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SPEAKERS

Suranjan Sen, Prashanta Augustine, Anthony Sanders



Anthony Sanders 00:10

Get in, loser. We're going shopping at the Gadsden Mall with Judge Roy Moore 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 Monday, May the 4th, 2026. But no, no Star Wars content today, because it is all about shopping at the mall, or maybe other things that perhaps happened at the mall, or perhaps didn't happen at the mall a long time ago. And then we're gonna get around to machine guns. So I hope that is some fun content for all of our listeners and our viewers today. Yes, we are going to be discussing a recent Eleventh Circuit opinion about defamation, and about judge, and then justice, and then no longer justice, and then he was a justice again, and then he ran for Senate, and that didn't work out so well. Roy Moore, and some advertising about when he used to go to the mall. So many of you probably remember that story. We're going to discuss this case about his defamation claims, and then we are going to move to the Fifth Circuit and an en banc denial, which was a very interesting en banc denial, as they often are in the Fifth Circuit, that involved machine guns. So machine gun fans will have to wait until a little later, but the person who will be bringing us that en banc denial is a first timer here on Short Circuit. Now, he is Prashanta Augustine. He is a Bingham Fellow here at the Institute for Justice. He has many accolades to his name. He's a graduate of Yale Law School. Actually, we have two Yalies on today. That might be a first ever. He's a graduate of Yale Law School. He also went to the University of Rochester for undergraduate work, and he is a fan of clerking. So he clerked for a judge before he came to IJ. He's going to be clerking again in the middle. He's doing some IJ stuff, and maybe you, dear listener, dear viewer out there somewhere, maybe you might be interested in doing a similar thing. So Prashanta, welcome to Short Circuit, and tell us a little bit about this, how you were able to work for IJ.

P

Prashanta Augustine 02:36

Yeah, thank you so much, Anthony. Well, during my clerkship, I was, well, I should say, I had a clerkship lined up for 2024 to 2025, and then I had another clerkship with a year gap. And I was thinking, okay, well, what am I going to do with this year? I've always loved the work that Institute for Justice does. I first came across IJ when I was in college, and I've always wanted to try working for IJ. And the Bingham Fellowship is a one-year fellowship that we have, and it's great for the space between clerkships, and I would really strongly recommend it.

A

Anthony Sanders 03:25

Well, great, yeah. And in, we're very pleased that you're able to join us for a year. It is crazy these days. I know everyone always complains about this, but it is crazy these days how judges hire clerks like three, four years out, or whatever. And I guess that's good in some ways for life planning, but it then means you have gaps. And so some people, when they have a gap year, they travel to India, or they learn a new instrument or something, but we're very happy that you instead chose IJ.

P

Prashanta Augustine 03:59

Yeah, no, it's been great fun here. Great fun,

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Anthony Sanders 04:02

Wonderful. Well, we'll hear from you in a little bit, and this Fifth Circuit case and what's up on machine guns. But first, we're gonna hear what's up at the mall, and that's from Suranjan, who's been on the show many times now, and we're very happy to have him back. So Suranjan, this is, in some ways, it's about some political stuff that some of us would like to forget in the past about this larger-than-life figure Roy Moore. But also, it has some really interesting defamation law in quirky ways that you don't often see about the actual malice standard. So take it away. Why should we care about the latest ruling in this saga?

S

Suranjan Sen 04:49

Well, Roy Moore has a little bit of a soft spot place in my heart, and it's because about 10 years ago I was in law school, and I was a TA for Professor Akhil Amar. And this was in the early Trump days, when it seemed as though it was a particularly fun time to be a budding constitutional law scholar, because a lot of seeming previously obscure constitutional provisions were suddenly in the news. Who would have thought that people would be just talking on the street about the Emoluments Clause? And one of the things that they would talk about was, there was a question during Roy Moore's campaign for U.S. Senate of to what extent the Senate has the authority to expel its members, because people were already talking about potentially expelling Roy Moore the moment he gets elected and inducted into the Senate

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Anthony Sanders 05:58

Or the Senate, I think, he was right.

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Suranjan Sen 05:59

I'm sorry, the Senate. I meant, I meant the Senate. And in particular, the interesting part being that he would be getting expelled for not only conduct that predated his election, but also conduct that was then known by the electorate, who then--so the argument could be made that all the people knew about this, and they voted him in, and so you're just completely overriding the will of the people here. Which I'm not sure now if that's still ever been done, of a person being expelled from Congress based on knowledge that was well known at the time they were elected. Fortunately or unfortunately, depending on what side of the aisle you're on, we did not actually have to test that, because he lost his Senate election. And that's because, in large part, if not entirely, because of the campaign against him that brought these allegations to light that are the subject of the case that I'm talking about today. So Roy Moore was a judge and then justice in the Alabama Supreme Court for quite a while. I believe he also, somewhere in there, worked as a prosecutor, an Alabama state prosecutor.

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Anthony Sanders 06:00

Well known for the Ten Commandments that he put out in front of the justice building, which, by the way, recent Fifth Circuit ruling, maybe that would be okay now. I don't know, but that's a whole other story. But that's kind of how he became famous.

S

Suranjan Sen 06:00

Yeah, and then I recall him running for office at some point, and like waving guns around at the audience that was there for his speech. And I recall thinking, you know, I feel like this isn't responsible gun handling, but I suppose that's not one of the most damning things or most controversial things about him, I should say. But once he announced that he was running for Senate, the U.S. Senate seat in Alabama, there came to light a variety of allegations against him of women saying that decades ago, I think in the maybe late '70s or in the '80s, that when Moore was in his early 30s, he made a habit of sort of coming on to teenage girls from ages of like 14 to 16 or so. There were, I think, at least nine, maybe more, separate women who came forward saying that he approached them. A couple who said that he took them out on a date and maybe tried to get inappropriate touching with them afterward without their consent. Some whose mothers had told them they weren't allowed to go on the date with Judge Moore, I guess, at the time, Prosecutor Moore. And he denied these allegations, for what it's worth. But this PAC, this political action committee, ran this series of ads against him that collected a few tidbits from various newspaper articles that had been published about this. And one of the statements was saying, quote, Moore was actually banned from the Gadsden Mall for soliciting sex from young girls. And so there are certain reports that security of the mall actually requested that Moore not come back because he had been making too many teenage girls feel uncomfortable. Now, there's other people that have said that that's not true, but then one of the security guards testified that it was true. But okay, the truth or falsity of that is a little bit beside the point of this particular case. Regardless, that's the first statement, that he was banned from the mall for soliciting sex from young girls. And then the second statement was that one girl that he approached was 14 and working as Santa's helper at the mall. And so what Moore sued about was saying that this was defamation by implication, because the girl, according to the girl, Moore told her when she was 14 and working as Santa's helper that she was pretty. And then, being ever the gentleman that he is, did not in fact ask her out until she was the ripe old age of 16. And so the case was Moore saying that it was defamation by implication, because by the statement saying that he was banned for soliciting sex from young girls, banned from the mall, and the other statement saying that he approached a girl who worked as Santa's helper when she was 14 at the mall, that was defamation by implication by wanting people to put that together as saying that he approached this girl when she was 14 as Santa's helper.

A

Anthony Sanders 11:27

When she was no longer Santa's helper when she was 16.

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Suranjan Sen 11:30

I think maybe. I'm not sure.

A

Anthony Sanders 11:32

She'd moved on in her professional life,

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Suranjan Sen 11:34

So I'll talk about this a little bit more later, but it seems like sort of like I wonder if part of what was going on here, that the court - spoiler alert - the court threw out his defamation case, but I wonder if part of the court's mind here was it's sort of like, this is really splitting hairs, man. Like, maybe you approached some 14-year-olds, but this girl, when you approached her, was 16, and so it was defamation to say that she was 14 when she was a Santa's helper. And it's just sort of like, okay, I don't know. But anyway, he sued about that, saying that this campaign ad was trying to say that he approached her for sex when she was 14. And the jury actually held in Judge Moore's favor, which is interesting, because Judge Moore, being a public figure under current law, which a lot of people think should be changed, but under current law of defamation, a public figure like Moore would have to show not only that the statement was defamatory, but that it was done with malice, meaning that either they knew they meant for the defamatory implication, and they either knew it was false or knew that it was likely false and didn't care. And so basically, you have to prove not only that the statement was defamatory, but a kind of subjective intent to defame. Which seems—I mean, I am not a defamation lawyer, but seems to be extremely hard to prove. I mean, I don't know what you could do to prove it, short of maybe finding documentation of them saying, ha ha, yeah, I know this is false, but who cares, screw this guy.

A

Anthony Sanders 13:23

Because it can't just be negligently saying something that's false. It's got to be that the person really knew it was false and said it anyway.

S

Suranjan Sen 13:31

Knew it was false or knew that it was likely false and didn't care.

P

Prashanta Augustine 13:34

Right.

S

Suranjan Sen 13:35

And this is all subjective from that person's mind. So the court then, looking over this jury verdict that was in Moore's favor, found that there was a lack of evidence in the record to support by clear and convincing standard that Moore had had shown malice, meaning that they either knew it was false or that they knew it was likely false, and didn't care, and so what they said was that Moore needed more evidence. So Moore first said, well, okay, we called these people to the stand, the people from the ad campaign, who testified that they, oh, we thought it was true, and we didn't intend for it to be this kind of implication anyway. And so Moore said, well, the jury is entitled to disbelieve those people. And the court said, okay, fine, the jury could disbelieve them, but not believing the ad people is not enough to show evidence that the ad people did mean it maliciously. Rather, like, okay, maybe it was reasonable for the jury not to believe the ad campaign people saying, oh, we didn't know, or we didn't mean it this way, but that still is different from evidence showing that they did know or that they did mean it that way. That seems a little dubious to me, that distinction. I mean, I would think that if somebody testifies saying, oh, I didn't mean X, and besides, I didn't think that X was false, that seems to me to be pretty much the same as—like, if you don't believe me when I say that I didn't think X was false, that seems pretty similar to saying that you think I thought that X was true. So, I mean, and if this standard is all about the subjective, what's going on in the defendant's mind, I would think that the defendant's own testimony could be enough to show that—no, we heard them testify, and we thought that no, he totally believed it. But this court thought you need something beyond, oh, we didn't believe his protestations. And then next, Moore said, well, the ad showing the two statements—one, he was banned from the mall for approaching teenage girls for sex, and two, one of the girls he approached was 14 when she was working at the mall as a Santa's helper—that the statements put together can show that they meant this to be taken together. And the court said no, that's not enough, because this is about the defendant's subjective view, not about what could objectively be drawn from the statement. Which again, it seems like you're really putting the plaintiff between a rock and a hard place of, you have to prove the defendant's subjective state of mind, but also, the jury hearing the defendant's testimony and thinking, nah, this guy totally meant this to be false, and knew it, isn't enough. Like I said, I guess the long and short of this opinion is you need some sort of third-party evidence, like maybe documentary evidence, like maybe an email or text message or something from the defendants saying, oh yeah, we know this is false, but screw this guy. And so I don't know if this is—I'm not familiar enough with the law to know to what extent the court got it wrong. What I will say is, from clerking on the Fifth Circuit, I've seen cases where the courts were more deferential to the jury verdict when the standard was beyond reasonable doubt. And so it seems a little odd for the court to be this willing to throw out the jury verdict for a clear and convincing evidence standard. But again, maybe this is just how hard it is to prove malice. Generally, I would think that this could be an interesting case of maybe the jury got it right, but that the damages award should be de minimis.

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Anthony Sanders 18:15

How much are damages?

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Suranjan Sen 18:16

The damages award was more than \$8 million and, and I just thinking, like, okay, if we all agree in some, in broad strokes, that there's enough there there to where—I don't want to be sued for defamation, so I'm not going to say he did it—but if we agree that there's enough there there to where one might reasonably believe he approached 14- and 15-year-old girls for sex at the mall. Okay, how much extra damage could it possibly have done that they said he also approached this other 14-year-old girl at the mall? Once we've established that you might have approached girls at the mall, is it the Santa's helper thing? Is that that much worse? Like, oh yeah, I would have voted for him. I totally would have voted for him when he approached the 14-year-old girls at the mall, but Santa's helper—have you no shame, sir? Santa's helper. I mean, maybe, I don't know. But \$8 million, it just seems like this seems to be more of a case of the Streisand effect to me. Which is an example—I don't know if people know about this case, but Barbra Streisand, somebody published a photo of her mansion or something, saying, look at how giant her mansion is, and she wanted to get some lawsuit to scrub it from the internet, and it caused everybody to—it blew up, so now everybody knows even more. This just seems like—I personally had no idea that he was accused of approaching Santa's helper at the mall, and if that is the thing that makes this so much worse, I don't know. And so as I said, it seems crazy. The craziest part of the story to me is that the difference between he approached 14-year-old girls at the mall and got banned from the mall for it, and one of them was Santa's helper at the time, being \$8 million of damages—seems the craziest part to me.

A

Anthony Sanders 20:21

It's an interesting add on. It should say it should add the Streisand effect, invented by, or I guess named by Mike Masnick of Techdirt, who we had on Short Circuit a few years ago, and we talked a little bit about that. I think what put it over the top for me, because I get, I get Suranjan what you're saying about some of the—I mean, the verdict, the amount of the damages we can put to one side, but the uncertainty that you were discussing. I think one other piece of the puzzle is that this isn't explicit, right? Defamation—it's implicit, because those two statements you put together, and it's a little ambiguous as to whether those two statements put together equal the Santa's helper part of this, which I'm not going to repeat all the words, but the Santa's helper part, right? And so because that's ambiguous, they had to know—the speaker has to know that that is going to be read as stating that fact. But because it's ambiguous, that's why the actual malice is even harder, I think, than it normally is. That was my—

S

Suranjan Sen 21:44

It's kind of like double malice. Like, you have to prove basically that the defendant intended the implicit meaning. Because like you're saying, these are—it's not that he's saying they said this statement and that was defamation. It's that they said these two statements and they wanted the audience to put those together to come away with this third, like the kind of syllogism that is defamation. And so what this court apparently—this was an issue of first impression in the Eleventh Circuit, but other circuits have gone, and the opinion purported to follow other circuits, holding that you had to show that subjective element that they meant it or recklessly disregarded that it would be taken as the implication first. And then secondly, that they meant it, or that they knew it was false, or recklessly disregarded the substantial probability that it was false, the implied statement. And so, yeah, you're right. However hard the standard is just for regular defamation, it would be, I guess, doubly hard in a case like this. It's just, they call me old school, but I feel like usually it's a really, really big ask to ask judges to find that the evidence was insufficient to support a jury verdict. And so it's always still a little surprising to me whenever I see that done. And I'm not necessarily saying they did it wrong. As I said, I'm not an expert on defamation here. I know I'm playing one on TV right now. But it just, that seemed interesting to me. And there's this whole section in the opinion too where they talk about how we have our independent duty to review the evidence because of the constitutional implications. It's like, well, but again, the whole point of review of sufficiency of the evidence shows that you have an independent duty to review it even in an ordinary case, like a criminal case, like I said, where the standard is beyond reasonable doubt, not just clear and convincing. And so it's kind of—I guess this is just another—I mean, I'm not going to cry myself to sleep at night that Roy Moore didn't get \$8 million from this. But it perhaps is another example, not one I would use if I were one of the people trying to get the malice standard changed, but maybe another one that's out there in the ether about showing how hard it is—justly, or perhaps in this case, wait, unjustly, or perhaps in this case justly—how hard it is for public figures to win on these cases.

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Anthony Sanders 24:31

Prashanta, do you have old school views about this, or some others perhaps?

P

Prashanta Augustine 24:37

No, I just thought it was very interesting, the defamation by implication, because it seems like if you rule for Moore in this case, I don't see how that ruling could be cabined, given how—I mean, it seems like so many different things would be susceptible to defamation by implication.

A

Anthony Sanders 25:05

Because often two statements put together can mean all kinds of things,

P

Prashanta Augustine 25:10

Right, right.

S

Suranjan Sen 25:11

I also would think that there's an argument to be made that him approaching her when she was 14 and saying that you're pretty, in light of the other allegations or whatever, it's like—I don't know, there's just so many layers to this. I think it's hard for me to come away with this thinking he deserved \$8 million.

A

Anthony Sanders 25:34

You wonder why is a guy in his 30s talking to a woman as she's working as Santa's little helper. Not a woman—a 14-year-old.

P

Prashanta Augustine 25:45

"Woman" is doing a lot here, Anthony.

S

Suranjan Sen 25:46

Yeah, I don't know.

A

Anthony Sanders 25:48

Yeah, yeah, I don't know.

S

Suranjan Sen 25:51

Not just 30-something—the local state prosecutor is approaching your teenage daughter at the mall.

A

Anthony Sanders 26:01

Well, prosecutors have their own lives, as much as we like to complain about them on this show.

S

Suranjan Sen 26:07

I think they should all be monitored.

A

Anthony Sanders 26:11

Yeah, that'd be another take. And now that would be another interesting defamation case, but we're not going to go into that one. Instead, we're going to move to the land of machine guns, which apparently is the Fifth Circuit these days. Because the Fifth Circuit, like most circuits, has binding case law that it is constitutional to ban machine guns. And machine guns aren't totally banned, but basically, if you want to own a machine gun, I think it has to be made before 1986, or maybe you had to buy it before 1986. Anyway, it's very hard to own a machine gun if you are a private citizen in the United States. And there's been challenges to that rule over the years. Of course, with the Second Amendment being what it is these days, some people are taking some shots. And so we come to this case in the Fifth Circuit, where it had a ruling based on some case law that basically this law is constitutional, and then it went to the en banc stage. The court did not take it, but we got some interesting statements from some of the judges. So Prashanta, what do they have to say?

Yeah, certainly. So this case is United States versus Wilson. And I think that to start, Judge Willett puts it nicely in one of his opinions, talking about how there are three maxims of federal criminal law established by the Constitution, and the first maxim is that only Congress, rather than the executive or the judiciary, can set forth criminal prohibitions. Then, second, federalism requires that such prohibitions rest on one of Congress's enumerated powers, and then third, that any such criminal prohibition can't transgress the Bill of Rights, and so within that framework we get this case Wilson, where basically Wilson had been duped into, into buying a fake firearm, he, he had thought he had thought it was real, and he was duped, and so what he did was he confronted the person who sold, sold it to him, and he shot him, and the gun that he shot him with was a semi-automatic handgun that had been modified with a Glock switch, and so under the definition of machine gun in the National Firearms Act, that extends to things you would commonly think of as machine guns, also devices that modify other weapons into becoming machine guns, so given that definition, he falls afoul of this section 922 zero, which is pretty much with a few limited caveats, a simple ban on possessing machine guns, and so in his criminal case he tried to get his indictment dismissed by raising a second amendment challenge, and essentially, as many listeners will know, second amendment jurisprudence has certainly been in flux these past couple of years, starting with the DC versus Heller case, but more recently with Bruen and Rahimi at the Supreme Court, and just as a recap, right, the DC versus Heller sort of rejuvenates the Second Amendment and re-injects the idea that there is an individual right to bear arms, and then. The wake of that, there wasn't really a significant substantive Second Amendment opinion for over a decade, and so the lower courts were crafting various tests, how to operationalize the Second Amendment. Then Bruen comes in and shakes things up, reorients things away from sort of typical balancing tests that you would see in other provisions, like the equal protection clause, and reorients things towards text history and tradition, and so in the wake of Bruen, there have been a lot of challenges to these prohibitions, and the trial court dismissed the Second Amendment challenge pretty quickly, you know, it indicated that Wilson was making both as applied and facial challenges to the statute, and basically it got rid of the challenge pretty quickly, but the Fifth Circuit gave more consideration to the challenge, however, it found that the challenge was largely foreclosed by this case, Hollis versus Lynch, which was one of these cases that the Fifth Circuit had had generated between Heller and Bruen, when everybody was trying to come up with a new methodology for the Second Amendment, and basically what the Fifth Circuit test had been prior to Bruen was that at step one you have to figure out whether or not the arm in question is within the scope of the Second Amendment, then if it is things were subject to a balancing test, and so Bruen wiped out that second prong. The question is, if it wiped out the second prong, what was the status of Hollis versus Lynch? And so, you know, it was kind of an interesting move. They, the Wilson wanted to basically get Hollis versus Lynch overruled on a panel decision, which is not typically what you would, what you would do when you're trying to get case law overruled, because there's an idea that panels are bound by subsequent panels, and so in order to overrule any given panel decision, you would have to take a case en banc. Right, there were basically two arguments why that shouldn't apply. The first had to do with basically a factual dispute, which essentially turns on whether or not machine guns are both dangerous and unusual, and so I think there's little disagreement that machine guns can be dangerous, but I, but there was a lot of disagreement as to whether they were unusual, and so there was a battle over basically ATF statistics, how many of how many machine guns were in circulation?

A

Anthony Sanders 33:05

And there's kind of the cart before the horse there too, right? Because one of the reasons they're unusual is they're basically banned. They have been for a few decades now, right?

Right, exactly. And so there are a lot of really interesting methodological questions. When you talk about even within the text history and tradition framework, even the definition of what counts as dangerous and unusual can get into some weird line drawing questions that we often think that text, history, and tradition would be avoiding. So ultimately, they found that the numbers were both insufficient to overrule the panel in its own right, and then also, there was a lot of fighting over the numbers too, so they found that was insufficient. And then they turned to actual case law, and there was an argument over whether Bruen just totally wiped away *Hollis versus Lynch*. And in this, there was a dispute over what role dicta should play—Supreme Court dicta—in panel decisions. And so basically, the question was whether the Bruen dicta describing machine guns as dangerous and unusual should be binding on the Fifth Circuit. *Hollis* treated it as such, and then whether it should still be binding in light of Bruen. And ultimately, there was some back and forth about this, but the Fifth Circuit opinion finds that the language in Bruen didn't totally undermine that. And in fact, I think if you look at some of the subsequent opinions, like in the *Kavanaugh Rahimi* concurrence and things like that, I think that bit on dangerous and unusual does indeed survive. But the interesting thing, though, is with the Second Amendment challenge foreclosed, Judge Willett, who wrote the majority opinion, then writes separately and says, well, this Second Amendment challenge is foreclosed, but maybe there's a Commerce Clause argument here as well. Because essentially, the machine gun ban can be construed to apply to people who just are in possession of machine guns outside the streams of interstate commerce. And so under case law developed in the '90s, there's a strong argument that that may be unlawful. And so, again, however, there was binding case law, actually this time also from the 1990s, to foreclose that argument. And also, at the panel level, there was an interesting opinion, a dubitante opinion by Judge Ho, which essentially chastised an earlier panel for staying their proceedings in light of this case. So it was a very interesting panel opinion. And then it goes up en banc, and it's a very fractured vote. I think essentially you can read it to have nine judges saying, look, there's a serious question as to whether these prior panel opinions are correct. But nevertheless, two of those judges thought that this was not an appropriate vehicle to bring such a challenge. And so ultimately, that means that the majority declined to hear it en banc. But in the en banc, you have a reiteration by Judge Willett of the fact that potentially both lines, both the Commerce Clause and the Second Amendment, are questionable at least. And then you have some dissents by Judge Ho and Judge Oldham, who both thought that the prior panel rulings were incorrect, but also that this was a proper vehicle. And so it's a pretty interesting and complicated case. I think it raises a lot of issues that are relevant to *IJ*, if not necessarily with respect to the Second Amendment, but also with respect to really as-applied versus facial challenges. There's a debate here in one of the footnotes where Judge Willett in the panel opinion essentially says, well, the litigants said it's as applied to machine guns, but it's a ban on machine guns, so this is functionally facial. And there's a question of, okay, well, if you bring a facial challenge, are you necessarily preserving an as-applied challenge because of the demonstration that you would have to make on your facial challenge? I mean, I think probably yes. And then there are also questions about the party presentation principle, which is essentially the idea that courts are going to be bound only to hear the arguments that litigants bring before them. Which I think, regardless of how we feel about it in civil cases, it seems like if someone is being convicted under a law that is arguably unconstitutional, you might say that there's more leeway for some flexibility on the party presentation principle.

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Anthony Sanders 38:55

Is that because the defendant just didn't bring the commerce clause argument?

P

Prashanta Augustine 38:59

Yeah, yeah, I mean, exactly right, so the in the trial court and in the Fifth Circuit, they had just raised the Second Amendment. But I think with Judge Willett's concurrence, they kind of did open the door for the Commerce Clause. And so I think you could plausibly say, okay, we're going to take this en banc, and then we'll have a supplemental briefing schedule. And I think that probably would be sufficient notice in my mind.

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Anthony Sanders 39:28

Well, Suranjan, you are an old hand with Fifth Circuit machinations, so I would love to just hear what you think about the breakdown of the voting here and all that, but also the substantive issues.

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Suranjan Sen 39:45

I want to refrain from naming names too much, just because--

A

Anthony Sanders 39:51

To be clear, I wasn't asking you to like spill the tea here or anything. Just what's interesting.

S

Suranjan Sen 39:58

Well the tea would be just my own personal opinions to get me in trouble. But I think it's interesting to see the party presentation principle mattering only when the government wins. The Fifth Circuit has not seemed to care very much about the party presentation principle when it comes to the court having to make up arguments the government hasn't put forward in order to say why the government should win. And so it's only when it's the person who's on the other side of the v. who hasn't presented the argument—now suddenly the party presentation principle matters. And I'm not going to mention specific judges, but there might be some judges here for whom the party presentation principle has not seemed an obstacle in the past to them ruling a certain way. But so with that said, I wonder how much what's going on here is that—I mean, this guy, correct me if I'm wrong, Prashanta—this was a firearms, an unlawful firearms possession case, but the guy had shot and killed, like, murdered someone, right?

P

Prashanta Augustine 41:24

Yeah, yeah. And I mean, that's a separate issue in the panel on sentencing as well that came in.

S

Suranjan Sen 41:32

Yeah. And so I'm wondering to what extent it actually is a separate issue. To what extent—you're not supposed to think this way, but to what extent this whole, this guy, he didn't raise these arguments, let's do it for another day. I mean, I first saw that and thought, well, that's pretty egregious if we're going to be sending this guy away to prison for decades, being like, oh well, you snooze you lose, spend the rest of your life in jail, next guy feel free to argue this. But if part of the equation, even if we're not really supposed to be thinking this, if part of the equation in the back of the judges' minds is, well, this guy also did just straight-up murder somebody. And so, sort of like my not being—I'm not going to cry myself to sleep at night about Roy Moore not getting \$8 million—I'm not sure if I'm going to be crying myself to sleep tonight about this guy spending some time behind bars, morally speaking. But it is a little frustrating, like you said, Prashanta, of like, okay, call me an old softie, but whatever he said before, at this point it's been raised. So can we not deal with it now? That sort of would speak to me if I were on the court. But I do understand some idea of, okay, these are very serious, very difficult, complicated questions that maybe could be—I mean, I personally think this would be a better question to be raised by a public interest type law firm that's representing an otherwise law-abiding gun owner, or would-be gun owner, who wants to own a machine gun for his old memorabilia collection or whatever. Maybe not a guy who we all agree just shot a guy in cold blood with said machine gun. So I think really, at the end of the day, even if you're a person who thinks that this law should be struck down, there's probably reason to think that this wouldn't be the case that you really want to come up for it to be struck down anyway. So I understand where all the judges are coming from on this, and I think, from a variety of angles, I can see why we're maybe all better off leaving this for a case that presents a better vehicle.

P

Prashanta Augustine 44:10

Though, at the same time, I mean, it is sort of laundering what is typically accomplished through state criminal law into the federal system.

S

Suranjan Sen 44:21

You mean, you're saying that, like, he should, like, he should—yeah, I have a problem with that too.

P

Prashanta Augustine 44:26

Yeah, I mean, I mean, murder is murder, right? Like, that's that's a criminal offense in any state, right? But when you're talking about the, you know, federal crimes, I would be sort of worried if we're letting the facts kind of get in the way of the Constitution. I mean, obviously there's a question as to whether or not this law is in fact unconstitutional, but I would hate to see the facts get in the way of the decision to rehear this en banc when the facts are not legally relevant to the determination of whether or not it's constitutional.

S

Suranjan Sen 45:09

Yeah, I agree, and that's why I said that you're not really supposed to think this way. But if we accept then that that he didn't raise these arguments, and if we accept that the court would sort of have to be really throwing him the sort of lifeline, going out of its way in order to reach this. Now, as I said separately, it's interesting how the court only cares about having to do this when it's when it's a private party, not the government. But putting that aside, then it makes more sense to me that maybe we'll be a little less willing to bend over backwards to ensure that this guy can present the arguments now, when part of the facts are that he's not the best of dudes here.

P

Prashanta Augustine 45:56

Yeah, although I mean, I think maybe I'm rusty on my habeas, but I do take Judge Ho's point that you know if you're essentially delaying a ruling on constitutionality for a later case, that could present some other issues. I mean, I would imagine that the first thing you would do if a ruling comes down in a later case that this statute is unconstitutional is you're going to file habeas, right? So it may just make sense to deal with it now.

A

Anthony Sanders 46:26

Yeah, well, and habeas is a whole other kettle of fish, of course, which things get harder and harder along the way. You know, what's interesting about this case, and the as-applied angle that you both mentioned, which is kind of—I don't know if this was the lawyer's deal or whatever, but it's as applied to machine guns. It wasn't as applied, it sounds like, to his machine gun, to this weird Glock with the pin in it or whatever they did to make it technically a machine gun. So it reminds me, there was a case in the early 2000s. It was in the Ninth Circuit. There was some federal prosecution of this guy who built his own machine gun. Long time since I read it, but I think it was basically in his garage. He built a machine gun and had this very clever defense where they said, look, this has not traveled in interstate commerce. It really was just this bespoke machine gun. And so the feds were arguing things like, well, the metal he used traveled in interstate commerce, and really to the edges of Commerce Clause arguments. And this was before the Raich case came out, so the medical marijuana case, but it was after the Lopez and Morrison cases. So there was this little window there in constitutional history where there were maybe some more arguments you could make under the Commerce Clause. And anyway, he won at the Ninth Circuit because this was not an interstate commerce machine gun. And then Raich came out, and I think it was summarily reversed by the Supreme Court after that. And you haven't really seen many cases like that since then. Now, this is a very different type of gun. I can't remember if that guy had done anything bad, but I don't think it was worse at all than this murder case. So—

S

Suranjan Sen 48:18

He breathed air that had moved in interstate commerce,

A

Anthony Sanders 48:21

Yeah, that's maybe the argument,

S

Suranjan Sen 48:22

Because of the continental drift, the land we're on is all kind of constantly moving through interstate commerce, so anything we do is--

A

Anthony Sanders 48:33

So perhaps it speaks to, you know, as applied. Of course, Angel Raich—she grew her own pot, and they still said that was interstate commerce. So in the end, perhaps it doesn't matter all that much. But we will see if the Fifth Circuit is interested in these cases going forward.

P

Prashanta Augustine 48:52

Yeah, and I mean, Anthony, to your point, I mean, looking to that Knutson case, which was the 1990s Fifth Circuit Commerce Clause case that upheld the statute in the wake of the 1990s Commerce Clause revolution—it's not really clear to me how the Commerce Clause challenge would come out here. Because on the one hand, that case rested on the substantially-affects-interstate-commerce stuff. And there's some language from that opinion where it's like, okay, this is not what we teach in 2020s law school, right? There's a quote here where it says, we cannot ignore these congressional findings, even though they were not explicitly reiterated in support of 922(o), they clearly subsist in the cumulative memory of Congress. Right? I mean, so that's not going to stand up, right? That's not going to stand up. But at the same time, there is language earlier in the opinion that discusses how, okay, maybe this does affect instrumentalities, et cetera. So we'll leave that for a later day, whether it would survive the Commerce Clause.

A

Anthony Sanders 50:12

Oh, great. Well, that's a great quote. Well, we will, we'll leave it all for another day. But for today, thank you both for coming on. Much appreciated. Thank you all for viewing us, and for listening. And please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, on all other podcast platforms, and remember to get engaged.