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SPEAKERS

Anthony Sanders, Dan Alban, Matt Liles

A **Anthony Sanders** 00:16

"Pardon me," said the attorney, locking his desk and putting his key in his pocket, "possession, my honest friend" cried he, striking his hand upon the desk, "possession is nine points of the law." Well, that was from The Parent's Assistant, a 1796 children's book by the famous Irish novelist Maria Edgeworth. That old adage that you've heard a million times, probably: "possession is nine tenths of the law," "points" of the law there. That is something we've all heard before, and even in 1796 was a tale as old as time. And it's probably because of the wisdom embedded in that old expression that the Ninth Circuit recently said that the United States could not civilly forfeit some money when it didn't have possession of it. So we're going to discuss that from a civil forfeiture case out west, and also the latest in the Second Amendment from the DC Circuit today on Short Circuit, your podcast on the Federal 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, November 5, 2024 and you're listening to this probably after the election. So sorry, we have no election analysis or results today. It's all about the circuits, civil forfeiture and the Second Amendment. And here to bring that to you, I have two of my IJ colleagues. So first, I'm very excited to announce to you a first timer here on Short Circuit. He is an attorney here at the Institute for Justice, fresh out of law school at the University of Texas, where, while he was at the University of Texas as a law student, he co-authored with me a piece that some of you long-time listeners may remember us talking about en banc, the en banc courts, and where the phrase en banc comes from, and what the heck those French words mean. And that is my friend Matt Liles, so Matt, welcome to Short Circuit.

M **Matt Liles** 02:32

Thank you, Anthony. I appreciate it. It's a privilege to be here. I'm excited to participate for the first time.

A **Anthony Sanders** 02:38

So you're a graduate of the University of Texas. You're also an actual Texan. I heard it's a place that you have to be born there. You can't just become a Texan, unlike being an American. And you're even going back to Texas to clerk at one point. So do you have any Texas love to share for the rest of our listeners?

M Matt Liles 02:58

Well, if I was in my office right now, y'all would be able to see I have a big Texas flag right behind my desk, and it's actually the flag that was flying over the State Capitol on the day that I was born. So it might be my most valuable possession.

A Anthony Sanders 03:13

Wow. Okay, so an old flag—not as old as me or Dan, perhaps, but an old flag nonetheless. Well, that's great. And now we have Dan Alban. So Dan is a old timer around Short Circuit, as I was just intimating, and he is also one of our leaders of our effort to end civil forfeiture abuse here at the Institute for Justice. He's beenworking on civil forfeiture matters for many years, and he found this most unusual, in my opinion, civil forfeiture case from the Ninth Circuit, where there's a heck of a lot going on in 89 pages. And it's actually not the longest case we're going to talk about today, but it is 89 pages. A number of opinions, only three judges. So give us the lay of the land, Dan, and also tell us a little bit about Lichtenstein.

D Dan Alban 04:14

Sure. So the case we're going to talk about is US v. Nasri, although that is really just a short title, because Mr. Nasri is a claimant, not a party to the case. So it's really United States versus $1,152,366.18 in funds from Bendura Bank, a bank in Liechtenstein. So for some of our listeners and viewers, it may be helpful to take a step back for a moment and just remember what civil forfeiture is in the first place, because this is a civil forfeiture case. So civil forfeiture is when the government can, through law enforcement, seize and permanently keep your property based on an accusation that it is connected to criminal activity. And under federal law, this goes back via customs laws to essentially the very founding of the country. It existed originally in admiralty law only, and was used to enforce customs laws. So when there was smuggling or piracy, typically, the owner of the ship or the owner of the cargo was not actually there. They were somewhere overseas. And while there might be a captain and certainly sailors on the ship, they weren't typically the owners of any of the goods or the ships. And so the remedy, which comes from English law before the American colonies got their start, is that the sovereign—the state, in this case, the United States—can proceed against the property itself under the legal fiction that the property is sort of guilty of committing the crime. And so if the United States can show, by a preponderance of the evidence, that a certain property is connected to crime and it has seized that property (the ship or the cargo, in the case of old admiralty law), then it could forfeit that property sort of in lieu of pursuing criminal prosecution of the owner, because they don't have jurisdiction over the owner. Now, obviously, things have changed from the colonial era, and due to a variety of things, including technology and extradition treaties, the United States has pretty wide, nearly global jurisdiction where it can obtain personal jurisdiction over criminals that it wishes to prosecute. Obviously, there's some exceptions. There's some non-extradition countries, that sort of thing, but by and large, the US

can exercise in personam jurisdiction almost anywhere on Earth. But that is not the same as actually controlling a piece of property, which is a prerequisite to using civil forfeiture, because in general, when you're using civil forfeiture, you have the property, you have seized it, and the question is, who gets to permanently control that property? Who does title vest in? Does it go to the sovereign, or does it go back to the original owner? Or is there some other claimant who has maybe some even better interest in the property? But there are also some weird exceptions to that rule, because for things like intangible property or real property, the sovereign can't necessarily actually seize it and take it and, like, put it in an evidence locker or something. And so there's a thing called constructive seizure, where you do the sorts of things like hammering a notice into the front door, posting public notices and getting a judicial warrant and an order to seize a bank account, those types of things, where, although you may not have seized the property and put it in some government controlled lockbox. You nonetheless control the property.

A Anthony Sanders 08:07

And then also those situations where the property is basically on land that the government has jurisdiction over.

D Dan Alban 08:14

Well, that's the key. That's the key in this case. So the US government can do that with respect to bank accounts in the United States, those, you know, are intangible property. There are not, actually—I don't know if this is going to spoil things for people—but there is not actually a box somewhere that has all of your dollars in it. This is just, you know, digital currency. It's intangible, and that's true of currency all over the world. And so in this case, prosecutors in San Diego decided they wanted to use civil forfeiture against a bank account in Liechtenstein, and the very short version of the story is that Younes Nasri is a Canadian citizen who now lives in Dubai, but owns a bank account in Liechtenstein, and he's accused of allegedly providing, I believe it's encrypted cell phones, or something similar to cell phones, to a large drug trafficking cartel, and some of the proceeds from those sales were deposited in this account in Liechtenstein. And the prosecutors in San Diego alleged that that cartel had contacts with the Southern District of California, as well as a number of other locations, including Australia and lots of places all over the world. It's an international cartel. So the prosecutors sought to forfeit the money in Younes Nasri's bank account in Liechtenstein and the district court was okay with that and signed off on it. But then it went up to the Ninth Circuit, and we got a very interesting series of opinions. This is a case with both a majority opinion signed on to by two of the three judges, a concurrence by one of those judges, a concurrence by the other of those judges—that's Judge Desai, who wrote the majority opinion—responding to the concurrence from Judge Bybee, explaining why she didn't adopt everything Judge Bybee said into the majority opinion, and then a dissent from Judge Bennett. So lots going on here, but the gist of it at the end of all the analysis is: unless there are really good assurances that the property is under the control of the government, the government cannot attempt in rem forfeiture—in rem meaning an action against the property. And so the final holding of the majority opinion is, we hold that the district court's exercise of in rem jurisdiction without a finding that it has control or constructive control over the defendant property violates due process. And the idea here is, an essential component of due process is notice, and the way that notice is provided is going through the full seizure process, which includes the things like hammering the notice into the front door and doing the

various things that you would do when seizing intangible property. Now here there's a bit of a wrinkle, as we've mentioned several times, the property is in Liechtenstein. It's in a bank account in Liechtenstein, which is a country Anthony was saying earlier something about it being 'notorious for having opaque banking laws,' but I was going to say famous for having laws very respective of the privacy of those who use its banking system.

A Anthony Sanders 11:50

I was quoting the usual suspects there, to be clear.

D Dan Alban 11:52

Ah, very good. And so Liechtenstein did actually put some sort of temporary hold on the bank account, but there were not any assurances that Liechtenstein was going to do anything further than that, or that Lichtenstein would follow the the holdings of the US courts in this matter. And so there was no assurance that even if the US District Court for the Southern District of California ordered the forfeiture of the property that that would happen because the property is outside the jurisdiction of the United States. There's not some agreement where they automatically follow the judgments of US courts. And there didn't appear to be any additional assurances here that anything was going to be done. And the opinion notes that there's been multiple occurrences before where bank accounts in Liechtenstein and various other places have not been made available just because a US court said that the property in them was to be forfeited and so that is the fundamental issue. Now, the reason the District Court did that is because there is a statute, a civil forfeiture statute, 28 U.S. Code § 1355, that is written somewhat more broadly. It says whenever property subject to forfeiture under the laws of the United States is located in a foreign country, an action or proceeding for forfeiture may be brought in the district in which the acts giving rise to the forfeiture occurred. And I think a latter part of that statute also says something about the District of Columbia being sort of a catch all. The US District Court for the District of Columbia is, I believe, the catch all circuit where you can also pursue forfeiture of overseas property if maybe the connection to the specific district isn't so obvious. So this is kind of a niche case. It's about seizing foreign assets, and so it's mostly going to be relevant to sort of those weird cases you hear about involving, like, seizing the yachts of Russian oligarchs, or seizing overseas bank accounts, obviously, maybe seizing oil or ships transporting oil for various trade sanction violations, that kind of thing. It's not a normal civil forfeiture case. But the way it's not a normal civil forfeiture case is really interesting, because it kind of illustrates the reason that civil forfeiture came into existence, and how it's grown so far beyond its original purpose that it's really become kind of unmoored from those historical traditions. The the reason for civil forfeiture in the first place was that you had possession of the property and not the owner. You had in rem jurisdiction, jurisdiction over the property but you did not have jurisdiction over the property owner, in personam jurisdiction. Here, the US has neither, but is still pursuing civil forfeiture, in rem forfeiture, because it knows where the bank account is, and thinks that somehow this conspiracy, international drug trafficking conspiracy can be traced back to the United States. So the Ninth Circuit ultimately rules, no, you don't have jurisdiction to do it, absent some better assurances, and that due process requires more because the amount of notice that's required when you're seizing a bank account is substantially greater than whatever it is Liechtenstein is doing when it's placing some sort of temporary hold on a bank account. Now Judge Bybee's concurrence is interesting, because Judge Bybee says, not only is that a problem, but it also is a problem for the cases and

controversies requirement, because, if we're deciding a case that ultimately can't be enforced by, well, ultimately, I guess, by the executive branch; but if the judicial branch is being asked to decide a case that there are no assurances that whatever it decides has any legally binding nature in the place where the property exists, then it's essentially an advisory opinion, and the concurrence points out that there are all sorts of problems here. Lichtenstein could, for instance, decide to just reject the US court's decision. They could say, No, we don't think there's a connection between this property and illegal activity. It could decide that there are some sort of creditors that have some sort of superior claim on the property to the United States. It could decide, for instance, that Canada could submit a claim saying, Well, this is a Canadian citizen, and he owes taxes on this money, and so we have a claim before the United States does. Maybe Dubai has some claim on the on the property. Maybe Lichtenstein itself has some claim on taxes or something related to the property. And so it's up to Liechtenstein courts to determine that, not US courts. And if the US courts are just issuing this advisory opinion, that's obviously not what US courts are supposed to do. It's an advisory opinion, and we shouldn't do that. So Judge Desai writes back that she's not quite convinced by this cases and controversies thing, but that it's interesting, and they both sort of agree. One of the problems is that this is being treated as an in rem case, when it really should be a quasi in rem case. Now that gets a little too nerdy, even for me, so I will just sort of pass on that and move on to the dissent, where Judge Bennett says, Well, you know, I don't think this is really a problem, and it just points to the statute, and says, look, the statute has long been accepted as providing sort of the jurisdictional limits, the requirements of jurisdiction that we need. We have a number of cases that have held this before, and you're essentially sort of overturning prior Ninth Circuit precedent to reach this conclusion—in particular a case called United States v. approximately $1.67 million. And so Judge Bennett says, Look, that precedent sort of controls here, and we just can't go any further. But the response from the majority opinion is basically, well, a statute doesn't override constitutional requirements for due process, and Congress did not appear to be trying to change what the actual jurisdictional limits of the courts were. It just appeared to be sort of defining the proper venue for where to pursue civil forfeiture of an overseas asset. And so, you know, absent some really clear indication that Congress is trying to weigh in on this pretty important constitutional matter, we shouldn't assume that a case that didn't really address those weighty constitutional matters was intended to consider them. And then Judge Bennett also says, Yeah, but you know what? Mr. Nasri never even raised these arguments. He raised due process arguments generally, but he didn't raise these specific due process arguments. And so you're overreaching here. You're deciding things that really shouldn't have been decided. So that's the case. It's quite a wild ball of wax, especially with all the different opinions going back and forth. But I think the ultimate takeaway from it, and who knows if it'll go up en banc, but I think the ultimate takeaway from it is to remind district courts, at least in the Ninth Circuit, that if you're going to proceed in rem against property, you would better have actual control, or very good assurances related to constructive control over the defendant property, because otherwise you're making no assurances to anyone who has a property interest in the property that they're going to receive notice so that they can contest the forfeiture and possibly also issue an advisory opinion, because whatever order you issue may not be enforceable.

A Anthony Sanders 20:06

Matt, do you have any advisory opinions on this?

M

Matt Lilles 20:09

Yeah, I think what Dan said, that this is an unusual forfeiture case, that seems right to me. It's definitely unusual. It reminds me of those cases like you said about the US government trying to go after mega yachts owned by Russian oligarchs. You know, these are kind of international fugitives, kind of unsympathetic characters involved in this. And so it's interesting to me that the Ninth Circuit is still pretty concerned about the due process implications, even in cases that involve some pretty unsavory acts. And I do think the justiciability problem brought up in the first concurrence is interesting too, I guess. I mean, the Ninth Circuit is remanding this case to tell the district court you need to decide whether you actually have control over this bank account, essentially to determine whether you have jurisdiction. And yet, the first concurrence is saying, Well, you don't have jurisdiction at all. So even just to decide that point is non justiciable.

A Anthony Sanders 21:19

It seems like this point about how there could be, like Dan, you said, someone in Canada could try to get this money, or there could be a claimant in Australia or Dubai, wherever. It's almost like thinking of this case that the Southern District of California is like a bankruptcy court. So when you have a bankruptcy proceeding, you need to have notice of everyone who has an interest in that estate, because we're going to figure out who owns what and how it all goes under the code. And here it's like the US is just one arguable creditor who's trying to have this amount of money adjudicated with nobody else involved who could be involved around from anywhere. And when they put it that way, it just seems to me, it's kind of obvious. You need at least some kind of, I don't know, enforceable lien or whatever the heck it is on the property. The problem for me also is like, I'm thinking—I'm not too sympathetic to the US government for simple forfeiture cases, for obvious reasons, but even maybe with this kind of defendant, but—if you have just some creditor, someone who is owed money by this guy and so wants to get that money from a Lichtensteinian bank account, the old fashioned way is to go through the host nation, and that often is really difficult. I had a case in private practice once where someone was trying to serve a company in China that obviously was at fault for this tort claim, and they took years, and they could never serve that company in China, even though everyone knew exactly where it was. So I have some sympathy to ways to get around that. Lichtenstein is not China, of course. So not a lot of sympathy here. But, like, I get it's when you abstract from it. It's not exactly an easy answer about how to sort out who owns what when you have money in a different spot.

D Dan Alban 23:32

Yeah, and that's one of the things the first concurrence address when it talks about how one of the problems here is the case and controversy requirement and the limit of Article Three is you can't make Article Three judges act like the executive branch and conduct international relations with Lichtenstein or any other court. That all has to be done through the executive branch. And so they basically say, look, there the executive branch needs to do whatever can be done in order to assure the courts that this isn't an advisory opinion, but that's not something we can go out and do. And yeah, so Matt makes a good point that the case is remanded to the district court to essentially make findings about whether or not there really is constructive control of the bank account. And perhaps, maybe there was just some sloppiness in the initial documentation. And maybe there really have already been all these agreements

made and assurances made, but it sounds like probably not, and it sounds like that might be something difficult to do with Liechtenstein. And so that puts you back in the spot of having potential creditors from all over the world—as the opinions repeatedly point out, an in rem case is to establish title as against the world, against everyone. And so here there's all kinds of potential claimants to title. There's any of the countries where there could be a forfeiture action, like Australia or the US or presumably Liechtenstein, Canada, Dubai, and any of the other places this cartel was alleged to have operated. There's countries that have some kind of connection to Nasri himself, including Canada and Dubai and Liechtenstein, since it has his bank account and the assets in it, and there could just be creditors of Nasri who may have some sort of superior claim, secured creditors that might take precedence over any of the other claims. And so, in order to genuinely quiet title as to the rest of the world, you need to be able to actually exercise decisive jurisdiction over that property. Now, the dissent does point out it's not true that a case has to definitively decide a controversy in order to satisfy the case or controversy requirement. It has to make it substantially likely that it resolves the problem that's at issue. And so the the dissent says, Look, you're applying too high of a standard here. We don't need 100% guarantee that Lichtenstein is going to do it. If we have reasonable assurances, that should be enough. And so, you know, who knows what the district court will find when it goes back to consider this on remand, but I think it's a good reminder to district courts everywhere that if you have an in rem case and the property is not in your jurisdiction, you'd better look real carefully at how well you control that property, because you may not be able to forfeit it.

A Anthony Sanders 26:42

One other point on the various opinions on the concurrence. So here we have a majority opinion, two judges written by one, a concurrence responding to that, which we've definitely seen a zillion times. But then you have a concurrence responding to the concurrence written by the majority writer, and then you have the dissent. I was thinking, I do not think I've seen that before. I've definitely seen, we've talked about it on previous episodes, where the majority author will break off on his or her own concurrence to respond to a dissent, because it's like, this is some more hot stuff that you know wasn't appropriate for the majority opinion, or you couldn't get the other judges to sign on to or whatever. But here it's like a concurrence and a concurrence that they take out of the majority. It probably happens every now and then, but first time that I've seen that.

D Dan Alban 27:40

Yeah. Definitely seems rare. And they address kind of the core issues of the case, but then both kind of talk about potential ways to solve this. And so those sections are quite clearly sort of dicta, like recommendations, here are some possibilities. So I kind of understand why you wouldn't include that in the majority opinion, but it is interesting that Judge Desai decides to respond to the case or controversy requirement with a separate concurrence, rather than maybe putting something in the majority opinion to respond to.

A Anthony Sanders 28:19

As we discussed just a couple episodes ago, that in the Ninth Circuit, dicta can be holding. And so if you put it in the majority opinion, it's more likely to be dicta, and thus holding. Well, it

would be dicta, but if it's in a concurrence, I guess it's just a concurrence and whatever, maybe that helps explain it. And they're being a little careful there in the Ninth Circuit, which is good to see. So, this is about Lichtenstein money, Matt, have you ever been to Liechtenstein?

M **Matt Liles** 28:50

I cannot say I've ever been to Liechtenstein. No, yeah.

A **Anthony Sanders** 28:54

Dan and I were talking and neither of us have been. I've been close in Innsbruck, Austria, and I have to say it was a beautiful countryside. So I'm sure it's a beautiful, rich place. But Matt, we're going to talk about an even richer place, which is the District of Columbia. Well, you know, certain entities in the District of Columbia, and they for years and years, have not exactly been the most Second Amendment compliant jurisdiction. That's, of course, where DC v. Heller came from, where the Second Amendment was recognized to protect the individual right to keep and bear arms. There was all kinds of litigation after that, where Dick Heller was not properly given his permit that he won at the Supreme Court to have a firearm in his home. And so there's all kind of litigation after that. Our friend Alan Gura was involved with that for, like, years and years, I forget even what happened there. And so this is just the latest chapter in this long story, which we get a little bit of discussion of in this 99 page opinion, with adding both opinions together in the DC Circuit. But at the end of the day, it seems the latest challenge does not stand up, at least for now, and that's because of history, tradition and some old laws that I kind of lost sense of what they're about. But there are some really cool diagrams along the way of some old guns. So Matt, tell us about this latest chapter in the Heller saga, and what's going on at the DC Circuit?

M **Matt Liles** 30:41

Absolutely. So we're going to talk about Hanson v. D.C. This case has to do with gun laws in our nation's capital, and we are talking about it on Election Day. So that's extra special, I guess. And I have to say that, as a Texan and now, actually, as a resident of the District of Columbia, this case hits kind of close to home for me. And like you said, Anthony, if you know the Second Amendment, you know that DC's gun laws over the last 15 years have kind of been the star of the show, or the belle of the ball, if you want to say. You talked about Heller—so after DC versus Heller about 15 years ago, DC has to rewrite a lot of its gun laws, and one of the new laws that it writes is the law that is being challenged in this DC Circuit case, and it is a law that prohibits the possession of any gun magazine that has a capacity of more than 10 rounds. And so actually, this is not the first time that that law has been challenged under the Second Amendment. If you know Heller, a lot of people know Heller, but a lot of people don't know that there was a sequel. And I think you alluded to that.

A **Anthony Sanders** 32:01

Yeah, there are a bunch. It was like Naked Gun—there were a bunch of sequels. [Laughter].

M Matt Liles 32:05

So there was a Heller II, where the same plaintiff challenged this magazine limitation that was written after Heller I, and the DC Circuit originally decided that case in 2011 under the Heller framework. So applying intermediate scrutiny under the Second Amendment, and that survived. This magazine limitation, according to the DC Circuit 13 years ago, did not violate the Second Amendment. And so, I mean, as far as anyone could tell, for the last 13 years, everything was fine and dandy, and you could not walk around Dupont Circle with a gun magazine that had more than 10 rounds in it. But then everything changed two years ago. If you know the Second Amendment, you know—it's a famous case now—called Bruen from the Supreme Court, where the Supreme Court changed the test that lower courts are supposed to apply to Second Amendment claims. So the Supreme Court says no more means-end scrutiny, no more intermediate scrutiny. Instead, if you are the DC Circuit and you have a Second Amendment case, you are supposed to ask "is the challenged law consistent with this nation's historical tradition of firearm regulation?" And so it's essentially asking courts to do a lot of history in Second Amendment cases. And for some people, that's a point of contention or criticism, but it does produce opinions like this in Hanson, where there are pictures of old historical curiosity guns from the 16th century. But so, I mean talking about this particular case: the plaintiffs in this case filed their lawsuit about a month after the Supreme Court decided Bruen so they were Johnny-on-the-spot. They knew this new test was a new opportunity to challenge DC's magazine cap, and they asked the district court for a preliminary injunction, which would keep DC from enforcing the magazine cap while the lawsuit goes on. The DC District Court uses this new Bruen test from two years ago and says, No, we don't think you're likely to succeed on your Second Amendment claim, even under Bruen. So you're not entitled to a preliminary injunction. And so now in this 99 page opinion, the DC Circuit has to decide that question: does it think that the plaintiffs are likely to succeed on their Second Amendment claim under this new test? And ultimately, it's interesting, actually, the court issues a per curiam opinion, and I actually don't know the answer—I assume both of you do, when and why courts of appeals will issue per curiam opinions out of three judge panels?

A Anthony Sanders 35:13

There's no hard and fast rule, basically. They don't want to... maybe they did it together, who knows, they just don't think it's worth putting the author's name up there. But, you know, because it was a holding of the court and there's three judges, that those two other judges are in favor of it, but you don't know who actually wrote it. That's the long and the short of it.

M Matt Liles 35:37

Yeah, it's like banning ink, but not the press. Obviously, ink is part of the right to the press. Well, so we get that 45 page per curiam opinion. And so what's important is, under Bruen, a lower court, when they have a Second Amendment case, has to answer two questions. You might call it a Bruen two-step if you wanted to. The first question is, does the Second Amendment actually cover the activity that the challengers will want to partake in. And the second question is, is the challenged law analogous to a historical restriction on firearms? And you know, that's for most people, the more interesting, or maybe more obnoxious part of it. But as to the first question in this case, the plaintiffs are saying they want to walk around DC carrying gun magazines that have 17 rounds in them, or, you know, 11 or 12, and DC's

magazine cap is not allowing them to do that. The question is, is walking around with a high capacity magazine protected by the Second Amendment? The court says, Yes, we think it likely is. And that's not really the more interesting or important part of the opinion—both the per curiam and the dissent agree on that question. But they say, essentially, a constitutional right in order to exercise it, implicitly also authorizes acts that are necessary to carry it out, right? So, if you walked around DC with a handgun and you don't have a magazine in it or you don't have a firing pin in it, you can't actually use it in self defense, right? So, just some basic logic there. But so where it gets interesting is they get to the second question of Bruen, which is where lawyers and courts get to do a bunch of history, put on their historian caps and look at a lot of historical research and decide, Is there a category of restrictions in this country's history that closely line up with what this challenge to the law is getting at. And so the DC Circuit in this case starts out by saying this whole process is kind of fraught with uncertainty. That's a pretty common complaint I guess a lot of the lower courts have about Bruen, because it's basically not known how closely analogous the restriction has to be, even after the court gave some more guidance in Rahimi recently. But so as to the second question, is there a historical analogy to DC's magazine cap? The burden is on the government to show that there is. And so the way it plays out in this long opinion is it's essentially DC's lawyers doing a little bit of spray-and-pray, right—if you'll pardon the gun pun—they are just throwing out a bunch of examples of different historical categories of gun control laws, trying to see if one of them will stick, if the court will agree that one of them is closely analogous. And the court goes through four different categories and essentially rejects the first three until finally settling on the last one. I'll point out that the first analogy that DC throws out is that this magazine cap is analogous to historical restrictions on the storage of gunpowder. So apparently, in the founding era of the United States, a lot of towns and states had statutes restricting the amount of gunpowder someone could store on their private property. DC says, Well, this is similar to us saying you can't have a 15 round magazine in your handgun. The DC Circuit says, No, actually, because the purpose of the gunpowder storage laws was primarily to prevent the spread of fires. It is not to prevent the perpetration of violent crimes or mass shootings, which is what DC says this magazine cap is intended for, so that one strikes out. We get to various restrictions, like time, place and manner restrictions on carrying a gun. DC says there were a lot of historical restrictions on setting trap or spring guns in this country, which is true, but the DC Circuit says, Yeah, we don't really think that that's a close analogy to what you're trying to accomplish here.

A Anthony Sanders 40:35

By the way, did either of you guys, when you took criminal law in law school, like the basic criminal law case class—do you guys remember that case about this trap gun in like a cabin, and it was about this mens rea for murder prosecution? Do you guys remember that?

M Matt Liles 40:52

Yeah, I think that was out of Iowa, if I remember right.

A Anthony Sanders 40:56

Yeah, probably—I can't remember the state. But I think it's like something every law student reads because it's such a crazy set of facts. So anyway, reading about the trap guns or the spring guns brought that to mind, and I am not surprised that a number of jurisdictions had

laws against trap guns.

M Matt Liles 41:14

And then the next category that DC points to, which I'll talk about in a minute, the DC Circuit doesn't really say yes or no to actually. DC says during Prohibition, actually, a lot of states created restrictions or bans on machine guns with high capacity magazines, and this was because in the 19-teens and 1920s a new invention was the Thompson submachine gun, which a lot of unsavory characters, we can say, were using to commit crimes. And so you think about a lot of states are banning Thompson submachine guns with high capacity magazines, in a sense that's kind of analogous to DCs magazine cap, right? Like they're saying, you know, regardless of what type of firearm it is, you're not allowed to have 15 or 20 rounds in your magazine at one time. And the district court held that this was the historical analogy to the magazine cap. This was enough for DC's law to survive Second Amendment review. The DC Circuit, I'm a little confused—they kind of pass on it. They don't say either way whether they agree with that, but then they kind of just move on to the last category that I think they agree with more fully, and that is in the last category DC kind of throws out to see, will this justify our historical analogy is historical restrictions on unusually dangerous weapons, or the DC Circuit calls it "weapons susceptible to unprecedented lethality." And so examples of that is in the 19th century, a lot of states passed laws banning Bowie Knives, apparently, because a lot of people were killing each other with Bowie Knives in public. And the court actually points out that there are state court decisions from the 19th century upholding these Bowie knife restrictions gainst either Second Amendment challenges or challenges under state constitutional equivalence. And so it was apparently well settled for a while that it was not a constitutional problem to restrict the lawful possession of Bowie knives, and the DC Circuit says that's it. We'll bite. That's our historical analogy that is close enough to DC's magazine cap to have it survive Second Amendment review, which, the court says it's primarily because they kind of serve the same purpose, right? So people are going around in public, slashing each other with Bowie knives, and DC's magazine cap is also intended to sort of prevent these random violent crimes, or mass attacks on other people, and because their purposes are close enough to each other, and a long knife is close enough to a very high capacity gun magazine, then that's enough. The magazine cap survives another day. And so yepp, the DC Circuit says the plaintiffs are not entitled to a preliminary injunction at this stage. I will say it's an interesting Second Amendment holding, but we were talking about there is a historical appendix at the end of the opinion. So after writing about 45 pages, the court goes out of its way to address the historical evidence that the plaintiffs have brought out. The plaintiffs have apparently submitted all this evidence saying, Here are historical weapons that are similar to high capacity magazines, I guess. And it attempts to show that no one was banning these when they came out. So there's no historical tradition of regulating high capacity weapons. Regardless of the answer to that, I would definitely direct it to everyone's attention to go look. It has several pictures and diagrams of, for example, something called a puck gun from 1718, which is apparently a Gatling gun. They talk about a Jennings multi-shot Flintlock rifle from the 18th century. And it also talks about a 16-shot wheellock from 1580 so if you are a gun nut or history nut, it is worth going to look at the appendix.

D Dan Alban 46:08

And there's pictures of some of these too.

M Matt Liles 46:10

There are, yeah.

A Anthony Sanders 46:12

1580, I thought they only had like Archie Buses back then.

D Dan Alban 46:18

And some of these guns look like they belong in like Terminator II: Judgment Day. They're like chain-fed revolver weapons. I mean, they're pretty impressive, especially given the era that they were made.

A Anthony Sanders 46:33

But the court's point, Matt, right, is that it's maybe these were around, but there aren't very many of them, and so they weren't "common use," as Heller said. I mean, they were in so little common use that probably no one bothered to ban them, because they were just these kind of quirky curiosities.

M Matt Liles 46:53

Yep, yep. The court says either they're just kind of weird curiosities that people paid a few bucks to go see get used or they're just not logically similar to a modern high capacity gun magazine.

D Dan Alban 47:14

But the relevant test isn't, "was there ever a time when such a weapon was in common use prior to the founding or at the founding?" The test is, "is the thing that the government is seeking to ban an arm in common use," like now, right?

M Matt Liles 47:33

Yeah, and I think there's some dispute between the court and the dissent on that point. They both seem to agree that high capacity magazines, if you take the United States as the sample, are arms in common use for self defense today. I think there's some dispute about how you arrive at that conclusion and what evidence you will get, but you are right.

D Dan Alban 48:01

Yeah, and so the dissent from Judge Walker basically says—so we're talking about guns that are in common use. And I think the majority does essentially concede that these are guns that are in common use. There may be some dispute about how and how common the use is in the DMV: Delaware, Maryland, Virginia and the District. But you know, there are obviously plenty of these on the Virginia side of the border where there are no such restrictions. Maybe less so in Delaware and Maryland. But if you look nationwide, guns that hold more than 10 rounds are, frankly, ubiquitous, and probably the reason they went with 17 rounds in their challenge is because one of the most commonly owned handguns, a Glock 17, holds 17 rounds. And so although some fairly popular semi-automatic pistols might hold a few more rounds than that, most guns on the market today are kind of around that range, and so, you know, they picked a common magazine amount for a very common pistol. But I think what Judge Walker's dissent points to, and what the plaintiffs point to is that this isn't like a time, place and manner restriction, or some sort of reasonable regulation of how a gun with 17 rounds can be carried or possessed or whatever, but it's an outright ban on anything with more than 10 rounds. And if you have an outright ban, then that is not allowed for a weapon that is in common use for lawful purposes. So while DC might be able to say, I don't know, who knows what would be a reasonable time, place and manner restriction, but they might be able to say, oh, you can't have a weapon of that sort, I don't know, in a church or near school grounds, or a variety of things that are a common regulation. You can't possess one inside a place with a license to serve alcohol. Maybe that would be like a time, place and manner restriction. If you ban them outright, you're banning a gun in common use, which is contrary to the holdings of Heller and Bruen.

A Anthony Sanders 50:24

Yeah, and one twist on that, that I I found, is it's just seems really weird that they went with the Bowie knife analogy and not the other ones, because a Bowie knife restriction, or whatever it is, is like, you cannot have this type of weapon. So if it's a ban on carrying Bowie knives, that's basically the same thing as a ban on carrying this kind of capacity of a weapon. But there it's kind of the flip side of what Dan was just talking about. There, you're saying it's categorical to the weapon, it's not about the number of bullets you can have ready at any one time for the weapon. Whereas the other analogies they had were, maybe that was more of a stretch, as their analysis says, but it was kind of more in that ballpark. So, we're trying to protect against a large amount of damage at one time. Well, that's analogous to the gunpowder restriction. It's also weird that—maybe it's not weird, but it's a little weird—that the court went through those and said, Well, okay, this one doesn't stand up, this one doesn't stand up, but then says the last one does stand up, whereas I think normally a court in this kind of analysis is going to say, well, we don't need to get into the other ones, because this one stands up. Because analogy number four, we'll just go straight to that and say it stands up so you don't get your preliminary injunction. So maybe they were kind of throwing a bone to the plaintiffs, and Judge Walkersaying, well, we'll say these don't work, and that'll help Second Amendment law later on, or maybe in other jurisdictions, or giving a little bit of a sop to that side, I guess. So it's a little odd that they structured that that way, which makes you kind of think maybe there was more going on in the back room than you know we realized once this 99 pages is actually issued. But that's just mere speculation, I guess.

D Dan Alban 52:36

Yeah, depending all this on similarity to Bowie knives seems really strange for all kinds of

Yeah, depending all this on similarity to Bowie knives seems really strange for all kinds of reasons. I suspect maybe the reason they liked it best is because historically, it was much closer to the Reconstruction Era and so basing it on prohibition era bans, on fully automatic Tommy guns—that I think the civilian model had, like a 50 round drum magazine, it's the one that you see like Al Capone carrying and in all the gangster movies from the 20s and 30s—that's a pretty different thing, but it's also from a rather different era. We're not talking about founding or Reconstruction era bans. We're talking about something that happened within a decade or two, before Miller was decided, and so at that time how much of a recognition there was of a individual right to bear arms, I think, was unclear.

A **Anthony Sanders** 53:38

Yeah, and Bruen basically says you shouldn't use laws from that period. The latest ones that Thomas cites in the Bruen opinion are quite late 19th century. And he basically says, Ah, they're too late to really to matter for what's going on at the time of the 14th Amendment, let alone the founding so I guess my take on all of this is we've talked about a couple of these post Bruen opinions before, including one from the Eighth Circuit from a few months ago, about the analogizing from convicted felons to the mentally ill at the founding and that they sometimes couldn't get access to firearms, and so that was good enough to uphold the law and all this analogy just seems like it's not really law. It's a lot of history without benefit, and this is coming from someone who is very supportive of the protection of the Second Amendment. So it seems like there's a better way. And I don't know if Rahimi was, you know, the court just throwing up its hands and saying, We don't know of a better way, but we'll make this way a little easier for the government, or what's going to happen in the future, but courts are going to continue to struggle with this for reasons we don't need to get into now. But you know, just because something was historical doesn't mean that it's constitutional, and vice versa, and then I guess that's all I'll say about that for the moment, unless either of you want to give your grand theory on the Second Amendment.

D **Dan Alban** 55:11

I don't have a grand theory on the Second Amendment, but I do think the Bruen test does tend to lead to motivation based reasoning in either direction. And you can always sort of cherry pick a historical history. But if you end up in a situation where you're saying a ban on Bowie knives is what justifies a ban and you're allowed to have a gun with 10 rounds in it, but not 17, that seems like an absurdity. Also unrelated to this, but related to the the callbacks to famous cases from law school, I should mention that in the Nasri case that I was talking about earlier, there are shoutouts to Pennoyer v. Neff and International Shoe talking about the differences between the minimum contacts required for personal jurisdiction, and how that whole set of analysis does not apply to in rem jurisdiction. So if you're a law student or you have painful memories, perhaps, of discussing Pennoyer or International Shoe, you can get a little recap by taking a look at Nasri, a mere 89 page opinion, nothing like the one Matt's talking about.

M **Matt Liles** 56:27

Yeah, I could feel my intense confusion from the first week of civil procedure as a 1L in law school coming up. As soon as I saw the word Pennoyer, my eyes kind of glazed over.

A Anthony Sanders 56:41

There's a weird backstory to Pennoyer v. Neff where, like, it jumps over assuming something about the jurisdiction of where it was raised in court. And one guy said to me once, I have no idea where this guy is now, but he said that he raised this in class once. And the professor was like, I never thought about that before. That's really weird. And they went back and looked, and it turns out, yeah, there's this weird flaw in the opinion that doesn't matter for anything we do today. And so there's a note in the case books because of this one guy raising his hand first day of law school to point out what was wrong in the case. So I don't know if that's inspiration to 1Ls listening, that you should raise your hand, because maybe one day, it'll lead to a change in the case book, but it shows you that maybe nothing's ever really settled in these cases, as we learned about today, because of what Dan and Matt have explained. So thank you guys both for bringing those two long but I think at the end, discernible opinions on what's the latest in civil forfeiture and the Second Amendment and so thank you all for listening, and please be sure to follow Short Circuit on YouTube, Apple podcast, Spotify and all other podcast platforms, and remember to get engaged.