career." So here you see the judiciary weighing in on what is appropriate behavior for a journalist. And historically, journalistic ethics have really had nothing to do with the First Amendment. We voluntarily adhere to them. And I will say that no organization I have worked for has had higher standards for publishing things than she does. But like I said, they're voluntary. The government has not told us that we have to adhere to these standards. And historically, courts

have said if you don't break the law in obtaining information, what you do with it afterward is not the government's business. I mean, this is something that media lawyers come to newsrooms and tell reporters: don't induce somebody to go into some part of the building that they're not allowed to be in to get the records, but if somebody gives you the records if you say I would like to know the answer to X question, then you're fine. And here you have the Fifth Circuit saying a right to public information that is no longer within the government's control is different from what Villarreal did. She solicited and received non-public information from a public official for personal gain. So it's creating an idea that simply asking for the information can be criminalized. That's, I think, what was newsworthy for us, that it was a real shift in how these things have been looked at traditionally.

G

Gus Bova 39:58

Now, Anya. Ms. Gonzales, who's here with us right now, she won her case. So why are we still having this panel? All the problems have been solved now, haven't they?

A

Anya Bidwell 40:13

Yes, we had to go all the way to the United States Supreme Court, and so five years later we actually get to go back to the trial court and start asking government officials questions. They haven't filed an answer to our complaint yet. So this is just at the motion to dismiss stage, and it kind of gives you an idea of how long it takes for these kinds of cases to even go through the pipeline. And the government gets to use special procedures like interlocutory review, where even if you win at the district court, they can immediately appeal it, and then the next thing you know, you spend four years in appeals before it can finally go back down. And by the way, at the summary judgment stage, we might have to do it again. So it does take a long time, but the Gonzalez case was a significant victory, because before Gonzalez, it was really generally understood that as long as you have probable cause as a government official, you can't be sued for retaliation. There was the standard that was articulated by the Supreme Court, but it was considered to be an extremely narrow standard where you had to find another person just like Sylvia Gonzalez, who committed that "crime" and was not arrested. And those kinds of cases are impossible to find—cases of non-arrest. How do you even go about finding that kind of stuff? And what the Supreme Court did with Sylvia's case is explain that it didn't mean for that standard to be that strict; that as long as you provide objective evidence—like, if all of a sudden a jaywalker gets arrested, you don't really need to point to a particular other jaywalker who wasn't arrested. You can provide other types of evidence to be allowed to proceed with your case. They kind of expanded the universe of things that you can do. So now lawyers actually have many more tools in their toolbox, and we're hoping that there will be more lawyers that will file First Amendment retaliation suits exactly because now they are not going to be thrown out of the court immediately. So it's a victory. I don't want to call it small—come on—but nonetheless, you still have to provide some evidence before you can even proceed with your case. So you still have this additional hurdle you have to overcome as a plaintiff. But hopefully now, at least in our case, Mayor Trevino wasn't able to just get rid of this case quickly. He's still stuck with us. And hopefully other mayors are paying attention, and other police chiefs are paying attention. We're representing a Councilwoman in the Marion County Record case, because it wasn't just the newspaper that was raided. It was also the house of this Councilwoman who was also in her 70s when her house was raided. So hopefully this will just set a pattern where these kinds of cases don't just get thrown out immediately, and there is a

price that government officials have to pay. The problem before Gonzalez was that the price that government officials would have to pay is extremely low, and the payout is wonderful when you actually get to arrest your critic and you get to send a very strong message to everybody else in the community. I don't think they can do it with such an ease anymore. So there is some sliver of hope.

G

Gus Bova 44:04

So we have a partial victory in place. But before we go to questions, no pressure, David, but could you just lay out how we could solve all the rest of these problems once and for all for good?

A

Anya Bidwell 44:19

I'm taking notes. Let's go.

D

David Gonzalez 44:20

Well, I mean, I think the best example is lawyers that can take on expensive, long and tough litigation that ends up being impact litigation that does hopefully start creating that ripple effect, because I don't see our First Amendment protections, given some of the opinions there, ever changing. So we're going to keep having what appears to be less civil discourse and dialogue. The question is, is there a remedy to it? And if you can be able to have access, whether it's in the state courts from anti-SLAPP laws or in the federal courts, that's at least the first step, at least there's some accountability for your speech. You know, we say that you can't have certain types of speech that incite violence. We'll see if the legislature starts to impose consequences for misinformation or disinformation. We know there was a very large settlement when a news organization said that voting machines were unsafe or rigged, and that created, I think, a pretty significant disincentive to continue having speakers that would say things that are actionable under defamation. And so, you know, I think it's funny that you've got Johnny Depp and all these celebrities that have an unlimited access to direct followers through social media, but when it comes to whether something's true or false, you got to still go to the courts. It's the one area where there's this belief that it's still pure. And if we can maintain that monopoly on integrity as that system, then I do think that's where we do have a place and as lawyers preserving what this needs to look like.

G

Gus Bova 46:07

Great. So we're on to the audience questions part of the evening. Will people be able to hear if they just—

A

Anya Bidwell 46:16

I think there is a mic going around. Yes, there's Kendall right there with the microphone, she's ready to take your questions.

G Gus Bova 46:23

All right, so don't be shy. We've got at least 10 minutes.

A Audience member 46:29

Yeah, I can break the seal. So in the face of all these, to me, depressing events, how do you maintain your resiliency? How do you maintain hope for the future of Texas?

G Gus Bova 46:42

Youths are on the front lines. You two get to start with what you see.

J Jason Buch 46:50

Well, I'm not soliciting non-public information from any government officials right now, but I got some contracts for The Observer out of it. So, you know, it's, I guess, six in one half a dozen in the other there.

A Anya Bidwell 47:10

And, I mean, I'm lucky enough to work for a public interest law firm that's built to do this kind of stuff. So as long as there is this negativity, I still have a job. [Laughter] But I'd love to be out of the job. But again, I think what we really need is we need more lawyers willing to file lawsuits on behalf of worthy plaintiffs. We need more journalists willing to listen. Just because there is a warrant for somebody's arrest doesn't mean they are a criminal. There could be something else going on here. It's true that nobody's gonna fire you for writing about the warrant because there's actually a warrant, but sometimes it's important to look into the details and then cover it. The more people hear about this, the more people read about it, the better it will be. I think there is another question. Oh, there are several.

D David Gonzalez 48:07

Well, I want to answer this. So I'll tell you the story of Mr. Batson. When Batson was having his trial—he was African American and the prosecutor had had struck 1-2-3-4 African Americans on the panel—Mr. Batson was a frequent flyer in the criminal justice system and had done this process a number of times. He told his lawyer, hey, object to that, they're striking every African American on the jury, object. And I say this because this is what I would say as his lawyer, no, they can do that. That's just the rule as it's always been—much like all of us would say to Anya when we talked many years ago, it's gonna be a tough case to win. It's a really, really hard case. Those of us that are older are saying, Look, we've just known that standard forever, and it's an uphill battle. And it's the same thing that that lawyer told Mr. Batson before we had what was called the Batson challenge. Mr. Batson turned to him and said, I don't *expletive* care

what that long standing rule is, you stand up and object. And from that one objection from one client changes the entire rule about race based and gender based discrimination in jury selection. So when you have people that will object, versus those of us older that are saying, Ah, it's going to be too hard, that's where I have hope.

J Jason Buch 49:31

And I will say, the existence of The Observer and other news organizations that are willing to take on these cases, that are willing to pay me some money to go out and write about this stuff is, I think, a good sign, right? I mean, Anya is talking about their struggle to find news organizations willing to write about these issues. But you know, it's front and center for The Observer; First Amendment issues in the state of Texas for as long as The Observer has been around, and they're not alone in that.

A Anya Bidwell 50:14

And by the way, when we heard that The Observer was interested in writing Sylvia's story, we were over the moon. To find a Texas publication who would be willing to do that is extremely difficult. So kudos to you guys. Thank you, and thank you to David. David's been there with the Sylvia case since the very beginning. And he wasn't really discouraging. [Laughter]

G Gus Bova 50:45

Who is next?

A Audience member 50:48

It's often tempting to look at these bleak situations and think, oh my gosh, it's never been this bad. But has IJ or The Observer done any historical research in the history of America about similar situations? Have there been peaks, valleys? What are the trends for the last 200 years?

J Jason Buch 51:09

I mean, if anybody ever says that it's illegal to shout fire in a crowded theater, they're talking about a Supreme Court decision that said it was illegal to disseminate information opposing the draft, or disseminate literature opposing the draft. So yeah, things have been bad for the First Amendment in the past. I guess I would say that what made the series of stories that I did for The Observer newsworthy was that they are a departure from fairly recent standards or ideas about speech freedoms. Yeah, they've been worse in the past, but we've been on a run for a while that I think First Amendment advocates would say was pretty good.

A Anya Bidwell 51:58

Eli, you have a question.

A

Audience member 52:01

Thanks. So what tea leaves can we read from the Supreme Court opinion? I know Anya you said a few things about the overall rule. I think nobody expected the opinion to be written in quite the way that it was, very fractured. And what's the takeaway from that? Are there further battles that are going to happen here, or is this a sign that the Supreme Court doesn't want to touch this area for a while? Any other takeaways you have about the opinion?

A

Anya Bidwell 52:28

Yes, it was an interesting opinion in that we have eight to one per curiam, essentially, saying that the Fifth Circuit was wrong to rule against Sylvia because she couldn't produce evidence of another Sylvia who presented a petition, then put a copy in her binder and then was arrested for it. And the Supreme Court, in a relatively short five page opinion, said that the case should be reversed and sent back to the trial court to proceed, and that the only limitations that we have on the kind of evidence that a plaintiff has to present is evidence beyond state of mind allegations. So you can't just come to court and say, hey, the mayor hated my guts. I know this because he told me so himself, and then say that's a First Amendment retaliation suit. The court said, just saying that somebody didn't like you, that somebody had a state of mind, some sort of a motive, is not going to get you there. But if you provide evidence beyond state of mind motive, then you should be able to proceed. So even though the opinion is short, it is pretty clear and pretty significant in its ruling. But you're right that there is also some drama behind the opinion, because we have Justice Alito's concurrence. He agrees that the Fifth Circuit was wrong, but he wrote his own rather long opinion where he does a great job explaining what objective evidence means, and we agree with him. He said, beyond state of mind allegations, everything else comes in as objective. And then we had very helpful concurrence also from Justice Jackson, who agreed with us. And unsurprisingly, Justice Thomas ruled against us, but he ruled against us for the reason that he rules always against plaintiffs in First Amendment retaliation cases—and it has a lot to do with history, to your previous question—and how, in history, at common law, when you had probable cause as a government official that usually got you off the hook in these types of cases. But again, as I explained earlier during our conversation, probable cause was a higher standard back in the day, and there were many fewer crimes back in the day, so the opportunities for that kind of conduct, for that kind of abuse of law enforcement authorities, were fewer at the time.

J

Jason Buch 55:11

Do you think if Villarreal gets taken up, it will give us any clarity on some of these issues that weren't addressed in Gonzalez?

A

Anya Bidwell 55:19

Yes, that's a great point. So the La Gordiloca case is up on the petition for certiorari right now, that petition got a lot of attention. There are a lot of friend of the court briefs that were filed. The government just filed a response, so I'm optimistic that the Court will take it up. And there

isn't a direct question on retaliation, but there are questions about media freedoms and Texas laws, where the court really could clarify that going forward. And hopefully, maybe we can have another panel here with good news from the La Gordiloca case. And shout out to FIRE, by the way, who is taking the lead on that, and one of the lawyers, JT Morris, who couldn't be here because he's actually working on the reply to the government's brief.

G Gus Bova 56:11

Okay, I think we have time for two more questions I think.

A Audience member 56:17

I'm pretty sure, after you did one of these stories, you started getting a lot of emails and people coming to you saying, hey, look at what's going on over here. How do you determine which one really meets the bar? I know you said that your editor has sort of a high level there. So, as journalist and a lawyer, how you determine what case to push out into the media and which one wouldn't be good under media attention?

J Jason Buch 56:23

Well, I wouldn't be entirely joking if I said I pitched Gus and then he tells me how much money they have in the budget. But for every publication, you're looking for something different, right? And so for The Observer, you're looking for some of these bigger tensions that we're talking about. You know, a shift in in how things have traditionally been talked about or or handled by the courts, that's a pretty easy sell, even if these are fairly technical cases. I think probably the easiest way to say it is that when you're looking at some kind of shift in whatever freedoms you happen to be writing about—you know, we're talking about the First Amendment here, but any sort of protected activity—that's a pretty easy sell for the bosses or for the editors. Gus, do you have a take?

G Gus Bova 56:30

Yeah, I mean, just in both cases, there were stories that weren't likely to be done elsewhere because they're difficult they require a lot of patience and know-how about how to do legal reporting, which Jason has. And then you got to find out, how do I sell the story a bit? How do I make it appealing to a wider audience? And Jason has both those skills, so it makes it not too hard to say yes, as long as there's money in the budget. [Laughter]

A Anya Bidwell 58:26

One more question. Gretchen, I think right there.

A Audience member 58:30

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Okay, I might be bringing this back to doom and gloom, so I'm sorry, but we're having this conversation in the middle of our attorney general trying to just subpoena and get rid of immigration rights organizations. I think two days ago, he sent a letter to the Commissioners Court, both in Bexar and Harris County for voter fraud, but they're just trying to do legitimate voter registration for people. So, you can answer this question however you want, but what do you think is going to come of those things? Or kind of, what are your reservations, concerns? You know, Bexar County media too seems to be, like, 'covering the warrant' when it's like, well, we know the people who...and it doesn't seem like that's...you know. So, however you want to take it, and I apologize for the doom again.

D

David Gonzalez 59:17

So, in representing journalists and folks that have received subpoenas that they view might be harassing or have a purpose of not necessarily information gathering. Typically, the first advice I give is, look, we follow the law. If we get a valid subpoena, we're going to file a motion to quash, or we're going to just go step by step by step. We're not going to necessarily make a giant fit about refusing to obey. And part of it too is that sometimes the most valuable thing is to produce records that say we have nothing to hide. Like, the story is the subpoena, not the content, and instead of filing a motion to quash and making it a bigger story about the subpoena, let's just say, like you want to inspect our books so this is what we're going to do and this is what you're going to do, all right? And other times, for journalists, there's a different pattern where we're like, No, we're not going to give you our source. We're not going to give you those things. And a lot of that's just client counseling. What's the ultimate message going to be? Where do we think that's happening? Do we have any exposure? Is there any liability? Or is a test case, to deter? And unfortunately, that's one of the problems. It's not just the arrest, but sometimes the subpoena process, the idea of serving a search warrant. Typically it's at 5:00 in the morning. Typically it's with a pretty large show of force that itself causes a lot of trauma. It's the business interruption of having your servers taken. I mean, there's so many collateral issues, aside from just the subpoena itself, that, as Anya said, even if you're vindicated, just that part, I've found, sometimes galvanizes people to then say, Okay, we're not going to be intimidated. Like if this is what you're going to do, we have nothing to fear. But, that being said, people complain a lot about lawyers sending unnecessary discovery and harassing questions and depositions and abusive questions on cross. That's part of what we're often criticized for. And so part of the system is to assume that you've got a third party, a judge who can listen to whether or not this is valid or not, and we just typically stay within those very boring lanes of doing that as compared to press releases. But, Anya, you might use the press a lot more than I do.

A

Anya Bidwell 1:01:35

Yes, we use the press a lot. Jason and I, we had a lot of conversations, and I am extremely open with the press, including, you know, legal questions. Sometimes the problem is reporters just don't want to bother with understanding the standard of review under which the court is looking at this, or some other technical thing.

G

Gus Bova 1:02:00

It is kind of convoluted. I don't know why y'all have to make it so difficult. [Laughter]

A

Anya Bidwell 1:02:07

I think part of it is because then it's much easier to cover that, and the violation of a constitutional right then comes second. Everything else is like, on top of it, you know, all these doctrines that you have to sift through before you can actually report on the real wrong that took place. Dean Chemerinsky from Berkeley Law wrote a wonderful book on this where he discusses how all these procedural mechanisms that court uses make it very difficult for the public to actually understand what's going on. If the Supreme Court were to say there is no such thing as a First Amendment right, people would be on the streets protesting, like what do you mean? It's a basic right as an American, to speak against the government. But if the court just says, oh, you know, there is not a case directly on point where you're talking about this and this particular posture, objective evidence and whatnot, then people forget that the actual issue is the First Amendment right, and they're just looking at all these procedural obstacles. It's a very clever way to make the thing go away, and to deter reporters from talking about this. Jason, you wanted to say something?

J

Jason Buch 1:03:19

Well, I was going to make a joke about being trapped between Gus and lawyers on these stories, but just the nature of daily journalism does not lend itself to perspective, and it can be really difficult. Newsrooms and daily newspapers used to have people who just sat around doing nothing all day that everyone else in the paper hated, and their job was to have perspective and look into these things deeper in a bigger picture. And a lot of those jobs don't exist anymore.

A

Anya Bidwell 1:03:52

We have Gretchen—just one more question. No pressure.

A

Audience member 1:03:56

Okay, Anya, you said something earlier that really struck me, and you just said it again, which is that you're open with the press. You're recruiting the press. You're enlisting them to shine a light on an injustice. And I just want you to elaborate on where you got this instinct, because most lawyers are very risk averse about talking to the press, or they want to control the narrative. And I just find that so impressive, but I also think it may be a reflection of how broken the judiciary is that you're having to bring reinforcements in.

A

Anya Bidwell 1:04:33

Well, a lot of changes happen when we start a conversation, right? And the judiciary is very much part of our democracy and our institutions, and judges are people too. And this is a project not just for today. It's not just for 10 years from now. It's for 20 years from now, for 30 years from now. So we very much believe that conversation starts at the level of public

awareness, and once you have that public awareness, then it really penetrates through other institutions, and it's much easier then for us to do our job. And yes, Gretchen, you're absolutely right. I'm continuing to recruit reporters to write long form stories—especially long form stories—because that's where you're allowed to really spend time digging into this, and to write about this and look for stories like this. And I also encourage law students to take up cases like this. And by the way, law students will be judges one day, and there will be more engaged judges, and we'll live in the better world.

J Jason Buch 1:05:52

While I might object to the terminology recruit—

A Anya Bidwell 1:05:58

That's my Soviet terminology [Laughter]

J Jason Buch 1:06:00

—I will say that I think the best thing you can do for your clients is to take my phone calls.

A Anya Bidwell 1:06:07

There you go. [Applause]

G Gus Bova 1:06:17

Okay, now I think we're out of time. So thanks so much to all of you for joining us again. This was an event co-sponsored by the Institute for Justice. Look up their podcast. Ask Anya how else you can support IJ and the Texas Observer, which, like I was saying, I think back there there's stacks of both the magazines that have Jason's two stories in them. There's one in each. So I'm hoping everyone will take one of each. That way I don't have to lug them back to the office on the East side.

J Jason Buch 1:06:53

But the Texas Observer is also a non-profit that lives on donations, you guys.

G Gus Bova 1:06:58

Correct, so texasobserver.org/donate/, [/join](https://texasobserver.org/join/). Great links. Just remember them. I think they're on the magazine itself as well. And to the lawyers and reporters here—I think there might be some. We hope you've got enough material for your next lawsuit and for your next story. Good night. [Applause]

