ShortCircuit366

Mon, Mar 10, 2025 9:16AM 45:38

SUMMARY KEYWORDS

Tammany Hall, honest graft, dishonest graft, First Amendment, campaign contributions, bribery, quid pro quo, FBI sting, iPhone search, Fourth Amendment, reasonable expectation of privacy, automobile exception, Supreme Court, campaign finance, entrapment.

SPEAKERS

Anthony Sanders, Bobbi Taylor, Paul Sherman

A **Anthony Sanders** 00:16

"Everybody is talking these days about Tammany men growing rich on graft, but nobody talks about drawing the distinction between honest graft and dishonest graft. There's all the difference in the world between the two. Yes, many of our men have grown rich in politics- I have myself. I've made a big fortune out of the game, and I'm getting richer every day. But I've not gone in for dishonest graft- blackmail, gamblers, saloonkeepers, disorderly people, etc.- and neither have any of the men who have made big fortunes in politics. There's honest graft, and I'm an example of how it works. I might sum up the whole thing by saying I saw my opportunities, and I took them." Well, that famous opening to Plunkitt of Tammany Hall came to my mind this week when I was reading a Sixth Circuit case. We'll discuss how some things in politics never change and the machinations of big-city politics in America. However, the line between what's graft, bribery, or what have you, and what's just politics- or maybe what's protected by the First Amendment- has never been all that easy to pin down. We'll discuss that this week, plus: Is an iPhone search a search? 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, February 25, 2025, and I have two of my Institute for Justice colleagues with me today. Paul Sherman, our resident graft and First Amendment expert, will be discussing this case from the Sixth Circuit. Then we will hear from Bobbi Taylor, who will be using her phone skills to dive into iPhones and searches. So, Bobbi, we'll hear from you in a little bit. We haven't had you on the show in a while. Your case is going to be from Waterbury, Connecticut.

B **Bobbi Taylor** 02:34

Yeah. Went to law school in New Jersey, so it's kind of nearby.

A **Anthony Sanders** 02:38

Well, to me out here in the Midwest, everything is just the same thing out east. And you go two

miles and you're in the next state. So, we'll say that it's your area, but not his area. Paul Sherman, who hails from Florida, he's going to discuss this case from the Sixth Circuit regarding politics in Cincinnati. Now, Paul, I believe you're going to have a little bit more sympathetic take on what happened to this fellow and I do too. He's a city councilor in Cincinnati, and perhaps he was a not in the same league as as Boss Hog at Tammany Hall?

P Paul Sherman 03:23

No, I certainly think not. The case out of Cincinnati is United States of America v. Alexander Sittenfeld, aka PG Sittenfeld, and I'll just read the introduction to the case because I think it sets the stage nicely. It says: "Every day in this country, politicians solicit donations to finance their campaigns, and every day, these same politicians make statements about what they believe in, what they've done, and what they promise to do once elected. Sometimes, even often, these solicitations and promises occur in the same place at the same time. But though this speech and conduct are generally protected by the First Amendment, bribery remains illegal. When the bribery involves money flowing to a politician for his personal use, the crime is straightforward. But when a politician is accused of accepting campaign funds in exchange for the promise of official action, the line becomes blurrier still. The Supreme Court tells us there is a line, and Congress and the courts have entrusted juries with discerning between legitimate campaign donations and illegitimate bribes. We must respect that line, even in hard cases. This is one such case." First of all, that's a fantastic introduction to a judicial opinion- it really grabs you and makes you want to see what's going on. What's happening in this case is that Mr. Sittenfeld is a city council member in Cincinnati. Soon, he will be term-limited out of the city council, so he wants to run for mayor and is soliciting contributions to do that. As he's going about this, he is approached by a gentleman named Chinedum Ndukwe, but they call him Chin- or at least Sittenfeld did colloquially, so I'm going to do that too, to avoid butchering his name any further. Chin reaches out to Sittenfeld about supporting his campaign, and Sittenfeld wants to get a contribution from him, as he has from other developers. Sittenfeld has a reputation for being very pro-development, so developers want to see him as mayor. Chin, however, has a particular project he wants to see pushed forward. Unknown to Sittenfeld, Chin has been approached by the FBI because he was trying to violate campaign finance laws. He was caught making straw donations- trying to contribute money under other people's names. Without Sittenfeld knowing, Chin became a confidential informant for the FBI and engaged in a sting operation to catch candidates engaging in bribery. Chin reaches out to Sittenfeld, and they discuss a particular development project. Sittenfeld is trying to get a contribution, and the question in the case is: Did this cross the line into being an explicit quid pro quo? As the introduction to the opinion suggests, it's an extremely important line, because the Supreme Court has held that people do have a First Amendment right to solicit campaign contributions or to make campaign contributions, and that anything less than quid pro quo corruption can't be punished or, in the campaign finance context, the appearance of quid pro quo corruption, which is a whole other set of problems. But in the bribery context, courts have been clear there has to be an explicit quid pro quo. So I'm going to read a little bit of the exchange between Chin and Sittenfeld, which was caught on a recording, and this was kind of the pivotal statement that formed the basis of the jury's conviction. The statement is: "Okay. So, so this is Sittenfeld. So just so you know, like, look, I have, you know, I, I love what you do as someone revitalizing our city, creating jobs. I'm fond of you as a friend. I also have, like, you know, obligations to do the things I need to do to be a successful candidate." Chin says, "Absolutely." Sittenfeld says, "But what I mean is, I don't really get, like, if you say, 'Look, I don't want to support you in the name of Chinedum Ndukwe, but some guy I've never met from Columbus is going to use a coup, you know, you know, network. Are you going to round up a bunch of LLC checks? Like, that's great.

I actually don’t care. But, I mean, the one thing I will say is, like, you know, I mean, you don’t want me to, like, be like, hey Chin, I love you, but can’t you know? Like, you know. I mean, like, you know. Like, I want people to support me.” That’s the centerpiece of this prosecution. And if you understood it on the first reading, that’s much more than I understood on the first reading. One of the interesting things about it is that the pivotal line, the line that the court and the jury really focused on, was this line where Sittenfeld says, “Hey Chin, I love you, but can’t.” Right? And the prosecution’s theory is that that statement is an offer of an explicit quid pro quo. He’s saying, “Look, I love you, but if you don’t make this contribution to my campaign, I can’t support this development project that you want to do.” Right? And Sittenfeld is saying what it really meant was, “I love you, but if I don’t get reelected, I can’t help you get this development project through.” An interesting fact is that Sittenfeld had never voted against a development project. He was an extremely pro-development candidate, so I think that kind of undercuts the idea that there was a quid pro quo- that he would have actually voted against it. In fact, he explicitly denied in a conversation with Chin that there could be a quid pro quo, actually using the words, “There can’t be any quid pro quo.” And he explained, “But I’m very pro-development. I’ve supported everything I can. I can get you the votes on the city council.” Nevertheless, ultimately, the jury convicted him on counts under the Hobbs Act of bribery. And the question is: Was there enough evidence to support that charge? There were other legal questions in the case, but I think this is kind of the most interesting question. There are three opinions in the case: There’s the majority opinion, which explains why it believes the jury’s evidence is sufficient; there’s a concurrence saying, “You know, I agree that under the law as it exists, this is a plausible reading of the federal bribery statute, and this was enough to convict,” and that’s actually kind of a problem because it seems like it’s criminalizing a lot of ordinary politics and raising some First Amendment issues, but that’s the law we have, so we have to deal with it. And then there’s a dissent, which takes issue with all of this and says, “No, this is criminalizing a ton of ordinary politics, and we can’t be doing that. That would raise serious First Amendment problems.” So I found it to be a fascinating case. I think it raises interesting questions about a lot of people’s intuitions about what’s legitimate in terms of campaign contributions. What promises can candidates make? One of the issues that they say is what if he had just said on his campaign website, “I will vote for every redevelopment project that comes before me, contribute to my campaign.” There’s a plausible reading of the bribery statutes where accepting that contribution from someone who wants a redevelopment project is a bribe. And that doesn’t sound like the sort of thing that Congress was probably trying to criminalize. So there’s a lot that we could talk about, but one of the things that I found really interesting, and that wasn’t raised directly in the opinion, was that we have this transcript of this conversation that goes on between Chin and Sittenfeld, which, as you heard, is almost entirely incomprehensible, at least as to what Sittenfeld was explicitly trying to say.

A Anthony Sanders 12:28

They sounded uncomfortable with what they were talking about.

P Paul Sherman 12:34

And Sittenfeld, in his own testimony, had said this seemed really out of character for Chin, who had never taken this kind of aggressive sell for him. There were other times where the FBI, which was involved in this case and had FBI agents pretending to be donors, tried to get Sittenfeld to accept illegal contributions, like $10,000 in cash. He refuses to do it. He says, "No,

if you want to give to my campaign, you've got to send the money to my PAC. It’s got to be done legally. It has to be attributable to a donor." No gym traffic. No sacks of cash. There was no "Jefferson with the cash in the freezer" moment. (I think that's a timely reference to make!) So there’s a lot of evidence that he was trying to walk some kind of line, and only a little bit of ambiguous evidence that he could have crossed it. But anyway, what I found interesting about the exchange between them- I'm reading this transcript, and since it's a spoken conversation, there’s no punctuation in it, but the transcript has punctuation. Where Sittenfeld says, "You don’t want me to be like…" and then there’s this quote: "Hey Chin, like, love you, but can't," you know? The conversation was about Chin saying, "I want to give to your campaign, but I can't do it. I’ve got to get other people to give the money. It can't be attributed to me." I’m not sure that the quotation mark is closing where the transcript thinks it does. The way it reads is: "I love you, but I can’t do the redevelopment project." But another way you could read it is: "Hey Chin, like, love you, but can’t you, you know?" suggesting, "Can't you support me openly?" Because his very next line is, “If a candidate doesn’t want people to support them, they're a shitty, dumb candidate.” So a very plausible reading is him saying, “It seems weird that you want to support me, but you don’t want people to know you're supporting me. Can’t you, you know, do that openly?” Now, I haven’t heard the audio recording of that, so maybe that’s not borne out in the audio, but the statement is very muddled. Sittenfeld is represented by very talented lawyers at Jones Day, and I think it’s very likely they will file a cert petition in this case. The Supreme Court has taken a number of cases in recent years to try to make brighter lines around some of these very vague white-collar crimes, like honest services fraud. I don't know if there is a circuit split on any of these issues, but this does seem like the kind of case that could appeal to the Supreme Court. It seems to have a good shot. This case also has real implications. If this is the state of the law, it would empower the government to investigate and prosecute many politicians for what is, frankly, perfectly ordinary horse trading. It may seem a little unsavory, but it's not necessarily the kind of graft and bribery that these laws were meant to target. It’s not about people taking money for their personal use to buy things like a boat or a lake house; it's about people raising money to engage in First Amendment protected activities. We have to be very careful about where we draw the lines around that activity.

B Bobbi Taylor 16:39

Paul, not that you didn't do it justice, but when I was reading this case, I did really want to hear the audio. Because the jury convicted him based on that statement. So I did wonder if they drew some inferences from his tone or his inflection, or something that suggested, in a way that the written word doesn't, that he actually was trying to induce a bribe. I also found it interesting that two of the men he was speaking to were working with Chin as FBI agents. And I think that in normal politicking, maybe an FBI agent would say something different than a normal donor in a way, to get someone to say something that they wouldn't otherwise say. And I don't think that one conversation, or even multiple conversations, like this that aren't so clear cut, quid pro quo type situations should be used to convict someone for something like this.

P Paul Sherman 17:45

Yeah. I mean, Sittenfeld was sentenced to 16 months in prison based on this rather equivocal statement. Now, I wasn’t sitting where the jury was sitting, and one of the differences between the majority opinion and the dissent is their view on how much trust should be placed in the

jury. I do think this is a situation where there are reasons to be particularly cautious, mostly from my background in working on campaign finance cases. One thing I've realized is that, while there's no doubt that unsavory things happen in politics, the public's perception of corruption in campaign contributions is often wildly different from how it works in practice. Most people give to candidates not because they're trying to get something out of the candidate, but because they want that kind of candidate in office. They think the candidate's philosophy or platform aligns with their best interests. It's not so much that money drives the political behavior of candidates; it's that money follows candidates who express certain views. That seems to have been the case here, where developers were giving contributions to the pro-development candidate. But because the views of the public are often diametrically opposed to that, they tend to be suspicious of legitimate political campaigns and contributions, reading a lot of ill intent where it doesn't actually exist. The consequence of getting that wrong is that someone who didn't break the law could end up going to jail for quite a long time.

A Anthony Sanders 19:38

One thing I didn't understand about that aspect of it- about whether it he's just a pro development candidate and so these people want to give him money these developers, or whether there's some kind of quid pro quo, there- is the the opinion doesn't talk at all about an entrapment defense. I know we're not criminal lawyers that are steeped in entrapment and all that. I know most of mine from when I've read about it in Russell the Bailey, and maybe what I learned in law school. But it seems to me that Chin at one point was saying, "well, it's like 100% right? Like, take the money and then 100% the permit will given. And it he's doing that because he's an FBI mole, and so he's trying to get that on the record. And, the defendants is like "Where's this coming from?"

P Paul Sherman 20:27

Yeah, this feels really weird. And he sort of takes the view of I can't guarantee 1,000% but I can tell you I've got the votes on the board and I'm confident I can get this through.

A Anthony Sanders 20:50

He just kind of falls back on, "I'm pro development. I've never voted against development. Blah, blah, blah." So it seems to me that would be where you think entrapment would come up. I know entrapment is a lot harder in practice than it is in theory, and maybe it was adjudicated in the district court and it just isn't worth it on appeal, but it really had that feeling. And maybe that's part of what's driving both the concurrence and the dissent saying, "This is a really hard case. And if it weren't for the jury, we'd be going that way. But it feels wrong."

P Paul Sherman 21:26

Yeah. I mean, even if this doesn't technically rise to the level of entrapment- and I'm not an expert on entrapment- it definitely has that kind of flavor, and I think that's reflected in the facts. Chin is a guy who actually did break the law, who was caught breaking the law. He has an incentive to set this guy up, and instead of punishing him, the government says, "You know

what, we'll let you off the hook if you help us catch other criminals." When that happens, you often end up with situations like this, where people who would never have actually broken the law- if Sittenfeld even did break the law- are actively pushed over the line by the FBI. I think you see this all the time with certain terrorism prosecutions, where people who are just young, angry individuals get on internet message boards. They're not actually particularly dangerous, and then there's some FBI handler who talks to them for months, working actively to rile them up, and then says, "Hey, meet me in this parking lot," and they get arrested. If that FBI handler hadn't been on the message board, none of this would have happened. To me, this feels very much like the same thing- these were people looking to make a crime happen, and arguably, they didn't even achieve that. But it doesn't seem like the best use of law enforcement resources.

A **Anthony Sanders** 23:03

One last thing- and I don't get the technicalities, because I don't know this area law- but there's this line that they had to prove an explicit but not express quid pro quo, and then Judge Murphy in the concurrence is like, "What the heck does that mean? What is that difference? I'm sure the jury doesn't realize what that difference is." And it's kind of like screaming out, "Supreme Court, please clean up the case law in this area, because that doesn't make any sense."

P **Paul Sherman** 23:34

So, an explicit quid pro quo would be something like, "I will not vote for your redevelopment project unless you give me this campaign contribution." An express quid pro quo would be where we share that understanding, but it's communicated without those exact words- kind of a wink and a nod. Something like, "Look, I can help you. It would be a shame if something happened to this project." That may communicate an express understanding, and it's up to the jury to decide if it did. But with a statement like this, the whole "love you, but can't," there's a ton of room for ambiguity, and I think there are very innocent potential explanations. But again, I wasn't in the courtroom. I didn't hear the recording, but from the transcript alone... And the other thing is, in the First Amendment context, courts are far less tolerant of vagueness around what is and isn't legal than they are in potentially other contexts; because when you have blurry lines around what's acceptable speech, people tend to speak a lot less because they want to stay as far away from the line as possible. And we don't want to lose that speech that exists between where the line is and where people are afraid it might be. So, the Supreme Court has typically been very insistent that the lines be bright so that people can come right up to the line and know they're there without crossing over it.

A **Anthony Sanders** 25:14

Well, speaking of lines, a line that is not bright is: what is a search? Something we've talked about on this show many times, and it seems to only get murkier. So Bobbi, tell us about these police officers in Waterbury, Connecticut, who used their iPhones and that was not a search.

B **Bobbi Taylor** 25:40

So, this is United States v. Poller, a recently decided case out of the Second Circuit. And like

So, this is United States v. Poller, a recently decided case out of the Second Circuit. And like you said, Anthony, this case deals with something we see a lot at IJ, which is what constitutes a search for Fourth Amendment purposes. Poller was convicted of several federal drug crimes, and he pled guilty to a lesser sentence on the condition that he could challenge the suppression motion on appeal for evidence found inside his car. This stems from events that took place on May 3, 2022. Police officers had been watching Poller's residence for some time. He was wanted as part of a narcotics and weapons investigation, and he also had a state warrant for parole violations. They observed him drive up to his residence, park a gray Acura, and some individuals approached the car. They exchanged some items by hand, then the individuals left, and Poller went inside. Based on their experience and training, the officers believed they had just witnessed a drug deal. So, they decided to act. Some officers went into the home to execute the warrant, while others stayed behind to focus on the Acura. This case deals with what happens at the car. The officers didn't have a warrant for the car, the windows were tinted, and the officers used their iPhone cameras to see beyond the window tint inside the car. Did either of you know that an iPhone camera could do that? Because, prior to reading this case, I didn't know that.

A Anthony Sanders 27:28

I didn't know about that but, as probably a lot of our listeners and viewers know, when we had the Aurora Borealis last summer or fall, people could use their phones to see it, even if you couldn't see it with your naked eye. So that I learned from that and from a comment also a few months ago that you could do the same thing. Aren't those phone cameras like crazy- they're like super eyes that can see all kinds of things.

B Bobbi Taylor 27:55

Yeah, the iPhone camera will allow you to see past window tint. I actually looked at the district court opinion to see what time of day this happened, because I wasn't sure if it was the phone or the flashlight, or some combination of the two. It was 8:17 in the morning, which is a prime time for a drug deal. But, it was bright as day, and you can clearly see the phone up against the window, which allows you to see right through the tint. I thought that was interesting. So, when they looked through the tinted window, they saw a bag of drugs and what looked like two firearms. There's also mention of another officer going around to the front of the car and cupping his hands to see through the front windshield, which wasn't tinted, and he said, "Hey, I see what looks like some guns and a bag of drugs." So, they tow the car, search it, and find narcotic/fentanyl substances and two firearms. Poller is charged with drug trafficking and use of a firearm while drug trafficking. He pled guilty to a lesser sentence on the condition that he could challenge the district court's denial of his motion to suppress the evidence found in his car. On appeal, he argues two things: First, that the officers using their iPhone cameras to see inside the car violated his reasonable expectation of privacy, and therefore, it was a search. Second, he argues that the officers leaning their phones against the car constitutes a physical intrusion into a constitutionally protected area. So, he has two theories as to why this conduct is a search. The first inquiry the court addresses is whether this is a search, because if it's not, there's no Fourth Amendment issue. There are two ways this conduct could be considered a search: First, it could violate a reasonable expectation of privacy, and second, the officers could have physically intruded into a constitutionally protected area. The court starts with the reasonable expectation of privacy, which is a two-part inquiry from United States v. Katz. It asks: Does Poller have a subjective expectation of privacy? And, if so, is that expectation one

that society is prepared to recognize as reasonable? As a threshold matter, the court states that mere visual observation through a window is not a search. Anything a person knowingly exposes to the public cannot be the subject of a search, even in the privacy of one's home. This is covered under the plain view doctrine. The court cites cases where this holds true, like when an officer shines a flashlight into a car window or a bag, and the items illuminated are still considered to be in plain view. Officers are not required to shield their eyes from evidence they see in plain view. However, Poller argues that his tinted windows give him a reasonable expectation of privacy because he tinted them to prevent people from seeing inside his car. It's an interesting argument, but the court doesn't buy it. They make two points: First, Connecticut law only allows so much tinting, so what is legally allowed still lets some light and vision through. Therefore, Poller couldn't possibly have an expectation that his windows would completely block people from seeing inside. Second, the court says that no matter how much you try to shield yourself, if your precautions still make your items visible to "snoops" or "diligent police officers," you lose your reasonable expectation of privacy. The court cites California v. Ciraolo, which says you can build a 10-foot fence around your home, but if what's inside is still visible to a passenger on a double-decker bus, your privacy is not protected.

P Paul Sherman 32:20

That was wacky to me. I understand how that's consistent with the doctrine, but I think a lot of people would be shocked by that.

B Bobbi Taylor 32:21

And I think that says something about the doctrine, but yes, I found that interesting. Using that logic, it's hard to imagine what you could do to signal your reasonable expectation of privacy. But as long as someone or anyone could make an observation about what's inside your car, you don't have any reasonable expectation of privacy in it. So that could have been the end of the inquiry because he has no reasonable expectation of privacy. But the court also goes on to analyze the use of the iPhone under Kyllo. Kyllo is a 2001 Supreme Court case where officers were outside of a home and used infrared technology to determine what kind of heat was inside the home. The Supreme Court basically said that's a search for two reasons: One, it's technology that is not in general public use, and two, it's a method of searching that you could not do absent a physical intrusion- at least, not in 2001. So Poller looks at the facts of Kyllo and says, "You know, that should apply to me too," because the general public's use of iPhones is not to go up to cars with tinted windows and look inside them. In the same way the police were using infrared technology in Kyllo, they were using their iPhones here, and that should constitute a search. What the district court in Connecticut did was say that Kyllo stood for the proposition that if technology is widely available and used by the general public, then its use by the police can't constitute a search. The Second Circuit says that's too broad of a reading of that case, and they're not going to read it that broadly. They could envision some circumstances where technology, available to the general public, is used in a very intrusive manner- such as in the home- and could still constitute a search. The Second Circuit doesn't want to extend Kyllo's reasoning beyond the home to the vehicle, but they could envision certain technology in general public use- like Ring door cameras or smart meters- that, if used in an intrusive way by police, could still constitute a search. However, they also say that it's not necessary here because they've already decided that Poller had no reasonable expectation of privacy. So, although they limit the district court's reading of Kyllo, they say they don't even

need to apply it here. Whether the police use the iPhone camera in a manner consistent with public use or not, Poller doesn't have any reasonable expectation of privacy regarding what's in his car, even if he does have tinted windows. Plus the one cop did the cupping thing. Right. And that's kind of the second, less important, but also analyzed claim: the physical intrusion. So the cops leaning against the car, cupping their hands, looking inside. They dispense with that pretty quickly because they say, first of all, there's no evidence that anyone actually leaned against the car. In the picture I mentioned in the district court's opinion, you can see the phone next to the window, but you can't really tell if it's touching the window or not. You also don't need to touch the windshield to see into it. Then, the court says, even if the cops did lean up against the windshield, that wasn't the but-for cause of the discovery of the evidence. The but-for cause was the use of the iPhone to see through the tint. And since they've already determined that was not a search, they don't need to analyze the physical intrusion part further. The interesting takeaway for me was, first of all, that the Second Circuit doesn't want to extend the reading of Kyllo to areas outside the home. I thought that was interesting. And it wasn't so much about the technology as it was about where that technology was aimed. They talk a lot about how the home is at the core of Fourth Amendment protections, but cars, not so much. At one point, Poller argues, "Well, people live in their cars," and they quickly dispense with that, saying, "You don't." So, they don't really need to talk about it here. But I just found that part of the case very interesting.

P Paul Sherman 37:06

Yeah, Kyllo was a favorite of mine when I was taking criminal procedure in law school. For those who haven't read it, it's written by Justice Scalia, and it has some nice turns of phrase. He talks about the sanctity of the home and how intrusive it would be to see the heat signatures coming off a home because it might reveal things like when the lady of the house takes her bath or something like that. But I do think this long footnote from the court, where they talk about how we don't want to foreclose this idea of technology becoming widely available or being applied outside the home, is very valuable. I'm glad the court is sensitive to that because we just have no concept of what will be available in the future. Think about some of the technological changes we've seen in recent years. One of the things I think will continue to raise a lot of Fourth Amendment issues, for example, is the use of drone photography. Let's say you make walls that are 100 feet high, and the police start flying drones over your property. Is there anything you could do that wouldn't be too intrusive for the police? It seems outlandish, but what if this is something like the Herculaneum scrolls that I'm sure Anthony knows all about. These are ancient scrolls that have been carbonized and buried for thousands of years, making them impossible to read. Now, we can scan them with MRIs, digitally unroll them, and decipher them. What if there were some kind of technology that would allow you to read the words in a sealed envelope sitting on someone's dashboard? I think most people would feel they have a legitimate expectation of privacy in that. And if that technology became ubiquitous, I would be very concerned about the police using it to read people's private correspondence.

B Bobbi Taylor 39:17

And when does technology become ubiquitous. You know, 10 years ago, not everybody had an iPhone. And as Anthony mentioned, infrared might not have been available in 2001, but it's more widely available in later years. The court talks about mapping cameras. And so drawing

such a bright line between available not available makes it difficult, especially with the speed of technology becoming available, to actually determine where each use of technology falls on that line.

A Anthony Sanders 39:49

And we don’t, today, have a member of our Fourth Amendment project at IJ leading this discussion, but I’ll speak on their behalf by saying that a lot of this just shows how confused Fourth Amendment doctrine is when it comes to what constitutes a search. There is a kind of better approach that has been shown by the physical intrusion technique, which comes from the case Jones from about a dozen years ago. That has at least provided some clarity, but it hasn’t led to all that much change in Fourth Amendment doctrine. I mean, our position at IJ is to view a search more as an investigative act by the government. And if it's a search, then it’s a search. From there, we can deal with whether it's a reasonable search, whether they should have obtained a warrant, and all that stuff. It seems like this is another example of where courts just want to shut everything down at the search level, instead of diving into how the Fourth Amendment operates when determining what constitutes a legitimate search or not. The whole Katz test of reasonable expectation of privacy has just made such a mess of that. I did think it was interesting how the court looked at Connecticut law regarding tinted windows, which touches on the whole positive law doctrine that a few scholars have written about in recent years. We had a panel about it at our Open Fields conference last year, which I had the pleasure of moderating, where you look at how we define what is reasonable or what constitutes a search under the Fourth Amendment. I'm sure I’m butchering it here, but it’s about defining what the law should be for a normal person and then allowing the police to act within that. If they go beyond that, it then has Fourth Amendment implications. While I don’t think they cited to any of that work, you could see that idea operating in the background. I also liked how you can often tell when a court isn't quite sure what it’s doing based on the number of footnotes. Man, there are some monster footnotes in this opinion. So, if you're a fan of footnotes, go check it out, and maybe you can see where the court might be confused. This is another case that would be great for the Supreme Court to clarify. We're still waiting for it to clarify some of this Fourth Amendment "what is a search" stuff, and this case could be one where it might actually make a difference. Although, I have to say, the police here had a warrant for his arrest. They had a warrant to search his house. They just didn’t have the specific warrant to search his car, and yet that's how they convict him and what the case is all about.

B Bobbi Taylor 42:50

I wonder if it was his car because it didn't really say that it was his car.

P Paul Sherman 42:58

To me, this is just evidence of the fundamental Fourth Amendment rule we all learn in criminal procedure, which is that if you're in a car, you're essentially out of luck. Historically, what happened was during the Prohibition era, when we started enforcing laws against people moving around evidence of crimes using newly available technologies. And the police realized that if they had to wait to get a warrant to search a car, the suspect would just drive away,

destroying the evidence. So they invented the automobile exception. Of course, you're driving around in a vehicle with windows, and you're often being stopped on the side of a busy road, which raises concerns about officer safety. Over time, the law has gradually moved in a direction where, if you're anywhere near a car, you're basically out of luck. The only exception is when the police covertly attach a GPS tracking device to your car. In that case, you win- because they've trespassed on your car.

B Bobbi Taylor 44:13

Also when they chalk your tires. Anthony, you mentioned footnotes. There's a footnote in this case about the split around the Jones doctrine. And when is it an intrusion, and when it's not? And the Sixth Circuit actually said that chalking the tire for the purposes of figuring out the movements of the car is a search. And when I saw that, I thought, "Well, that seems a little bit less intrusive than this." But again, it's murky. It's murky.

A Anthony Sanders 44:43

Yeah, I think the Ninth Circuit went the other way. I think maybe we did both cases.

P Paul Sherman 44:49

That's putting like a mark with a piece of chalk on the tire so that you can identify it.

A Anthony Sanders 44:53

Yeah. I take that over the GPS device. But you know what? I. Know? Well, I know that our guests today have had brilliant exposes of what these courts are up to and and analysis. So thank you both Bobby and Paul, and thank you for listening or watching. Please be sure to follow short circuit on YouTube, Apple podcast, Spotify and all other podcast platforms, and in the meantime, we ask you to get engaged. You.