

ShortCircuit429

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SPEAKERS

Christie Hebert, Jessica Underwood, Anthony Sanders

A Anthony Sanders 00:11

We will start this podcast with some famous fifths. Remember, remember the fifth of November, and who could forget from Henry the Sixth, Part One, long after this, when Henry the Fifth, succeeding his father Bolingbroke, did reign. But I think everyone can remember when Oliver North said, "On advice of counsel, I respectfully decline to answer the question based on my constitutional Fifth Amendment rights." But you didn't tune in to listen to a bunch of fifths. You're here for the Fifth Circuit, and that's what we're doing today 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 are recording this on Wednesday, May 20, 2026, and yes, this is all about the Fifth Circuit. So, listeners know that we have been doing a series, 12 months, 12 circuits, where once a month we focus on a circuit, and sometimes we just say a few facts about the circuit to give a little bit of an overview about that court. But this month, because it's the Fifth Circuit, we do so much Fifth Circuit stuff anyway. There are countless episodes I can remember through the years where we focused on a couple of Fifth Circuit cases, because the Fifth Circuit just has, for good or for ill, so much to offer law podcasts, and this month is no different. So, we're going to do a little Fifth Circuit facts, and then we're going to have a couple of Fifth Circuit practitioners who will tell us about a couple of recent Fifth Circuit cases. What's up with the Fifth Circuit? So, one of those will be a familiar voice to our listeners, and that is crackajack IJ attorney from Austin, Texas, Christie Hebert. So, Christie, how are you?

C Christie Hebert 02:15

Great, thanks, Anthony. Thanks for having me again. And Crackajack, wow, I don't think I've ever been described that way, but I'm going to put it on my tombstone.

A

Anthony Sanders 02:22

That was a mispronunciation of Cracker Jack. I hope you realize, so don't get your hopes up, but you are also a Cracker Jack attorney. But we have another Cracker Jack attorney here, and that is a special guest from outside of IJ, and that is Jessica Underwood. So, Jessica also practices in Austin, Texas. She does so at the firm of Nix Patterson. She is a grad of Baylor Law, which is also in the Fifth Circuit, and she was valedictorian there, so that's pretty good. She also attended Wesley College, which I always mispronounce, and was a clerk to Judge Haynes on the Fifth Circuit and also to Judge Fitzwater in the Northern District of Texas. So, there's a lot of Fifth Circuit going on with Jessica, and we are very happy to have her here today. So, Jessica, welcome to the show. You can tell our listeners anything else you want to say about yourself, but also, what is your take on the Fifth Circuit?

J

Jessica Underwood 03:26

Thank you so much for having me. I'm excited to be here with y'all. My take on the Fifth Circuit, you know, when I came out of law school and applied for clerkships, I went to Baylor, as you said, which is deep in the heart of the Fifth Circuit, and I come from a family, my dad was a law clerk for the Fifth Circuit, so I knew a lot about-

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Anthony Sanders 03:46

what judge said he clerked for,

J

Jessica Underwood 03:49

He clerked for Sam Johnson back in the early '80s, so the court has changed a lot since then. But one thing that I appreciated about it, even before I clerked, is that the Fifth Circuit, for better or for worse, sort of depending on the court's makeup and your own political views, is a real heavy hitter. There's a lot of really interesting and impactful litigation that comes through the court. Now, we think of the court as this very conservative court, and it is, and there was a time when the court was really on the front lines of pushing forward new civil rights cases, forcing desegregation of the Southern Districts. So it's got this really, I think, interesting history, and it's changed a lot over the last 50, 60, 70 years.

A

Anthony Sanders 04:43

Yeah, and we, we actually discussed some of that history on a recent short circuit. The time that was split in 1981 because it used to be basically all of the southern coast, if you want to call that, of the US, and then it got a little too big and. Had the split up.

C

Christie Hebert 05:01

And you might not know this little fact, it used to include the Panama Canal Zone when that was something within the United States jurisdiction. It had the Panama Canal Zone. It entertained appeals from the Panama Canal Zone until the United States gave the Panama Canal Zone back to Panama.

A

Anthony Sanders 05:21

That's right. That is, Christie you are just so up on the Fifth Circuit. That is part of the Fifth Circuit facts I was about to share. Yes, it encompassed the Canal Zone, kind of like how the Third Circuit has the U.S. Virgin Islands and the First Circuit has Puerto Rico. But then the Canal Zone district was abolished in 1982, not long after the U.S. gave up its claim on the Panama Canal pursuant to the treaty it had with Panama. So that is a great piece of history of the Fifth Circuit. The Fifth Circuit goes all the way back, as do most of the circuit courts of appeals, to 1891. Before that, there were circuit courts, but they were not called the U.S. Courts of Appeals because they were kind of district courts, kind of appellate courts. We've talked a little bit about that history before. But since then, it was split, as I said, in 1981. So Georgia, Florida, and Alabama went their own way with the Eleventh Circuit, but the Fifth Circuit still has Mississippi, Louisiana, and Texas. It has 17 judges these days. It had 26 in 1981, and that was a short-lived experiment where—I didn't know this until I did the research for the show—so in 1978 it still had 15 judges, then it was bumped up to 26, and then everyone was like, whoa, this is, like, we can't do en banc. And so then they split it. And, of course, that for some reason has never happened in the Ninth Circuit, but it has had a different history. That's as I was saying, we talked about that a few months ago when Tom Metzloff of Duke Law was on, who actually clerked on the Fifth Circuit at that exact time, when it was a little unwieldy. So there's 17 judges today. There are nine, I believe, senior judges, although I know that can always fluctuate a little bit. And another thing about the Fifth Circuit is Justice Alito is the Fifth Circuit justice. So when there is an emergency motion of some kind from the Fifth Circuit to the Supreme Court, Justice Alito is the first line of review of that. It's kind of interesting, too. He's the Fifth Circuit justice for whatever reason. Justice Scalia used to be the Fifth Circuit justice. Usually circuit justices are assigned kind of in a line to where they're from, if they can do that, like Justice Thomas for the Eleventh Circuit. But there haven't been any Fifth Circuit justices in a long time, it seems.

J

Jessica Underwood 08:09

No, I think that's right.

A

Anthony Sanders 08:11

Yeah, so anyway, so that's why- someone's got to do it. So he has the fifth circuit. So any anything else you guys would like to add about the Fifth Circuit over all, it has this beautiful courthouse in New Orleans. They don't really sit regularly anywhere else, do they?

C

Christie Hebert 08:28

They do sometimes. They do rotate to.. I know there's been some in Austin, Houston, other areas. I think when they're gonna hear argument somewhere else, it's usually posted on their website, but they do do that on occasion. Is that right, Jessica?

J

Jessica Underwood 08:44

Yeah, that's right. I would say at least two or three times a year the sittings are held elsewhere, and a lot of times it turns on who the panel is. There's a huge group of Fifth Circuit judges in Houston. There's also a big group in Dallas now, which has changed, and so sometimes the panel, for their own convenience, will decide to hold it elsewhere. They've even held it, I think, on college campuses. They held a panel at Tulane one year when I was there. They've done it at Baylor before, which gives law students kind of a fun chance.

C

Christie Hebert 09:15

Yeah, one of the observations that I think would be helpful to highlight is, you mentioned earlier, Jessica, that right now the Fifth Circuit's kind of been widely regarded as the most conservative circuit court. But that being said, it's been the most reversed in recent years, and that's kind of an interesting tension because the Supreme Court is widely viewed as increasingly conservative. So you would think that maybe the Fifth Circuit's opinions would really be the ones being upheld by the Supreme Court, but it has the highest reversal rate, I think, right now out of the circuit courts. And in the last year, I think the Supreme Court took 12 Fifth Circuit cases and flipped 10 of them.

J

Jessica Underwood 10:03

Yeah, I think they took the most from the fifth circuit of any circuit, is what I looked at.

A

Anthony Sanders 10:06

True. Well, I guess not all conservatives think the same, which is a good reminder. Even libertarians don't all think the same, but we don't need to get into that. So we have a couple of great Fifth Circuit cases. The first one is that the top line about what the case is about may make people think, well, this is going to be a little boring, but don't be fooled. It's about the False Claims Act, which maybe some of you haven't heard of, but the False Claims Act is huge in the federal courts. It does all kinds of work with, yes, false claims, or maybe false or potentially false claims having to do with the federal government. And this one is going to be about a big part of that practice, which has to do with Medicare or Medicaid fraud. So, Jessica, take it away. Why should we care about this case?

J

Jessica Underwood 11:05

Sure. So the case is *Moncrief v. Peripheral Vascular Associates*, a vascular surgical center in South Texas. Why should we care about False Claims Act cases? The False Claims Act is sort of an interesting device in the federal statutes. It's basically a civil statute, not a criminal statute, and it prohibits knowingly submitting a false or fraudulent claim to the United States for payment. Most commonly, I think this comes up in the context of healthcare programs like Medicaid or Medicare, but it also applies in the context of defense and government contracting, federal grants, and subsidies. And these False Claims Act cases bring in a pretty serious source of revenue to the federal government. I think in the last few years, the total False Claims Act recoveries entering the federal government have topped \$2 to \$3 billion. So it's a pretty substantial line item on the federal budget, if you will. So the way that the False Claims Act works, there are kind of two paths that a False Claims Act case can travel. One is that the federal government, through the DOJ, can just bring a False Claims Act case against a defendant alleging that they have submitted some kind of false claim to the government for payment. But the other way that this can happen is that a private individual—we call them a relator or a whistleblower—can initiate a False Claims Act case. There are certain requirements about what that relator has to have knowledge of and things like that, but you file a lawsuit, it's filed under seal, which gives the government some time to investigate the claims in the case, and then the government has the opportunity to decide whether it is going to take over the litigation of that case or whether it's going to decline to intervene and just let this private party litigate the case on their own. If the government decides to intervene, they take it over, they run the litigation, and the relator gets a small fee in those cases for bringing these false claims to the attention of the government. But the government runs the show from there on. When the government declines to intervene, it's private law firms and private individuals who are pursuing the case. It functions a lot like a normal civil case in that scenario, and the relator is awarded anywhere from a 25 to 30 percent fee of the recovery for their work.

A

Anthony Sanders 13:46

Wow, so, say 70-75% goes to the US Treasury, but the rest goes to that person who brought the case.

J Jessica Underwood 13:56

That's right. So it's a significant amount of money that comes to these relators, and there's a good reason for that. The federal government has an interest in encouraging people to pursue these lawsuits, and they've got to make it worth someone's while to go through the hassle of litigating these cases, which can last, in some instances, for 5, 10 years. In fact, that reward, the amount that the relator gets as their reward for bringing a lawsuit, was increased, I think, in the '80s, and so starting in the '80s, these cases really kind of took off. And can the relator also get the attorney's fees, so that they're not out what it costs to bring the suit too? That's right. Attorney's fees are also part of the recovery for the relator in those cases, so that also incentivizes attorneys to pursue this kind of litigation.

A Anthony Sanders 14:46

So questions some people may be wondering, the person this relator bringing this action, do they have to have any special injury from the person that they're effectively suing, or can just any old person off the street file a lawsuit.

J Jessica Underwood 15:04

The relator doesn't have to have a special injury, right? The injury that's at issue in the case is the injury to the federal government. Has the federal government had to pay out some money, or has the federal government been deprived of some money that they're entitled to? So the injury is the government's injury. But the relator can't just be any old Joe Schmo who has no special relationship to the facts of the case. The relator has to have some kind of special knowledge, and we call them whistleblowers because they usually are folks who worked for the defendant. They have some reason to have specific insider information about the false claims that this defendant is submitting to the government. So, in this case that we're talking about today, the plaintiff was an ultrasound technician who was employed by the surgical center and who ultimately filed the lawsuit accusing the surgical center of submitting these false claims.

C Christie Hebert 16:06

And I've heard that these relators are sometimes termed private attorney generals, kind of maybe foreshadowing some of the stuff we're going to talk about today, but do you agree with that idea?

J

Jessica Underwood 16:17

I think that to some extent that's a fair characterization. You've got the federal government deputizing individuals to try to uphold the law. You don't just see that in the False Claims Act context, by the way. You see that in consumer protection cases, where you've got individuals who file lawsuits, and maybe their individual injury is relatively small, but when you look at consumers writ large, it's a significant impact. And there are state statutes that say, hey, we're going to sort of deputize individuals to bring these consumer protection cases, and it protects everyone, it doesn't just protect that individual.

A

Anthony Sanders 16:59

And you sometimes see it in the campaign finance context, and we've been involved in this, where a competitor to someone politically will sue them to enforce campaign finance laws, which raises all kinds of First Amendment issues that we've litigated in different places. But let's look at this case here in the Fifth Circuit. So we have this former employee. We don't exactly know what her beef was with them or how pure-hearted she is, but in any case, she is bringing this action with her attorneys. The U.S. government did not step in, and there is a lot of money at issue here. You might think, oh, a few overbilled payments, a few thousand bucks. No, this is millions and millions of dollars.

J

Jessica Underwood 17:46

Yeah, that's right. The ultimate judgment in this case was \$28.7 million, or \$28.1 million, I think. So it's significant. The nitty-gritty of the overbilling claims is a little bit dry here, so I'll give you just a high level, and I won't get too into the details, and I'll probably oversimplify it a little bit. But basically, there are two kinds of fraud alleged in the case. This surgical center would perform vascular ultrasounds, and as part of that, there's the actual performance of the ultrasound, and then there's a doctor looking at the ultrasound results and interpreting those results and writing up a report. This case involved two kinds of fraudulent claims. One, they called the testing-only claims, and that's where the surgical center would allegedly perform an ultrasound, but before the doctor had actually done the analysis and written the report, they would go ahead and submit the claim to Medicare, saying, "Hey, we did this ultrasound, we did this report, and we want to get paid for it." And in submitting that claim to Medicare, they actually attest that they performed all the services already that they're submitting a claim for. So that claim is kind of a timing issue, which may seem insignificant, but one point that the court dwells on, and that the relator makes, is that Medicare doesn't let you submit claims in advance. You have to submit the claim after you perform the service.

A

Anthony Sanders 19:16

It's kind of like charging you for fixing your car before the mechanic actually fixes the car, and then they do fix the car, but is that right? It seems to be pretty clear that you can't do that under the law, right?

J

Jessica Underwood 19:31

That is right. And it's interesting, in this case, the surgical center actually, for a brief moment in time, changed their policy to sort of do it the right way and submit the claims after the services were all performed, and it resulted in them getting paid much slower, and they didn't like that, so they went back to doing it this way. And even just that lag in time, it's better to get paid now than it is to get paid later. We all sort of understand the time value of money, and so even just the interest on that difference in time was substantial in this case. The second kind of claim—the court called these double-billing claims—basically involved an allegation that the surgical center was double billing the federal government for the actual analysis of the ultrasounds. They were submitting claims under two different CPT codes for basically the same thing. So those are the claims at issue. And the district court granted partial summary judgment for the relator on two elements of the False Claims Act claims for both of those kinds of fraud. The elements of a False Claims Act case—it might be helpful to just go over those really briefly—are that there has to be a false statement or some kind of fraudulent conduct. It has to be made or carried out with knowledge of its falsity. The falsity has to be material to the government, so the government wouldn't have paid the claim if it had known. And there has to be some kind of damage to the government. The district court here granted partial summary judgment on both the falsity of the statements and knowledge of the falsity on the part of the surgical center, and then it went to a jury trial where the jury heard the evidence in the case and agreed that, yes, it was also material and there were damages. Ultimately, like I said, the court awarded a judgment of about \$28 million to the government in this case, and the relator would have gotten a nice chunk of that.

A

Anthony Sanders 21:32

And a huge amount of that is like these treble damages, and, and all that, the actual harm was much less than that, it seems.

J

Jessica Underwood 21:39

That's right. The way a damages award, or a judgment award, actually works under the False Claims Act is you've got sort of different categories. You've got statutory penalties, you can get treble damages, there's the actual harm to the government, which, as you noted, Anthony, was relatively small compared to the total judgment in this case, and then, Christie, as you brought up, there's attorney's fees and costs. So those are kind of all the elements of that damages award. So the surgical center appealed to the Fifth Circuit and argued the district court shouldn't have granted partial summary judgment, and also argued that the jury's findings were unsupported. And we could walk through every single one of those findings, but I think we all might lose interest, so I won't do that. But there is one that I think is interesting beyond just the facts of this case, and that's the court's holding on the materiality element of the False Claims Act. So, like I said, one of your obligations as a relator, or as the government in these cases, is that you have to show that the false statement or the fraudulent conduct actually mattered to the government. It can't be some sort of trivial, insignificant paperwork error. It's got to be something that really would have changed the outcome of the claim. And the surgical center argued that the district court messed up here because it didn't submit to the jury a question about whether the surgical center had knowledge not just that the statements it made were false, but that those statements were material to the government. So basically what the surgical center is saying is you've got to show that I knew that the false things I was saying would have mattered to the government. And to make that argument, the surgical center relied on a case from the Supreme Court from 2016 called *Escobar*. If you look back at the *Escobar* case, it pointed to what's really kind of just an offhand statement from the Supreme Court. That's not really what was at issue in the *Escobar* case, but the Supreme Court in that case wrote, basically, that what matters is whether the defendant knowingly violated a requirement that the defendant knows is material to the government's payment decision. And the surgical center in this case really latched on to that sort of offhand remark from the Supreme Court and said, "Hey, that shows that this scienter requirement applies to both falsity and materiality." The Fifth Circuit said no. They rejected this argument. They distinguished *Escobar* by saying that *Escobar* was a case involving omissions, not affirmative misrepresentations. The *Moncrief* case actually involved affirmative misrepresentations, and so the court said the scienter requirement doesn't apply to materiality, just to falsity. Between us and all of your podcast listeners, I think the author of this opinion, who was actually a judge I worked for, was being—what's the right word?—politically correct, maybe, or not calling the Supreme Court out for sort of throwing in this language that was just not really on point and is now being pointed to to make an argument that I don't think the Supreme Court ever really intended to give life to. But she distinguishes the Supreme Court case that way and says, no, materiality is separate from the falsity requirement. You don't have to have knowledge. So we haven't seen this particular issue, I don't think, come up in other circuits, but it will be interesting to see whether that sort of offhand remark gains some traction in other circuits.

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Anthony Sanders 25:30

And that's got to be often an issue, right? Materiality of whatever the false claim statement is.

J Jessica Underwood 25:37

It is often an issue, and what was at issue in the Escobar case wasn't whether the defendant had knowledge of the falsity or knowledge of the materiality. It was really about, you know, is this material? Is this significant enough that anyone would care about it? And certainly that's a requirement. But here the surgical center sort of latched on, like I said, to that language to try to almost inject a fifth element into the False Claims Act claim.

C Christie Hebert 26:04

So, I have a question about kind of the next case. Jessica, do you think the next person who comes along can cite this case in an omissions context and say, for the omission piece, you know, the Fifth Circuit has already said you need knowledge of the materiality for an omission in distinguishing Escobar from this particular case here?

J Jessica Underwood 26:28

Yeah, I certainly think someone's going to try to do that. Do I think that you can really read the Fifth Circuit's holding here to go that far? I don't think so. I think the court was distinguishing—and again, this is sort of dicta, right? This isn't an omissions case. But sure, I think that's probably an argument that a litigant would wisely try to make. And really, what this underscores is something that comes up, I think, all the time, and it's really the importance of judges writing really crisp opinions. Don't say something if it's not at issue in the case, because you have no idea how some litigant is going to take that and use it to make some unintended argument or have some unintended consequence.

C Christie Hebert 27:12

As a pragmatic thing, I just want to highlight in this case—I wrote this out a little bit, I sketched out this timeline—the case was filed in 2017. It had a five-day jury trial in February 2022. The final judgment came in February 2024. The Fifth Circuit opinion came thereafter, and now it's going to go back for a new trial. It's like eight years and counting, and then they're going to do a new trial. I mean, wow, that is a case that's not for the faint of heart. And I understand you do FCA cases, and whew, that is a hefty timeline.

J Jessica Underwood 27:55

It is. These cases have long lives in some instances, and actually, this case, they ended up—you know, they remanded it back to the trial court for a new trial, and I think the parties decided, we don't have it in us to do this again. And so the case actually settled after it was remanded to

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Anthony Sanders 28:11

Oh, wow.

J

Jessica Underwood 28:12

And probably the surgical center saw some writing on the wall, and the relator thought, gosh, are we really going to go up to the Fifth Circuit again and, you know, heck, maybe to the Supreme Court? And that sort of opens up what I think is the other interesting piece of this case, which is the concurrence. Judge Duncan, a judge on the Fifth Circuit, wrote a concurrence in the case. He agreed completely with the reasoning of the majority, agreed with the outcome, but he wrote to raise the question of whether the qui tam provision—the device that allows private individuals to prosecute these cases—is constitutional. And the argument he makes is that this device, where a private individual is sort of deputized as a private attorney general, violates Article II of the Constitution. He cites both the Appointments Clause and the Take Care Clause. The Appointments Clause gives the President the power to appoint all officers of the United States, and the Take Care Clause says that the President has to take care that the laws be faithfully executed. And the argument that Judge Duncan makes in his concurrence is that a relator, just a private individual, by stepping into the shoes of the federal government and prosecuting these cases, is basically acting as an officer of the United States, but they haven't been appointed, they haven't been confirmed by the Senate, they haven't gone through any kind of vetting process, and that they, in doing so, sort of take away the choice from the executive of how the FCA, in this instance, is prosecuted and executed. And so he suggests that, hey, this is a violation of the Constitution. Now, he acknowledges that this panel can't actually hold that it's unconstitutional, and the reason for that is the Fifth Circuit has already, in an en banc decision, said, no, no, the qui tam provision is constitutional. And they looked at these exact arguments back in 2001 in an en banc case that ultimately only, I think, had two dissents. So it wasn't a split court. It seemed relatively uncontroversial at the time. I think Judge Smith, who is actually still an active judge on the court, is the only one who wrote a dissenting opinion in that en banc case.

A

Anthony Sanders 30:40

And the Supreme Court's never squarely held on that either?

J

Jessica Underwood 30:44

No, it hasn't. But in the last three years there has been some signaling from Supreme Court justices, specifically I think Justice Thomas and Justice Kavanaugh, that they'd be open to considering this. And so this is, I think, a relatively recent resurgence of this suggestion that maybe the qui tam provision is unconstitutional, and it's getting attention around the courts. There's a recent case from within the Eleventh Circuit where a Florida district court actually held that the qui tam provision is unconstitutional, and that case is up before the Eleventh Circuit. It's pending right now. They held oral argument on that case in December, but the opinion has not come out yet. So that argument was five months ago, and we may see that decision any day now.

A

Anthony Sanders 31:34

Stay tuned to the Short Circuit newsletter for that one. Christie, your thoughts about, well, the Constitution and the FCA itself.

C

Christie Hebert 31:42

You know, from the constitutional aspect of it and the unitary power of the executive, I think this was such a foreclosed argument in the Fifth Circuit until relatively recently, and it's just getting so much attention right now. From a pragmatic approach—and you know I'm always looking at that pragmatic side—it sure seems like the government has such an interest in allowing private individuals to bring these suits in their own capacity, because that just takes such a load off of the federal government. And, you know, this case, it...

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Anthony Sanders 32:22

It allows for bigger government. It's great.

C

Christie Hebert 32:24

True, but in this particular case, the relator had inside knowledge. As Jessica kind of highlighted when she was introducing the FCA, these whistleblowers have inside knowledge and often are coming forward at their own risk, sometimes, sometimes not, and looking for a benefit for that. But it allows individuals to report fraud that they're seeing in a way that's not just, "Hey, government, pay attention to this." So from a pragmatic side, I can see the benefit of it. I also think it's going to be hard to draw the line between a qui tam relator and a general civil rights plaintiff who's asserting that their rights were violated, sure, but also is effectively a private attorney general trying to hold local government accountable for constitutional violations and Monell violations. So I think the line drawing there can get pretty sticky.

A

Anthony Sanders 33:37

So, I have a question about the mechanics of this that's related to Judge Duncan's concurrence. You said, Jessica, that when the suit is filed, the United States can take over the case if they want. Can they veto the case and say, you know what, this is bad that you are bringing this from the United States' perspective? We don't think those people actually did anything wrong, or you're just trying to use the mechanism to gain leverage, or you're just a bitter ex-employee. So, can they shut it down if they wanted to?

J

Jessica Underwood 34:10

They can, and that's part of the rebuttal to these constitutional arguments. It's what the Fifth Circuit's en banc opinion relied on, this idea that the relator has some kind of outsized power, that they can really act as the executive and they're unchecked. It's not really true in reality. The government can veto the case, they can veto settlements, they can settle the case over the relator's objection, even if they haven't intervened, and even after they make the decision initially not to intervene, if they show good cause, they can come in later and intervene, even after the case has been proceeding. So the relator, you know, they're not acting truly with all of the power of the executive.

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Anthony Sanders 34:54

Right.

J

Jessica Underwood 34:55

But, you know, Judge Duncan, in framing it in his concurrence, says something that I think signals where this is coming from and brings into play that idea of the unitary executive that you mentioned, Christy. He writes, "Unlike Articles I and III, which place federal legislative and judicial power in multi-member bodies, Article II places the power to execute federal law in one person." And that's really, I think, the theory driving this. We want to make sure that that one person, the President of the United States, keeps and exercises all of the power that we think they're entitled to under Article II. And we see that in all kinds of contexts right now, right? Not just in the claims act.

A

Anthony Sanders 35:41

So, here at IJ, we have done a bit, as I said, in the campaign finance context, but in another context too, about the perils of private enforcement of governmental power. When someone can bring a lawsuit against another private person and get a benefit from that, and it's not that they've actually been harmed, it's that they've kind of been deputized by the state. So I definitely see a lot of perils in a system like this, where you hand that governmental power off, and a lot of constitutional problems. But how we've usually framed them is either in the First Amendment context, that being a problem, or as a due process issue—that you are not being afforded due process by having this wildcat person who really just has a private interest, not a public interest, like a prosecutor would have. Here it seems to come from a very different angle, Judge Duncan's opinion, which is about the unitary executive, and we do not want to go down that rabbit hole in the remaining time that we have today. So I think it's interesting he comes at it from that perspective, because it's a very different perspective than a lot of the concerns that we have had in this area. I do think also that how you describe the FCA and how the government can veto those cases is a lot different from some of the other abuses we've seen—not that there can't be abuses with the FCA. So anyway, that's how I would differentiate the two. But, you know, some justices have made murmurs, so we'll see if this has legs.

J

Jessica Underwood 37:16

Yeah, it'll be interesting. There's the 11th Circuit case I mentioned. This is also maybe coming up in the sixth circuit, so stay tuned.

A

Anthony Sanders 37:23

Stay tuned, everybody, and stay tuned for Christie as she brings us to this. This is a case where maybe it seems like the court thought it wasn't litigated so well, but it's really interesting at the same time. So it's got an economic liberty angle, it's got a free speech and open courts angle, and it doesn't have a free press angle, though you'd think it should be there. So, what's going on?

C

Christie Hebert 37:51

Sure. And the case that Anthony was just highlighting is *Martin v. Burgess*, not to be confused with the House of Burgesses, but it is a Fifth Circuit case from April of this year. And the case starts with one of the more unusual business models you'll encounter in a federal court opinion. The plaintiff runs a company out of Harris County, Texas, and for decades his operation has been like this: he gets Texas county court records, pulls the publicly available bail bond orders filed in misdemeanor cases, harvests the contact information of some recently arrested criminal defendants—their home addresses, their phone numbers, or email addresses—and then he sells that information to private criminal defense attorneys, who then use it to solicit new clients. Now, Anthony, before you wrinkle your nose at that, ...

A

Anthony Sanders 38:55

I wasn't wrinkling.

C

Christie Hebert 38:56

The plaintiff here has a genuinely sympathetic pitch for what he does. He says that his services make it easier for defendants to find competent counsel. He says it reduces warrant arrests because attorneys can reach out to their clients before they miss a court date. He says it takes the burden off of already overburdened public defenders, and he also argues that it allows for greater competition among lawyers, bringing down the cost of legal services.

A

Anthony Sanders 39:34

I think it's all great. I think what he's doing is great.

C

Christie Hebert 39:37

Whether you buy all that or not, he's been doing this for decades, and it worked right up until June of 2023. That's when Judge Genesis Draper—and yes, that is her real name, and it's a great name for a judge—was, at that time, the presiding judge of the Harris County Criminal Courts at Law, and she issued an administrative order to the district clerk. The order said to keep the contents of the bail bond orders in misdemeanor cases confidential. The public can still see that a bail bond was issued, it can see the title, it can see the filing date, it can see the page count, but the actual information in the bail bond order—you can't see the addresses, the defendant's name, phone numbers, email addresses—that's all now sealed. And so the plaintiff said this is a bad idea, but nobody listened to him, and he experienced the fact that the lack of public information caused his business to drop by 90 to 95 percent almost overnight. His whole business model, decades in the making, essentially collapsed. So he sued. He sued the district clerk, he sued Judge Draper and her successor. He brought claims under Section 1983, which your listeners are very familiar with, alleging violations of his First, Fifth, and Sixth Amendment rights, and a claim that the order was issued without legal authority in what lawyers call an ultra vires act. And he asked the court to enjoin this administrative order in its entirety, or just give me back public access to criminal defendants' contact information. The case went before a magistrate judge—the parties consented to that magistrate judge—and the magistrate judge dismissed for failure to state a claim. And, of course, the plaintiff appealed. In a unanimous opinion before Judges Clement, Graves, and Ho, in an opinion written by Judge Clement, they affirmed. Every argument by the plaintiff lost. And as, Anthony, you just kind of signaled, there were pieces throughout the opinion where the court suggested that it wasn't particularly happy with how things were briefed in this case. And that's a good little asterisk for your listeners here. I didn't actually check if there was argument in this case or not, but most cases in the Fifth Circuit are decided without argument. I understand that only about 20 percent of cases actually get argument in the Fifth Circuit. But let's talk about why the plaintiff lost here, and I want to pay particular attention to the First Amendment claim. That's the meat of the opinion, and that's what I'm most interested in. The Fifth Circuit said this case turned on a 1999 case called *Los Angeles Police Department v. United Reporting Publishing Corp.*, which, interestingly enough, concerned a nearly identical business model to the plaintiff here. In that case, a California company was collecting the names and addresses of recently arrested people and selling them. But California passed a law restricting access to that information to specific types of people who were going to use it for specific purposes, and the company in the *United Reporting* case said, "Hey, that violates the First Amendment." The Supreme Court said, "No, that doesn't violate the First Amendment." The statute, in the Court's words, was nothing more than the denial of access to information that the government had.

A

Anthony Sanders 43:51

Right, so not suppressing speech is just not giving its own speech out.

C Christie Hebert 43:55

It's not giving information out. The government is prohibiting giving information out. It wasn't a restriction on you speaking about information that you already have in your possession. And notably, even the lone dissenter in that Supreme Court case agreed with that framing; he just dissented on other grounds. So in this case, in the Martin case, the plaintiff tried to distinguish United Reporting. He said, "Okay, that case involved arrestee information. This case involves criminal defendants. United Reporting concerned a state statute. This is an action by a local judge. And the United Reporting case was about internal law enforcement records, whereas this is public records." But the Fifth Circuit was unpersuaded by these factual distinctions.

A Anthony Sanders 44:53

Slicing it pretty thin there.

C Christie Hebert 44:55

Right, and the court said, you know, it's not the source of the restriction, it's not the information, it's the nature of the restriction. Here, the administrative order, like the California statute in the SCOTUS case, restricted access to government-held information and didn't stop the plaintiff from speaking about information that he already had. So that's not a First Amendment problem at all. I'll just highlight that the Sixth Amendment argument got a pretty dry reception from the court because the plaintiff didn't actually plead a Sixth Amendment violation in the district court, and he didn't...

A Anthony Sanders 45:38

I don't know how he could have.

C Christie Hebert 45:39

Yeah, I mean, his theory was kind of like being charitable, that he was arguing something about it, highlighting or infringing on the right to counsel, because I guess without his services, defendants are less likely to get counsel.

A Anthony Sanders 45:55

But that's not his right.

C

Christie Hebert 45:58

It's neither here nor there.

A

Anthony Sanders 45:59

And he didn't have any of these other folks join the lawsuit with him, any of the bonds people, or whatever.

C

Christie Hebert 46:05

Right? And nothing prevented these criminal defendants from just going out and hiring a lawyer. And then the ultra vires argument was a little strange, I think. But I don't think the court was wrong. I think the prior district court decision was a little odd. The plaintiff argued that the judges had no legal authority to issue this order in the first place, and there was a prior federal district court decision saying, hey, an administrative order in a very similar context should be enjoined because it appeared to obstruct justice. But the Fifth Circuit said, you know, the judges in that prior case didn't point to a specific provision of law giving them that authority. Here, the judges do. They point to a specific Texas statute saying the judges have an administrative role over misdemeanor cases, and the Fifth Circuit said that's enough. They had express legal authority, and the ultra vires claims fail. The court didn't look at immunity arguments because there was no claim to begin with. So, bottom line, affirmed all the way around. There are a couple of things that I have a particular interest in highlighting. Footnote two—you know the footnotes are where the action is sometimes. Footnote two in this opinion highlights, or quotes, a case called *Houchins v. KQED* for the proposition that "the Constitution itself is not a Freedom of Information Act." That's a pithy line for sure, but I don't think that Supreme Court case should be read as broadly as saying there's never a constitutional right to information in the government's possession, because after all, how could someone speak about the government? How can we have informed debates about government activity if the government can keep important information secret? And for that matter—and hold my beer here, well, it's a little too early for beer, hold my coffee here—how can people petition for redress of their grievances if the government can keep key information secret? Petition Clause, you know. Particularly given that there are so many different doctrines that make it difficult for a civil rights plaintiff to win, having access to information to thread the needle to bring suit is particularly key. And so I, for one, am interested in looking at cases that apply the Petition Clause in cases just like this one. And the cases it cites don't seem to even reference the idea that the Petition Clause is a distinct part of the First Amendment that might be wholly different from speech. I'll make one last observation. I think it's worth noting that the plaintiff in this case made a last-ditch *Griswold*-style penumbras argument, essentially asking the court to recognize kind of a substantive due process right of access to criminal defendants' contact information.

A

Anthony Sanders 49:47

Well, I think the court sold him short there, because they said penumbra of the First Amendment, and then they say substantive due process. It wasn't substantive due process, it was just reading the First Amendment broadly.

C

Christie Hebert 50:02

I think that's probably fair, but I think it's a bold move.

A

Anthony Sanders 50:06

To use the word penumbra in the Fifth Circuit. I'll tell you that.

C

Christie Hebert 50:09

Like, once you use the word penumbra, you just shot yourself in the foot, because these days that is akin to saying, hey, you should go back to some of these squishy substantive due process rights, these squishy constitutional rights. And particularly given the emphasis on rights deeply rooted in history and tradition that we've really seen the Court focus on, the court swatted away that argument, basically saying the mere novelty of the claim, without having to talk about it much, was enough to kill it. So I thought that was another talking point worth commenting on. Big picture, the Fifth Circuit says under the current doctrine, the government can restrict your access to information without triggering the First Amendment, even if your entire livelihood depends on access to that information. And although the First Amendment protects your right to speak, the government doesn't have to give you any information to speak about.

J

Jessica Underwood 51:19

I mean, I think it mattered. I think there's something about this business model that, as lawyers, kind of seems a little squeaky, you know? When I was reading the opinion, I remember thinking, okay, wait a minute, we're just giving lawyers these defendants' contact information, and the lawyers are just cold-calling these defendants, saying, "Hey, can..."

A

Anthony Sanders 51:40

I just read it's like reading Pacer. It's like, "oh, this guy is on pacer. He's a defendant, I'm going to send him a letter." That happens all the time.

J**Jessica Underwood 51:49**

Yeah, yeah, that's true. But I think the kind of information we're talking about here influenced the court's decision, right? I mean, this is not the kind of information that you could probably really characterize as a matter of public importance, where citizens need access to it. If it had been, maybe it would have been a tougher case. But I think it's worth thinking about whether this kind of holding is going to have, like I said earlier, unintended consequences in other contexts.

C**Christie Hebert 52:20**

Yeah, I guess, for me, the response I have to that point is that there needs to be a greater distinction drawn between what is protected First Amendment activity and the restrictions on that activity. Here, he was collecting publicly accessible information and then, arguably, speaking about it by providing it to these criminal defense attorneys. And then you have the restrictions on that speech—the criminal defendants' private personal contact information—which the government probably had at least some interest in protecting. And depending on the level of scrutiny, surely that could be something discussed on its own. So I think it's really important for us to take a step back in some of these constitutional cases and first define the right, and then decide whether the government conduct is meeting the required burden for infringing on that right or not.

A**Anthony Sanders 53:18**

And to some extent this is about putting information online, right? Like, I bet there's a way to go down to the courthouse and look through paperwork. I mean, I don't know, but you could still get this information. But for this business model, that's not going to work. The question I have for you, Christy, is they kind of allude to a freedom of the press claim at one point, although it seems like it's just wrapped into a First Amendment claim. And then they say, well, there actually is a freedom of the press right the Supreme Court has recognized to access trials, so you can't have secret trials that are unobserved. And that's not exactly in the Constitution, but they call it a press right; the Supreme Court has said that. And they say, well, that's not being denied here, because you could still go to this guy's trial, you just can't get his personal information when he posts a bond. And I get that, but it seems like there could have been a little more development of the press right itself, I guess, in line with your argument about the Petition Clause, and if you have thoughts about that aspect.

C Christie Hebert 54:25

Yeah, I guess one of the things that it brings up to me—and it reminds me of a recent case that I worked on—is that the government can't decide who the press is. So, you know, if this guy was posting it on, let's say, social media and he was reporting that way, putting aside that it's confidential contact information of these criminal defendants, let's pretend for a second it's the nature of the offense. If he was putting it on some kind of social media and they were saying, "You're not press, because that's what we're doing," that would definitely be an issue. And, you know, in the California case, the Supreme Court case, there was the distinction that journalists could publicize the information and get the information, but people who were going to sell it to another party couldn't get the information. And so not only does that implicate who's the press and who's not the press, but it also implicates content-based restrictions, which we at IJ have routinely litigated.

J Jessica Underwood 57:18

Oh, that sounds like a dangerous game.

C Christie Hebert 57:20

That does sound like a dangerous game. I don't think there's much more to say in terms of parting shots. I will say that the en banc—or en banc, depending on your pronunciation, as a prior Short Circuit episode really explored—process is particularly active lately in the Fifth Circuit. So that's something for practitioners to pay attention to. If your case touches a live circuit split or contested Fifth Circuit precedent, make sure you flag that in your brief, because you never know.

A Anthony Sanders 58:02

Right. They're also big fans of certification, which I know has been a another point of controversy among, among the judges.

C Christie Hebert 58:09

Indeed. And it has certified many cases to the Texas Supreme Court, and I don't want anyone to quote me on this, but it is my understanding that the Supreme Court of Texas has never turned down a certified question from the Fifth Circuit, so make of that what you will.

A

Anthony Sanders 58:25

I mean, it's like a huge part of their docket, the Texas Supreme Court.

C

Christie Hebert 58:29

More and more.

A

Anthony Sanders 58:30

Right? And so, well, we'll quote you on that. Sorry. And we are going to dig into that, I'm sure, some other time. But for now, thank you both for coming on. Jessica, really appreciate you joining us here on Short Circuit. And for everyone else, please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms. And remember to get engaged.