ShortCircuit229

Wed, Jun 04, 2025 1:15PM 34:10

SUMMARY KEYWORDS

First Amendment, qualified immunity, recording police, Irizarry case, 10th Circuit, Texas prison, mootness doctrine, Tucker v. Gibbs, Nation of Gods and Earths, religious services, civil rights litigation, procedural barriers, constitutional violations, judicial engagement, Institute for Justice.

SPEAKERS

Anthony Sanders, Jeff Rowes, Dan Alban

A **Anthony Sanders** 00:24

Hello and welcome to Short Circuit your podcast federal courts of appeals. Hope you are enjoying our new intro music composed by my colleague Patrick Jaicomo. My name is Anthony Sanders. I am the Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Friday, July 22, 2022 Joining us today are a couple very distinguished IJ attorneys. And I'm not putting scare quotes around the word distinguished, like the title character in the 1980s dramedy and cop show, Sledge Hammer. These are guys who know what they're doing. And speaking of cops who know what they're doing, Inspector Hammer would be expected to know that there's a First Amendment right to record his and his fellow officers work. That is, he would know that at least as of May 26, 2019 if he were in the Tenth Circuit, which is where distinguished attorney Dan Alban is going to take us in a moment. Hey, there, Dan.

D **Dan Alban** 01:30

Hello. Thanks for having me.

A **Anthony Sanders** 01:32

And you know, where else law is clearly established: in prison. It's often also where cases go to die. But we're going to visit a prison in the Fifth Circuit where that court just said it ain't over till it's over. However, as Judge Jim Ho says in a concurrence, judges say it's over way too often. We'll hear about this case involving a Texas prison from Texas's pride and joy, Jeff Rowes Jeff, welcome and have you ever visited a Texas prison?

J **Jeff Rowes** 02:05

I have not. I've only ever been to a prison in Florida.

A Anthony Sanders 02:09

Well, I'm sure there's some differences that we could discuss in a different podcast. But for today, the case Dan is about to discuss was also the subject of an op-ed in the Wall Street Journal last Monday by our even more distinguished colleagues, Anya Bidwell and Alexa Gervasi. So we'll put a link up to that piece in the show notes. Encourage all of you to go and read it. But first, Dan, tell me, have you yourself ever recorded the police?

D Dan Alban 02:42

I have recorded the police, yes, but how did they go there? It was uneventful. Nothing ended up happening. It was a traffic stop that I happened to be walking nearby. I've also been in my neighborhood a few times when there's been incidents, but they were uneventful. And you know, ultimately, nothing came of it.

A Anthony Sanders 03:04

So it was a little bit more eventful for this fellow, fellow, Mr. Irizarry.

D Dan Alban 03:11

Indeed, it was, so the this case is Irizarry out of the Tenth Circuit. It was just decided a couple of weeks ago, it's a case about citizens recording the police in a public traffic stop. In this case, it was a DUI stop. The citizens that were recording were YouTube vloggers. I believe four of them were standing on a corner near the near this DUI stop and were recording, and suddenly a police car comes blazing up. The officer gets out, starts shining a light directly in their faces, blocks their line of sight to the DUI stop itself. And the YouTube vloggers are upset by this. The flashlight that's being shined right in their cameras is making it impossible to record. This is something that's happening at night, and the officer's in their way, and so they start giving him a bad time about it. Eventually, other officers come over and tell that officer to give them a break and leave them alone. The officer does so by getting back in his car, driving it straight at the vloggers and then swerving away at the last minute as he guns his engine and one of the one of the YouTube bloggers, Irizarry, sued over the First Amendment violation, saying that he was being intimidated and retaliated against by this officer for for exercising his First Amendment right to record the police. And so this is a case that involves a qualified immunity defense by the officer. And of course, in qualified immunity cases, they're difficult to win, but plaintiffs can win if they can show that the defendant, the police officer, violated a constitutional right or a statutory right, and that that right was clearly established at the time of the conduct. And that second prong is typically the most litigated over portion in qualified immunity cases. And this case is no different, because what this case really is is a story of what a difference a year makes, because a year earlier, in March of 2021 the Tenth Circuit decided, in a rather similar case, that there was qualified immunity for an officer who intimidated someone who had recorded police during a drug raid in a parking lot in Denver, and that there was no clearly established right to record the police at that time. Now, when I said that's a story of what a difference a year makes, it's actually really a story of what a difference five years

makes, because the case that was decided in 2021 by the Tenth Circuit involved an incident that occurred in August of 2014 whereas the incident at issue in Irizarry happened in May of 2019 and in the intervening five years, there were two additional Circuit decisions that held that there was a First Amendment right to record the police at the same time, there was also a case in the Tenth Circuit that did not involve the right to record the police. Involved the right to record basically nature, but the Tenth Circuit referenced the right to record the police in that case, in the Western Watersheds case. And so what the court does in Irizarry is it says, we know we said last year that there wasn't a clearly established right to record the police, because there were only four circuit decisions from other circuits saying that you have a First Amendment right to record the police. But now there are six circuit decisions saying there is a right to record the police. And we have this language from this Western Watersheds case, which indicates that maybe we assume there is a right to record the police when talking about the right to record nature. And I want to read the line aloud from Western Watersheds, because I think this would normally be considered dicta, but it is something the court relies on as sort of persuasive about how the Tenth Circuit views the right to record the police in the Western Watersheds case, they said an individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter. Now, again, the Western Watersheds case was not about recording the police. There's just this mention in the opinion about how it is, it is a type of speech, and there are now six circuit decisions saying you have a right to record the police, but none of them are coming out of the Tenth Circuit. And so the panel in Irizarry says, Well, regardless of whether that it was clearly established in 2014 it's definitely clearly established in May of 2019 and so the officer is not entitled to qualified immunity. He should have known that he could not show up on scene intimidate citizen journalists who are trying to record a DUI stop from a safe distance. He can't obstruct their attempt to to film the encounter or intimidate them by driving his vehicle at them and and revving the engine, and therefore he's not entitled to the qualified immunity defense that he tried to raise. The other interesting thing about the case is it's a pro se plaintiff who seems to have made a few minor mistakes in drafting the complaint. Didn't explicitly allege retaliation, but but alleged facts that were sufficient for the court to determine that there was retaliation, failed to include the date that the incident happened, but the apparently, the defendants didn't really contest that, and the plaintiff in the case also apparently alleged that the the police officer actually drove his vehicle at one of his companions, not at himself. And so it's unclear whether the threat was really directed at him, but the Tenth Circuit sort of waves that away and says they were all near each other. And so it can be reasonably inferred that driving a vehicle towards someone standing on the corner of a street, if someone else is nearby, that's that's a threat directed at them. So it's an interesting opinion. It seems to be something of a correction of the 2021 opinion in Frasier v. Evans, I think ultimately the court gets it right. There obviously is a right to record the police. It's, it's been long established. I'm not sure why you need six circuit opinions versus four circuit opinions to determine that it's clearly established, but at least they've fixed things now and announced that it is a clearly established right in the Tenth Circuit.

A Anthony Sanders 10:11

So five is the magic number. Is that once you cross the five threshold.

D Dan Alban 10:15

The court seems to suggest it's six because they they cite a case where they had previously

cited six other circuit opinions as establishing precedent. But I'm not really clear on why it's six versus four. You know it seems pretty evident that there's a right to record the police, and once you have four circuit opinions on it and none against it, seems like that probably should have been enough back in 2021.

J Jeff Rowes 10:52

It seems like this case, to me, actually is exactly the kind of case where qualified immunity shouldn't apply at all, and that all this haggling over five circuits or six circuits or seven circuits, and when did it happen? And all of that that should courts should just say that's actually a sideshow in this situation, because if qualified immunity has any justification, its justification is when police are in highly stressful split second decision, kind of context where they're pursuing a legitimate law enforcement objective, and somehow something goes wrong. But here, this is a slow motion event. This police officer arrived for the specific purpose of harassing, bullying and intimidating people who were exercising their First Amendment rights. There's no allegation that these folks were interfering with police work. This police officer wasn't called because they were up in the faces or otherwise shouting, and yelling at the at the people who are being investigated to, like, fight back or engage in violence against the police. So there's just no justification for qualified immunity at all. This is just a person with a badge who did, who engaged in behavior that if one private citizen did it to another private citizen would be guilty of various crimes. And so it seems like it it's great that the Tenth Circuit got this right, and it's great that the number of cases establishing the right, or saying that it's clearly established to record the police, is increasing. That's all great. And yet, at the same time, it feels as though the courts ought to make some basic paradigm shift about their qualified immunity doctrine and then just start saying that you don't get qualified immunity in contexts like this.

D Dan Alban 12:34

I think the fight over the number of existing opinions on on the topic, kind of highlights the flaws with a qualified immunity doctrine. If you're really fighting over whether four out of circuit cases versus six out of circuit cases is enough to clearly establish the right I feel like you've sort of lost the focus of what these cases are supposed to be about, which is whether, whether a citizens rights were violated by an officer who should have known better. And yeah, this, as Jeff points out, this isn't something that's like in the heat of a police chase or something. This was a an officer showed up after the fact deliberately to interfere with some citizen journalists who were recording a DUI stop from a distance.

A Anthony Sanders 13:21

One other nuance in this case that we we could get into here a little bit and I think just shows how, not just what the court did here, but what the court courts do in other cases, in qualified immunity, sometimes is just angels dancing on pins counting is that Western Watersheds case from 2017 that was not a qualified immunity case, as I understand it. That was a challenge to a statute. So it's not you're asking for damages for for a wrong that's happened in the past. It was a group that saying that we have a right to record the these natural environment and the statute violates our First Amendment rights, and brought prospective relief, and that was then decided in 2017 and admittedly has this, what is arguably dicta. And then after that, we have

this other case that's that looks back to 2000 so that, like happens. I guess you could put in quotes in 2017 regarding a statute. It looks like that was passed in 2015 and then in 2021 we have this opinion about something that happened, the the state of the law in 2014 so you can't use the 2017 back to 2014 and of course, looks at these other cases in other circuits, and now we have this case which can look back to 2019 which is after 2017 so after you explain all that, it kind of sounds like it makes sense, but I think it just undermines the whole idea that qualified immunity, in some way, is is in line with the rule of law, when you have all these kind of just floating islands of of legal fictions that have to come together in order to have the doctrine make any kind of sense, right?

J Jeff Rowes 15:18

And I mean, the biggest legal fiction of all is that the police, after they get home from policing, hit the internet to find out what all of the other circuits are saying about various rights, because this is a suit against the police officer in his individual capacity. This is whether or not the officer knew, or should have known, that this right was clearly established. And it's just obviously preposterous for the for courts to say, Oh, well, there have been recent appellate decisions on this. I mean, sure, Police Department lawyers are supposed to routinely apprise the officers of like developments in the law. But you know, again, what the court is saying is that this guy should have known, because the Seventh Circuit rendered a decision he should be on, personally, on notice, which itself is a sort of silly legal fiction and and, you know, this sort of which, if you're a bit of a legal realist, you sort of say, like, all of this stuff is just kind of built on sand, and that, like you say, Anthony, we should actually just have real doctrines that say, if you're a government official acting under Color of state law, and you violate somebody's rights, you're going to be accountable for that.

A Anthony Sanders 16:25

Yeah, and that's exactly what we hold people in the I mean, this is a point that's been made many times, but for listeners benefit, this is a in the private law arena. So if you're suing about a tort or something federal, the federal courts have for a few decades now, rejected the doctrine that a ruling on what the law is, say it's tort law, contract law operates only prospectively because, well, we didn't know what the law was until you articulated it, and because the idea is under the under the common law, at least the law is Just the law, and the court is finding the law. It's not just making the law up, although a lot of people might argue that courts, in some cases do, and so that operates that on the parties that were in that lawsuit. And yet, when it comes to police officers and other government officials, we have this legal fiction that they didn't know what the law was, even though the court is articulating what the law was, and that would be true for any private citizen,

J Jeff Rowes 17:27

Before we shift gears too, I thought, since our audience is interested often in esoteric matters of legal rhetoric, this was the first decision I've ever read that used the phrase sibling circuits to refer to other circuits, rather than sister circuits. And so that suggests that there's some kind of evolution in the kind of the terminology of the federal courts. That's that maybe we're going to see more of in the future.

A Anthony Sanders 17:52

I like, I have to say, I like Sister circuits. What brothers circuits would sounds a little old fashioned. So I don't want to go to that. What do you think, Dan,?

D Dan Alban 18:02

I don't have a strong opinion. I think it's fine to refer to it either way. I just find the whole opinion sort of very weird because of the way in which it focuses on these two new, you know, circuit opinions that were issued in the interim. And so, as a result, someone who did more or less the exact same thing in 2014 as someone who recorded the police in 2019 isn't entitled to vindicate their rights in the 2014 incident, but the plaintiff in the 2019 incident is and the fact that two other circuits issued opinions in the meantime, and there was this Western Watersheds case about recording animals and wildlife habitat, just doesn't seem like like something that should have made all the difference and highlights the flaws with the qualified immunity doctrine.

A Anthony Sanders 19:00

Well, let's stay weird while we're at it, and we're going to go to Texas prison. So Jeff, take it away from here. Case about when a case is over, and then we get some uplifting language from from a concurrence as well.

J Jeff Rowes 19:19

So this case is Tucker v. Gaddis. But the basic nutshell here is this case is about mootness. Mootness is the doctrine that says you have to have a live claim. And if something happens while the lawsuit is going on, like the law changes, or some important fact changes, somebody dies, for example, that the claim is no longer live, and if it's not live anymore, the courts can't decide it. So this is a basic justiciability doctrine, and it is one of the procedural barriers that litigants have to overcome. So in this case, it's about the Nation of Gods and Earths, which is a Nation of Islam, offshoot from the. 1960s and it believes, basically that Africans were the original people on Earth, that at least part of their doctrine, according to Wikipedia, is that the white race is an evil race, and so in in the Texas prisons had initially, had originally classified them as a racial supremacy group, so they weren't allowing them to meet at all, so there couldn't be any religious congregation. So they decide to sue. The way the rules work in the Texas prison system is that there are 10 approved religions, and there are prison system chaplains that allow that conduct weekly congregation services for those religions. If you're not one of those 10 approved religions, then you can apply to have religious congregation with an approved volunteer chaplain. And so what these guys sued for, is they wanted to be able to to have religious services for the Nation of Gods and Earths. So this this guy sued originally as pro se, but eventually got, eventually got pro bono lawyer. He sues, and midway through the lawsuit, the Texas Department of Criminal Justice says, I'll tell you what, we're changing our minds. We're not going to treat you as racial supremacists anymore, so you can go ahead and apply to get these secondary services. And the district court said, looks like your thing is moot. You don't have a claim anymore. You can go ahead and apply and get this done. So it goes up

to the Fifth Circuit. Here's what the Fifth Circuit says. And this is a classic predicament, this is and this is also a classic government move. Any constitutional lawyer knows that when you sue, there is always a reasonable risk that government lawyers are going to get to get together and they're going to say, what is the least change we could make to this policy that will persuade kind of disengaged, kind of skeptical Federal Court who doesn't feel like doing a lot of work and who realizes it's a bit of a personal and professional risk to strike something down as unconstitutional that they can just seize on and say it's moot. And the kind of, the kind of scenario, something like this, imagine a laws passed that says you can't get a happy meal, can't buy a happy meal, and so you're aggrieved. You love happy meals, so you sue. And what the what the government does after you sue is it changes the law that says, Okay, you can get a happy meal. You can you can go to McDonald's, you can get a box that says Happy Meal on it, and McDonald's can even put a Shrek toy in it, and that's what you can get. And then the government lawyers rush in and say, Hey, this is moot. This guy wanted a Happy Meal. He can go to McDonald's to get a box that has a happy meal in it, and it's even got a toy. We're so magnanimous, we're so enlightened, that we're making sure this guy gets a toy, which really it's the toy that puts the happy and happy meal. And of course, the person, the person suing, is gonna say, oh, a happy meal isn't a box that says Happy Meal. It's a box that has a burger and fries and drink and a toy is great. Yeah, this is, these are healthy times. And so that's basically what the what the government did here, of course, the person who sued wanted to have religious services. The person who sued didn't want to be able to apply to have religious services. And so the Fifth Circuit reversed and said, we look to the complaint. We look to the relief the person wanted, and what they wanted was to have religious services, not to be able to fill out some bureaucratic paperwork and see what happens. And Judge Ho writes this interesting concurrence, which is a kind of cri de cœur that you ordinarily hear constitutional lawyers make all the time, especially around the water cooler when they're when their cases have just been dismissed on on some kind of bogus mootness grounds. And Judge Ho says, things have have just kind of gone too far here. There are so many doctrines that you know, if you try to sue someone for money for violating your constitutional rights, you have to you have to run. You know the kind of the phalanx of absolute prosecutorial immunity, qualified immunity of the officers, sovereign immunity of the US government, 11th Amendment immunity of state government. So it's and Monell liability against local the menel case, which insulates local governments against money, money liability in many situations. So you can't get any money for past constitutional violations. And then going forward, the government makes some trivial change in the law, cosmetic, non substantive. And the federal courts throw up their hands and cheer and say, I can get this off my docket. This is moot, and so judge ho says, Look, this whole system is turning into heads we win, and tails, you lose, and that there are all kinds of constitutional violations that are going un redressed because the federal courts have these doctrines, which, in the abstract may be legitimate, but the courts are using them imprecisely. I'm putting a bit of a gloss, but the courts are being lazy. The courts are being expansive. The courts are not fulfilling their duty of hearing serious constitutional claims. They're trying to get rid of them. And so Judge Ho is absolutely on the money. He's 100% on the money, no question about that. And it is a concurrence that is remarkable, it seems to me, for its candor and courage in putting this out there. And he's, he's a relatively new judge on the Fifth Circuit. He only been there a few years at this point, very smart, very distinguished background in Texas. And there are a number of relatively new judges on the on the Fifth Circuit, and I hope that they can start moving that court and then, because the Fifth Circuit is a source of influence across the country, can start moving other courts away from the profligate use of these procedural barriers to litigation and make it easier for meritorious constitutional claims to be heard.

D Dan Alban 25:58

Yeah, and I mean the sorts of things that Judge Ho talks about show that first of all, that he has a background in civil rights litigation. He's litigated some of these types of cases himself, and also highlights the sorts of things that we at IJ encounter all the time in a wide variety of cases, forfeiture cases, for instance, a classic area where the government Moots the case as soon as well, IJ is involved, or, frankly, when a lot of attorneys get involved, because they know it's going to potentially be an uphill battle, maybe be more costly to litigate than the amount of money that's been seized, and they don't want to establish negative precedent. And so that's one of the things that governments are always trying to do is sort of sidestep actually litigating the case, avoid the cost of doing it, but also avoid negative precedent that would shut down whatever it is they want to do in the future. One IJ case that I recall in particular where the mootness was particularly suspect was in Philadelphia when we sued over their tour guides. And there was a tour guide licensing scheme in Philadelphia that had been passed onto the books, but apparently had not been fully rolled out because of a lack of funding. But tour guides were told they would, they would need to get licenses. Had to get licenses. We sued over this on behalf of tour guides who wanted to be able to exercise their First Amendment rights to show people around the city point at historic places and tell stories about those historic places without getting a license from the city. And the city ended up being able to moot the case because it claimed it did not have funding to enforce this requirement and did not plan to fund the the tour guide licensing scheme anytime in the future because of budget shortfalls. And based on that, they were released from the case due to due to mootness. And so it's, it's those kinds of gaming the system actions that I think civil rights attorneys find particularly frustrating, because you know that that would not have been the case absent the lawsuit, and they're just trying to avoid getting a ruling against them saying they can't do it in the future, and maybe Someday, when they have funding and they have the political will to to implement licensing for tour guides, they'll try it again, and there's no binding precedent to stop them from doing it.

J Jeff Rowes 28:32

I think it's a great point again. One of the things you mentioned that Judge Ho had litigated some of these cases, and in fact I got the sense in reading it it's not just litigating it on the plaintiff side. It's litigating it on the government side. He was the Solicitor General of Texas for three years. And there had to have been moments for or there have to be moments for government lawyers when they say to themselves, I'm ethically required to make this bogus standing argument, because courts always go for standing even though, like, objectively, I'm sitting here thinking these guys have standing but the fact is that 80% of the time if somebody makes a standing argument, the district court dismisses the case. So I've got to make what I think is a bogus standing argument. For all of us who litigated these cases, you get the sense sometimes that when you get briefs from the government, it's like, they have a kind of template, or they have some macro on their computer, and they're just hitting like shift, f1, f2 f3, f4 and it's just spitting out, like standing mootness, ripeness, immunity, etc, and they just throw it against the wall like a bowl of spaghetti to see what sticks. And I got the sense that Judge Ho is not just talking about judges, but the whole point of having a disciplined judiciary with clear procedural doctrines is that it creates the right incentives for government lawyers too, so that what you wind up litigating is not some bogus procedural barrier that's concocted and pitched to a judge as a softball that said, Hey, why don't. To just bunt this one, and this whole game is going to be over, that what the government lawyers will have to do is actually

dig in, defend government action on its merits, and then, if they went on the merits, they win, but if they lose, then they should lose, and the case should not be, should not be relegated to the trash heap because of a bogus procedural reason.

A Anthony Sanders 30:20

One thing that Judge Ho and the majority both bring up is this idea of voluntary cessation, which we litigate way too often at IJ, where the government stops something, but it might bring it back in the future, then your case is not supposed to be moot. It's similar, but actually a little different, than the concept of capable of repetition yet evading review. That also makes cases not be moot. And when you actually dig into I realized recently, when you actually dig into a lot of voluntary cessation cases, the government wins those way too much for a doctrine that is supposed to be about cases not being moot. We've seen this a lot recently, with litigation over the pandemic, and I think courts just they don't want to deal with it anymore, and they're washing their hands of these cases, saying, Well, this is moot, even though, you know, experiences show that whatever the merits are of the challenge to the pandemic restriction, restrictions could come back. And that's true in many other areas of the law. And yet, when you really dig into the cases, it's really shocking how often government wins these cases. I know you guys have worked in a courthouse and helped judges with their dockets and seeing how judges really are. I think a lot of this is not ideological. This looks like a really difficult case that we're going to have to put our next next out on like you were saying, Jeff, and yet, if we called it moot, it's just going to be forgotten about, and we can write a lot shorter opinion. Our clerks can go home early, and so that's what we're going to do. And so not to offend any judges clerks listening right now, but it is the job to rule on these issues, as Judge Ho says, and you can't just use mootness as a reason to to get off early.

J Jeff Rowes 32:26

Yeah, I think that's right. And you know what Judge Ho is saying is that the mootness doctrine is a serious doctrine. It has clear boundaries, and courts ought to be it ought to be purposeful in applying it, not just sort of like put Vaseline on your eyeballs and kind of squint, and if it still looks moot, then you get to rule that it's moot and and like I say, the problem with having the problem with having overly liberal doctrines or expansive procedural doctrines isn't that the judges are bad people or the clerks are bad people. It's that it creates incentives, or indeed, requirements. I mean, the lower if a lower court judge reads a Fifth Circuit opinion that says everything under the sun is moot, then you can't blame the district judge for dismissing everything under the sun as being moot, right? And that's the point Judge Ho is making. It's why he doesn't go after the lower court in this case, particularly, his concurrence is really just directed at this larger system and judicial culture of being overly solicitous of government procedural arguments.

A Anthony Sanders 33:30

Yeah, public choice theory applies to judges, just like other government employees so and other actors in our system. So thank you guys. This has been a fun romp through the First Amendment and mootness, this show itself is about to become moot. But first, thank you again

for coming on. I want wish everyone a very happy weekend, and until next time, I want everyone to get engaged.