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SPEAKERS

Anthony Sanders, Will Aronin, John Wrench

A **Anthony Sanders** 00:12

Can the government steal a baby's blood? We'll find out when we discuss a case from the Sixth Circuit that addressed that question. Also, out in the Ninth Circuit, there was a unicorn sighting—the circuit actually found a gun control law unconstitutional. All that this week here 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, July 1, 2025. I have two of my esteemed colleagues here today to discuss these earth-shattering cases of interest. First, I have a quick announcement: as we discussed on last week's show, we are coming to Chicago for a Short Circuit Live. If you are in the Chicago area and would like to see us in person, we have a show on the evening of Sunday, August 17, at the Swiss Hotel in the Geneva Room in downtown Chicago. It is on the eve of the Seventh Circuit Judicial Conference, which we will also be attending. I will be hosting that show, and on the panel will be my colleague John Wrench, the Assistant Director of the Center for Judicial Engagement, who also happens to be on the show here today. John, welcome back to Short Circuit. Anything more you want to tell the folks about our show in Chicago?

J **John Wrench** 01:54

Thanks, Anthony. Yeah, I think it's going to be a ton of fun. It'll be great to be in Chicago, and I think it will be kind of a nice way to lead into the conference for people. So I hope that they come by and hear a live Short Circuit recording, which is always a ton of fun to actually be there in person.

A **Anthony Sanders** 02:12

That's right. And it won't be this one, but a ton of fun will be had at a future short circuit live with Will Aronin, who is a senior attorney here at IJ, and I say Will will be on a future short circuit live because he just threatened me and said he has not been on one in the past, and so

we're going to make sure that happens to keep the peace. So Will, welcome the Short Circuit and welcome to your future appearance.

W Will Aronin 02:41

Thanks so much for having me. And in fairness, I don't think it was as much a threat as like applying like New York style guilt.

A Anthony Sanders 02:48

Are those the same thing, though, basically?

W Will Aronin 02:50

No. One is "look, it'd be terrible if you didn't invite me." The other is, "ure, just don't invite me. I understand you don't want to be near me."

A Anthony Sanders 02:56

Gotcha. Well, I don't know how that segues into gun control, but that would be the thread. That all kind of runs together. We have this case out in the Ninth Circuit. The Ninth Circuit has a reputation, although it's not quite as progressive as it used to be. It still is fairly that way, and at times in the past it has not really wanted to go along with what the Supreme Court has said about the Second Amendment. But on this occasion, it seems it went with the flow—or is it with the flow these days, considering how Second Amendment law keeps changing? So, tell us about Nguyen v. Bonta and this rule I had actually forgotten about in California, that you can only buy one gun a month.

W Will Aronin 03:55

Thanks so much for having me. I have the very rare privilege of talking about a Ninth Circuit case that struck down a restriction for violating the Second Amendment. As Anthony said, this is Nguyen v. Bonta, and it concerns a 30-day restriction in California under which you can only buy one firearm—of any kind—once every 30 days. California said the purpose of the law was to prevent mass purchases, arms trading, and straw purchasers, but ultimately it limited the rights of law-abiding citizens to purchase ordinary firearms. The Ninth Circuit panel went through the analysis to determine how to decide if a law restricts or violates the Second Amendment, applying a two-step test after the Supreme Court's decisions in Bruen and Rahimi: (1) Does the restriction violate the plain text of the Second Amendment? and (2) if so, it is presumptively unconstitutional unless it is similar or analogous to a law in our text, history, and tradition—something the founding generation would have passed, though it need not be an exact match. First, the Second Amendment, as Heller recognized, protects the individual right to possess and carry weapons, and nothing in its text limits the number of weapons a person may own. Relevant case law has consistently treated this as a plural right—an individual's right

to own several weapons. The panel found the restriction violated the plain text and rejected California's two arguments. The first was that the amendment does not cover the right to have multiple firearms, which in California's view meant you could have just one weapon.

A Anthony Sanders 05:56

And the court does say "arms" right?

W Will Aronin 06:00

You get to have one "keep and bear arm." The panel gave that argument short shrift—it was textual, it didn't fit the history, and it wasn't supported. The court did note, however, that a delay in and of itself is not necessarily a facial violation of the Second Amendment, and it acknowledged some reasonable arguments on that point. For example, it cited a Fifth Circuit case where a background check could result in up to a 10-day waiting period before purchasing a firearm, which was not unconstitutional because the delay served a legitimate purpose: ensuring unusually dangerous people do not get firearms. In California's case, by contrast, the goal was the delay itself—the process was the punishment—and it was designed simply to make people wait. The panel included a particularly helpful quote, analogizing the restriction to other rights: "We doubt anyone would think that government could limit a citizen's free speech rights to one protest a month, their free exercise right to one worship per month, or their right to be free from unreasonable searches and seizures to only one search or arrest."

A Anthony Sanders 07:42

Sorry to interrupt. Will I thought about how I can only buy Sudafed once a month, and I do have a right to purchase pharmaceuticals that help my allergies or my cold symptoms. So anyway, maybe we could circle back to that later.

W Will Aronin 08:01

It's in the penumbra—no, the right to keep free and clear nostrils. So I know it's a little reductive, but I do actually think analogizing one right to another is helpful, and I do think it's a useful way of considering the right. Like, take the right that anyone cares about, or that you care about most in the Constitution, consider whether a restriction on that would apply, and then apply that same logic to the right you care the least about. And if everyone did that, I think we'd be in a better place. So the court rejected it, said that delay in and of itself is not okay, that the 30-day restriction does violate the plain text, which moved them along to step two, which is really kind of the key of Second Amendment analysis. Now the text, history, and tradition—so once we know "keep and bear arms" is covered by the text, we then consider whether or not there are analogous laws from the founding generations, and I say generations because they could be at the actual founding in the late 18th century, or post–14th Amendment in the 19th century, and to consider whether or not our history included other laws that similarly restricted individuals' rights to solve similar problems. And this is where the real litigation of the Second Amendment comes to a head, because the fight is how high of a level of generality do you go? If the idea is our history allows you to restrict dangerous weapons,

then that basically justifies any restriction. If, on the other hand, you literally need a one-to-one law, then honestly, you can't solve anything that wasn't solved in—let's just call it—1880. So the fight is on the level of generality. And I actually thought that this panel went through and did a very good job of somewhat briefly summarizing where our history applies. And it talked about the types of laws at the two foundings that existed. And some of them, for example, were laws limiting sales to intoxicated persons. Some maintain that there were, at least in 1881 and 1882, laws that required firearms dealers to register and track sales, so some sort of a background or registration requirement. There were taxes. And then there are the two that I think really make up the key of the Second Amendment analysis, which is limiting the sale of weapons to people that were thought to be unusually dangerous in our, frankly, somewhat racist history. The laws that were relevant here were laws that limited the sale to Native Americans, or laws banning or restricting the purchase and the owning of what were thought at that point to be unusually dangerous weapons. So in Georgia, dirks, sword-cane spears, and some limits on pistols—they were barred. Essentially, they were hidden, concealed weapons. And then in Tennessee, in 1838, there were restrictions on Bowie knives. And ultimately what the panel determined was they reviewed the history and said, we need to look at what was the problem that both the founding generation and California were trying to solve, and in this case it was straw purchasers. And while straw purchasers may have been somewhat of a problem then, they analogized it to arms dealing. And they said that there were absolutely laws on selling to Native Americans, selling to rebellions, just arms trafficking in general, but that the solution that the founding generation came to was not restricting the amount that a law-abiding person can buy. Instead, it was to actually criminalize the arms trafficking, which is largely what the concurrence came down on.

A Anthony Sanders 11:50

Which there are laws that do that already in California.

W Will Aronin 11:55

That's basically the law, and because the founding generation had seen this problem, they didn't try to restrict it by limiting the rights of law-abiding citizens. At that point, they tried to actually criminalize the criminal conduct. It doesn't pass our text, history, and tradition. I want to credit David French on advisory opinions because I've heard him talk about the Second Amendment a lot, and I think where he comes down is probably a really good place: our future litigation is going to come down to two things—Is the weapon itself unusually dangerous? And then we have to evaluate what that means. We're seeing that with magazine restrictions, with assault rifles, and with restrictions on people who themselves are unusually dangerous—whether felons, people subject to red flag laws, or those with domestic violence histories. That's probably where the Second Amendment focus is going going forward: what does it mean to be particularly dangerous, either as an individual or for the weapon itself? The concurrence here is unbelievably short; it is one paragraph, and it just says—I'm paraphrasing since it's not literally in front of me—that there's nothing in their opinion that says you can't deal with straw purchases or bulk sales, which I think is 100% right: criminalize the criminal conduct. Go after people breaking the law, who use weapons unlawfully, or who buy a weapon just to transfer it to someone who does not have the legal right to purchase it. Criminalize the bad actors; don't go after law-abiding citizens. And I really want to say I have the rare privilege of saying that the Ninth Circuit panel got it right in this case.

A Anthony Sanders 13:38

And that concurrence is three sentences.

W Will Aronin 13:42

It could have been one.

A Anthony Sanders 13:46

Well, it's one paragraph, three sentences, and it would be great if we could have more concurrences like that. I must say, John, do you have a similar take on this unicorn?

J John Wrench 14:01

Yeah, no, I do think it is a pretty solid analysis. One thing I would have liked to see hashed out, though, and this is probably the kind of thing that would come up in a future case, is what Will was saying—that it's likely going to come down to whether there's a uniquely dangerous weapon or a uniquely dangerous person, and maybe the government develops methodologies to identify both. I think you could make the argument, if you were the government defending a similar law, that the ban on more than one gun in 30 days is kind of a stand-in to address those concerns—an inference about stockpiling and accumulation. The idea is that combining weapons within a 30-day period becomes something more dangerous than simply having arms. That's the kind of argument you'd expect after this case, because you can't just have a loose inference without explanation, where the government says, "No more than one gun in 30 days," and that's it. They'd have to do more work and show data on when people stockpile weapons in a 30-day period, what dangers are associated, and reasons to support that. Unless they have that info, it's just an unsupported inference. The same applies to whether a person is uniquely dangerous. There might be evidence the government could marshal showing that people who stockpile weapons quickly are concerning, but without that evidence, you end up sweeping in lots of responsible people exercising their rights who just happen to buy more than one gun a month. To me, that's where the law reflects inferences but lacks evidence, and the government didn't make those arguments clearly. So I could imagine a harder case where they do make those points—even if the history and tradition are the same—and that might be a tougher case. I'm not sure it would come out differently, but the Ninth Circuit did a good job analogizing here. The question of the level of generality will continue to be a problem, and I could easily imagine a different Ninth Circuit panel taking a different view and saying the cited examples are sufficient under Bruen to uphold the law. So yeah, I do think this is a unicorn, and I also think it's probably right.

A Anthony Sanders 17:33

Yeah, it does seem like the lack of an analogy—anything close to an analogy here—really dooms this under any fair application of Bruen and Rahimi, as David Lott has called those two cases combined, because there's just nothing in history about a "once a month" restriction.

Now, I want to go back to the once-a-month law I most hate, which is the one about Sudafed. Maybe we can get into a little bit of the analogy of rights that you're playing up. Of course, there's no enumerated right to buy medicine, so that's probably a rational basis case because it's unenumerated, non-fundamental, or whatever. It seems pretty important to get medicine, but really what's going on there is the government trying to stop meth production. If you can only buy one package a month, you just can't get enough to make a lot of meth quickly, which cuts down on meth dealing. And really, if you need it just for your household, you can get by unless you're sick 24/7—you can get by on one Sudafed a month. Sometimes I buy Sudafed or generic when I don't even need it, just because I haven't done it that month yet and I want to stock up. Why stockpile Sudafed? Because everyone in the family is sick frequently, so there's a constant need with four of us often needing it. When you get a cold, you can go through a box of Sudafed in a week because it lasts about 12 hours and actually dries you up, unlike that fake stuff they marketed and everyone knows is bogus. Anyway, I'll get off my Sudafed box soon, but you can work around it just to get medicine. Whereas with the one gun a month rule, maybe it's doomed anyway because there's just no analogy. But if we get into ends-means fit, maybe you buy five guns a month or 12 a year. Like, if you're buying guns and it's not just to give to others, maybe hunting season's coming up and you want a couple rifles, or you and your spouse are taking firearms training and each want a couple handguns. So it's not like every month you buy lots of guns, but one month you might buy more than one. That's just not a fit. But I could see if they come up with a rule like five a month, or 12 or 14 a year, then you'd probably be more in the box. It's still not an analogy, so maybe it's doomed anyway, but I could see the Ninth Circuit being more okay with that.

W Will Aronin 20:48

So I take all the points, and I just have to say it sounds like either A) everyone in your household was sick, like two weeks ago, and you're really focused on it, or B) that you've got, like, an illicit stockpiling of Sudafed going on in your house, and I'm really concerned.

A Anthony Sanders 21:02

I'd love to say, if you want Sudafed, come to our house, but we barely have any around, because we use it all.

W Will Aronin 21:14

Okay, so I take both your points—I genuinely do. I also think you can have a shorthand for people buying a bunch of guns and say, "Well, that's odd and unusually dangerous." I take the point about whether there's some rational limit on how many guns people can have. I analogize this to other constitutional litigation where you might assume that people who buy three guns in a month—or whatever number you pick—are dangerous. But what I'd like to see before the government restricts rights is actual evidence. I want to see they're not just acting on assumptions but looking at data and saying, "Huh, this is a problem we can identify for these reasons, and this is a not overly restrictive way to address it." What we have here is completely divorced from that; we have no evidence. To be fair, that's more a tier-of-scrutiny issue—like rational basis versus strict scrutiny—and I don't know how that applies to text, history, and tradition. I also take Anthony's point about whether there's a number that's just nuts. You can

probably tell my priors—I believe in a strong Second Amendment; others may disagree. For law-abiding people, this is a hobby. People like to buy different, modified versions of guns, go shooting. I have friends with honestly somewhat scary, large arsenals, but they themselves are not scary—they're law-abiding individuals. This is ultimately an enumerated right, the second right listed in the Constitution. As the panel said in that paragraph I quoted, we wouldn't restrict people's free speech rights if they protested every day—that's a lot, but this isn't the red-headed stepchild of the Bill of Rights; this is an enumerated right. If the government restricts it, they need evidence that a person is unusually dangerous or at least evidence that the means and ends fit together. One other historical analogy I found useful: back in the 1800s, people carried six pistols because they were sold in pairs—they were single-shot and hard to reload. Weapons today have greater capability, but historically, people were allowed to have multiples. The founding generation knew about arms trafficking, which has existed as long as arms have. The approach was to criminalize criminals and criminal conduct, not restrict law-abiding citizens' behavior, even if there's a number of guns that, when you see it, you think, "That's a lot."

J John Wrench 24:16

Yeah, one thing I really liked about the opinion was how it compared the Second Amendment to other rights. The court used language like, "We don't meter out constitutional rights," which I thought was very strong. When I first read that, I was like, okay, I like that comparison, but then I wondered, how much is the Second Amendment like other rights in that way? If you put yourself back in the place of early U.S. Supreme Court decisions about the First Amendment—where the Court was very scared of anti-war protesting, communists, and viewed those things as potentially dangerous and chaotic—it becomes easier to make the court's point. It's not just that we don't want constitutional rights metered out; it's that exercising constitutional rights often carries risks, and despite that, we still require the government to produce evidence to restrict them. In that way, Bruen is doing exactly what the court wanted it to do in the Second Amendment context: stop courts from treating Second Amendment claims under something that's like conceivable basis version of rational basis review. The Ninth Circuit, at least, seems to have gotten that message.

A Anthony Sanders 25:49

Yeah, I think that's the bottom line for this case. It would be nice if the government had evidence, and when you take a step back, it is kind of shocking that they really don't have any for this law. One other thing where someone very legitimately, non-scary, could run afoul of this law is if you went to an auction and bought a few guns at the auction, right? I think that happens. I don't go to those kinds of auctions, but that happens all the time. I don't go to many auctions at all, by the way. It's not like I hang out at Sotheby's

J John Wrench 26:26

That's shocking, actually.

W Will Aronin 26:28

I could see you as an auction dude, especially if they sold Sudafed.

A Anthony Sanders 26:32

I have family members who love going to like painting auctions, that kind of thing.

W Will Aronin 26:36

We have an IJ'er who really loves those

A Anthony Sanders 26:39

Oh, we should get an auction case sometime- I think we might have few years ago, there was some, like illicit art trade type thing we talked about. But there's another illicit trade, and that's baby's blood- its not really a trade, more just stealing, but it's going on in Michigan. Well, not quite like it used to, and I am very confused by that. And John is here to un-confuse me and sort out what's going on in the Sixth Circuit in Kanuszewski.

J John Wrench 27:15

I think it's Kanuszewski.

A Anthony Sanders 27:20

Sorry and I said Ohio, but it's in Michigan, Michigan Department of Health and Human Services.

J John Wrench 27:27

So this is, like Anthony said, a Sixth Circuit decision, but we're actually going to talk a little bit about two Sixth Circuit decisions in this same case. The most recent one was in June 2025—it's very recent. The case is about Michigan's newborn screening program, which has existed since the mid-1960s. What it essentially consists of is that whenever a baby is born, someone from the Michigan Department of Health and Human Services pricks the baby's heel and takes blood samples—usually five or six blood spots on pieces of paper called blood spot cards. They then run those cards through an initial screening process to look for diseases within hours of birth. The cards also contain demographic information from the baby and mother, but they don't just throw the cards away. Before 2010, the department would store those cards in their own lab. After 2010, they started getting rid of most of the cards, keeping one, and transferring it to a nonprofit corporation's biobank, which acts as a temperature-controlled storage facility. When transferring that retained card, they removed identifying info, leaving just a list of about eight digits on the card, which they gave to the biobank. The biobank stores it, but the department keeps the identifying info in its electronic records matching those digits. In practice, if you want to know whose blood is on the card at the biobank, you can match it up by accessing the

department’s electronic database with that identifying info. The department can keep those cards—with the baby’s blood—for 100 years, which, in this case, they said they intended to do with the biobank.

A Anthony Sanders 30:08

Wow. How could, like a non profit promise to do something for 100 years? That just strikes me as little science fictiony. But anyway.

J John Wrench 30:16

And oh, it is quite strange. There’s a state law that sets the limit on how long the department can keep those cards, and it sounds like the same 100-year limit applies to the biobank as well. The court made clear in its most recent decision that both entities intend to keep them for that full period. So one question is, why store these cards in the first place? You’ve already done the heel prick, run the initial screening, and looked for diseases. Why would these cards end up at the biobank? There are essentially three reasons Michigan wants to retain them. First, they say they use the cards to validate the screening tests, basically to calibrate testing instruments and methods. Though, as the District Court pointed out, they use basically the same five samples for that, so the idea that you need all of these cards isn’t really true. Second, they say they keep them so third parties can access anonymous samples for medical and public health research. They engage in transactions with public health researchers—so it’s a useful way to do large-scale research on children’s blood. Third, the cards can be used for crime victim identification. That works by the family giving permission for the blood spot to be used, or the government obtaining identifying information and the blood with a warrant or subpoena.

A Anthony Sanders 32:05

And they only say crime victim identification, not crime perpetrator identification,

J John Wrench 32:11

Right, right. Though, I can’t see how, practically speaking, that actual line would be policed. I don’t know what the actual use is on the back end. Part of the thing that’s going on in this case is that the government didn’t use the plaintiffs’ children’s blood for those purposes. So we don’t really have—it’s not a situation where someone is saying, “You shouldn’t have used my blood, and my blood is what allowed you to put me in prison.” It’s not one of those situations. The problem with all of that—the prick, the blood prick, the screening, the retention, the storage, the subsequent uses—is that the department doesn’t obtain parental consent for any of it. At no stage do they ask the parents whether they are okay with it, whether they’re interested in doing it. After 2010, the department does now ask for parental consent to use the blood for research purposes. So one of the three reasons why they store and retain it, they do ask for consent. For any of the other reasons—the heel prick, the initial screening, crime victim identification, or validating screening tests—they do not ask for consent. A handful of parents whose children had their blood taken, screened, stored, and now sitting in the biobank in these blood spot cards sued the department and the biobank. They argued that the collection,

screening, storage, and subsequent use without parental consent violates their own and their children's right to substantive due process under the 14th Amendment, and were unconstitutional searches and seizures under the Fourth Amendment. This got up to the Sixth Circuit for the first time, I believe in 2019. So this is in- we can call it- Kanuszewski One. The judges on that panel—I'll just name them because the second panel won't have a single one of the same judges, and that turns out to matter—were Clay, Rogers, and Merritt. When it got to the Sixth Circuit the first time, it was at the motion to dismiss stage, so all facts had to be taken as true, and that's the assumption the court operated under. At the district court, the plaintiffs had lost at the motion to dismiss, so they appealed and it got to the Sixth Circuit. On the substantive due process claim, the court said there is a fundamental right at stake—the parents' right to direct the upbringing of their children, including their right to direct medical care and treatment. That's a legal conclusion: on these facts, if true, that right is not only implicated but violated. There's a quote from the opinion that's pretty explicit: "Defendants' actions constitute a denial of the parents' fundamental right to direct the medical care of their children, and their actions must survive strict scrutiny," based on the assumption that they are taking, storing, and retaining the blood without consent. That's the only fact assumed to reach that legal conclusion. So that survives for the substantive due process claim—it's about the parents' right, not the initial screening but storage, retention, and subsequent uses. The case was remanded for factual discovery, where the first panel said the things that matter are: did the parents actually consent? Does the government have a compelling interest? It's not about whether there's a fundamental right, because the court already decided that. On the Fourth Amendment claim, the first panel whittled it down to an unlawful seizure claim, saying, "If these facts are true… if this is indeed defendants' purpose in retaining the children's blood samples, then their ongoing indefinite seizure of the samples is unreasonable." They sent that back for discovery too, to prove or disprove the facts. After discovery, the district court applied the legal standards from the first panel and ruled for the plaintiffs. The defendants appealed, which brings us to the most recent decision, Kanuszewski Two, with a totally different panel: judges Griffin, Nalbandian, and Mathis. The panel started by deciding what, if anything, of the prior panel's decision is binding, and decided not a whole lot. On substantive due process, after the first panel, the question was whether the parents' fundamental right to direct the upbringing of their children—specifically medical care—is violated by the department's nonconsensual storage, retention, and subsequent uses of their children's blood. The second panel reframed the right narrowly, saying this doesn't look much like the right to make medical decisions impacting the child's bodily integrity. So with that redefinition, it's not a general right to direct upbringing, including how children interact with the medical world or what is done with medical information. It's really about whether the child is receiving life-saving care or not.

A Anthony Sanders 38:59

Because usually the context where this comes up is like can you pull the plug on the child kind of thing? You know that that kind of situation. And so the this panel seems to think that's just totally different.

J John Wrench 39:12

Right, they're basically saying that cases about whether you receive life-giving care or not basically define the limits of that right, so they start by narrowly framing the right even though the children's blood was taken without consent, given to third parties, and potentially used for

criminal investigatory purposes—none of which factors into their framing of the right. With the right defined so narrowly, the panel does two things in its substantive due process analysis. First, it says if the right really concerns making medical decisions about things that impact your child's bodily integrity, the first panel didn't analyze how storage, retention, or subsequent uses of the blood samples impact that right as narrowly defined. Therefore, the second panel says it isn't bound by what the first panel said about any of that. Second, as a consequence of this narrow definition, the court concludes no right is actually implicated here, because storing, retaining, and sharing anonymized blood samples doesn't interfere with medical decisions that affect a child's bodily integrity—the blood cards are just stored in a biobank, maybe shared with law enforcement, but that doesn't affect whether or how a child receives care. So with the right narrowly defined, the court effectively rejects the substantive due process claim. On the Fourth Amendment claim—which by this point is only about whether the storage, retention, and subsequent uses constitute an unreasonable seizure since the search claim has been dropped —the court says that claim also fails. The panel explains that a seizure requires some kind of property or possessory interest, a legally cognizable interest in the thing that's being seized, and to determine if that interest exists, they look to state law. Under state law, there is nothing giving parents a right to their anonymized blood samples taken without their consent. They don't explicitly say "taken without consent," but that's the context. So that's the level of generality they apply in deciding whether the parents have any legal interest in the samples, and the court says they do not. Moreover, there's actually evidence suggesting that such a right does not exist—the fact that the state is allowed to take these samples in the first place.

A Anthony Sanders 42:14

And who has a right to their own body- like no one's ever claimed that, right?

J John Wrench 42:19

Right. And that's kind of the problem here — blood was a problem for the most recent panel, but it clearly wasn't a problem for the first panel. There's a difference between drawing blood immediately, which seems to be the distinction the second panel is drawing because they cite Skinner, which talks about how drawing blood implicates all these issues. But the problem is that the blood has then been taken and put in a biobank on a card, and now, really, is it yours or not? One of the strangest things about this analysis is, as I mentioned before, post-2010, you can actually contact the department as a parent of a child whose blood is stored, or as an adult child, and tell them to destroy your blood sample. That's quite interesting — if you're going to say there's no cognizable interest at all, how do you explain that law letting you control how the sample is used and letting you have it destroyed? I don't know many situations where someone doesn't have a right in something that they can have destroyed. It's quite unusual. And so the panel just kind of waves that away. There are also a couple of pretty interesting takeaways, not just about the court's analysis, but about the relationship between the two panel decisions. Thinking back to what the first panel said on both substantive due process and the Fourth Amendment — on substantive due process, they said if it's true the defendant stores, retains, and uses the blood as the plaintiffs say, those actions constitute a denial of a fundamental right. That's a pretty explicit legal conclusion based on an assumed set of facts, and those facts didn't change by the time it got to summary judgment and the second panel. The Fourth Amendment is similar: the prior panel said if that's the government's purpose for retaining the blood, the ongoing use is an unconstitutional seizure — another legal conclusion

based on assumed facts that didn't change by summary judgment. So what happened between the first and second panel? I think the second panel looked badly on the first panel and said, I would have reached a different conclusion. It took a smart, subtle path to get around the first panel's conclusions, which were legal conclusions about the relevant standards. The second panel did that in a way that let them reach what they thought were the right conclusions. On substantive due process, they narrowly defined the fundamental right, and on the Fourth Amendment, they primarily found no possessory interest. But neither conclusion is consistent with the first panel's decision. If the second panel is correct, then the first panel is wrong — not about the facts, but about which legal standards apply to identify the fundamental right and the possessory interest. If the fundamental right were that narrow, the first panel should have affirmed dismissal and all these claims should be gone. If no possessory interest exists, the seizure claim makes no sense. So what you have are two panels that fundamentally disagree about legal standards, not about how those standards apply to facts, and that seems like a strong candidate for en banc review.

A Anthony Sanders 46:30

Will does all this seem like a problem to you?

W Will Aronin 46:34

Yeah, honestly, John's legal analysis is spot on—there's really nothing I can add on that front. But I do have two takeaways, mostly about the lawyering side of things. I've been practicing law for 16 years across different areas before IJ, and I'm not trying to be dramatic when I say this is my absolute worst nightmare. Like, I've actually woken up in the middle of the night terrified that this exact scenario could happen to me. You file a case, draft a complaint, pour tons of work into framing your arguments carefully, including every important detail, and then you get dismissed on a motion to dismiss saying the claim isn't plausible. Then you win on appeal, go back down, and you prove everything — this was a bench trial, and they proved the complaint's factual allegations were true. They showed the government was holding the blood for research and crime investigation. But then on appeal again, a different panel—or even the same one, it doesn't matter—starts slicing the right really thin. For the Fourth Amendment, they say the search involves privacy, but the seizure only involves a possessory interest. And then at the very end, they basically say they don't even need to resolve the question because the plaintiffs supposedly never alleged the magic words that they had a possessory interest in their own blood. Like, the idea that after all this time, effort, trial, and proof, my complaint somehow "missed" magic words about possessory interest — that's literally the kind of thing I've woken up worried about. That's takeaway number one for me.

A Anthony Sanders 48:32

It's happened to me.

W Will Aronin 48:35

Yeah, I think we all do. If you're not waking up in the middle of the night freaking out that you've screwed something up, you're not a lawyer. Don't go to law school. My other takeaway

you've screwed something up, you're not a lawyer. Don't go to law school. My other takeaway is, and I kind of hate to say this, but it's frustrating how much things turn out to the luck of the draw. As I said, I practiced a lot of different areas of law, mostly criminal defense. We talk a lot about conservative or liberal appointees to the Supreme Court, but judges are people, and they have priors, just like I do. They have different viewpoints and things that matter to them. It's frustrating how one panel can agree this is a fundamental right, and the next panel says, "Well, you didn't plead that it was possessory," and they chop it into pieces. It really is just luck of the draw, and that's frustrating.

A Anthony Sanders 49:37

Yeah, yeah. What I keep going back to is the panel saying it's not bound by the law of the case. That doctrine usually comes up with successive appeals, where the court has to follow what it said before, sometimes at the trial court level too. But I don't even see this as law of the case. This is just precedent. There was a panel decision, it was published, and it's binding on future panels unless you go en banc and it happens to be the same judges, but it's still precedent. So, John, you read this more carefully than I do — is there some exception to precedent when it's the same parties? I haven't really thought about this before, but it doesn't make sense.

J John Wrench 50:28

There actually is. It's called the "I would have done this differently" exception, and it's interesting because the second panel basically used that. You can look back at the prior panel and find points that are maybe inferential or not spelled out clearly, and use those as weak spots to say, "Well, if they had gone further into that analysis, it's not that they were legally wrong, it's just that they didn't go into it fully, and if they had, they would have come out differently." You can do that to some extent. To be fair, you could look at the first panel and say, "Maybe they could have gone into more detail about the nature of some of these rights, or what they thought the possessory interest was." But what you can't say — and this is why what Anthony's saying is such a problem for precedent — is that the first panel did say that if there is a fundamental right, they described the scope of that right, and said if the facts fit within that scope, then there is a constitutional problem and strict scrutiny applies. The same goes for the Fourth Amendment claim. They weren't saying "if there's a possessory interest" — no, they repeatedly referred to it as the child's blood. They said the question on remand was whether these actually were the government's purposes for retaining it, because if they are, it's a constitutional violation. So what the second panel is doing is weakening or reframing the first panel's analysis to make it sound vague. You can see that even in the section where they talk about law of the case — they cite cases where there was dicta or vague discussions in earlier panel decisions — and they're using that to basically disassemble the first panel opinion, even its legal conclusions. So yeah, it is precedential. There are conclusions in that first panel decision that, if you do a simple thought experiment — if you had the same judges writing both opinions — you'd wonder if the judges were schizophrenic or had forgotten what they decided before. It's that jarring. So like Will said, you end up with this unfortunate reality that depending on which panel you get, you get different conclusions, and sometimes a panel will say what they did before actually wasn't what they did before — and it seems like that's exactly what's going on here.

A Anthony Sanders 53:23

So quickly before we end — my war story I was alluding to earlier is about a case we litigated here at IJ all the way up to the Minnesota Supreme Court. We averred in our complaint that we were bringing it under a bunch of things, but specifically under this clause in the Minnesota Constitution — a right to a remedy clause — because it was a constitutional claim. The case goes all the way to the Minnesota Supreme Court, and we're arguing that we brought it under this clause, and that the case was otherwise moot but that we had a damages claim. The court says, "Well, you didn't specifically say anything more than just a 'veering' it in the complaint." So they say we didn't address it below in the complaint. This is right after the court, just a few months earlier, had rejected the Twombly and Iqbal cases and said we just have notice pleading — complaints are super broad, you just have to say a bunch of facts, you don't even have to say the cause of action exactly. Yet, when it came to this, they said, "Oh, you didn't exactly plead that in the complaint." Like, those two things don't go together. So what was going on? Well, they didn't want to address our claim as what was going on.

W Will Aronin 54:51

That's how quick ball works. That's notice pleading but not for constitutional cases so it doesn't apply to our case.

A Anthony Sanders 54:59

And I guess what I should say more there is that case went to summary judgment. And you know, this case we're talking about today is at summary judgment. By the time you're at summary judgment — the Supreme Court has said, and definitely when you get to trial, or, I'm sorry, they did have a bench trial in that claim — that the complaint shouldn't matter at that point. Right? That's just to start things out. So when you see the complaint come up on appeal, it just seems to me there's often something funny going on. So, Michigan has changed the law since this case was brought, right? So things are a little better now from the privacy standpoint.

J John Wrench 55:43

It's true, there has actually been a consent decree as a result of this case, and that was part of the discussion at the second panel about whether certain claims were moot or not. The court decided they are not moot, which allowed them to address the case on the merits. I should also note that IJ is currently in the early stages of litigating a challenge to New Jersey's practice of taking children's blood without their parents' consent. There's not much overlap here besides the fact that it's a similar issue, but if you're interested in this topic, that's something to keep an eye on because this isn't the only place where this is happening in the country.

A Anthony Sanders 56:33

That's right. Yeah, it's common practice, and especially in the our age of DNA and data banks and all that. It's a little different than the 1960s when you just keep a blood smear in a library somewhere. But thank you both for coming on. This has been a great conversation. Thanks

everyone for listening. Please be sure to follow Short Circuit on YouTube, Apple Podcast, Spotify and all other podcast platforms. And remember to get engaged.