ShortCircuit348

Wed, Nov 27, 2024 11:27AM 51:33

SUMMARY KEYWORDS

Excessive fines, 11th Circuit, Ninth Circuit, legal scholarship, Section 1983, Civil Rights Act, legislative immunity, FBAR penalties, IRS, tax evasion, dicta, Supreme Court, judicial immunity, legal analysis, constitutional law.

SPEAKERS

Sam Gedge, Anthony Sanders, Jacob Harcar

A **Anthony Sanders** 00:16

"But which now, in her own estimation, meant nothing, though in the judgment of most people looking on it must have had such an appearance as no English word but flirtation could very well describe. 'Mr. Frank Churchill and Miss Woodhouse flirted together excessively.' They were laying themselves open to that very phrase—and to having it sent off in a letter to Maple Grove by one lady, to Ireland by another." Now, the most important word in that short passage from Jane Austen's Emma was as the text said, "flirted." But the second most important was the word modifying that word, and that was "excessively." Excessive: it's a powerful and strong and commonly used English word. We're going to be talking about it today, not in conjunction with flirted, unfortunately, but in conjunction with another common, but I would not say popular English word that is fines. Excessive fines and more, today on Short Circuit, your podcast on theFederal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, October 22, 2024. Well, this episode is going out, I believe, on Friday, November 1. So it's just after Halloween, for when most of you will be listening and viewing this. So a belated Happy Halloween to all of you. I hope your trick or treating was spooky and yet safe. We're going to have a little bit of spookiness ourselves here with a case from the 11th Circuit about excessive fines. That's something to scare the woolies out of most Americans. But also we're going to have something that has a little bit of mystery to it out west, and that's the wild and wooly Ninth Circuit, and what they do out there with dicta. We're also going to have a little bit of a legal scholarship preview for all of you. But first of all, I want to introduce our guest. Now, we have a first timer here on Short Circuit, but before that, I want to introduce for the the nth time, and whatever that number is I'm sure is quite high, and that is IJ's own Sam Gedge, who, it was revealed in a in a recent episode of our spin-off podcast, Unpublished Opinions, is kind of an old sea dog at heart. And as our YouTube viewers can see, he's kind of got the sea captain look, like he'd be at home on the deck of the HMS Victory. So I'm very pleased to welcome Sam aboard once again.

S **Sam Gedge** 03:06

Thank you for that introduction, Anthony.

A Anthony Sanders 03:09

You got your sea legs ready?

S Sam Gedge 03:11

Um, yes. Brace yourself, yeah.

A Anthony Sanders 03:15

Woah. And we'll now bring in another son of a gun, and that is Jacob Harcar. So Jacob has just joined us here at the Institute for Justice. He is a graduate of the Harvard Law School. After that, he worked in some legal services in Illinois for a couple years, and he's now joined us at IJ before he goes off again for a clerkship, and he's a good example of one of our Bingham Fellows. So if one of you out there has got a clerkship lined up and got a little time before that, it is a great opportunity to come and litigate for liberty. But while he was doing his thing post-graduation, he did what a lot of young lawyers do, in that you finally get a little bit of free time, and you got some ideas that have been turning around in your head, and you put them to paper and write some legal scholarship. And he's written this piece about something that we've talked about many times on Short Circuit, and that's Section 1983—the Civil Rights Act from 1871. Now I did this when I was a young lawyer right out of law school, but unlike most young lawyers who take a stab at legal scholarship, he's written something that seems really, really good. Now it's been a little while since I read a draft, but since I did, it has been accepted for publication at the Kansas Law Review and our friend William Baude, when he first posted it to the SSRN, the network where you post papers, said "an excellent contribution from Jacob examining parallels between section 1983 and the Civil Rights Act of 1866." That's pretty impressive stuff. So Jacob, first of all, welcome to Short Circuit. And then give us, not an elevator pitch, but kind of like a long escalator ride pitch about what your article is all about.

J Jacob Harcar 05:15

Yeah, thanks so much for having me and for your very kind introduction. So yeah, the paper is about the original meaning of Section 1983 with respect to official immunity. And one of the things I really dived into was the original meaning of the statute upon which Section 1983 was based, which was section two of the Civil Rights Act of 1866. And this is now codified as amended at 18 U.S.C. § 242. It's just a criminal provision that makes people liable for basically the same things that they could be liable for under Section 1983. And one of the things I would dive into was I wanted to examine it as a matter of original intent, because the Supreme Court case that first found that legislative immunity was incorporated into §1983 was a case called Tenney v. Brandhove, a case from 1951. And the reasoning in that case, essentially is that there's no way that the Congress of 1871 would have abrogated such an immunity that is so wise and so great, that has been tested by experience. And I mean, you know, there's something to that, I think, especially...I mean, I think a lot of people have talked about qualified immunity and even judicial immunity, but legislative immunity will get a footnote or kind of be just brushed aside. And I really just wanted to explore that issue, see what was there. And what

I found was that I think what is really important to understanding § 1983 is, again the Civil Rights Act of 1866, in which there's a lot of legislative history, a lot of other sources in which they explicitly talk about the abrogation of immunities, specifically the veto message of President Andrew Johnson, and the response speech by Senator Lyman Trumbull, in which there's a lot of agreement on exactly who would be liable, and they had complete agreement on executive officials, complete agreement on judicial officials, even. Legislative officials: President Johnson was like, this will invade the immunities of legislators, and Senator Trumbull agreed, but he had an argument for why, for a causation reason, legislators wouldn't actually be held criminally liable. But set that aside, really exploring and diving into those and also a lot of newspaper evidence from the time to see what did the public actually talk about? What did they actually say? And I mean, there's always more evidence that you can uncover, but at least as far as doing the best that I can and checking my own biases and all that, the conclusion is that these immunity documents are not justifiable as an originalist matter.

A Anthony Sanders 08:00

And what you found, if I remember right—it's been a while since I read the draft—but this is important because Section 1983 itself passed a few years later. There was all kinds of other stuff going on when that was adopted, the Enforcement Act at that time, when President Grant was in power, and there's not much in the legislative history on the immunity question there. But to paraphrase, I know Chris Green has written about stuff in this time period—he's at Ole Miss—in a different context. But to steal his words, it's like people have been digging in the wrong place, like in Indiana Jones. And actually, when you look back at 1866 and this legislation, it corresponds to Section 1983 but it just was about this earlier statute. Well, great. Well, for those interested, we are going to put a link in the show notes to the draft. Do you know when is the published version in the Kansas Law Review probably going to be out?

J Jacob Harcar 08:54

Yeah, exactly. And a lot of these, especially the immunity issues, were addressed—and I mean, there's some arguments that you can't just assume that the interpretation of a criminal statute would apply to even a civil statute, even if they have the exact same words. And I did my best to just present the evidence and arguments in the paper. I do need to make clear that I'm not the first person to analyze the legislative history or the public media of the Civil Rights Act of 1866 to inform the understanding of Section 1983, but I feel like what I do that's different is really analyzing it with respect to legislative immunity. It should be coming out this year. I just got back the second round of edits from the editors there. And, you know, shout out to them. They've been fantastic and really helping me make it the best paper that could possibly be. Especially a shout to their Editor in Chief, Karen Campbell. She's been fantastic. So thank you to them. And yeah, so should be coming out later this year.

A Anthony Sanders 10:08

Great, yes, the worker bees of the legal scholarship system. I mean, basically the entire system would fall apart if it wasn't for these unpaid law students. They actually pay. They pay to do that work. So thank you. Thank you, law students, for your payments. We're going to talk about

some other payments, pretty painful ones, actually, that the IRS is interested in now in the 11th Circuit. And this is United States v. Schwarzbaum, is that right? Schwarzbaum?

S Sam Gedge 10:40

That sounds right to me.

A Anthony Sanders 10:41

This is a great case with some history, some analysis, some things that I think Sam think went the right way, but maybe some other stuff that maybe didn't go the right way, interesting facts. And it all brings back to me a case that IJ did a few years ago that I was a little bit involved with, but Sam was very involved with, and that was Timbs v. Indiana about the Excessive Fines Clause. So Sam, what is the excessiveness here?

S Sam Gedge 11:14

Great question, Anthony. I also have to say, if you had a superpower, it would be just the most seamless segues from piece to piece of this podcast, which is really, really impeccably done.

A Anthony Sanders 11:25

Well, thank you. Maybe we can bring it back to Jane Austen later on.

S Sam Gedge 11:30

I have a little parentheses on that, because we talk about Patrick O'Brien and his nautical fiction quite regularly. And little known fact, which I may have said earlier on your podcast, his authorial inspiration is primarily Jane Austen. So there's your little tie to Patrick O'Brien, but anyway, so yes, United States v. Schwarzbaum. This is an exciting case for a few reasons, one of which I think, is that it ratifies my view of the world, and my view of the Excessive Fines Clause more particularly. So maybe we can start with a little bit of background. So the Eighth Amendment, Anthony, is in the Bill of Rights, and when most people think about the Eighth Amendment, we immediately go to the Cruel and Unusual Punishments clause, like that's the sexy part of the Eighth Amendment, or at least the uninitiated people think that. Because where the real action is is the Excessive Fines Clause, which also is in the Eighth Amendment, and as the name suggests, it secures our right to be free from excessive fines. And for about the first 200 years of our nation's history, the Supreme Court said basically nothing at all about the Excessive Fines Clause. The first real decision that grappled with the Excessive Fines Clause was in the late 1980s. I can't remember the exact date, but the Supreme Court took an excessive fines case and said, you know, the punitive damages between private parties and civil litigation: those aren't fines within the meaning of the Excessive Fines Clause, because we think that the kind of fines that are contemplated by this clause are payments to the government and obviously punitive damages, and in that circumstance they aren't payments to the government. Then a few years later, in the early 1990s, the Supreme Court stakes out a

standard for determining what is and is not a fine within the meaning of the Eighth Amendment. And this is a civil forfeiture case, which, of course, we at IJ are big fans of, and the standard that the Supreme Court laid out—

A Anthony Sanders 13:27

We're big fans of it being an excessive fine, but not civil forfeiture itself.

S Sam Gedge 13:32

I think that's right. I mean, I think more generally, like we all have a lot of good times when it comes to civil forfeiture cases, it's a big part of our professional lives, but yeah, we obviously take issue with the concept of civil forfeiture. You're right, Anthony, thank you for for correcting me on that. But anyway, in 1993 in a case called Austin v. United States, the Supreme Court lays out the standard for, okay, how do we answer this threshold question of what is and isn't a fine? And they basically say, you know, a fine, it doesn't necessarily need to be a criminal court fine. That would be kind of artificially narrow. It's basically any kind of payment to the government that is at least in part punishment for some kind of wrongdoing. And that's basically the standard that stayed in place ever since. It doesn't, to be clear, doesn't necessarily answer the question of whether a particular penalty or fine is excessive, right? Like something can be a fine and can be not excessive and be entirely constitutional, but that question of whether or not the payment is at least partly punitive, at least gets you in the door and has the court then ask the second order question of, okay, well, we're in excessive fines territory. Is this particular fine that we're dealing with disproportional or excessive? So that's kind of the legal backdrop before we get to the Schwarzbaum case, which is a case involving what are called civil FBAR penalties. FBARs are fun. I was thinking about it this morning because it's kind of a shorthand, and it combines both an acronym and an initialism. We don't need to go too deep on what the difference is between those, but since you look curious,Anthony, as I understand it, an acronym is when you have a bunch of words and you take the first letter and you make it its own word, like ERISA. An initialism, by contrast, is when you pronounce each of the letters. So DOJ, that's the difference between acronym and initialism. I know mind blowing.

A Anthony Sanders 15:18

I literally never heard that word before. Initialism. So once again, we're adding to our lexicon, Sam.

S Sam Gedge 15:24

Well, I'm glad to add value on this on the show, Anthony, but anyway, I realized this morning, the FBAR is kind of both, right, because the F has the attributes of an initialism, and then you go with the BAR. So I don't know of any other example of a initialism-acronym, portmanteau in that way. But in any event, the civil FBAR regime applies to US citizens and residents who have at least $10,000 in foreign bank accounts. It's a bit more complicated than that, but that's all that we need to deal with right now. And basically what it requires is that if you're one of these

people with this money in foreign bank accounts, every year you have to file basically a one page report with the IRS that says, hey, here is my name. I have this amount of money in a foreign bank account, and that's pretty much it. You have to file that report whether or not you owe any taxes on the particular accounts. It doesn't really have much of anything to do with your tax obligations. You just have to file the report so that the IRS knows that there's this money floating out there. Sorry, I jotted down some notes because this opinion is 53 pages long. So if you don't file these reports, then there's an escalating series of what are called penalties. And you hear the word penalties, you might think that they're penal, and I don't want to spoil this for you, but I agree that they are, in fact, penal. So the way it works is that if you don't file this report and you can show reasonable cause, which is a relatively high bar, you're off the hook for any kind of penalties. If you can't show that you were reasonable in failing to file it, but you were kind of just low level negligent, then the government can go after you for up to $10,000 in penalties for each failure to file a report. But if the government determines that you've been what they call "willful," which doesn't just cover knowing or deliberate reporting failures, but even reckless—so, it's pretty broad gamut of culpability—if the government says you've been willful in failing to file one of these FBAR reports, then they can go after you for the greater of either $100,000 per failure or up to half of whatever was in those unreported bank accounts during the relevant year, which is kind of arbitrary and can be really astounding and enormous amounts of money. And we might think that this is a punitive system in lots of contexts, the government has kind of acknowledged that it's punitive in lots of briefs and court filings over the years. The court has said, Yeah, you know, this is a lot of money that we're hitting people with because we want to deter them from not filing their reports. The National Taxpayer Advocate has gone on record saying that these FBAR penalties are, quote, "among the harshest penalties the federal government can impose." So we have this penalty system. We know that the standard under the Eighth Amendment is okay, is it a payment to the government for, at least in part, punishment for some kind of wrongdoing? And I guess I'll throw it to you guys, because I've been talking for a while. But like,we have these twoconcepts: do we think that these FBAR penalties are fines or not? Anthony, Jacob, what are your thoughts?

A Anthony Sanders 18:30

I'll pass to Jacob.

J Jacob Harcar 18:32

Seems like a fine to me. I mean, it's trying to punish someone for not reporting these amounts or these bank accounts to the federal government, right?

S Sam Gedge 18:44

Yeah, that's exactly right.

J Jacob Harcar 18:45

That's just seems like a, you know, quintessential fine.

A Anthony Sanders 18:48

Yeah, you could have only $15,000 in the account and be fined $100,000?

S Sam Gedge 18:53

Yeah, that's exactly right, if they determined it was at least reckless. It is punitive, Anthony, you're both exactly right. I recognize we might be kind of an echo chamber here, but it seems pretty commonsensical to me as well. The reason that we at IJ first learned about this is because, while the government in all sorts of contexts, says, Absolutely, this is deterrent and as punishment and X, Y and Z, whenever people try to raise excessive fines defenses against these staggering penalties, the government says, Well, hold up a second. We admit they might be deterrent and punitive, but they're not punitive in the excessive fine sense. So we can't even ask whether this particular multi-million dollar penalty is disproportional, because they're definitely not. They're not punitive in that sense. That's always struck me as kind of unpersuasive, but the First Circuit a few years ago, in a case called the United States v. Toth, totally bought it and said, Yeah, absolutely, there's this two and a half million dollar penalty that was imposed on an octogenarian lady because she failed to file a couple of FBAR reports. And we're not even going to ask if that two and a half million dollar penalty is excessive, because it's not even a fine to begin with. So obviously, Anthony, you know, maybe Jacob, you know that we ended up taking on that First Circuit case. We filed a cert petition on behalf of Monica Toth. It was denied, very disappointingly. But the silver lining is that Justice Gorsuch wrote a dissent from the denial of cert in Toth and basically said what we were all kind of dancing around a moment ago, which is that this sure sounds punitive, or at least partly punitive, which is the touchstone for whether something's a fine. And Justice Gorsuch, very gratifyingly, said, You know, I hope that future courts will not repeat the First Circuit's mistakes, after which the Department of Justice got back diligently to trying to persuade courts all over the nation to repeat the First Circuit's mistakes, which brings us to the Schwarzbaum case out of the 11th Circuit. And there's been a lot of lead up here. So the government goes after Mr. Schwarzbaum, as I understand it, Mr. Schwarzbaum is born in the 1950s in Germany. He's lived all over the world: Switzerland, Costa Rica, sometimes the United States. He's a lawful permanent resident. His dad apparently is a US citizen, right? I believe. I don't know he was either a lawful permanent resident or US citizen, but either way, for FBAR purposes, it doesn't matter, because if you're either of those, then, as I understand it, you're subject to the FBAR reporting requirements. Mr. Schwarzbaum's dad is a textile magnate and puts something like $30 million in a variety of Swiss and Costa Rican bank accounts for the benefit of Schwarzbaum Jr., and Mr. Schwarzbaum Jr. ends up not filing all of the FBAR reports he should have. It sounds like maybe his CPAs were giving him bad advice. It sounds like maybe he was a bit sloppy with his filings. Who knows? I wasn't there. But the IRS ends up going after him and penalizing him $12 million for failing to file these one page FBAR reports. The district court says it's not a fine, because the DOJ insisted that it's not a fine, and happily, the 11th Circuit a couple of months ago says, What are you guys talking about? This absolutely is a fine. Quoted Justice Gorsuch as dissent from the cert denial in Toth and basically, kind of walks through the commonsensical analysis that we were talking about, right? They're saying, you know, this is in no way compensatory, right? The government's not trying to get back money that they lost. You know, we're not talking about compensatory damages, which we can think of as more remedial than punitive—the connection between the amount of money that the government's penalizing you and any possible harm that the government suffered. It's purely arbitrary, purely

happenstance, and it's just a ton of money. You know, you're hitting someone with $12 million in penalties—I won't say fines, because that kind of assumes the answer to the question—but it sure feels kind of partly, partly punitive. And so the court says we're not going to repeat the First Circuit's mistakes and we're going to subject it to excessive fine scrutiny. So I found that very gratifying. You know, it's always more gratifying when the courts in your own case think that you're right, but as a second best, courts in other parts of the country, years later saying that you were right is fun too, and that happened here, so I don't know. I'll try to wrap it up, but there were a few things I think that are interesting about the Schwarzbaum case. The first is that there's now a circuit split that even the federal government can't deny. You have the First Circuit saying this particular statutory penalty is not a fine. You have the 11th Circuit saying, this absolutely is a fine and the First Circuit was wrong. Just to be clear, like there was a circuit split even before the 11th Circuit decision. But it wasn't, perhaps it wasn't on the same statute, right? And so the federal government could at least say that, well, there needs to be more percolation, but I think that that's off the table now there's a very obvious circuit split on this, this important question, I think it's an open question, whether the government petitions for re hearing from the 11th Circuit, they've sought an extension to do that. You know, if anyone's asking for my opinion, I think it would be kind of a waste of time, because, you know, even we're the 11th Circuit, to take it and bank and go the other way. You haven't solved the circuit split. You've just kind of changed the contours of which courts are on which side of the split, the seventh and the Ninth Circuit, for example, absolutely apply known Eighth Amendment standard that's inconsistent with with the first circuits in Toth. And the only other thing that really jumped out at me is that while it's certainly kind of nice to see this kind of more sensible application of what is and is not a fine, the 11th Circuit's actual kind of second order analysis of, okay, is this $12 million penalty imposed on Mr. Schwarzbaum? Is that excessive? No, I think that actually was subject to a little bit of criticism on a few grounds. So for one thing, the court says we're not going to look at that $12 million fine in the aggregate. We're kind of going to break it down on an account by account basis. That I think is not necessarily the most persuasive way to think about whether fines are or are not excessive, and you have courts in other parts of the nation saying, you know, we're not going to kind of break things down in that fashion. We're going to look at the overall penalty and see whether that's excessive. The other thing that kind of jumped out to me is maybe a weak spot that that highlights how some courts. Wrong in evaluating excessiveness is there's kind of this kind of like multi factor test that courts have developed for whether something's grossly disproportional, whether it's excessive, and one of those factors, they say is okay, is the person who's being hit with the fine in this particular case. Do they fall kind of like within the heartland of what Congress was trying to target, or the legislature was trying to target with this particular penalty or forfeiture or fine. And in some cases, and I think this case is a good example, that factor really ends up being kind of a gimme for the government, because what the courts say is, well, you know, the statute applies to this guy. That's why they've been hit with the fine. And so because the statute applies, of course, the person falls within the question. It's like, okay, well, that's right, but if that weren't the case, we wouldn't be considering excessiveness anyway, because it would have been an ultra vires fine that violates the statute. We wouldn't even be getting to the constitutional question. So that, I think, is an issue that you see popping up across the nation where it's not really clear exactly how we're supposed to be considering whether someone is on the more culpable end of the spectrum or on the less culpable end of the spectrum. Courts sometimes short circuit that analysis. Oh, Short Circuit.Shout out to your excellent podcast, Anthony. And the other thing which jumped out to me is another one of the factors that courts look at is, okay if we're evaluating whether this particular fine, this $12 million penalty, is excessive, we look at how does it compare to the harms that the person's wrongdoing caused here? And the Supreme Court, at least back in the 1990s indicated that you're supposed to be evaluating the harms caused by the specific defendant in that specific

case, rather than looking at the macro level harms of this particular type of wrongdoing at a global level. And here, the 11th Circuit didn't quite honor that analysis either. Instead of asking whether Mr. Schwarzbaum's reporting failures led to any particular kind of tax deficiencies or were part of a money laundering scheme, or whether he's a drug kingpin, and this is all part of some really serious criminal enterprise. Instead, they basically said, Well, as a general matter, these reporting laws are important, and that means that it's a serious harm when someone doesn't do it; and that, I think, is not the most persuasive way to go about the excessiveness analysis either, because there too, it's kind of like a free box on the government's bingo card. Because if you zoom out to the national level, and you're comparing that national harm against any particular punishment of one person, obviously the balance is probably going to tip on the side of that nationwide global harm as compared to, like, one particular fine. So I don't know. Those are just kind of my thoughts. I don't know if you all had any reactions to it though?

J Jacob Harcar 27:41

I kind of had the same reaction as you to the factors that they use and how they're applied. I mean, it does seem that the "does this apply to this person," "is this the type of person we intended to encompass by this statute" is almost always going to be a gimme. I think what it's trying to get at is is this some weird externality of the application of the plain text of the statute that Congress wasn't really trying to get at, but still, they would be liable under it. But I think in the vast majority of situations, it would just like, you said, be a gimme. And then it kind of...the main factor, which is just, is this disproportionate, is this excessive? It doesn't directly get at that.

S Sam Gedge 28:33

Yeah, that seems absolutely right to me. You know, one other thing that jumped out at me about this one is that, you know, in these FBAR cases, I think it's easy for a lot of folks looking at it to think, This dude has $30 million, you know, who really cares if he's lost 12 million, he still has more millions of dollars than I will ever have. But I think it's important not to lose sight of the fact that one, even in the FBAR context, the government goes after people of very modest means. You know, oftentimes they're going after recent immigrant families. Oftentimes those people don't speak English, and they're getting hit, maybe not with $12 million in fines, but $100,000 and I wouldn't like to be hit with $100,000 in fines. And of course, the principles here extend beyond FBAR. And oftentimes, when we're talking about excessive fines, we're not talking about foreign bank accounts. We're talking about people on the lower end of the economic scale getting hit by their local or state law enforcement.

A Anthony Sanders 29:29

And the IRS also, in this case and in other FBAR cases, it has discretion to go for a lesser amount, right? That's just the maximum. So it asks for the maximum for every single one of this guy's accounts. That's seen as standard practice, and that's a little scary.

S Sam Gedge 29:47

It is. And perhaps, in fairness, the IRS—if you read the opinion, there's a bunch of charts and a

it is. And perhaps, in fairness, the IRS—if you read the opinion, there's a bunch of charts and a bunch of numbers, and I haven't taken the time to try to make sense of all of that—I don't know if they reflexively go for the maximum all the time. I know in Monica Toth's case, I believe they did, but they have various kinds of internal policies that are supposed to guide the exercise of that discretion. But you know, even if you're not completely maxing out every year's worth of penalties, it's very easy to get to a penalty amount that's just crippling for any ordinary person.

A Anthony Sanders 30:23

I won't take too much time on this, but I do have something that left me confused that doesn't really come up in the opinion at all, that Sam, maybe you can help me with, or maybe I'm just out to sea here. So there's a really handy chart—for anyone who wants to look at the case, which, as always, we will link in the show notes—on page 30 and 31, of all this guy's accounts. And so some of them only have, like, just a little over $10,000 in them, and yet they still fine him $100,000 and those are the ones where the court says that's an excessive fine. Some are unknown, which is a little weird. And then some have millions of dollars, and so it's half of that, which is still often millions of dollars. And the court basically upholds them all. What I don't get is...the reason why this statute exists, this requirement exists, is because you may have to pay taxes on your income from these accounts. It's not just like the IRS wants to know what all American citizens money is all over the world, although it does want to know that because of this odd quirk of US citizenship: the reason why you might not want to be a US citizen, which I would get, although there's a lot of good stuff about being a US citizen (privileges, immunities and all that), but there's some quirky stuff too, and that's that US citizens are taxed on their income no matter where it is in the entire world, which is different from the citizens of most nations. And so that doesn't necessarily mean that you need to pay taxes on that, because you could have an account in one of these places, and you make a little bit of interest on it, and yet there might be a tax treaty between the US and that country, and actually you pay taxes to the home nation, and it's actually higher than what you'd pay in the US. And so you do all this paperwork, but you don't end up even paying taxes. Or maybe you don't. Maybe it's a tax haven, and so you wouldn't pay taxes there. So you have to pay the tax in the US. But anyway, all of this is just about the IRS knowing that. What they ultimately are interested in is what taxes you owe. And there's nothing in the opinion—I mean, maybe it just was argued this way—about what the actual taxes should be. And I did a little bit of back of the envelope—it wasn't even back of the envelope, I think it was all my head—surmise of what the taxes would be here. You know, this is the years 2007, 2008, and 2009: interest rates were kind of all over the place during that time in our history. But say it was like 5%, this guy has close to $30 million whatever that would be...it is a few million dollars in income. And so the actual tax on that with the top marginal rate is probably—say it ends up being like a couple million bucks. It seems to me thqt the excessive fines thing should counter in what is the government ultimately out in tax revenue, and if it's a couple million bucks, then maybe $12 million is or isn't an excessive fine. I mean, I don't like taxes, so I think it sounds excessive to me. Maybe it is, maybe it isn't, but it seems like that should be part of the analysis, not just this like fraud assessment. It seems like the court takes a very high and mighty position, like "look at his actions. It's fraud on the government by not issuing these forms," when, like, who cares what the actual forms are? What is the actual interest of the government is this tax revenue. So why is that completely absent, Sam, do you think?

S Sam Gedge 34:08

Yeah, so I think there are a couple of responses to that. First, the government, at least, says

Yeah, so I think there are a couple of responses to that. First, the government, at least, says this isn't just about taxes. Like this reporting system is a way for us to try to cut back on money laundering and transnational crime and all this other stuff. I have no idea whether or how much that factors into it. So they say it's beyond just, you know, we need to make sure we're collecting taxes. But I think your instinct there is correct in that it's actually not all that uncommon in these cases, for the folks who are getting hit with these pretty large FBAR penalties, either to not owe any taxes at all on the money they haven't reported, or to owe a very modest amount. And in a lot of these cases, these people end up—in separate IRS proceedings—they end up paying the back taxes and paying penalties on the back taxes, and then separate and apart from all of that, then they're hit with this enormous FBAR penalty on top of it. And so I think your reaction is right. Like, it seems like one of the easiest ways to try to quantify the seriousness of a particular non-reporting instance or the harm that it might have caused, is to look at, okay, well, did this result in someone not paying their taxes? How much did they not pay? Did they separately pay it? Did this come to the IRS's attention because, as in Mr. Schwarzbaum's case I believe, because he voluntarily brought it to the IRS's attention when he realized that he hadn't been reporting it. There are a lot of fact specific considerations that I think should validly go into the analysis of whether a particular fine is excessive, and it just looks like the 11th Circuit here didn't really dig much into any of that, but just kind of said, well, you know, he violated the statute, he had a lot of money, a lot of it wasn't reported, game over.

A Anthony Sanders 35:50

Well, I was glad to read from this opinion that at least it's only accounts over $10,000 because I, in my life have had a foreign bank account or two, but they were nowhere close to—

S Sam Gedge 36:02

Let me stop you right there. Let me stop you right there, because it's in the aggregate. So if you had like, 10 foreign bank accounts with $1,100 each, then you could be looking at like, I don't know, $75 million in penalties. I'm not a mathematician but—

A Anthony Sanders 36:15

Dang. Well, sadly, I did not even have in the aggregate $10,000. I did, when I was a child, have a UK Post Office account where you bring in a little book and they stamp it, and I think I had like, 50 pounds in there or something. I don't know if you ever had one of those, Sam?

S Sam Gedge 36:33

I think I actually did, yeah, I was never there to physically go to the post office. Or did you go to a US Post Office for that? I don't know how any of this worked.

A Anthony Sanders 36:42

No, it was a British Post Office. You'd go in, they'd stamp your little book. And I think I bought some sweets with it once. But anyway. But some of that stuff in this opinion was just dicta. And

in the Ninth Circuit, they have opinions with just dicta. But there it's not just dicta, it's the law. So this is a weird quirk of the Ninth Circuit that we talked about once a few years ago, and now it has reared its ugly head again, and it seems like it's going to keep rearing its ugly head. But it's something you want to know about, especially if you're practicing in the Ninth Circuit. So Jacob, give us the view of dicta out west, which seems to be completely contrary to the rest of the entire common law universe.

J Jacob Harcar 37:33

Yeah, so I guess first things first. Dicta is just generally in a judicial opinion. it's anything that's not really required to reach the result in that opinion. There are a lot of different definitions. You can find a bunch, but that's generally it. And generally speaking, these are not binding on subsequent courts. So if it's an aside remark, or it's just not really essential to the holding of the case, then a future court looking at the same issue is not going to view it as binding precedent, and you're free to disagree with it and say, Well, that was just dicta, and we're really considering it now, because it's pertinent, and it's directly relevant to this case, and we decide something different. And in the Ninth Circuit it's a little bit different, because there's this rule that at least well-reasoned dicta, or dicta that is not just an offhand remark, but is dicta that is maybe not necessary to reach the holding in the case, but they've still gone through the steps. They did all the reasoning, they wrote out a nice opinion, or maybe a few paragraphs. I don't know how exactly—

A Anthony Sanders 38:53

There's a few citations here or there.

J Jacob Harcar 38:55

Yeah. At the very least, that is binding, and that becomes the law of the circuit. And so here's an example: so the case is Stein v. Kaiser Foundation Health Plan Inc., and it's an example, at least in the eyes of Judge Forrest, of why this binding dicta rule is very inefficient. Because what happened was there had been a couple previous panel opinions by the Ninth Circuit in which they made a remark that the first-to-file rule under the Federal Claims Act is jurisdictional, and subsequently, after those cases, the Supreme Court made some announcements saying, Hey, we should not throw this jurisdictional word around. We need to really be careful about using it, so only when there's a clear statement that a statute is jurisdictional, is it jurisdictional. And, now this case arises in the Ninth Circuit, and there's a panel opinion in which they say, well, we noticed that there's some tension between the previous dicta in these cases and the Supreme Court's recent pronouncements. But they're not too in tension that it's been overruled. So we're just gonna keep with this, that the statute's jurisdictional. And if an en banc court takes it, then it takes it. And so the en banc court took it and in five pages, in a unanimous opinion, Judge Forrest, writing for the en banc court, held that it's not jurisdictional under this new clear statement test. So this is an example where this binding dicta required an en banc court to be held, and Judge Forrest ends up writing a self concurrence in this case, in which she does, I think, a pretty persuasive job explaining why this binding dicta rule is problematic, not only because it wasted the court's resources here by making them go en banc—

A Anthony Sanders 41:18

Wasted her own time.

J Jacob Harcar 41:24

Right. But also it's problematic for multiple reasons. Well, first, there's the fact that it's an anomaly within the federal courts. No other circuit has any rule that's similar. And then there's also just some Article Three problems, especially as a matter of whether or not you have the authority to make binding law when it's not a case or controversy. And I think the idea is that if it's dicta so it's not necessary for the holding of the case, then you're kind of going out of your way to announce a rule of law outside a case or controversy. And so, like I said, she does a good job explaining the history of the common law about dicta, and she cites from, I think, Francis Bacon—you know, going really far back to really show how deep this is. And she's not the first to do this in the Ninth Circuit, like, ever since this was first announced by the Ninth Circuit, up until even recently, with the case that we covered on Short Circuit a few years ago in a dissent from denial of rehearing en banc by Judge VanDyke, this has been widely criticized. But I mean, she only had one other judge that joined her with this concurrence, only Judge Bumatay. So it seems like it's here to stay at least, unless, I mean, I don't know exactly how the other judges outside this opinion feel about the rule, but it's definitely interesting.

S Sam Gedge 43:14

I wonder if there is any way to get the Supreme Court to review that issue, or is it really just kind of like the courts of appeals have the discretion, just a matter of local practice, to do this? I don't know.

J Jacob Harcar 43:27

So that's actually how it was justified in the en banc decision that adopted Judge Kaczynski's concurrence from a previous case in which they talked about the supervisory authority on how to help the courts within the district follow circuit precedent, or something like that. But, yeah, I don't know how it would be reviewed, and I don't know...how would the Supreme Court overturn it? Like, it's kind of one of those weird common law things. I guess, you know, the Supreme Court announces the common law rules.

A Anthony Sanders 44:10

I guess it could be...I'm trying to think how that could ever come up, unless you make the argument that binding dicta violates Article Three, which I think that's a really hard argument. I mean, Judge Forrest kind of talks about that, but that would be a hard argument to make. Maybe if it was a matter of federal common law, like an admiralty law case, and then the Supreme Court would take it—of course, it would just reverse whatever the rule was on its common law grounds, but maybe it could say the court below...I guess it might be dicta,

though...like they'd say the court below has this weird thing where they follow their own dicta. And that's not good. But I guess it's just not good as a matter of the common law. I mean it's not inconceivable that it could say something like that.

S Sam Gedge 44:53

I wonder if the Ninth Circuit has a rule about following Supreme Court dicta, because I know there are some courts of appeals that basically say we don't even have to follow Supreme Court dicta, and it'd be crazy if the Ninth Circuit said we don't have to follow Supreme Court dicta, but we do have to follow our own circuit court dicta.

J Jacob Harcar 45:21

Yeah, I don't think they have a rule about Supreme Court dicta the same way, which is a bit strange to me, at first glance at least. I mean, I guess you could make an argument that, well, Ninth Circuit judges know that they're making circuit law when they have a conclusion of law in their dicta, but Supreme Court judges aren't thinking like that, and so there's kind of expectations of what you're doing when you're writing an opinion. But, yeah, I'm pretty sure they don't have a rule that's similar for Supreme Court precedent, but I could be wrong.

A Anthony Sanders 45:59

Because in some circuits, it's kind of like a presumption that they follow Supreme Court dicta, because, after all, it's the Supreme Court so unless we have something really binding on us, we're going to follow it. It did go up all the way to 1 First Street, and so there must have been a lot of smart lawyers involved. I mean, it kind of makes sense, but it's still dicta and still feels a little uncomfortable, I gotta say. But maybe some of us sell dicta short. I mean, that's the other argument. I mean, I think I agree mostly with what Judge Forrest says. And that Judge VanDyke opinion was mostly memorable for a lot of fiery stuff that Judge VanDyke said in a very Judge VanDyke way, which we've covered in multiple opinions on Short Circuit before, but he also makes some good points about dicta, but the main point is that dicta is likely not to have been fully argued by the parties. I mean, it could be, but often it's not, and the court isn't going to take a lot of time on it, unlike what's necessary to the case. But there are huge gray areas here, right? So I can see how a court is tempted to have well-reasoned dicta be something it follows. I mean, I think what isn't often well-reasoned dicta, and what is the biggest example of this is, as Sam well knows, we've had judges on the Seventh Circuit in past years and current years, who regularly will just go on their own path and write a mini treatise about whatever in the middle of their opinion, it might be five pages with sometimes with no citations, and it's all about this grand theory of law that would be great, maybe in a case book, but is a little weird to have in this opinion. And then another judge, I guess, signs on to it, and then it's cited all over the place. And you can make the argument that it's dicta, but it's a little bit—if it wasn't for that rule, I think it would be hard for other judges not to follow it. And so the dicta rule is kind of a nice firewall against judges just kind of doing that lawmaking as we say.

S Sam Gedge 48:27

Yeah, I feel like if there were that practice in the Ninth Circuit where you have these excursuses

Yeah, I feel like if there were that practice in the Ninth Circuit where you have these excursuses on stuff followed by the like, "but that's all by the by, all we need to say for resolving this case is x, y and z." I feel like if that were more common in the Ninth Circuit, you wouldn't see this rule about dicta being binding surviving that long. I think the virtue of it, to the extent there is one, is that it oftentimes is or can be difficult to decide what is and is not actually dicta. But at the same time, I think Jacob's point is that it can be equally hard to decide what is and is not well-reasoned. And it's just like, Well, that seems kind of circular, because if you think it's well-reasoned, odds are you'd follow it anyway, regardless of where that's binding. And if you can just say, Well, I'm not following it because it's not well-reasoned, then okay.

A **Anthony Sanders** 49:17

It is very telling of this case that I mean, the Ninth Circuit, as we've discussed before, is very odd in that—because it's so massive—in that an en banc court will be 11 judges, like here, not the 29 active judges, not to speak of senior judges. And this case was, like, such a no brainer case. So this would be the case where they would reverse that. And who knows, maybe there was some internal deliberation, and only these two judges were like, This is our chance, and everyone else just said don't bother me, we like citing dicta or following dicta, and so they didn't go with it. So I think, reading between the lines like, this is going to be around a while, and it's not going away. You know, one quirk about the Ninth Circuit too is, and I only know this from a Short Circuit newsletter from a few weeks back, Sam, maybe, you know a little bit about this, is the Ninth Circuit does have a mechanism to appeal from an en banc denial to go en banc because, in theory, there is an en banc of all 29 judges, but I think it like, almost literally never happens.

S **Sam Gedge** 50:32

Yeah, that rings a bell. I don't know if it's ever happened. Maybe it has, but that would be really something. They'd have to, like, build a new courtroom, probably. [Laughter].

A **Anthony Sanders** 50:38

Well, if any listeners know if the Ninth Circuit ever has truly gone en banc with all 29 judges, or—I think it's been 29 since the Carter administration, I think that's when they really beefed up the Ninth Circuit. So if that's ever happened, please let us know. But otherwise, hold your peace, and instead, we will hold our peace. And I'd like to thank our guests here today, Sam and Jacob, for joining us, and we will see them again in a later episode. But for now, please be sure to follow Short Circuit on YouTube, Apple podcast, Spotify and all other podcast platforms, and remember to get engaged.