Short Circuit 224

Thu, 6/16 8:19AM 55:57

SUMMARY KEYWORDS

barron, case, search, carpenter, legislature, question, lynch, bucci, government, katz, recording, court, concurrence, camera, governor, decision, circuit, indiana, people, privacy

SPEAKERS

Josh Windham, Anthony Sanders

A Anthony Sanders 00:06

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 Tuesday, June 14, 2022. And before we begin our regular programming, we have a couple of great cases that we'll be talking about in a little bit, I want to tell you all about an event coming up that we discussed a little bit a couple of weeks ago, in the Los Angeles area. So if you live in the Los Angeles area, you can come to UCLA Law School on Thursday, June 30, 2022. It the event starts at 1030. And it goes to about 1:30. And it is a presentation of a new report that we at the Institute for Justice have made with our Project on Immunity and Accountability called Constitutional GPA: Is Your Government Preventing Accountability. What it is, is a scoring, state by state, of different states' immunity doctrines, both at the federal level by circuit and also at the state level, and how your state racks up against other states. There'll be a number of people there, including Anya Bidwell, of the Institute for Justice, and some others, others from IJ and some outsiders as well. It'll be a great conversation, we'll be discussing the report, and then we're going to have lunch that you are welcome to join in on. And then after lunch, we'll be recording an episode of Short Circuit. So you'll get to see a live recording of the podcast. We'll put a link in the show notes for information and to RSVP. But again, if you are in the LA area, and you can make it, we'd love to see you on Thursday, June 30 at UCLA. Today, we have a couple of cases very far from Southern California. They are from the First Circuit and its famous courier font. In fact, 129 pages of courier font. If anyone in the First Circuit is listening, I think the rest of the country is united in saying perhaps courier has met its time, it had its time, met its maker perhaps, and it's time to move on like other circuits have done. But until that time comes we will discuss this 129-page case on the use of cameras on poles and whether that is a search under the Fourth Amendment. And then we're going to transition to a case from the Indiana Supreme Court on the Indiana Constitution and separation of powers that has some interesting parallels to some federal cases that some of you may have heard of. So first, I'd like to welcome our new Elfie Gallun Fellow at the Institute for Justice for freedom and the Constitution. You may be familiar with him. His name is Josh Windham. He's an attorney at IJ and he's part of our project on the Fourth Amendment. Welcome, Josh.

J Josh Windham 03:20

Hi, Anthony. Thanks for having me.

A Anthony Sanders 03:22

So Josh is going to discuss a little Fourth Amendment with this poll case. And after he climbs this greasy pole and comes down again, I'll be talking about what's going on in Indiana. So Josh, apparently, the First Circuit, which I think is the smallest circuit with only six active non-senior judges, can't make up its mind about whether a search is a search.

J Josh Windham 03:48

That's right. I mean, this is a long awaited case for folks who are kind of following the pole camera litigation that's kind of sprouting up across the country. So folks may be familiar with this issue from an episode of Short Circuit from July 23, 2021. My colleague Rob Frommer came on and talked about a case called United States versus Tuggle, which involved, you know, eerily similar facts to the facts in this case. And so if folks kind of want more background on this issue, or want a refresher on what, you know, kind of the legal landscape is here, it's worth checking out that episode a Short Circuit from last year. So anyway, this case concerns a Federal Bureau of Alcohol, Tobacco and Firearms and Explosives, ATF, investigation that started in Springfield, Massachusetts in May of 2017. And ATF agents suspected a woman named Nia Moore-Bush of selling narcotics and running guns, that is selling them without a license, initially by herself but then once she moved into her mom's house, they suspected her of doing it there as well. And so in order to, you know, learn more information about what was going on, the agents installed a surveillance camera on a utility pole across the street from the home. And they didn't get Moore-Bush's consent, obviously, they were doing it in secret, didn't get a warrant. And they didn't claim to have had probable cause or any kind of suspicion at all really, you know, when they were doing this, they just set up the camera and decided, you know, we're going to see what we can see. Right. So from where the camera was located, it had a clear view of the home's side entrance, so not the front door, but the side entrance, which was apparently by the driveway, and in the garage itself. And so when the garage was open, you know, the camera could see into the garage. And just like in Tuggle, the camera had a number of kind of capabilities that allowed police to, you know, get better views. so they could pan, they could tilt it, the camera could see it. And it didn't have night vision, but you know, it was constantly recording at night as well.

J Josh Windham 05:59

And apparently, the way it could zoom was pretty powerful. It had the capacity to basically, you know, give you binocular type views of things. And so the camera recorded 24/7 live streaming to a government website, and then storing all that data as well to be accessed, you know, retroactively for about eight months. And once the agents felt they had enough information or evidence, they arrested Moore-Bush and charged her with federal drug and gun trafficking crimes. And so as criminal defendants often do in this situation, when there's what they think is a warrantless search, Moore-Bush moved to suppress the evidence that was used to, you know, form the basis of the arrest. And they argued that recording and accessing eight months of 24/7 video footage was an unconstitutional warrantless search. And she said it was a search of

her curtilage, because the curtilage is this constitutionally protected area sort of immediately surrounding the home. And there was not really any dispute in this case, that what was what was being recorded was within the curtilage of the home. And so, you know, it's notable how little was actually disputed, that there wasn't a dispute about whether a warrant was obtained, whether there was consent. There wasn't a dispute about we didn't have probable cause. There wasn't a dispute about this is the curtilage of the home. Really, the only question in the case was and is did a search occur under the Fourth Amendment, because the Fourth Amendment by its text, you know, protects people's right to be secure in their persons, houses, papers and effects from unreasonable searches. So this case just sort of turns on did a search occur occur or didn't it? And the First Circuit's decision...so let me back up a little bit. The district court ended up granting the motion to suppress, saying that a warrantless search did occur. And it's interesting in the context in which that happened, because the First Circuit had a case panel decision from 2019, called Bucci, that involved essentially the exact same facts as this case. And it held that, look, a poll camera looking at things that people knowingly exposed to the public is not searching you. It's not conducting a search for purposes of the Fourth Amendment. And that decision was pretty in line with a number of prior decisions dating back to Katz. That said, basically, things that you knowingly expose to the public are not things that can be searched under the Fourth Amendment, you know, they are things that any passerby could just see by walking by or, you know, maybe a neighbor looks at you and neighbors can see these activities. And so there's not a search going on here. Well, the U.S. Supreme Court's decision in Carpenter in 2018 was sort of this sea change in how people started to think about these issues, because in Carpenter, the Supreme Court held that the government's accessing cell site location information, CSLI, seven days worth of location information about where a person, you know, had been out in public was actually a search that violated a reasonable expectation of privacy. And so the district court said, well, actually, Carpenter has changed the game, the Bucci decision is no longer controlling and I'm going to follow Carpenter. And so this kind of question on appeal really centers around, is Bucci still controlling? Did Carpenter change the game? Those kinds of questions. Now, the First Circuit issued an en banc decision in this case. And so there's a number of things I want to break down. When Anthony says there's 129 pages,I mean, this is there's a lot going on. It's pretty complex. And so I want to try to boil it down to kind of the essentials of, of what's happening here. So first of all, there's a per curiam holding that says, we're going to unanimously reverse the district court's decision. So all six judges on the First Circuit say they're unanimously reversing but they're deeply divided on the basis for that reversal. So, you have two concurring opinions that sort of go to war with each other. You have an opinion by Chief Judge Barron joined by two other judges. In his he would hold that a Fourth Amendment search did occur, but that the motion to suppress should have been denied because of the good faith exception to the exclusionary rule, which we can talk about a little bit later. And then you have an a concurrence by Judge Lynch joined by two colleagues who says actually, we should be applying starry decisis here, we should follow the Bucci decision, and Carpenter definitely does not justify departing from Bucci. And so maybe we should pause there. Anthony, I want to unpack both those concurring decisions, but is there anything you want to add about the context and kind of setup of the case before we dive into what the concurring judges talk about?

A Anthony Sanders 11:00

Yeah, well, I think it's just an interesting issue, as a side note, as to whether Carpenter overruled this specific case or made it that it wasn't law anymore, essentially, of course, it didn't directly overrule it. And I think you could, I mean, I think both sides make an interesting point there. But that's, of course, a little separate from just the point of, in this Carpenter world,

maybe setting Bucci aside, in this Carpenter world, whatever circuit you're in, how does that change the analysis? You know, given that before Carpenter, you would instead have a quite different way of looking at the situation?

J Josh Windham 11:52

Yeah, actually, before we get into what the concurring opinions say, what their disagreements are, it's worth kind of surveying the lay of the land here. So prior to Carpenter, you had a number of circuit court decisions that actually did address, you know, the use of pole cameras surveilling homes in different contexts. So you had the Sixth Circuit and the Tenth Circuit saying that the use of pole cameras in this way is not a search. You have a Fifth Circuit decision saying that it is a search in a context where the homeowner had erected a fence. And so maybe I'd taken some steps to try to preserve privacy. And so there's this question of whether that was a dispositive difference between the circuit court decisions. And most recently, you have, you know, decisions post Carpenter, like Tuggle from the Seventh Circuit, that say it's not a search, and cert has been denied in that case, it was denied in February. And you have two state high court decisions post Carpenter, one in Massachusetts, and one in Colorado from 2020 and 2021, both of which say that it is a search under carpenters reasoning. And so it's the case that before Carpenter, the majority of courts would say, this is not a search. And now post Carpenter, it seems like more courts are saying it is a search, but there's still a divide. And so it's fair to see Moore-Bush this First Circuit decision as sort of a continuation of this ongoing debate, which is, you know, not to put the cart before the horse but sort of why it's, it's, it's pretty clear, we should expect a cert petition in this. I would expect there to be a fair amount of activity around that in the coming months. So anyway, let's dive into the concurring opinions. So let's start with Chief Judge Barron's concurrence. So his approach is to apply the Katz test, because there's two ways of, according to the US Supreme Court, there's two ways we figure out whether a search has occurred, right? One way a search can occur is if the government physically intrudes on a constitutionally protected area for the purpose of obtaining information and judges in courts call that the trespassary test, or the common law trespass based test. It's a question of whether there requires a common law trespass or simply a physical intrusion. But it's a distinction without a difference here because judge Barron and the rest of the judges say, well, actually, there's no trespass here. So what really matters is other tests. Under Katz, I mean, there's a debate about what the elements are. But basically, you can think of it as two steps. A person has to subjectively exhibit or manifest an expectation of privacy, and that privacy expectation has to be one that society is prepared to accept as reasonable. And Judge Barron treats it like there's three prongs and he kind of adds this. He says, well, also the government has to intrude on or infringe that expectation. So he does it in three steps and says, you know, also did the government intrude on it? Just starting with step one. Judge Baron says that Moore-Bush did manifest an expectation of privacy in her, quote here, because it's a useful phrasing, "the totality of her movements and activities and associations...in the curtilage of her home." Now, he would have held that the reason that Moore-Bush manifested that expectation was that she chose to live in a quiet residential neighborhood where she had no reason to think anybody was doing 24/7 video surveillance. And it's, it's worth pausing here, because that just seems a little. It's interesting that that's the approach judge Barron takes because typically, when you hear courts talk about exhibiting or manifesting an expectation of privacy, there is some kind of like affirmative step taken, like you've put up a fence or you've put up maybe a no trespassing sign in certain contexts, right? But here, it's just that Moore-Bush chose to live in a neighborhood where she didn't think surveillance was.

J Josh Windham 16:03

That's true wherever you live. I mean, the curtilage is going to be very different, say, an apartment versus a home, whether it's a residential neighborhood or a mixed use neighborhood, in the city, anywhere, people have that expectation. So I don't quite get that distinction,I think what Judge Barron is doing is sort of giving the benefit of the doubt to anybody who happens to live in a home, right? It's like, well, any reasonable person in this person's shoes would not think they were being surveilled. And therefore, Moore-Bush has manifested an expectation. I mean, it's a little bizarre, it's very legalese, right? But it's sort of a common sense approach of like, nobody would think they're being recorded in this context. And so the government, interestingly, argues, Well, it's not enough that she just chooses to live there, you know, she has to do something. She has to erect like a privacy barrier, like maybe a fence or some shrubs that conceal from view, you know, for activities in the curtilage. Because otherwise, any casual observer, like a nosy neighbor, could see what the ATF agent saw. It's open to public view. And in the concurrence, Judge Barron disagrees. And he basically says, Look, there's a huge difference between an expectation against like a chance observation when someone's just like strolling by or looking out their window, or even flying a plane over. And long-term targeted and secret surveillance, trained on your house for months and months and months, it's just a different kind of thing you would have an expectation against. And second, you know, the Carpenter case, which found a reasonable expectation of privacy in the whole of a person's physical movements in public, according to Judge Barron didn't require, you know, walking around in disguise to prevent casual observations. And so why would we require someone like more bush to take steps that clearly weren't required in a case like Carpenter. So Judge Barron is not convinced by the government's argument. And he says, the first prong of the Katz test is satisfied. So then we move on to the second prong. And Judge Barron would hold that Moore-Bush's expectation in the whole, or what he calls the aggregate of what went on in her curtilage, was one that society was prepared to accept as reasonable. And I think is, frankly, you know, Judge Barron kind of keys on the fact that it's, it's more revealing, and it's more detailed, and it's more intrusive, even than what happened in Carpenter, because in Carpenter, with the CSLI, the cell site location information, we're talking about like dots on a map that indicate where a person has been. Here, we're talking about 24/7, you know, color TV video that agents can kind of watch at their leisure for, you know, eight months, and that just seems much more detailed and perhaps much more intrusive than simply somebody's location on a map. Right. And so, Judge Barron doesn't really have an issue holding that under Carpenter, if it's true that a person has a reasonable expectation of privacy in the whole or aggregate of their movements in public, then certainly somebody has to have that same expectation in the curtilage of their home, which traditionally, is something that's gotten heightened privacy protections under the Fourth Amendment. And so finally, we move to step three, which is this question of whether the government actually infringed on on that reasonable privacy expectation and Judge Barron... and I don't know what I think about this form of reasoning. It's I like to talk about this a little bit later, once we've gotten through the summary, but Judge Barron says that the fact that the government not only recorded it but then accessed the information is what constituted the infringement on Moore-Bush's reasonable privacy expectation. It's the fact that not only did they record this detailed, encyclopedic, backward-looking repository of information, but it's the fact that they accessed it that constituted the search, which I find interesting because the record isn't Moore-Bush's record. It's data that the government collected and owns right now, the question of whether they did that, constitutionally is perhaps important here. But it seems like Judge Barron is more focused on the fact that they actually access the information, which, to his credit is what, you know, what the court in Carpenter said, that the accessing of the CSLI was what constituted the search in that context.

J Josh Windham 20:44

And so, you know, before we move on to kind of the rest of Judge Barron's concurrence, and the the part that gets into holding that ultimately, the motion to suppress should have been denied, I think it's notable the way in which he disagrees with the Tuggle court's decision from the Seventh Circuit. So he says, Look, Tuggle is distinguishable because Tuggle was really concerned about the line drawing problems that might arise if we apply something called the mosaic theory, right? The mosaic theory basically says that, you know, if you get if the government conducts a kind of surveillance that would give you a mosaic or a big picture look at someone's entire life, including their patterns and habits and associations, that might constitute a search or that might violate a reasonable expectation of privacy. And Judge Barron basically says, I don't see the same line drawing problem here. I just don't see it. Because we've got cases like Carpenter, we've got cases like Jones, where five justices agreed that 28 days of GPS tracking on a car would violate a reasonable expectation of privacy. And so I just don't think there's the same problem here. I think this misses what's really driving Tuggle, because like, the way I read Tuggle is that it's really focused on this idea that there's this solid line of cases going back to cats that say over and over and over again that it's not a search to look at what you knowingly expose to public view, that police don't have to shield their eyes to what anybody could see. And I'm not saying I agree with that reasoning, but I think it brushes Tuggle off a little bit to just say the Tuggle is about the mosaic theory or that's the only basis on which we need to distinguish it. Because really, the core problem is that and I think this is what other concurrence, Lynch, keys onto, is that Moore-Bush just did this stuff in public. So this is an issue that I think it's hard to really get around. And I don't think dismissing Tuggle on a different bases really addresses although

A Anthony Sanders 22:43

You do have in the background, and the court does talked about this some in the Kyllo case, the case from 2001 about heat imaging. And that, of course, is inside the house, marijuana plants growing, grow lights inside the house. That, of course, are not in the public view, but that heat is in public view. And so if someone is in the curtilage, which is like being in a house, and they are being recorded in a way that no human would ever do or even be capable of, I think I see how that's a problem. That was a problem for Tuggle and how the concurrence here is, although they rest more in Carpenter than on Kyllo, that's kind of in the background also.

J Josh Windham 22:43

Yeah, no, it is. I mean, and Kyllo is, I think a case that both opinions wrestle with, Tuggle wrestled with as well. Ultimately, you know, one thing that's notable about Kylo is that Judge Baron says, well, Kyllo basically says that if police are using a technology to invade a space that otherwise wouldn't have been possible to invade at the founding, and the technology is not one that's in general public use, it's not a conventional technology that people would reasonably expect police to be using, then that's going to constitute a search, that's going to violate reasonable expectation of privacy. And so there's a fair amount of debate between the opinions here about, you know, whether this is actually a conventional Yeah, technology. And we can get to that in a little bit. Because I think Lynch's concurrence definitely thinks that it is a conventional technology. But in any case, you know, Baron concludes by saying this is a search

and yet we're still going to hold or we would still hold that the motion to suppress should have been denied, under what's called the good faith exception to the exclusionary rule. So there's a case that Barron cites called Davis from 2011 from the Supreme Court that says that a search conducted in objectively reasonable reliance on a binding appellate precedent is not subject to the exclusionary rule. And so because this 2009 case Bucci squarely addressed the question, the exclusionary rule shouldn't apply. In other words, because in 2009 a panel of the First Circuit held that using a pole camera like this without a warrant doesn't constitute a search at all, you know, ATF officers were right to kind of rely on that precedent. And, you know, we shouldn't exclude the evidence obtained in in objectively reasonable reliance on that precedent.

A Anthony Sanders 22:45

It's like qualified immunity, but not quite as bad, because the officer needs something kind of affirmatively saying that it is constitutional, instead of qualified immunity, where you need something that says that this absolutely is unconstitutional, otherwise, you can do whatever you want.

J Josh Windham 26:02

Yeah, it's definitely a similar logic to qualified immunity. I'm not sure that I agree that it's not as bad.

A Anthony Sanders 26:07

It's not quite as illogical, I guess.

J Josh Windham 26:13

Yeah. So one thing I wanted to just note about this is that there's a debate right about the exclusionary rule. It's kind of live and ongoing right now. And, you know, one thing that's, I think, going on here is that, you know, there are supporters who would argue that the exclusionary rule is all about deterrence. And so excluding evidence here wouldn't really help with deterring unconstitutional behavior, because the ATF officers followed what they thought was the law, and what in fact was the law in the First Circuit. But critics would argue that the rule is actually a remedy for a constitutional violation in the same way that damages are under Section 1983. And one that, you know, in the criminal context actually has massive stakes, you either go to jail or you don't. And so if the court is going to say that a violation of the Constitution objectively occurred here, if that's what Barron wants to hold, it can't be that the violation can be used to throw somebody in jail, you know, whatever the subjective motivations or reasons of the officers happen to be. And so there are certainly concerns with applying the good faith exception in this context, if it's even legitimate at all, but that's maybe a question for another day. So let's move on to Lynch's concurrence. First of all, Lynch's concurrence is a bit shorter than Barron's. Thank goodness, because the courier font, like you said, Anthony.

A Anthony Sanders 27:48

Yeah, the opening concurrence was 99 pages. Yeah.

J Josh Windham 27:55

But so Lynch is a little bit shorter, but basically, Lynch disagrees on the Carpenter question, that's the fairest way to put it. Lynch sees this as a straightforward application of stare decisis, says the court should follow the Bucci decision and that Carpenter just doesn't justify a different result here. And so the courts that are starting to hold that are wrong. I want to highlight maybe four points from Lynch's concurrence. So one is that Lynch says that there's no subjective expectation of privacy here under that first Katz prong. Because, again, Moore-Bush exposed all of this to public view and didn't take any measures to conceal it or block it. Now, again, Barron disagrees with that it's even necessary under Carpenter. Two, Lynch disagrees with the Carpenter analogy. So Carpenter has a few, I don't know if you want to call them factors, Barron kind of treats them like factors, but basically says that a number of things have to be true or ought to be true for Carpenter to control. And so Carpenter relied on a few things that relied on the fact that technology was super cheap and easy for the government to use, that it was really invasive, and kind of gave them access to a big picture look at someone's life, and that all the government had to really do is like click a button, and they can access this fast kind of retrospective repository of information. Carpenter also said that the opinion was narrow and wasn't going to disturb conventional surveillance techniques, and specifically including security cameras and the government's ability to use those free from the Fourth Amendment's constraints. And so obviously, Barron disagrees on all of those fronts, and the one I want to point to specifically as a security camera point. So Barron thinks, you know, security cameras are markedly different than pole cameras, and I find that it's an interesting distinction that these judges are trying to draw, but Lynch would say basically, these have been around for decades, you know, governments have used pole cameras for decades, including, you know, in the lead up to Carpenter they were used widely. And so if Carpenter isn't purporting to turn over the applecart, why would you all of a sudden hold that Carpenter is in fact doing that, right? And Barron's point is actually that surveillance cameras of the sort that are used here have grown much more intrusive and efficient.

A Anthony Sanders 30:20

And invisible, right? Like the old fashioned security camera from a couple decades ago, you'd see them, they're sitting there on the pole, if you're a drug dealer, you're probably going to notice it. But these newer cameras I take it are, are much more easy to conceal.

J Josh Windham 30:39

Yeah, and one thing that they you know, there's a little discussion between the judges about, you know, Barron's like, well, security cameras just incidentally pick things up, right? I mean, they're they're there for typically a non-criminal purpose, or either they're just to kind of keep watch over a shop or something like that. And maybe that footage is turned over to police later. But it's there for the store owner's purposes to kind of keep, you know, watch on what's going on in their own shop and to prevent theft. And they incidentally pick things up, whereas a pole camera is secret, it's trained on somebody for, you know, months and months and months. And

it is targeted to them for the specific purpose of finding evidence that that person has committed a crime and so that the judges just disagree about, you know, whether pole cameras are really the same as security cameras. But as I'll talk about in a minute, I think this distinction is just a bizarre one to think the case turns on. So the last thing I want to point about Lynch's concurrence is that Lynch says that, so Lynch agrees with Barron and about the, about the capacities of pole cameras.

J Josh Windham 31:51

And I think it's revealing that, you know, Lynch doesn't find what's going on here, the surveillance, intrusive. So in Lynch's view, all of this is sort of knowingly exposed to the public. And, you know, here, unlike CSLI, which detects where you go out in public and you wouldn't reasonably expect somebody to be tailing you for days and days out in public, you actually do expect that people know you're going to come home every day, you actually do expect that people are going to know that you're constantly meeting people at your front door, for example, when you get mail. And so Lynch actually thinks this is revealing less about somebody than it would if you are kind of tailing them out in public, which I find really, it's an interesting argument I hadn't heard before, and I'm not sure I agree with it. But it's an interesting point nonetheless. And there was no discussion of good faith exception for Lynch. For Lynch this all turns on Carpenter doesn't doesn't control, we need to follow Bucci, and so no, no Fourth Amendment search occurred.

J Josh Windham 32:59

I have a few kind of thoughts on all of this and some of the themes that are addressed here. And so I think that there's something nice going on in the Baron approach. So Barron signals a broader concern throughout the opinion that the Fourth Amendment's purpose is about preserving your right to be secure against this sort of brave new world of pervasive surveillance and that holding this wasn't a search means the government can just do whatever it wants to do in this context, right? So we're seeing reports of, you know, kind of all encompassing camera networks in China, where there's a camera on every street corner, right? And do we really want to let that kind of Orwellian world come about? Now, some would say it's a policy decision, but I think Barron's perspective is that actually the framers just could not have thought this was okay,could not have thought this was consistent with your right to be secure in your home. And so this sort of broader purpose based reasoning, I think, kind of animates Barron's approach to this. Now, in Barron's decision there's a number of things that I just don't see why they matter to this analysis. And this is a broader creature of maybe problems with kind of the Katz test, this question of what society would think is reasonable. So let's unpack a few of those. So Barron says that, you know, what matters is whether the government is recording and accessing a repository of information on the whole or the aggregate of somebody's movements or activities. And I just don't know what that means, right? So like, what is the whole of someone's movements, because inherently when you're recording a slice of time, you're not recording the other time that you don't record. So there's, it's inherently limited already. It's less than the whole of something broader, when you've taken a recording, that is finite, right? And then you have the question of, well, the government has to access it. And so how much of the recording does the government have to access for them to access the whole or the aggregate? And there's not really a discussion of how much access has to occur of what was recorded for it to be an access of the whole or aggregate.

A Anthony Sanders 35:23

It kind of reminds me of some national security cases, these programs that will pick up all phone calls that go internationally or what have you. But the actual kind of Fourth Amendment angle comes in when you search them. And there, I think that sometimes you even need to get a FISA warrant to do some of those searches. And I wonder if he kind of has that rubric in the back of his mind that well, you can pick all this up, but if you never look at the footage, who cares? And it's when you look at the footage that we need to be more careful.

J Josh Windham 36:07

Yeah, I mean, it's just bizarre, though, because I mean, there was eight months recorded here. I don't know how much was accessed. I don't think the opinion goes too far into that. But suppose that, you know, only the last two months were accessed. And that information was the information on which the arrest is right? Would Barron have still said it was a search, even though it was only two months that was accessed, even though eight months was recorded, right? It's just hard to know what the answer to that is. But, you know, I'm also a little confused about what the search is under this theory, because if the concern is about accessing information about the whole or the aggregate of somebody's movements or activities, then the concern isn't about a discrete recording of a discrete thing. It's actually about an inference that you're drawing from the recordings. And so it's sort of like treating an inference like a search. And I just don't know if that's a thing that makes any sense under the Fourth Amendment. Now, I'm not saying the result that Barron wants to reach is wrong. I just don't know that this theory is coherent in my view.

A Anthony Sanders 37:22

So to me, this goes back, and this is something that us at IJ have spoken about many times, and perhaps we have different views on, that I see this as a search. I think really what is going on is is this a reasonable search? Or is it a search where you should get a warrant? And to me, this seems very unreasonable and you should get a warrant. But I could see how people would disagree on that. But whether it's a search is starting to do to do violence, to steal a term which usually I think it's pretty stupid to use when you're talking about language, to the word "search," because of course they're searching, they're searching the curtilage with that eight months of surveillance video. And arguing for 129 pages over whether this is a search or not instead of "was this reasonable," I think is kind of putting the cart before the horse.

J Josh Windham 38:22

Yeah, I mean, this was the theme of the Institute for Justice's brief in Tuggle. We found amicus brief at the cert stage in Tuggle. And our argument was, essentially, look, the Katz test is confusing and broken and what the court ought to do is take this and adopt a more clarifying test. And we call this the ordinary meaning tests in our brief, but the idea is that a search just in normal parlance, and if you look back at the founding era, it was true then as well, search just means a purposeful investigative act directed at somebody or their property, right? And so, it doesn't seem at all like a question that if a neighbor was just watching you in this way, that

they'd be searching for something, they'd be trying to learn something about you, right? And it's definitely the case that your home and your curtilage are protected. And so it's not an issue of whether they're searching something that's constitutionally protected. Like they're trying to learn information about you and your curtilage, they're searching for something about you. The question about whether it's reasonable or not I think is really the salient one here. And so, what we have here is a test that just kind of flouts the ordinary and commonsense meaning of what this term actually is and says, and that's why I was gonna say that, you know, I think it's just bizarre that there's all this discussion between the judges about how conventional is the camera or how much of a barrier should someone have to put up, like is five shrubs enough, is six shrubs enough? It's not obvious why any of this stuff matters to the question of whether a search has occurred, because whether a search has occurred is just what are the agents doing with the camera? And they're obviously searching regardless of any of these other factors.

A Anthony Sanders 40:11

And one great point, I think that the opening concurrence makes is that if this was done by a neighbor, under state tort law in a lot of states you would have a cause of action. And they list all these cases where someone has done this and, you know, whatever the invasion of privacy tort you'd have, you can't do that. And so if you can't do that if you're a neighbor, if you're the government you have to get beyond the initial step of is this a search or not?

J Josh Windham 40:46

Yeah, I was going to place a bet with somebody about whether Anthony Sanders would make a comment about the reference to common law torts in this, and you did it, so I should have made that bet. But yeah, so the analogy was to the tort of intrusion upon seclusion, which I don't have tons of experience or familiarity with so I just kind of Google like...

A Anthony Sanders 41:07

For the record, I don't either, but anyway.

J Josh Windham 41:09

So the elements that I found on a quick search are unauthorized intrusion/prying into a person's seclusion, highly offensive/objectionable to a reasonable person, the matter intruded upon was private, and the intrusion caused anguish/suffering. So that to me kind of sounds like the Katz test honestly, right? Was it an intrusion on something that somebody would think was private in a way that was offensive and caused them anguish, basically. That to me is kind of the gravamen of the Katz test. So it's interesting, that to Orin Kerr's point kind of all comes full circle.

A Anthony Sanders 41:47

Well, we could talk about this case all day, given the 129 pages of courier font. But instead, I think we're moving on to Indiana, where there was a better font and a better page count in this

think we're moving on to Indiana, where there was a better font and a better page count in this recent case that I think anyone who's interested in separation of powers, non-delegation doctrine, that kind of stuff, would be interested to read even though it's on a state constitutional issue specific to Indiana. The case is Holcomb v. Bray, and it concerns yet again, a theme here on Short Circuit, another case born out of the pandemic. So what happened in Indiana is the governor had issued some emergency regulations, what they are is not relevant to the case. But during the pandemic, the General Assembly was out of session. And so it couldn't do anything in response to some of these measures. And so when it came back into session, it wanted to make sure that it could call itself into session when it was out of session in the future. Now, what the law actually says in the Indiana constitution, is that the General Assembly has wide powers to set its own schedule, but that the governor is the only authority that has power to call a special session. There's a lot of history and background about this that I discuss a bit in a blog post that we'll put a link up to. But essentially, the background is that way back in our past in the founding of the country, so before Indiana was even a state, legislatures were thought to be kind more of the repository of the people than the executive. And this goes back to, you know, revolutionary times and how during the revolution the idea was that the trust should be in the legislature that's close to the people and not the executive, which had parallels to Old King George. But over time, the Constitution itself is a manifestation of this, over time people got more fed up with legislatures and the crooked deals that they do, that that kind of thing. And eventually, in the middle of the 19th century, this really got to a point where legislators were very untrusted, and a lot of restrictions were placed on their power in state constitutions. So Indiana's constitution, the current one was adopted in 1851. And it had quite restrictive measures on when the legislature could meet and how long it could meet. You may know that there's a lot of states still today where the legislature, say, only can meet every other year, like Texas is an example of this. There's a few other states, Montana is an example of this. They only meet once every two years, and then only for 90 days. Other states, I think Georgia, they meet every year, but only for 40 days. So those restrictions, however, got in the way of a lot of the growth of government in the 20th century. And so some states reformed their legislatures during that time, Indiana was one of those. So Indiana finally passed an amendment in 1970 that gave kind of the opposite, gave what they call the General Assembly, their legislature, wide powers to set its own schedule. But it still kept the power to call a special session in the governor. So what the current constitution says is the General Assembly has to start in January of each year, not every other year. And then it can, by law, set a different time or set its own schedule. The governor can call a special session when they're out of session. And then, and this is the key phrase, the length and frequency of the sessions of the General Assembly shall be fixed by law. Now handily, elsewhere in the Constitution, "law" is defined, this is in the article dealing with the legislature, "law" is defined as a bill passed by both houses of the legislature and that then is either signed by the governor or they override a gubernatorial veto. So law can't just be, you know, a proclamation by one or both houses, something like that.

A Anthony Sanders 46:41

What they did, because they were angry about not being called into session, is they passed a law that created this new entity called the Legislative Council of kind of the eight senior legislators from each house. And this council has the power to pass a resolution to call the legislature back into session when the legislature is out of session. And they said that this was under their power to define the length and frequency of their sessions, and it's "fixed by law." So the question for the Indiana Supreme Court, which the governor essentially suing the legislature is, is this delegation to this Legislative Council unconstitutional? Because it is not an

act of the legislature where it is defining its own term and where it's fixed by law. And the Supreme Court said that, yes, it's unconstitutional. There's a number of provisions of the constitution that also come into play. Indiana, like many states, but unlike the federal Constitution has a separation of powers provision that explicitly says that each branch will have its own powers unless it's stated in the Constitution that the power is to be shared differently. And so because "fixed by law" means by bill, it doesn't mean by this proclamation or resolution that is delegated, it is unconstitutional. Now, the interesting thing for me about this is not so much the legislature setting its own schedule, but that it's a little bit of an example of the non-delegation doctrine that you hear a lot about these days under federal law, and that, you know, the Supreme Court has never done anything about in close to 90 years now. But it's kind of come close a couple times recently with some of the new justices and so they think that, non-delegation might get a lot more veracity sometime soon. But this shows that, you know, this is a kind of less controversial case than some of those cases. I know the pandemic, of course, created all kinds of controversy, but really, it's about whether the legislature can just kind of meet whenever it wants, or whether the governor has some saying that. And by trying to get around that through creating this kind of separate entity, they found that no, the legislature can't delegate that. Usually non-delegation doctrine is where the executive itself is, you know, passing laws, we call them regulations, that you might argue should be passed by the legislature itself. So it's not the same instance of that, but it's an example of how the tug and pull between the legislature and the executive can cause the courts to step in and say that the legislature is overstepping its bounds. One other interesting thing from the opinion is that this is an example of how the executives are split in most states, unlike for the most part under the federal government. So the attorney general is a separate elected office from the governor. And the attorney general in this case intervened and said, Only I can represent the governor. And the governor wanted his own counsel. And attorney general said, No, no, no, he has to have me as his lawyer. And the Supreme Court said, Well, maybe that could be true, but the way the statutes are written, actually he can have his own counsel.

J Josh Windham 50:32

And not only that, but the attorney general argued that you need my consent if you want to sue. You need the permission of the attorney general's office as the governor to file a lawsuit.

A Anthony Sanders 50:45

Yeah, I am the gateway to the courts for the governor, which would of course, give the attorney general all kinds of power in a lot of other areas. But the courts brushed the AG back there. Josh, I know you have some opinions on how this case was written.

J Josh Windham 51:01

I thought it was written beautifully. I mean, the thing that's astonishing about it is that, so this is Chief Justice Rush, and credit to him and his clerks. Or he or she, I don't know whether male or female, I don't want to throw shade at anybody. But yeah, clerks as well. I mean, this was beautifully written. And it's an esoteric, kind of dry history, heavy discussion of separation of powers. And it's not the kind of thing that gets most people like jumping out of their seats with excitement. Unless your name is Anthony Sanders, but it's super easy to follow. It's very, very

clear in it's logical progression. It's meticulous. And I want to contrast that with some, I won't say who, but some of the opinion writing in the case we discussed earlier, which tends to be very repetitive and using the same quotes over and over again, nothing like that in Chief Justice Rush's opinion, it's truly a delight to read.

A Anthony Sanders 52:09

Who I will note for the record is the honorable Loretta Rush.

J Josh Windham 52:12

See, that's exactly why...there you go, there.

A Anthony Sanders 52:17

Yeah. And there's some interesting discussion here on standing also, whether the governor has standing and whether there was ripeness. There wasn't a lot in the discussion on ripeness. I absolutely think that this case would be ripe. But it parallels to a lot of cases involving private litigants, where I think they wouldn't get the benefit of the doubt on whether a case is ripe or not. But I think here, obviously, this could come up in the future, it's going to be hanging over the governor's head whenever the legislature is not in session. Of course, the case is ripe.

J Josh Windham 52:51

I mean, there's a number of things that I like about the court's analysis of these justiciability questions, because on the ripeness issue, I mean, kind of the key question on ripeness is like, Are there more facts that need to develop for the court to properly resolve this case? Right? And the court properly says this is a facial challenge to the constitutionality of a statute, right? And so you just look at the statute, you look at the text of our Constitution, and you ask, is it constitutional or not? And there's not really anything we need to look into more factually to figure the answer to that question out. And so it's ripe for judicial resolution. Now, on the standing question, I think the courts analysis is quite good. I mean, different states approached us in different ways. There's this question of what is the relationship between the Declaratory Judgments Act and standing doctrine? Because there's this sort of tension between on the one hand that the DGA is designed to allow for the kind of the early and expeditious resolution of cases that just require the court to answer a legal question. And on the other hand, you know, standing is a pretty robust doctrine that courts tend to use to kick cases they don't want to deal with and so there's a tension between those two things. But here, the court says, actually, there definitely is standing. And it's not just because the governor really wants this case resolved. And it's not just because the case seems like it's ripe. The court says there's standing, because and I'll just read this quote, but this is a test that I think if it applies in other contexts, like for a private litigant, folks are going to have a much easier time bring constitutional challenges. The test is, quote, "plaintiffs can satisfy the injury requirement by showing their rights are implicated in such a way that they could suffer an injury. We need not find that an injury has occurred or is imminent." Like that is markedly different from federal tests, right?

A Anthony Sanders 54:47

Yes. That will make a lot of former plaintiffs very angry, I will say, who had their cases thrown out on standing who definitely had much more imminent harm than the governor did in this case.

J Josh Windham 54:58

Yeah.

A Anthony Sanders 54:59

Well, we hope that that will inform future civil rights litigation, and perhaps those people will be able to better get their rights vindicated. Speaking of Fourth Amendment rights, Josh, thank you for explaining through that courier font that that we all had to wade through today. And I think we're all a little better off knowing where the issue of the poll camera is heading. And to all of you, please check out the link in the show notes to our event in Los Angeles on June 30, if you live in that area and are interested in coming and for the rest of you, I would ask that you get engaged