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Anthony Sanders 00:08
Hello, and welcome to 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 Thursday, September 2, 2021. If you're listening to this in the week after that date, and you're in the DC area, you're invited to join us for a conference on Friday, September 10, 2021. at George Mason University in Arlington, Virginia. You can also catch it online, anywhere in the world. But if you're in the area, we'd love to see you. The conference is all about the concept of the will of the people and its relationship to judicial review. You can find a link to the conference in the show notes where you can read all about it and register to attend. If you come in person, there's free CLE if you're a Virginia attorney, and a free lunch, if you're any member of the people. Our conference thus violates Milton Friedman's rule that there's no such thing as a free lunch. You know what else isn't free? Parking tickets. Sure, if you're lucky enough to find free parking, that's great. But much of the time parking on city streets is limited by time and money. We're going to focus on the time limitation today. I'm sure many of our listeners have done some version of the following. You park at the curb and see a sign that says something like one or two hours of parking. You go to where you're going, but then you run out later to check your tires. If they're clean, then you're okay. And the parking attendant probably hasn't been by. But if there's a chalk mark on them, you have to take action, which sometimes means slightly moving your car forward to cover the chalk. But that's a different story. When you witness that chalk on your own tires, I'm guessing you probably didn't think that was an unreasonable search under the Fourth Amendment. Actually, giving you're a loyal Short Circuit listener, perhaps you did. And you know who else did? Allison Taylor, a woman in Saginaw, Ohio, who sued that city for repeated violations of her constitutional rights. And so said the Sixth Circuit last week, she may have prevailed in that lawsuit. IJ attorney, Josh Windham, who I'm sure has never rolled his tires to avoid a chalk mark joins us to report on this exciting development for busy drivers everywhere. Thanks for coming, Josh.

Josh Windham 02:29
Thanks so much, Anthony.

Anthony Sanders 02:30

You know, where there's plenty of parking and not much parking enforcement? Wyoming. Now, I'm not sure what the parking laws are in Yellowstone National Park. But after this episode, you'll know a lot more about its laws concerning assault with a deadly weapon. But the problem is the park is a federal enclave inside of Wyoming. So do federal laws on assault apply there or state laws? Now luckily, the 10th Circuit case we're going to discuss didn't occur in the little bits of the park in Idaho or Montana, or we'd be running into a different legal problem of not enough community members to serve on a jury. However, we'll also talk about that fun yet dangerous issue. IJ senior attorney Dan Alban, who grew up not too far from Yellowstone is going to explain these problems so you can be prepared to avoid any legal loopholes or exploit them as the case may be next time you go camping. Welcome, Dan.

Dan Alban 03:29
Thank you.

Anthony Sanders 03:30
So, Josh, explain to me how I can fight my next parking ticket.

Josh Windham 03:33
Oh, gosh, okay. I didn't realize that was my job today.

Anthony Sanders 03:36
Well, I think that's what the listeners are waiting for.

Josh Windham 03:39
Okay, well, you could start by you could start by filing a class action Fourth Amendment lawsuit like this lady did. So, we're going to be talking about a case called Taylor v. City of Saginaw. Saginaw is actually in Michigan. Anthony. It's not in Ohio.

Anthony Sanders 03:52
Oh, I'm so sorry.

Josh Windham 03:54
Yeah, it's north of Detroit.

Anthony Sanders 03:56

Got Ohio on the mind.

Josh Windham 03:58
Yeah. Okay. Well, in any case. So, this is a lady who, I guess is fond of parking in downtown Saginaw, and from 2014 to 2017, a local city official, basically, a meter maid, repeatedly chalked this lady's tires and gave her tickets. And chalking tires, if you're not familiar with the concept is basically when a parking attendant goes up to the tires of a car and put some, you know, washable chalk on them to mark, hey, this car hasn't moved in a while. And if the parking attendant comes back after a certain amount of time, you know, whatever is dictated by the city ordinance and says, oh, you've been here your cars and moved, they're going to issue a citation for that. So, after the 15th citation, this lady Taylor received, she finally filed a Fourth Amendment lawsuit against the city and against the against the officer and said, hey, this was a search under the Fourth Amendment. Chalking my tires is a search, and it's an unreasonable search because you didn't have a warrant to do it. So, I want to start by explaining what happened and kind of the first, the kind of the opening foray in this case, because the Sixth Circuit decision is called Taylor two. Taylor one is important to kind of, it's kind of important to grasp what happened there. So, in Taylor one, the city had actually filed a motion to dismiss the case. And this is back in 2019. And it's an entirely different Sixth Circuit panel, actually, and a different judge wrote the decision. But basically, the city says, okay, there's not a search here, chalking tires doesn't count as a Fourth Amendment search. And there are a few exceptions to the warrant requirement that apply, even if it is a search. And they're saying it's the automobile exception, which we can talk about, and the community caretaking doctrine. And so, I want to cover this briefly, because it's good context for what happens in Taylor two. So, in Taylor one, the Sixth Circuit says, a search did occur. And the court applies the so-called property base framework that the US Supreme Court adopted or I guess, reaffirmed in a case called Jones from 2012. And in Jones, I've probably mentioned this on the podcast before but in Jones, basically, the Supreme Court held that physically placing a GPS tracker on a car counts as a search because you've physically trespassed on somebody's property for the purpose of obtaining information. And so those are the kind of the two prongs of this property-based tests for what constitutes a search, a physical trespass and purpose of obtaining information. So, the Sixth Circuit says, look, yes, it's pretty de minimis to chalk a tire, you're not damaging the tire, but it's a search because this would qualify as a trespass at common law. Now, we can come back to this later, I think I might disagree with the Sixth Circuit's reading of Jones a little bit. The Sixth Circuit reading of Jones is saying if it's a common law, trespass, that's what's required for to make it a search. And so, the Sixth Circuit looks at the restatement of torts and says, Okay, well, this is a de minimis trespass to chattels a car, therefore, it's a trespass at common law. That's the first prong of Jones. And it was for the purpose

of learning how long the car had been there, and therefore you've satisfied both elements. That's a Fourth Amendment search. Alright. So, at that point, the Sixth Circuit says, Okay, now that it's a search, the burden is on the city to prove that some exception to the warrant requirement applies. And the city makes two arguments, it says, well, there's this kind of free-standing exception to the warrant requirement for cars, which is not how the automobile exception to the to the Fourth Amendment's warrant requirement works. And the Sixth Circuit rightly corrects that misapprehension by the city and says, well, in order for this exception to apply, you actually have to have probable cause that there's something you know, evidence of a crime in the car, and the city is just going and chalking every car that it sees, right. And so, there's no probable cause here. Not even reasonable suspicion. And so, the automobile exception doesn't apply. And the city also invokes the so-called Community caretaking doctrine. It's interesting, the city's doing this, you know, a few years before the U.S. Supreme Court's decision earlier this year and Caniglia v. Strom which kind of clarifies the nature of that doctrine. But effectively, the doctrine said even at the time, that police when they're performing certain so-called Community caretaking functions, which really just means they're out there on the highways dealing with things like disabled cars or impounded cars in their possession, they don't have to have a warrant to conduct certain types of searches. And the court there says in Sixth Circuit says, "no, the community caretaking doctrine doesn't actually apply, because as we read the Supreme Court's precedent, the city still has to show some connection to public safety." So for example, in some of the early community caretaking cases, what government officials were doing were, you know, taking loaded guns out of disabled cars that were on the side of the road, ostensibly for the purpose of making sure that it didn't fall into the hands of the citizenry or criminals or whatever, which is a whole separate issue, but suffice it to say the city was unable to show at least in Taylor one, that there was any connection to public safety in chalking these tires. And so, neither of these exceptions to the warrant requirement applies. And so, the 12 v 6, dismissal was reversed in Taylor one. Okay. So that's the context for what happens in Taylor two. In Taylor two the case is back before the Sixth Circuit, in front of a different panel at the summary judgment stage, and again, the district court rules for the city and says here summary judgments appropriate because an exception to the warrant requirement applies. And this time, the city invokes a different exception. It says the administrative search exception to the warrant requirement applies. And the Sixth Circuit's first reaction to this is to say, well, you know, there's kind of a basic requirement. So, well let me back up and kind of explain what the administrative search exception is and how it works. So, the administrative search exception says that basically the Government can conduct a warrantless search or inspection of your property if it's doing so pursuant to a scheme that has reasonable legislative or administrative standards, which really just means that it's authorized by kind of a detailed set of rules to conduct the inspection, right? There's a little bit of question begging

going on in this doctrine. But it basically it's like, I'm a city official, I'm following the rules, therefore, I don't have to have a warrant to search your stuff, right.

Anthony Sanders 10:30
And also, it's kind of it's not targeted against that particular person. It's like we do this to everyone, or we do this everyone who does this thing?

Josh Windham 10:38
Yeah, the point of it is that we're trying to make sure that you know, the buildings up to code, or, you know, in this case that the cars are not parked for whatever amount of time, right?

Dan Alban 10:47
A classic administrative search that a lot of our listeners will probably be familiar with is, when you enter a public building like a courthouse or the Capitol Building, certain other buildings, you may be searched, that's an administrative search in order to enter the building. Or when you go to the airport, TSA conducts an administrative search of passengers to make sure they're not carrying any bombs, weapons or incendiaries. And in another case that we won't discuss now, also, whether you're carrying cash.

Josh Windham 11:18
Yep. So, so the city invokes this doctrine and says, well, there's kind of an ordinance here, it's authorizing us to do this, and therefore, the administrative search exception applies. And, excuse me, the court disagrees with that. It says, look, one of the basic requirements of this exception applying is that this scheme gives the property owner an opportunity for pre-compliance review. And what is pre-compliance review? Well, it's basically a requirement that the government show its work, right? If the city official wants to inspect you, for a code violation, for example, you as the property owner, get an opportunity to say, Hey, can you actually prove before like a neutral, you know, adjudicator that what you're doing is consistent with whatever scheme that authorizes you to do this, right? It's basically an opportunity for the property owner to say no, you know, prove that you're allowed to do this. And here, you know, there's definitely no opportunity for pre compliance review. The officers just going around chalking tires willy nilly, right, and just not asking permission before they do it, and no one's there to object. So, the court says this falls outside kind of the pale of the normal administrative search type situation. But the city responds, we've got to kind of sub exceptions here that justify deviating from the pre compliance review requirement. And those are the so called closely regulated businesses doctrine

or closely regulated industries doctrine, and the special needs exception. Now I, I don't know that I did. I agree with the Sixth Circuit that these exceptions are really deviations from the pre compliance review rule. We can talk about this a bit later. Last time I was on this podcast, we talked about a case called Kilgore involving massage therapy establishments and the closely regulated industries doctrine, listeners might remember this. And there we talked a fair amount about a case called Patel from the US Supreme Court, which talked about all of these issues. And I'd commend that to the listeners attention. I think the Court made pretty clear in Patel, that pre compliance review is required, even when we're talking about special needs, and even when we're talking about closely regulated industries, but that's for another day. Here, the court rejects both of the city's arguments on actually different grounds, it says the closely regulated businesses doctrine, which really just allows the government to conduct warrantless inspections of highly, you know, in pervasively regulated industries that are typically pretty dangerous, right? The US Supreme Court has only allowed, only recognized four industries that qualify for this exception that's mining, junkyards, liquor and firearm sales.

Anthony Sanders 14:05
Although the lower courts have recognized about 150, right,

Josh Windham 14:09
That's right. I mean, the doctrine has ballooned sort of wildly out of proportion, but the way it works basically, is that the government can conduct warrantless inspections if it meets a series of kind of a three prong test, which is it's got an important government interest, the inspections are necessary to further that interest, and the scheme provides an adequate substitute for a warrant. And at the threshold level, whether this doctrine even applies the Sixth Circuit says no, because, look, first of all, parking isn't an industry, right? We're not talking about a business here. We're talking about city regulation of vehicles parking on the street. And second of all, in the cases where the US Supreme Court has recognized the application of the doctrine. The industries have been, you know, inherently dangerous or pose a threat, clear threat to the public safety, and here, we're just talking about parked vehicles. And so no, the doctrine doesn't apply. And I made a reference a second ago to the Kilgore case out of California of the Ninth Circuit. This is actually a stark contrast to how the Ninth Circuit apply the closely regulated industries doctrine in Kilgore. And in Kilgore, the court said massage therapists are closely regulated because they're heavily regulated, not because the industry itself is dangerous. And here, the Sixth Circuit is taking a totally different approach, and saying this doctrine doesn't apply, because the industry itself is inherently dangerous. So that's an interesting distinction. It kind of shows that even after the US Supreme Court's decision in Patel a few years ago, this is still pretty much a live

issue in Fourth Amendment law, it's not at all clear how the doctrine works. Alright, so the city's second argument is, well, the special needs exception applies and special needs, basically, is that the government has a need that goes beyond the need for normal law enforcement, right? So, it's things like, it would be impractical for the government to have to get a warrant or have reasonable suspicion to achieve this end. So, kind of the stereotypical example is sobriety checkpoints, right DUI checkpoints, or Dan, you mentioned one a moment ago about like TSA and airports, right. And I'm sure the government tries to raise that exception in our TSA work. This exception, one of the hallmarks of it, that clarifies this is that in order for it to apply, the programmatic suspicion less searches going on have to be necessary to further that kind of special need the government has. And here, there's not a special need. And the way you know, that is that the city admitted that the meter maids' job wouldn't change at all. If she wasn't allowed to chalk the tires, she would still be perfectly capable of issuing tickets and determining whether cars had been parked for too long. And so, the special needs exception doesn't apply here.

Anthony Sanders 16:48
I was just flabbergasted by that. They said, yeah, we don't actually really need to do this. That is quite a concession.

Josh Windham 16:55
I know it is. So, you know, we've covered a bunch of different doctrines in a short period of time. But the long story short is that the Sixth Circuit is not at all convinced that any of these exceptions to the warrant requirement apply. Now I want to just flag one or two things about the Taylor two that I found interesting. So that the Sixth Circuit rejects the city district court's reasoning, and I like how it does that. So there's two particular arguments that the district that the Sixth Circuit rejects. The first is that the district court appeared to place the Wyoming backup District Court conflated the city the property owners challenge to the city's procedures, right the search procedure here with a challenge to the city's authority under its police powers to regulate parking at all. Right. And so, because the district court didn't appear to understand the distinction between a Fourth Amendment challenge to a particular kind of search, right, with the city's broader power to regulate parking at all, and to adopt, you know, reasonable parking ordinances, the district court applied a different kind of analysis. And this is the second issue, the court the Sixth Circuit flag, which is that the district court place the burden on Taylor, to show that the ordinance was unreasonable. Rather than, once you've proven that the government has conducted a warrantless search, the burden being on the government to prove that an exception to the warrant requirement applies. And as you know, regular listeners of this podcast know, who bears

the burden in these constitutional cases often dictates who wins the case. And so here, I think Sixth Circuit was good to correct that error and the district court's reasoning. Okay, I'll stop there. I've been talking for a bit, and we can come back to some other issues I found interesting if we want to.

Anthony Sanders 18:45
And Dan, how are your parking habits?

Dan Alban 18:48
You know, I tried to I tried to avoid getting parking tickets when I can. I find very frustrating having to fight them. I had to fight DC a couple times over tickets that were I was very clearly within their regulations, unfortunately, was able to overturn the tickets on appeal, with photos and records from the online ticket paying thing. But I doubt our listeners care all that much about my travails with DCs parking authority. One thing I think, just taking a step back, that listeners may be puzzled by, especially if they're not in the Fourth Amendment space, or, you know, folks who deal with these issues. It just seems weird to call marking chalk on someone's tire, a search. And I was wondering if you could talk a little bit Josh about kind of how search is a bit of a term of art. And it incorporates other things beyond what you and I might say, is searching a vehicle or searching a home?

Josh Windham 19:48
Well, I think it's maybe useful to start with. I've got my own pet theory about this. And so, Justice Scalia had a really good way of talking about what constitutes a search in a case called Kyllo from a number of years ago. And in Kyllo, he basically said, look, if you just look at the word search, and you look back at the founding and what the term meant at the time, it just meant the government is engaged in purposeful investigative conduct. It's trying to learn things about you, right? That's what it means to search you. Now, if you take any kind of common-sense level, I think this constitutes a search, because what the government is doing here is it's directing its attention at Taylor's car multiple times and trying to learn like, hey, how long have you been parked there? Now, moving beyond kind of whatever that kind of common-sense conception of search is and whether that's correct or not, the US Supreme Court has basically two ways that it determines what constitutes a search. And this is where kind of the term of art stuff comes in. The traditional way that it did that was by looking at, like I said earlier, whether the government had physically trespassed on somebody's property for the purpose of obtaining information. And I flagged earlier that, you know, in Jones, I may disagree with the Sixth Circuit that what's required as a common law trespass, because it seemed to me that in Jones, but the court was saying was that if the government physically intrudes on your property in any way, and it's

trying to learn something about you, that makes it a search under the Fourth Amendment. And I agree with that, I agree. I agree. That's what Jones says. Now. It's kind of interesting. The Sixth Circuit focuses on some of the language in Jones talking about the common law, because it comes up later in the case. And we're not going to get too far into this. But there's an issue of qualified immunity that comes up in this case. And one of the things that Sixth Circuit holds is that the city official here gets qualified immunity, because it wasn't at all clear that chalking somebodies tires would constitute a search at common law. Because it's a pretty de minimis act. There's no damage to the property, and scholars, including Blackstone seem to disagree on whether that would constitute a common law trespass. The second way just for just for kind of comprehensiveness that something can constitute a search is if it violates your so called a reasonable expectation of privacy, right. And that issue doesn't come up at all, in this case, either in Taylor one, or in Taylor two. Probably because I don't think anybody really expects when they go out into public and park their car on the public streets that, you know, people aren't watching their car for how long they've been there, and perhaps even like, you know, government chalking their tires. Now, I don't really know what your expectations are Dan and Anthony, I personally don't really have any expectations about that or care about that very much. If the government wants to chalk my tires, it's not really a big deal to me. But I think the court was right to focus on this question of physically touching, physically trespassing, because that's actually what happened here.

Dan Alban 22:50
All of my expectations are reasonable.

Anthony Sanders 22:52
I think this also highlights I mean, if you if you kind of drill down into it, it highlights to me how often the US Supreme Court and the lower courts get hung up on the search question, and not the unreasonable question, which is really the what I think is going on here, I mean, the difference between a chalking the tire and say, writing down the license plate number, which of course, as another way, the meter maid can easily enforce this law, and then coming back later and seeing if the if that license plate is still there, which by the way, would get around my little suggestion of rolling the tires. That those both sound like searches to me. One is not a trespass, but one definitely is a trespass on the tires, but one maybe is unreasonable, and one isn't. So, the trespass itself kind of makes it more unreasonable, especially when there's an easy way to do it otherwise. And so, the court doesn't really get into that. But that this coupled with the first case, I think, kind of shows that and I'm, you know, I'm hopeful in the future that the courts are going to be less hung up on this whole search thing, which is important

question, of course, but really what the Fourth Amendment is getting at is the unreasonableness and of course, then the separate weren't requirement.

Josh Windham 24:14
Yeah. Just to add, I mean, one other thing I thought was worth noting about this decision was that it drives home that the Fourth Amendment actually should apply, even to kind of the lowliest of government conduct are the most, you know, innocuous of government conduct, because, I mean, this comes up a lot, actually in Fourth Amendment cases. And we've dealt with this argument and IJ, that basically, if it's not the police enforcing a criminal law to find like a guy on the run or something like that, the Fourth Amendment doesn't apply. It doesn't apply to things like civil actions or administrative activities of government, and officials who aren't cops and I think that's wrong. I mean, the Fourth Amendment doesn't say that. It was intended to continue strain the discretion of the government when it's, you know, conducting searches and seizures. And so, I think it should be construed and interpreted broadly, you know, to kind of scrutinize a lot more government conduct. And the question of what constitutes a reasonable search procedure can come after that question of whether the amendment applies at all. But to me, it was heartening that here you're, you're getting kind of the full measure of fourth amendment scrutiny to effectively the activities of a meter maid, which may seem trivial. But as we know at IJ, I mean, a lot of what government does, can happen on the sly can happen, you know, quietly can happen, innocuously by people just kind of bureaucrats going about their daily business. And that can violate your rights, too. And it's important that all of that activity gets subject to Fourth Amendment scrutiny, you know, when it involves a search or seizure.

Anthony Sanders 25:54
So, thank you, for that, Josh. And so, one of the core responsibilities of government, perhaps separate from the types of government actions that you were just referring to Josh, is protecting us from deadly weapons used by other people. And that is what Dan is going to introduce us to and give us some advice about maybe how to conduct yourself next time you're in a national park.

Dan Alban 26:21
Well, to be clear, I will not be providing any legal advice, but I'm happy to provide National Park advice. The case I'm discussing is United States v. Jeffrey Lee Harris. It arises out of an interesting set of events where one camper at Yellowstone got into an argument with some other campers at Yellowstone, pulled a gun on them, and threatened to shoot them. And of course, they complained to the relevant authorities. He was arrested by the Park Police. And then the prosecutors were faced with

a decision whether to charge Mr. Harris under federal law, or under Wyoming law, because the part of Yellowstone that he was in was in the State of Wyoming. And the reason that they have that choice, or at least that they thought they had that choice is a statute, a very early statute almost 200 years old called the Assimilative Crimes Act. This is a statute that was passed in 1825, to deal with crimes that are committed in federal enclaves, which includes things like national parks and military bases. And the reason that the statute was passed 200 years ago is because prior to the existence of the statute, there were very few federal criminal laws and activity taking place in these federal enclaves was exempt from state law enforcement. And so as one court described it, these areas were pretty literally lawless, because they were subject only to federal enforcement. And there were very few to no federal criminal laws at the time. And so, the Assimilative Crimes Act enables the feds to prosecute people if they violate if they commit acts that would violate state law within those federal enclaves. But there's an exception. And it's a pretty big one. Because if Congress has passed a law that is designed to regulate those same behaviors, federal prosecutors are not supposed to prosecute under the state law, they're supposed to prosecute under the federal law. And so, the question that arose in this case, and that was challenged by Mr. Harris, is whether prosecutors should have prosecuted him under Wyoming state law or under federal law. And again, these are federal prosecutors, just to be clear, they chose to prosecute Mr. Harris under Wyoming state law, and they probably chose to do this because Wyoming state law provides that assault with a dangerous weapon is a felony, and specifically, it's aggravated assault in battery. So, Wyoming aggravated assault is a felony, whereas under federal law, somewhat surprisingly to me. This was, if it was simple assault, which is what it most likely qualified as, it would only be a misdemeanor. So, the federal prosecutors decided to go with Wyoming state law prosecuted him and convicted him. But he appealed and said, oh, this was improper. Under a decision by the US Supreme Court in 1998, called Louis v. United States. That explains how the assimilative Crimes Act is to be applied when there's a possibility of overlapping state and federal laws. And essentially, Louis creates a two-part test. The first part of the test is pretty basic. The court is supposed to ask, is the defendants act or omission punishable by any enactment of Congress? In other words, is there actually any federal law out there that governs this conduct? If the answer is no, then you are supposed to prosecute under state law if there's a state law that exists, that punishes this conduct, and that's to fulfill what the real purpose of the assimilative Crimes Act is, which is a gap filling provision, essentially, if somehow Congress hasn't thought to create a law that criminalizes certain conduct, that would obviously be criminal under state law. You have this sort of, you know, ability to go to the state law and say, oh, you know, there's a gap in federal law here. But obviously, this is illegal under Wyoming law, so we'll prosecute. But if the answer to that first question is, yes, it is punishable by any act of Congress, then there's a much more complicated second question, which is whether the federal statutes that apply to

this act or omission preclude application of the state law in question because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue. So, the 10th circuit considered all of this and they looked at the federal statutes related to assault, specifically assaults within maritime and territorial jurisdictions, and noted that there are a whole bunch of different provisions. They list them for nearly two pages on pages 12 and 13 of the opinion, there's all these different subcategories of different types of assaults that vary in seriousness and vary and intent and vary in the state of mind of the person that's committing the intent. And so, they say, yes, Congress definitely intended to occupy this area. Congress clearly created a wide set of statutes that cover all different types of assault. And there's absolutely no reason that you need this gap filling provision here, because Congress has already done it, Congress has addressed the issue of assault. Now, of course, the federal prosecutors, they want a felony conviction. They don't want a misdemeanor conviction. So, they argue, well, it's not exactly the same. There's, you know, there's different CN term or mens rea requirements in the federal statute versus the state statute. There's only a general requirement in the federal statute, and there's a specific intent requirement, the state statute, and also the penalties are different. There's a felony versus a misdemeanor. But the 10th Circuit is not having any of that, and essentially says, well, that doesn't matter because the question is not like, is the state statute identical to the federal statute? Or does it work in precisely the same way? The question is, did Congress intend to legislate in this area? And has it demonstrated that it's intending to occupy this space with a set of statutes or regulations governing the conduct and it obviously had, so at the end of the day, the 10th Circuit concludes that the ACA, the Assimilative Crimes Act, or the other ACA, as Anthony has been calling it, was designed to solve a lawlessness problem, not create a legal hodgepodge from which prosecutors could pick and choose. And so, it ultimately concludes, Mr. Harris should have been prosecuted under the federal assault statute, and not under Wyoming's aggravated assault statute.

Josh Windham 33:38

So, I had just a thought on this case, that I mean, one thing that the court talks about early on is that the, you know, the other ACA, as you call it, was intended to solve a lawlessness problem, and that there weren't, you know, there weren't really criminal laws in these federal enclaves. Right. But you know, and I get that one of the hallmarks to me, though, of the rule of law is that the rule of law is understandable, that you can actually ascertain what it is as a citizen or even as a prosecutor. Right. And here it, I think you've gotten into a situation where, because there are so many federal crimes, you've got that books, you know, three felonies a day, or whatever it's called. Because you've got this

proliferation of federal criminal law. It's not at all clear. What things are which crimes in, you know, federal enclaves, depending on where you happen to be? And that, to me seems like a rule of law problem that can only be remedied by Congress.

Dan Alban 34:42
Yeah. Well, I mean, it's sort of an interesting, historical anomaly, really, this Assimilative Crimes Act because as Justice Gorsuch, then Judge Gorsuch noted in an opinion a few years ago. Those were different Current days than our own. There was lawlessness within these federal enclaves. Of course, now, there are a huge number of federal criminal statutes as our friend Mike Chase tweets about daily on crime a day, his crime a day Twitter feed. There's, you know, basically, you could, you could, you know, tweet out one crime a day for here to Eternity and never really finish.

Anthony Sanders 35:25
And some of those crimes he tweets out are specific to Yellowstone National Park if I remember, like, you know, some weird thing you might do to a garbage can at the park. And that's actually a federal crime.

Dan Alban 35:35
Oh, yeah. Because it's not just the statutes, but it's also the regulations that are passed underneath those statutes by, for instance, the National Park Service. And, you know, when they issue an edict about what you can or can't do with the trash cans or any other thing at the park, it becomes a federal crime that's prosecutable by federal prosecutors. So yeah, I don't think we have the problems anymore that were designed to be addressed by the Assimilative Crimes Act. And it really is something that I think prosecutors, federal prosecutors sort of game in order to find the more favorable crime to prosecute, and the 10th Circuit sort of addresses that near the end of their opinion, where they talk about, you know, this really shouldn't be up to those sorts of vagaries when there's so, so much federal criminal law. That's, you know, that's what people should be, should expect that they would be prosecuted under. And here, you know, I don't think there's any argument that Mr. Harris thought, oh, I'll get off Scott free under federal law. And it's only Wyoming law. That's my concern, I think, pretty much anyone would be aware that pulling a gun on someone and threatening to kill them would be illegal under whatever the set of laws are. But the prosecutors were trying to cherry pick and went for the Wyoming statute which provides for felony rather than the federal statute which only provides for a misdemeanor.

Anthony Sanders 37:04

The crazy thing is that it looks to me that Congress could fix this in an instant, I mean, that the Congress could change the law that, you know, the federal prosecutors can prosecute under either. And they're both crimes, but because of how this 1825 law was written, it says, well, if there isn't a federal law, then use the state. But if that, if there is a federal law, then you have to go with that one. It's been almost 200 years, you know, it's been almost 200 years since it was passed. It's been many decades since the beginning of the proliferation of federal criminal law. And yet, they haven't fixed this. And that case is from the supreme court for is from 1998. It's just, it's, it's silly, to me that that's something so obvious can be fixed so easily. Which brings up something else that Congress could fix involving Yellowstone National Park, Dan.

Dan Alban 37:59

Well, it does, although before we get to that, I would offer a different solution. Here, I would not, I would not amend the Assimilative Crimes Act to say Congress can prosecuted under either or I would simply eliminate the assimilative Crimes Act. We don't need it anymore. This is no longer an era where Congress hasn't thought to legislate a bajillion crimes. They've already legislated a bajillion crimes, and we don't need prosecutors to be empowered to bring criminal charges under both state and federal law anymore. It might have made some sense in 1825, when Congress hadn't really gotten around to it. We were very young country. Congress had a lot of other things to do. And, you know, probably, you know, passing an exhaustive criminal code was not high on their agenda, but we're no longer there. And I don't think we need the assimilative Crimes Act. What Anthony was talking about, though, I believe, is what's known as the murder zone in Yellowstone Park in Wyoming. There's a section so Yellowstone Park, for those who don't know, something like 90/95% of it is in Wyoming, but small parts of it are in both Montana and Idaho. But under federal statute, all of Yellowstone National Park is within the Wyoming Federal District Courts supervision. However, the Sixth Amendment provides that in a criminal trial, someone's entitled to a jury of their peers selected from the same state and district that that the crime took place or that they're from. And so, what is what is arisen because of this is the idea that there is a murder zone or a death zone in the Idaho portion of Yellowstone National Park because it has no population. There's no one who lives within about a 50 square mile area that makes up the Idaho portion of Yellowstone National Park, and therefore it would be impossible to recruit a jury from the same state and district where the crime is committed. So, in theory, you could go on a murderous rampage in that uninhabited area of Idaho, and Yellowstone National Park and get off Scot free. And there's been a Law Journal article written about this. There's a novel about this by CJ Box called Free Fire where there's a mass murder that's committed in in that area of Idaho. I think it has actually been

tested a few times involving poaching. And I don't think these arguments have been accepted by the federal courts. But it is an interesting anomaly. And yeah, the suggestion has been that Congress should perhaps fix this in one way or another, including by I suppose you could just add the Idaho portion of Yellowstone National Park back into the Idaho federal district court, and then it would be easy enough to recruit a jury of peers from Idaho. And they would be from the same district and the same state where the crime took place. Anthony, your additional thoughts?

Anthony Sanders 41:08
Well, yeah. So, Professor Brian Kalt, who's at Michigan State, was the original author of this article, it came out in 2005. And I know it very well, because I was actually clerking in Montana, which also has its own little section of Yellowstone where there's, there are some people but not many, like a few dozen, I think so it would pose problems for getting a jury together. And, and so we had some interesting discussions in the courthouse about the implications of this when it when it came out. And so Professor Kalt actually, he thought like, this is this is kind of wacky, and like, what if I publish this and you know, people take up on it and start committing crimes in these places of various kinds. And he actually went to Congress and tried to talk to people about fixing this. And he wrote a follow up article a few years later, and nobody was interested, at least, not much of anybody. And so the map is still as it is, with drawing that. I think it's the only district in the country that is not, you know, coterminous with a state. So, it's the only place you could do this. And it happens to be in an area where there aren't many people. So, then you have this, this jury problem.

Dan Alban 42:23
We really need to get the Idaho Tourism Board behind this. Come visit Idaho. Josh, you had something

Josh Windham 42:32
I was just going to make the pithy remark that so you're telling me the purge is real? You could cut this from the podcast, Anthony. But I was going to make a note. I forgot to mention this earlier. About Taylor one. I just wanted to give some credit to Judge Bernice Donald for her opinion. Our colleague Anthony Ward, on last week's episode of Short Circuit was very praiseworthy, of judicial opinions that are, you know, pithy or use puns and that kind of thing. For folks who like that sort of thing, go check out Judge Donald's opinion and Taylor one. It she constantly makes parking jokes. And it's great. Like, you know, in the opening lines of the opinion, she says that, you know, we're going to chalk this up to, which is a nice little line. Then later on the opinion. She says, you know, the city's arguments are deflated and stuff like that. So, if you do enjoy that sort of thing, go check it out.

Anthony Sanders 43:29

I actually went back and read that opinion, too, when I read this, and yes, I did. I did enjoy those puns. And I think that is the type of digital opinion that with humor, that would be okay, relating back to an episode we had a couple months ago, where we discussed where sometimes judges go a little overboard with that kind of thing. But here, I think it was, it was a good use of judicial humor. And also, this case is a good example, I would say of judicial engagement. So, Josh, we are not cutting that from the podcast. I think our listeners will agree with what you just said. I would I encourage our listeners to check out the link for the conference for next week. We hope perhaps to see some of you guys there or at least online and like to thank our guests for coming on today. And I ask that all of you whether you come to the conference or not get engaged.