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SPEAKERS

Wesley Hottot, Anthony Sanders, Anna Goodman

A **Anthony Sanders** 00:24

When you leave the office on a Friday afternoon, make sure you don't use the elevator. Because if you do and it gets stuck, you might be stuck there all weekend. That was advice that was given to me at my old job, where we lived in a worked in a Chicago office building with three floors and an elevator that I swear was manufactured in the 19th century. And the elevator would actually get stuck quite a few times, in fact, and so I never took the elevator on a Friday afternoon. That's one thing that we're going to talk about in the context of qualified immunity today on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, June 29, 2023, and I have two returning Institute for Justice attorneys to join me on Short Circuit to talk about elevators and also airports. Two very exciting topics, but both in the context of civil rights cases. So first, we're going to hear from our old friend, Wesley Hottot. Wesley, welcome back to Short Circuit.

W **Wesley Hottot** 01:43

Thank you very much. And then we're going to talk about a case that Anna Goodman is going to present. Anna, welcome back as well.

A **Anna Goodman** 01:51

Thanks, Anthony.

W **Wesley Hottot** 01:52

So Wesley, this, I think there's been some scuttle about this case the last few days since it came out in the Sixth Circuit. And the interesting thing about it is that it presents qualified immunity, not with a split second decision by a cop, but by a not so split second decision by an

inspector of elevators. I will say that the elevator that I used to take in that building, always had its inspection certificate up from the City of Chicago, although I think the city hadn't been there in 20 years or so I don't know if maybe that was part of the problem. But that wasn't the problem for this hotel, which seems like it was doing everything right. So tell us a little bit about elevators, Sixth Circuit qualified immunity, and how it relates to trying to leave your hotel on a Friday afternoon or any other time. Yeah, so this case is Sterling Hotels vs Scott McKay from the Sixth Circuit. It was released on the 22nd of June, and in it, we have a unanimous three judge panel with Judge Kethledge writing for the panel. And what had happened was Sterling Hotels had, I believe, five elevators. It's in Sterling Heights, Michigan. And those elevators needed a backup system in case of an emergency. So they were informed by the, you know, the regulating agency that they needed to make these changes. They applied for a variance, and it was granted. The board subsequently came back and said, Hey, in light of this variance, we'd like you to install these sort of battery backup systems. That in the event that the power goes out, it will take all of the elevators down to the ground floor, so that no one gets stuck, right? They agreed to make these changes and implemented them. So they had the backup battery system working. The board sent an inspector out to confirm that it was working. It was working in the way that they had agreed it would, but the inspector nevertheless failed all of the hotel's elevators. Which if that doesn't sound like a big deal, the opinion mentions that it meant that the hotel could not rent rooms on five of its six floors.

A Anthony Sanders 04:30

Well unless you pretend like you're in Paris, then there are no elevators.

W Wesley Hottot 04:35

Right.

A Anthony Sanders 04:36

Sterling Heights is a little different than Paris, I get it.

W Wesley Hottot 04:39

I think so. Yeah, I mean, I wondered the same thing. Couldn't people walk up the stairs and I imagine some people could, but in any event this was a huge setback to their business. And they took the unusual step of suing the elevator inspector. I mean, at this point, it sounds like they have no real gripe with the agency. The agency has been accommodating, it's let them know what they need to do. Their gripe was with this inspector who insisted that the emergency system was not operational, because it was bringing the elevators to the ground floor, rather than the basement where there were no exits. So I'm not really sure what was motivating this inspector. I mean, perhaps he was a stickler for the rules and interpreted ground floor to mean the lowest floor in the building, but it doesn't seem like it would increase safety at all to take people to a basement that had no exits, right? Like you'd rather go to the lobby floor. So in any event, he fails these, these five elevators, leaves them with no elevators operational, and they take the step of of suing him. The district court dismissed one of their

claims, an equal protection claim, on the face of the complaint, but then declined to rule on McKay's qualified immunity defense. So qualified immunity, it's not just for police anymore. It's for, you know, any government actor who, who in the course of their duties, like is being sued for the decisions that they made. And the district court said, Well, we're gonna have to kick this can down the road and decide later. The Sixth Circuit in reviewing that decision says, Well, first of all, yes, there are some circumstances where qualified immunity needs to wait the development of a record and be decided on summary judgment rather than at the motion to dismiss stage. But those circumstances are rare, and this is not one of them. So the district court should have, and district courts should in general rule on these QI defenses at the motion to dismiss stage. But because refusing to rule has been held in prior Sixth Circuit decisions to be equivalent to a denial of qualified immunity, which seems fair, right? The whole point of it is to keep the case from going forward. They nevertheless analyze the immunity question, and this is where things, you know, take an unexpected turn. As you know, listeners of the podcast will know, one of the key doctrines in qualified immunity is whether there is clearly established law, from the circuit on point, saying that the right that is being invoked is a right that people have vis-Ã -vis the government, and they can sue under 1983. And here the court construes the right at issue as the the well-recognized, venerable right to notice and an opportunity to be heard. And, you know, so construed, obviously, this guy is not entitled to qualified immunity, right, because he just shut down their elevators without any prior notice of what the requirement was going to be. In fact, it seemed to be directly contradictory to what the agency he worked for was telling these folks they needed to do. It wasn't written anywhere in the agency's policies. In fact, it seems to have been a poor interpretation of the rules. But while that seems like the correct outcome, in this particular case, it's really puzzling because of how the court goes through the analysis. If we decide qualified immunity on such a broad scale, as whether a person has a clearly established right to notice and an opportunity to be heard, well then we wouldn't expect it to to prevent a lot of lawsuits, and yet it does. So if we switch over to the context we're more familiar with where police and making some sort of split second law enforcement decision are sued, courts go looking for clearly established law there in what many people, certainly myself included, view as sort of unfairly specific context, right? The it's not entirely true anymore, as people have started to chip away at this doctrine, but the conventional wisdom is that you have to have a case where the police were held to be liable for doing the exact thing they did to you. And that any small variation will make it so that it is not clearly established and the officers weren't supposed to know. So a great example of this is the Jessop case from the Ninth Circuit a couple of years ago where police were alleged to have stolen a substantial amount of money, that in the course of investigating someone they had seized, and the Ninth Circuit said, Well, that does seem wrong, police probably shouldn't steal property from people, but there's no case, There's no case that says that they, they can't do so. And so therefore qualified immunity in that case was upheld for the officers and the Supreme Court ultimately didn't take the case. So if the level of specificity for police has got to be that granular, you would think it would be similarly granular for someone like an elevator inspector, right? But no, the Court just says, We all know that you're entitled to notice and an opportunity to be heard, and this guy just shut down the elevators. Now, I was thinking about this and wondering like, do I agree with this outcome or not? I mean, in one sense, I think it's great that the court is taking a, you know, a more natural reading of the idea of clearly established law. And you're willing to apply it to new factual circumstances where there's not a case directly on point about an elevator inspector, right? But on the other hand, it seems like elevator inspectors, you know, among other people out there in the world, like they, they're not doing their job if they're not shutting down elevators that they deem unsafe, right? And so if the idea is that you're actually entitled to prior notice, and an opportunity to be heard before the elevator can be shut down? Well, now I'm starting to think like one of these apologists for qualified immunity, you know, and that, that, that maybe, maybe this power, in some sense

does need to exist. But then again, you know, I mean, agencies have ways of coming up with rules for emergency orders and the like, and getting quick review. So there are ways of dealing with this that are consistent both with people's constitutional rights, and with, you know, the reasonable power of the government to ensure health and safety in these kinds of circumstances. I just, I'm frustrated by the inconsistency, right? It seems like it's one doctrine. Now, granted, we're dealing with circumstances that don't involve these sort of life and death split second decisions, but then again, maybe we are, right? I mean, no one wants to get trapped in an elevator or, you know, if you are trapped in an elevator to be released into a basement that you can't get out of. And, and yet we seem to have two regimes, right? We've got one regime for the police, where it's so difficult as to, you know, the received wisdom is that it's impossible to overcome QI, although we're seeing it happen more and more. And then in this context, where there aren't guns, there aren't people being beat up, or dogs being killed or houses being burned down. But in some ways, you know, I'm not sure that the transient, you know, disability of some elevators is as socially important as ensuring that police remain under some kind of control, right? I mean, in these QI cases, it's often the estate of someone who's been, you know, arguably, unconstitutionally killed. And they're told sorry, but you know, someone would have had to have died in that exact way before for us to do anything for you. And then here in this relatively mild case, I mean, I'm not belittling the need of a business to, you know, to be able to continue operating, but the stakes are lesser, right? We're talking about money. We're talking about the fact that if you are successful in this case, you could get money damages, right, that would that would cover your losses. That's almost never the case when what we're talking about is someone being killed at the hands of the police.

A Anna Goodman 14:03

Yeah, I mean, I think the whole thing with qualified immunity, and with working at IJ, and being a Fellow here, we talk about it in so many different contexts. And the times when qualified immunity bars situations that, it seems just as a matter of common sense, right? That any police officer or official should know that what they're doing would violate the law, and yet qualified immunity is still held to protect them, because there isn't the case that says, well, on this day when the sky was pink, and it was exactly the same line of activities, they couldn't have possibly known. So it's fascinating that this one goes so far the other direction. I do think there's something to be said for the fact that it isn't a split second situation, and that this was a guy just kind of in the regular course of his duties that had plenty of time to think about it and was very conscious of what he was doing, that maybe goes to that somewhat. But it's very interesting that they didn't really even focus in on that and they really didn't, they kind of just seemed to take this almost for granted that, well obviously, this is the conclusion. So I'm curious to see kind of how this opinion is used going forward, and I would be curious to hear both of y'all's thoughts on kind of how other courts are gonna apply it or use it or its impact in this area.

A Anthony Sanders 15:16

Yeah, that that whole point that both you are very perceptively making about the split second decision versus the other actors. The interesting thing about that is, you know, that seems to be some of the subtext here, is that like a lot of the cases we've talked in the last year or two about on the show in the Fifth Circuit, some of which IJ has been involved with, many of which are not police officer cases, so cases involving school officials and the like, and there's been a

big split and a huge uproar within that circuit about whether you should think about those differently, or, you know, qualified immunity is qualified immunity has actually at bottom, it doesn't have a lot to do with the split second decisions. And so it's interesting that here in the Sixth Circuit, it's just kind of thrown out there. I think, it seems like just the oddness of like an elevator inspector invoking qualified immunity kind of makes the court come at it, you know, first principles, and just have this kind of duh like everyone knows about notice. Whereas of course, that should be the case, and if you're going to have qualified immunity, that would be a much more, I guess, just way to do it. Where you have these broad principles, and you don't live up to them, and everyone kind of would know that, you know, under the legal standard. But this, I mean, that the Court doesn't cite, right, these couple of cases from the Supreme Court in the last couple of years, where the Supreme Court right finally said, Okay, if something is super obviously, just terrible, then you don't need a case on point to say qualified immunity, right? There was the case about the guy who was stuck in his cell for almost two weeks in his own feces and all of that. There's nothing like that here. That's nothing close to that. It makes sense. Yeah, the hotels should not be in this situation. So you know, maybe this is just a one off. The judges just care about this elevator inspector, maybe there's something else? One other thing I'll point out, is at the very end of the decision, right? So this was all procedural due process claim, right? Where there's no qualified immunity. Very end of the decision, they address the takings claim, and they say, you can't have a takings claim against someone in their individual capacity, which I've never heard of before that as a point of law. I guess there's this old Sixth Circuit case that they cite to that says that, because almost always, you know, takings claims are against cities or units of government of some kind. But why can't you have? I mean, it doesn't make sense to me. Why couldn't you have a takings claim against a government official, if he's acting on the, you know, if he's acting under color of law? So that reminds me also of the case that we're involved with at IJ in the Fifth Circuit. We talked about on the show about, you know, whether you can have a cause of action inherently under the under the takings clause. So in any case, it's weird that there's this very permissive, and if you're going to have it, you're gonna have qualified immunity. We'd like it here at IJ standard on one hand, and then this kind of bananas, one paragraph just assertion under the takings clause, which didn't make sense to me. I don't know if they're trying to balance things out there with, you know, the rational with the bananas and one opinion, but that's the vibe that I got.

W Wesley Hottot 15:37

I mean, it struck me a little differently. I haven't done as much takings work as you have, Anthony. But the rationale is, you're suing this guy in his individual capacity. Individuals don't have a takings power, right? Like a person can't take property for public use, and then, you know, incur the responsibility of just compensation. That's something that a government does. But surely, you shouldn't be able to sue officials in their official capacity for takings and regulatory takings claims.

A Anthony Sanders 19:39

And I think I think that kind of makes sense, except it's a it is explicitly a regulatory takings claim. And there I think, you know, I think you're right, like an individual couldn't really do eminent domain. If an individual tried to do eminent domain, I'm guessing that would just be outside their job description.

W Wesley Hottot 19:57

Well, if an individual wanted to do eminent domain, they just go get some government officials do it for them. Well, that's, and that's usually what happens. So, I mean I, I hope this case gets cited a lot. I mean, to me the problem with the whole clearly established thing, which the Supreme Court is now chipping away at with this obviousness principle that Anthony mentioned. The trouble is how slippery the term "clearly" is, right? You know, what is clear to me is not necessarily clear to someone else. And to me, the essence of it has always been like, is there fair notice? Right? And if the standard was fair notice then that sweeps in the obviousness principle, right? Like the cops in Jessop should have known that you can't steal people's money, right? The elevator operator here should have known, and it's perhaps it's good judicial policy to insist on enforcing the principle that you've, you've got to provide people with prior notice of what their responsibilities are, that could make this consistent. But the regime we live under now is one that is so malleable, as to almost force judges to make policy decisions in individual cases. And when you're asking a bunch of you know, guys in robes, many of whom used to work for the government, or were even prosecutors themselves, they're gonna tend to side with the police. And so if you ask them what's clear, you know, the tie is gonna go to the officer. And ultimately, the Supreme Court needs to do away with this judge-created doctrine that I think in a society where we talk all the time about how we don't want judges making policy, this is this is a judge-made policy qualified immunity, that's been made even more absurd by inviting judges to enact their policy preferences and in individual cases, all in contradiction to Congress' wishes under 1983. So, you know, ultimately, we need some some supervision from the High Court.

A Anthony Sanders 22:24

Amen to that. All right, well, I'm not gonna complain about being stuck in elevators anymore. Although I will say I once did a work call from an elevator I was stuck in while I've been working at IJ, and that went pretty good. The cell phone worked from the elevator, and then I was out about an hour later, so the day continued. But in any case, we're now going to talk about something else painful, which is going through an airport when you get back into the country. Now, I think, all those of us who have done this, I've done it way too many times, have, you know, not enjoyed the experience going through customs and all of that. But this one gentleman particularly seems to not enjoy the experience. And then he has good grounds not to do so. So Anna, let us know about if you're an attorney what to do when the customs folks take your phone?

A Anna Goodman 23:24

Yeah, you know, as an attorney that is traveling this long weekend, this was an interesting one to be reading and thinking about. So this is a case out of the Fifth Circuit, it's Anibowei v. Morgan, and the plaintiff, his name is George Anibowei, and he's an attorney in Texas. He primarily works with immigrants, he's a naturalized citizen, and he works a lot with proceedings and deportation proceedings, those types of things. And he travels a good bit and out of the country, and he specifically in his complaint has talked about a few different times. And it started back in 2016, where he was traveling internationally, and was coming back to the United States and was stopped by customs. And they took his phone, and not only looked at it without a warrant or without giving him any reason for why, but then copied information off of

it, then kind of gave it back to him and sent him on his way. And he further has said that every time he's traveled since then, or almost every time that he's traveled internationally in the years that have followed that incident, they have continued to take his phone every time, and the circuit court's opinion says it's not entirely clear if he's saying that they copied information on the subsequent attempts, but they definitely took it, they looked at it without telling him why or if they had any, like suspicion or reason to be doing that. And that was particularly irksome and worrisome to him because he is an attorney and it was his work phone. So he had information on it about his clients and potentially clients that were involved in proceedings with these same entities that were taking his phone and and looking at it and copying this confidential information. So because he was uncomfortable with that, he went ahead and filed a lawsuit against the whole alphabet soup against DHS, Customs and Border Patrol, ICE, TSA, and the agency heads of those. Basically, his first complaint said, You're violating my First Amendment rights and my Fourth Amendment rights, and you can't just take my phone and look at it and search it with no cause, even at the border. The district court dismissed that initial complaint. So he came back and filed a second verified complaint. And in this one, he really focused on those Fourth Amendment claims of saying, this is an unlawful search and seizure, you can't do this, you can't take my phone, and you certainly can't take my phone, take information off of it, and then permanently retain it. You just, that's unconstitutional and a violation of my rights. So right after he filed that verified complaint, and for our listeners, a verified complaint basically means that he has verified and signed off on what is in the complaint, saying that these are true statements, it gives it a little bit more weight.

A Anthony Sanders 26:05

Like an affidavit.

A Anna Goodman 26:06

Exactly. And so he took this complaint and followed it up with a couple of different motions. The most important and what the Circuit Court was looking at is he filed a motion for a preliminary injunction and kind of an accompanying motion for partial summary judgment. So with the partial summary judgment, he basically was saying, Hey, Court, please go ahead and say that it is illegal for them to take my phone and search it when they don't have a warrant, and in the alternative, they at minimum need to have reasonable suspicion to be able to do that. And then for the preliminary injunction, he was saying, if you're not going to grant my motion for summary judgment, at least grant an injunction so that either they, so they can't enforce these against me while I'm traveling in the next few years while the case is pending. Because every time I'm traveling, the same situation is happening. I'm worried about them taking my phone. The District Court was not impressed with either motion and basically said no, we're not going to grant the preliminary injunction, and we're not going to grant summary judgment in your favor. So with that, that brought it up to the Circuit Court, and the panel was Judge Richman, Judge King and Judge Engelhardt, and Chief Judge Richman is the one that wrote the opinion on this. And they really focused primarily on the preliminary injunction. That was the primary focus of the opinion. The motion for summary judgment was kind of just handled at the end as a secondary argument because he, to get them to even look at the summary judgment motion, because it was denied below, the court would have had to exercise what's called pendent jurisdiction, and basically choose to take it up, because it normally wouldn't have been an appealable order. And they said, We don't have to do that. We can address the preliminary

injunction without reaching the merits of that, and that's what we're going to do, and this case can go down again below and proceed. But with the preliminary injunction, that's really what they focused on. And so for any preliminary injunction, right, there's four things that you've got to have. You're going to have to have the substantial likelihood that the plaintiff is going to prevail on the merits, a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, a threatened injury to the plaintiff that outweighs the harm that could be done to the defendants, and evidence that granting it is not going to disserve the public interest. And so the court starts out by just kind of outlining those and then really just hones in specifically, and talks about the second of those: whether or not George had sufficiently alleged irreparable injury. And their statement, what they ultimately concluded, which is kind of shocking and a little again, unnerving as someone that's traveling, is we conclude that Anibowei failed to establish a substantial threat that he will suffer irreparable injury if an injunction is not granted. And George had argued actually two different distinct and irreparable harms that, at least on their face, seem like they would be a pretty good basis for granting this injunction. The first was that the government still has his private information and from that first seizure back in 2016. And it should be noted that after the District Court denied the preliminary injunction, and before it came up to the Circuit Court, the government actually filed an answer to his complaint below. And in that, they admitted to having taken and searched his phone and everything in 2016. They acknowledged that that happened. So that's not even, that's not something that's disputed or questioned. That's just fact. But so he alleges, or he argues that the fact that they still have it, that's an irreparable harm, especially because it has his clients' information on it. And then second, his other major argument was that he's going to continue to face irreparable harm every time he travels internationally and is subjected to these ongoing, warrantless searches. And the court really focused more on that first argument, that amount of information that the government still retained, which, again, practically speaking right, that sounds like that should be an injury. The government has your property, they're not giving it back, they have access to information that they're not supposed to have access to, some of which may be privileged, attorney-client privilege, all of those things. And George is obviously very uncomfortable with that. But the city, or the government, excuse me, their rule on that, that was adopted by the court, was that government retention of unlawful seized property is not sufficient, standing alone, to establish irreparable injury. So in other words, just because they have your property, and they don't have the right to have it, that doesn't actually mean that you were harmed by it. You have to show specifically something more than that of how it is harming you, which is a little bit concerning and disconcerting, in my view.

A Anthony Sanders 26:30

That's always easy to figure out. I mean, the data is stuck in some federal bureaucracy, and of course, they wouldn't look at it if they're not supposed to. There's no reason to worry about that, so you need extra evidence.

A Anna Goodman 31:12

Exactly. There's no concerns. Yeah, no concerns whatsoever. But so the fact that George said, hey, the government can't keep my information illegally, that just wasn't enough. He had to tell them how it was hurting them. And one of the cases that they cited in support of that, which kind of shows a little bit of an uncomfortable trend in the Fifth Circuit around these cases, was United States v. Search of Law Office, Residence & Storage Unit of Alan Brown, which was a

2003 case. And that case, there was a search of a law office, all of his documents were seized and kept by the government, and he petitioned to get them back. And the court, at the district court in that case, actually did side with him and said, Yeah, give this attorney back his documents, you don't have the right to have them. Also, you need to destroy all your copies of them. The government took it up to the circuit court and the circuit, Fifth Circuit actually reversed and said no, he didn't say which particular documents of the 1000s of documents you seized from his offices might be privileged or why they're privileged or what the specific laws under which they're privileged, and he has to do that. And if he doesn't do that, then he doesn't get his stuff back. There's not an issue. He hasn't shown that he's irreparably harmed. And that's basically the same rule that they applied here, to George's property. And they said, Well, he didn't actually prove exactly what was taken, which also for the record, and from looking at the case, how could he have known what the government took from his phone when they took his phone and copied it? They they're kind of asking him to prove the impossible of was what was taken attorney-client privilege? Well, he knows it's his work phone, and he knows it's full of privileged information, but how is he supposed to prove exactly what they took when he doesn't even know what they took. You can see kind of the circular reasoning of it, and it does set up for failure for someone in his position. And then, and so that was really where the Court came down on that first reasoning. They said, Nope, sorry, didn't give us enough information. You're out of here. That's not a reason for a preliminary injunction. And then his second basis for that irreparable harm was his future traveling internationally. And this also, I found the Court's reasoning, just fascinating, because they acknowledged that his allegations pretty much established a pattern of the seizures. They recognize like, Yes, it is the custom and practice of these organizations to conduct these searches without a warrant. But they said, Well, in this Circuit, we haven't found that these warrantless searches are a problem A). And B), as specific to George, even though this has happened to him all these times in the past, he hasn't actually established for us that it's going to happen again in the future. So since he hasn't established that it's going to happen again, we don't actually know that he's going to be harmed by it. So again, no irreparable harm, no preliminary injunction, and they really just left it there and didn't even reach any of the other factors. So all in all, kind of a disconcerting case a little bit I would say, and kind of leaves you wondering, if he doesn't have standing and have the ability to move this case forward and isn't entitled to protection, who would be when you're dealing with kind of those searches at the border?

W Wesley Hottot 34:18

Yeah, and I wonder, like, what is an attorney supposed to do when traveling internationally? I mean, it's not always just for fun. You know, there are plenty of corporate attorneys who have business in Europe who have to come back and forth. This guy was working with immigrants on removal petitions and you know, asylum petitions and the like, so you know, he had cause to be abroad at times as well. What would you suggest, if anything, that an attorney do to ensure that his or her confidential information isn't searched as they cross the border?

A Anthony Sanders 34:58

And the underlying principle here is that, which the courts have been struggling with a little bit, but it is clear in this case, is that you have no rights at the border. So your privacy, they don't need a warrant, they don't need probable cause, they don't need nothing. There was actually another Fifth Circuit case that came out the same week as this one that said, essentially, that

they're okay with like a manual, as they call it, search of a phone, which it seems like it happened here. A forensic where you, you know, you'd like plug the phone into a computer and you hack through people's passwords and all that stuff. Maybe that would be different. But it seems like this was just, you know, run of the mill search, which is still very intrusive, when you're talking about attorney-client data on on a computer, which, which is what it is. So I, I don't think that that's going to hold up long term for the reasons you give, Wesley. I mean, we just like, courts are treating cell phones differently. The Supreme Court is treating cell phones differently in some of these search cases because it realizes almost every American is going to have their life turned inside out if the authorities can just look in your phone. That's going to be true here. But like, they're not, the circuit courts are not catching up with that. And so, I hope eventually this gets fixed. But if it can happen to this guy, an attorney with privileged stuff on there, it can happen to anyone. And they don't think that there's a harm in it being held by the by the government? That's not irreparable harm? That's nuts!

A Anna Goodman 36:45

Yeah, that to me was the most disconcerting of anything, because that seems like of anything, on its face, they have your information that they're not supposed to have. Of course, you're being harmed by that. And if it was anyone except the government, it would be very clear that that's what was happening, but.

A Anthony Sanders 36:58

I mean, I think part going on there is that I know people who know much more about the Fourth Amendment and, and like encryption and all that could speak better than than this, but that there is some case law that if say, the government has downloaded or gathered data, but it hasn't searched it, so it's just sitting in its database, and literally no human has looked at it? They haven't run it through a program or anything? That might be okay. But it's when you, once you start searching, that Fourth Amendment issues arise. I'm guessing that's kind of what's going in the back, but the thing is here, it's not established what the government even has done with it, or looked with it or anything. It's just, it admits it has it. And so I don't get why he can't get it back.

W Wesley Hottot 37:45

Well, how could a person know? How could you know what the government has has done with the information once they've taken it from you? I mean I, what I don't want to see is a regime with a special rule for attorneys, right? Or other people who handle confidential information. But if I'm the General Counsel at, you know, a company that has people coming and going out of the country, you know, this is a problem, because we have an obligation to protect, including in the technology space, to take steps to protect clients' confidential information. And it seems to me that the only way to do that if you're doing international travel is to wipe people's phones before they leave, you know? There's not, I mean, there's probably a technological way to do that, but you simply could not carry confidential information across the border under this regime.

A Anthony Sanders 38:40

Well I have been told, and probably many listeners have heard this, that if you travel to China, you do not bring your phone, because the moment you land, the Chinese authorities are trying to hack into it. If you turn it on, I didn't think that would be a worry in the United States, and it's not quite like that, but this kind of had shades of the of the same thing. So we'll hope that this evolves in that not everyone has to do what you're just talking about, Wesley. Well, thank you all for joining us before this travel weekend where many listeners may be flying around like Anna, and hopefully, not having their phone searched. It's at the border that it's at the lowest point. I think at a TSA checkpoint, you have some modicum of rights, but maybe a lot, a lot more than that. But in that, in any case, thank you both for coming on. This has been a great conversation. And I look forward to next week's show where we'll have a couple more IJ attorneys on talking about exciting cases. But in the meantime, Happy Independent Day everyone, and I hope that all of you, get engaged.