The Specter of a Circuit Split: *Isaacson, Bankshot,* and § 1983

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Introduction

At first glance, the Ninth Circuit's decision in *Isaacson v. Mayes* (2023) set the stage for the perfect law review student comment. It called out the Eleventh Circuit's decision in *Bankshot Billiards, Inc. v. City of Ocala* (2011) by name. And the Congressional Research Service listed *Bankshot* and *Isaacson* among 2023's circuit splits. By all accounts, the two circuits had split over a significant issue. They disagreed over whether a party needs to connect its injury to a constitutional right in order to establish standing for claims under 42 U.S.C. § 1983. Only one problem remained: the courts were on the same page.

If the circuits had disagreed, the split would be a significant concern—cert-worthy, even. Reading § 1983's injury requirement into the standing inquiry would muddle Article III's judicial process. Standing is a question of whether a party can get their foot in the door. A court need only ask if a party has suffered, or will soon suffer, an injury because of another's action before it can hear a case. Once standing is established, the court will determine a winner and what remedy they will receive. In essence, a court must ask what happened and if it can help before deciding exactly who and how to help. Melding those steps together would derail the ordinary judicial process and risk prematurely denying injured parties the assistance they deserve.

Luckily, the judicial train remains on the tracks. Despite superficial disagreement, the Ninth Circuit and the Eleventh Circuit agreed. Both courts correctly understood that plaintiffs only need an injury in fact to establish standing, no additional civil rights required. No doubt, the courts very well may disagree on which party prevails and the remedy they should receive in each case. But the substance of the relevant law was not actually disputed. So, how did the two cases get spun up into an alleged circuit split?

In this instance, the source of the alleged split was a cross-citation. Sometimes legal citations resemble a game of telephone. Someone reads an opinion and pulls out the line they are looking for. Without context, however, that line might tell the tale of a conflict that

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never existed, conjuring a circuit split out of thin air. When our understanding rests on misunderstood foundations, the state of law becomes labyrinthine. What's more, wrong interpretations of circuit precedents can be self-fulfilling. For example, a litigant could cite a false interpretation of *Bankshot* to a district court in the Eleventh Circuit, potentially compounding the reach of the mistake. Here, what emerges is the specter of a circuit split.

I. Sifting Out the Kernel of Law

The most convincing faux circuit splits, like the best falsehoods, contain a kernel of truth (or, in this case, a kernel of law). And where such mistakes affect laws like § 1983 that protect against constitutional abuse, their impact is magnified. With access to judicial redress on the line, getting to the bottom of things is incredibly important. To correctly diagnose where things ran amok in this game of telephone between the Ninth and Eleventh Circuits, one must first recognize the law that *should* have made it to the final ear.

A. Article III Standing and Injury in Fact

For a plaintiff to establish that she has standing, she must show "(i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." The second of those requirements is the subject of this discussion. Injuries in fact must be "(a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"

Note the distinction between actual and imminent injuries. Actual injuries occur when a party "sustain[s] or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." In essence, a party suffers an actual injury when he has already been, or is about to be, injured. Conversely, imminent injuries must only be "certainly impending." An injury is "certainly impending" if a plaintiff can show "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." Simply put, a party can show that she will suffer an imminent injury if she plans to act in a way that is barred by a statute and faces a credible threat of punishment under that law.

B. § 1983, Damages, and Actual Injury

Codified as amended at 42 U.S.C. § 1983, the Civil Rights Act of 1871 empowers people to sue for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Specifically, § 1983 extends liability to "every person" who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" to deprive another of his constitutional rights. In practice, people can recover damages for violations of the Constitution as if each violation were a tort, in addition to, or as a substitute for, injunctive relief. The choice between these remedies depends in part on the difference between actual and imminent injuries.

Plaintiffs do not typically recover damages for injuries that they have not yet suffered. That is as true for § 1983 claims as it is in tort law. As the Supreme Court put it, "the abstract value of a constitutional right may not form the basis for § 1983 damages." To that end, a party cannot win compensatory damages under § 1983 "absent proof of actual injury." Parties who can prove imminent, but not actual, injuries can still sue for injunctive relief. Though cases involving § 1983 and standing both use the language "actual injury," Article III standing is separate from the merits of a plaintiff's claim to monetary damages under § 1983. Keep in mind that Article III, not § 1983, governs standing.

II. *Bankshot*: The Eleventh Circuit's Reading

In *Bankshot Billiards, Inc. v. City of Ocala*, a city ordinance "ma[de] it unlawful for anyone under twenty-one to enter an establishment selling alcohol." Bankshot Billiards, a pool hall, challenged the ordinance as unconstitutionally vague. Bankshot sought money damages to the extent that it had overcomplied with the law and "challenge[d] as unduly vague the portions of the [o]rdinance that applied to it."

The district court decided Bankshot lacked standing to bring its claim for § 1983 damages. Because Bankshot had "suffered such financial losses solely due to its own voluntary election to exclude all persons under age 21 at all times," it did not prove that its injuries were caused by the ordinance.

On appeal, the Eleventh Circuit affirmed the district court's denial of § 1983 damages, but it did so "on different grounds." The court held that, to recover § 1983 damages, a party must show "(1) that [its] constitutional rights were violated; (2) that the municipality had a

custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." Under this framework, Bankshot failed the first prong: it failed to "demonstrate[ ] that its constitutional rights [had] been violated."

The Eleventh Circuit never decided that Bankshot lacked standing. The district court found that the alleged injury, constitutional harm or not, was sufficient for standing on Bankshot's facial vagueness challenge, a holding that the Eleventh Circuit left untouched. What's more, the ordinance was repealed after the district court's decision, so the Eleventh Circuit remanded the case for consideration of mootness. Faced with that alternative jurisdictional defect, the Eleventh Circuit did not need to consider Bankshot's standing, and there is no language in the opinion to suggest that it disagreed with the lower court. In other words, the district court found that Bankshot had standing, and the Eleventh Circuit never weighed in.

III. *Isaacson*: A Repudiation of *Bankshot*?

Unlike *Bankshot*, the Ninth Circuit's decision in *Isaacson v. Mayes* began and ended with standing. At issue was an Arizona law that criminalized abortions "sought solely because of genetic abnormalities in the fetus or embryo." Physicians challenged the law as unconstitutionally vague and claimed they had lost and would lose revenue from not performing abortions because of genetic abnormalities. They alleged two theories of standing. First, the physicians alleged that, like Bankshot Billiards, they had suffered an actual injury because of overcompliance with the vague law. Second, they alleged imminent injury, as they intended to keep performing abortions, despite a credible threat of prosecution.

The district court disagreed that the physicians had proven injury in fact. As the Ninth Circuit noted, "[t]he closest the district court came to recognizing Plaintiff's economic interest in performing abortions was noting that any such interest was outweighed by State interests." Had the law already been enforced against the physicians, they could have easily proved an actual injury, but the law had not yet been enforced.

However, the physicians had also alleged imminent injury, claiming that they had been "chilled from engaging in constitutionally protected activity." The problem with this argument? The Supreme Court in *Dobbs v. Jackson Women's Health Organization* had held that "the Constitution does not protect a right to elective abortion." Since no other constitutional injury was ripe, the district court ruled against the plaintiffs. In doing so, the district cited *Bankshot* to support the idea

that standing for pre-enforcement challenges requires actual, constitutional injuries.

The Ninth Circuit disagreed. It decided that the physicians had alleged enough to show imminent injury. Quoting the Supreme Court standing doctrine outlined above, the Ninth Circuit posited that the district court had misapplied the standard for imminent injury for two reasons. First, it stated that "a chilling effect is only a cognizable injury" in First Amendment challenges and thus should not have been applied in this case. Second, the court held that an "imminent threat to life, liberty, or property interests without due process of law" was a cognizable injury sufficient to support standing. Because the statute impacted the doctors' property interests and there was a credible risk that it would be enforced, their injury was imminent, and the doctors had standing.

If the doctors had standing, then the district court had reached the wrong conclusion of law—that is, pre-enforcement challenges do not require actual, constitutional injuries; imminent injuries will suffice. But in the district court's eyes, the Eleventh Circuit had said the opposite in *Bankshot*. The Ninth Circuit hit this proposition head-on, "conclud[ing] that *Bankshot* is not persuasive and [holding] that the district court erred by applying it to determine that there was no standing."

Clearly, the Ninth Circuit did not support the district court's application of *Bankshot* to override the concept of imminent injury in standing doctrine. Rebuking the *Bankshot* citation could mean one of two things: either the Ninth Circuit agreed with the district court's reading of *Bankshot* but objected to it as bad law, or the Ninth Circuit recognized *Bankshot* as good law but objected to its relevance in the case at hand. The first scenario would be a circuit split, whereas the second would simply be correctly executed appellate review in action. The determinative question remains: which one is it?

IV. "Mighty is the Pen": Conjuring Up the *Bankshot* Specter

Like a game of telephone, one must find out which actor was the source of incongruity. Because both the Ninth and Eleventh Circuits correctly articulated Article III standing doctrine, the immediate culprit is the district court in *Isaacson*. The district court cited language from *Bankshot* to describe the pre-enforcement injury: "the litigant is chilled from engaging in constitutionally protected activity." The problem? That language came from the portion of the *Bankshot* opinion discussing the merits of the plaintiff's claim to § 1983 damages. As such, it was wrong to quote that language for purposes of Article III standing, even though

it dealt with a pre-enforcement vagueness claim similar to that in *Isaacson*.

The district court introduced the error, but is it fully to blame? Certainly, the citation to *Bankshot* was not adequately vetted for applicability at the district court level. District courts, however, are incredibly overburdened, so much so that a bipartisan Congress voted to increase the number of district court judges (that bill was vetoed by President Joe Biden). With cases piling up in district courts, it should not be surprising that such confusions sometimes arise.

And, being charitable to the district court's reading, one could notice that *Bankshot* repeatedly uses the phrase "constitutional injury." Certainly, that verbiage is similar to the language the Court uses in determining imminent injury. Due to similar language, it might have been reasonable for the district court to think the Eleventh Circuit was referring to the standing inquiry of imminent injury rather than the merits of the § 1983 claim.

Taking those concerns at face value, there appears to be enough textual evidence to assuage any confusion. Specifically, the court in *Bankshot* clarified that its opinion "addresses whether the business sustained a constitutional injury and is thus owed damages under § 1983." Standing lets a party get its foot in the door, but does not automatically merit recovery. If "constitutional injury" was referring to standing, the conclusory "thus" would not make sense. Standing is the beginning of litigation, not the conclusion. Therefore, the court's signposting confirms that its use of "constitutional injury" refers to the denial of § 1983 damages rather than the standing inquiry.

But the Ninth Circuit is not completely blameless either. The appellate review model exists to correct mistakes that are bound to arise from the district courts. To its credit, the Ninth Circuit repudiated the district court's reliance on *Bankshot*, concluding that the Eleventh Circuit was "not persuasive and [holding] that the district court erred by applying it to determine that there was no standing." As highlighted above, it is not clear what the Ninth Circuit meant by "not persuasive." At first glance, *Isaacson* might have created a circuit split: Was the Ninth Circuit agreeing with the district court's reading of *Bankshot* but disagreeing over whether it was the correct reading of the law? A deeper look into *Isaacson* and *Bankshot* reveals that both cases can be reconciled with standing doctrine and that there is no circuit split.

A clear parsing of the law unmasks the specter haunting the Congressional Research Service and law review comment writers. But whose duty is it to undertake that inquiry: the general public or the courts? Courts are tasked by the Constitution with interpreting the law.

Plus, they are staffed with teams of clerks. Those clerks' primary job is checking applicable opinions and ensuring that judges read and apply them correctly. While it may be tempting to quickly resolve claims that could be at odds with long-standing doctrine, judicial efficiency should not introduce flippancy. The law deserves due regard, ensuring that errors do not hinder access to judicial protection. Interpretations are meaningless if those primarily affected by them cannot understand them.

V. Conclusion

Judicial interpretation can be a tricky business. When citations change hands and cross circuits, opinions are prone to introduced error. And what may seem clear to one reader may be an enigma to another; after all, man is fallible, and mistakes are inevitable. Still, individuals rely on the law for clarity, and unnecessary controversy is costly. If there is a lesson to be learned from *Bankshot* and *Isaacson*, it is that judicial actors should take care in their citations and refutations, lest another specter of a circuit split roam the minds of readers.

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