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SPEAKERS

Michael Perloff, Anthony Sanders, Rob Frommer

A **Anthony Sanders** 00:00

Hello and welcome to Short Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Monday, September 9, 2024 and we have a special guest today and a recurrent theme on Short Circuit, which is the Fourth Amendment. We're going to be talking about a couple cases to come out of a very memorable time in American history, and that is the summer of 2020 and everything that happened in the wake of the murder of George Floyd. So we have two cases that at least in part are about the Fourth Amendment, and both of them involve protests that happened over the course of that such a memorable summer to all of us. So one of our guests today is a familiar face and voice to our listeners, and that is my old colleague, Rob Frommer, so Rob, welcome back to Short Circuit.

R **Rob Frommer** 01:09

Oh, it's wonderful to be back. Thank you.

A **Anthony Sanders** 01:11

And Rob is talking about a case from the Ninth Circuit in a little bit, but before that, we're going to keep it local, at least for IJ's headquarters, and that is the DC Circuit. And a friend of ours from the ACLU DC, and that's Michael Perloff. So Michael is a graduate of Harvard Law School and of Brandeis University, he clerked for Judge Fisher on the District of Columbia Court of Appeals, and today he's discussing a case that he argued and won at the DC Circuit. So a bit of a twofer. It is also a case that signed on to an amicus brief that our friends at the MacArthur Justice Center took the lead on and it's about something very familiar to us at IJ, and that's the intersection of property rights and the Fourth Amendment, and this little word in the Fourth

Amendment that always gets skipped over: effects. So Michael, welcome to Short Circuit. We're so glad to have you. Tell us about this victory you secured for your clients, and what the heck "effects" means.

M Michael Perloff 02:27

Well, thanks for having me, Anthony, and great to see you again. Rob. Effects, absolutely an important Fourth Amendment concept, and these cases go to the question of: how long can police hold effects once they've lawfully taken possession of them? So these cases you mentioned at the outset, Anthony, arise from protests in the summer of 2020 and during those protests, DC police officers arrested journalists, they arrested legal observers, they arrested protesters on two specific days that are relevant to these consolidated cases giving rise to this decision. And for all of the plaintiffs in these cases, the police released them without charging them. But what they did not release were the protester's and journalists' effects, namely, one of their effects: their cell phones. The police held onto their cell phones for months, in some cases, for more than a year, despite repeated requests for their return. And that decision on behalf of law enforcement had serious consequences for people. It meant that they had to buy new phones. In some cases, it caused them to lose access to data on their phones, they lost access to pictures, lost access to apps, had to continue paying contracts for data charges for the old phones, even though they were getting new phones. So major consequences for the phone owners, but what about the government? Why did the government decide to hold on to these phones? We don't know, but from what we can tell, there was no legitimate basis to do so. There were no charges filed, so it's unlikely that there was anything relevant to an ongoing investigation on the phone. But even if there was, the police have the administrative and technological capacity to get warrants and conduct searches of phones and return those phones in far less than a few months or a few years. So DC did this to these protesters and journalists, but it also has done this to many others, this practice of taking people's phones and not returning it is long standing, the incidents that we talked about in our complaint are among more than 240 cell phones that DC police officers have retained and not returned in a reasonable period of time over the past few years and the practice goes beyond cell phones. It includes medication, it includes money. It includes one instance of police taking and holding on to someone's winter coat so that they had to walk back from the courthouse in a t-shirt in 15 degree weather.

R Rob Frommer 05:12

My goodness.

M Michael Perloff 05:14

So, big problem here in DC, a problem we hear about all around the country, but a problem that many people around the country aren't able to address, because in most circuits to consider this issue, courts have concluded that the Fourth Amendment doesn't speak to this problem. The Fourth Amendment may govern—and these courts have held it does govern—the initial decision to take property, but it doesn't apply to what the government does with property after it has lawfully secured it. The DC Circuit held otherwise. It concluded that the Fourth

Amendment not only governed the initial taking of property, but also what police do with it after they've secured possession. And that's what this case is about, and that's what this decision is about.

R Rob Frommer 06:05

This is fascinating. I mean, I remember when this was all happening in 2020. So let me get this straight, Mike: so, so at these protests, they were arresting people, and often, like letting them go or bailing them out or whatever the next day, but they were still holding on to people's phones and other personal property?

M Michael Perloff 06:26

That's right. And I think what's really important to recognize here is not just letting them go, but letting them go without charges filed against them. So this isn't just a case of officers saying, go and come back, we're investigating what you did, we may need this cell phone for a criminal trial against you. These are people who are released with no charges against them, no reason to think that they're going to face charges. And so why hold on to the phones? So, pretty egregious example of property interference by law enforcement in this case and many of the other cases that give rise to this pattern as well.

A Anthony Sanders 07:09

You know, I understand the government here argued that it's just not—that there's a seizure at the beginning, and then later on, you don't even get to call it a seizure. You just have to have a different reason for getting the property back. But what does it seem like is the government's theory? I mean, I could see them arguing something as strong as until the statute of limitations runs out on what we might charge you about, we get to keep that property, because, God knows, maybe we'll charge you in four years, and then the property will be evidence. What, like, what is their governing theory for when you have a right to get the property back?

M Michael Perloff 07:48

The government hasn't given a theory for when you get the property back. That wasn't how they argued this brief. We don't know if they have a theory on that point, but I'll say, you know, even if the government were to argue at some point that they may need the phone for a future criminal investigation. They really don't need the phone. What they might need is data on the phone. You can see an argument where maybe in some circumstance, the government needs your picture, because you maybe took a picture of someone committing a crime, but the government has the technological capacity to, after getting a warrant, search and extract any data that they need, and then give you the phone back, fully intact, able to authenticate the data. So even if they were to advance that type of theory, there's really no justification for holding onto phones, let alone people's medication, their coats, things like that that we've seen in other cases.

R Rob Frommer 08:48

Yeah, there's no potential evidentiary value in a coat.

A Anthony Sanders 08:52

Right. It seems like maybe where the—I mean, it just seems egregious what the police and prosecutors are doing here, but I'm guessing, from their point of view, usually, when they're dealing with evidence, it's stuff that no one would want back, like, you know, a blood spattered piece of paper or stuff from a crime scene, right? Or contraband, right? So this is a case where it's something that someone would want back, but it's not just an article of clothing, it's not just a hat or something like that. It's a super important in today's society piece of equipment that costs several hundred dollars to replace.

M Michael Perloff 09:38

Right, and we see this also happen with vehicles at times, there's other cases that have been about vehicles. So this can apply to effects, as we're talking about here, that are fundamental. But even something like a hat may be important to someone, and the police shouldn't hold onto your hat. They should give it back if there's no legitimate justification. So that's what the DC Circuit said. Essentially, they said that has to happen here. If a seizure becomes unreasonable in duration, it's got to end. And the way the court got to that conclusion is interesting and important. The court looked at this in three levels. It looked at this at text, history and precedent. Starting with text: the court went back to founding era dictionaries, and it talked about how at the founding the word "seizure" could mean both the act of taking possession and possession itself. And in terms of history, the court said, well, actually, case law acknowledged both conceptions of seizure when it came to common law property rights. You could state a claim that someone unlawfully took possession of your items, or that they lawfully took possession of your horse but they didn't give it back within the time period that they should have, and they're liable for damages to you. And finally, when it came to precedent, the court talked about the Supreme Court's decision in the United States v. Jacobsen, where the Supreme Court said that even though a seizure of a package was lawful, supported by probable cause, the Fourth Amendment analysis wasn't complete, because there was still a question of what the police did with the contents of that package after they seized it. Namely, the police conducted a field test of a white powder inside the package, destroying a portion of that powder. And the Supreme Court said, you know, that field test needs to be reasonable. We're going to assess whether it's reasonable, and in that case, it was reasonable, but in applying the Fourth Amendment to the field test, and not just the initial decision to take the package, the court in Jacobsen reached the conclusion that the Fourth Amendment applies to what police do after they secure possession, again, a decision that is in complete contradiction to these other circuits that went the wrong way.

R Rob Frommer 12:04

This has been a fascinating issue in the law. What's interesting here is, you're right, like the DC Circuit and the Ninth Circuit, in a case called Brewster v. Beck, have both taken this position that under the Fourth Amendment, once the government's justification for a seizure ends, it either has to give the stuff back or get a new justification. What I find interesting here, and you

keyed in on this at the beginning, Anthony, when you mentioned the word "effects" is—and Mike, I don't know if you noticed this—but when we're talking about seizures of persons, nobody seems to have any sort of problem saying that a seizure of a person continues, not just at the time of the grabbing of the person, but for as long as the person is grabbed. And the Supreme Court's been that way, I think the circuits are uniform on that. So why do you think it is that the courts, if they all agree that a seizure of a person continues as long as the person is seized, why is it different just because it's your thing, instead of yourself?

M Michael Perloff 13:02

The person context is interesting because there was some tension within the circuits about whether a seizure persisted after the initial...'taking of possession of the person,' I guess you could say, and that dispute was essentially resolved in a Supreme Court case called Manuel from a few years back. So the courts made clear that the Fourth Amendment applies to the ongoing detention of people, and that conclusion in Manuel is consistent with other Supreme Court Fourth Amendment decisions that predate Manuel, going back to, for instance, Gerstein v. Pugh. So there is this conception of what a seizure of a person is, and that, you know, the court says in Manuel that a seizure of a person lasts from the beginning of the detention all the way until there is a trial, at which point the Fifth Amendment or the 14th Amendment due process principles kick in, and that should be the same with effects. Why courts have treated those things differently is somewhat mysterious, but I think it may well relate to some discomfort at the outset with the idea that the Fourth Amendment should apply to the ongoing detention of people altogether. That tension, perhaps that was sorted out in Manuel with respect to people, needs to be reaffirmed with respect to effects. And hopefully that will happen now that the DC Circuit has clarified the legal issues.

A Anthony Sanders 14:41

One thing I saw in the opinion is, interestingly, that this and the Ninth Circuit are the only ones on this side—we think the correct side—of the issue. Bunch of other circuits have gone the other way. But it also said a lot of them were pretty perfunctory. And I'm guessing, maybe they weren't the most sympathetic clients, maybe they didn't have the greatest lawyers at times. And it seems like this is maybe one of those issues where you get kind of one precedent leading another, where it's just not very well developed. And finally, when you have some more sympathetic clients or some better lawyers on the other side, you can kind of right the ship on the other way. But the problem is you have this split that's developed, and so then there's a lot of uncertainty in the law. Do you see Michael that now that there is this opinion, of course there is the older Ninth Circuit opinion, that things will start shifting the other way, or is it just going to take the Supreme Court to decide this one way or another?

M Michael Perloff 15:48

Hopefully courts will start to recognize the correct direction here. There is actually one other decision on our side, a Fourth Circuit decision that's unpublished, but I agree that a lot of these cases are the results of courts not engaging deeply with these issues for a variety of reasons. It's interesting, there's a Sixth Circuit case that's fairly prominent in this area of law, where the dissent highlights the Supreme Court's decision in Jacobsen and the majority just ignores it. So

it's unclear why that decision came out the way it did. I do think that what the DC Circuit did that's really helpful here is not just analyze Supreme Court precedent, but also go deeply into first principles of Fourth Amendment law. And for a lot of judges, that deep analysis that Judge Katsas and the panel did in this case may be very compelling and help them see how this isn't just an example of the Supreme Court inventing a rule, but rather, this is a set of Supreme Court decisions that has deep roots, and so the decisions that have gone the wrong way aren't just being unfaithful to precedent, but in many ways are betraying a core guarantee that the founders would have expected. So Judge Katsas's opinion does a good job of explaining that. And there are circuits that that haven't reached decisions in the ways that you might call holdings. They've stated the issue in dicta. So there are circuits where this issue can be revisited. Obviously, in the circuits where there are holdings, there's going to need to be a review en banc. But I do think this is the kind of decision that can turn the tide on this important issue.

R Rob Frommer 17:28

Yeah. In fact, we have one of those cases brewing right now up in the Third Circuit. It turned out that New Jersey was, you know, as part of testing babies, taking their blood—which, okay, that's fine—and they would test the blood for genetic diseases, and then they just decided for itself to hold on to the blood for 23 years for no rationale. And we are saying that that is a seizure, and it's a continuing seizure that thegovernment has to justify. So hopefully we can make some good law up there and/or deepen the split.

A Anthony Sanders 18:01

And for those interested in the baby blood case, we'll put a link in the show notes. I think we've talked about it on Short Circuit briefly in the past. And finally, I'll just say, in going deep into this issue I was pleased to see the Court cited our friend Molly Brady's opinion, The Lost "Effects" of the Fourth Amendment, from the Yale Law Journal from a few years ago, that I'm sure Michael, that you've found useful as well. So that is the DC circuit, and some shenanigans from the summer of 2020. Now we got Rob telling us about this case from the Ninth Circuit, where not only were there shenanigans in the summer of 2020 but someone was very badly hurt in a rather sensitive area.

R Rob Frommer 18:52

Yeah, yeah. I felt bad, because when I first read the case, I started laughing, and I thought of Hans Moleman and The Simpsons. But then I read more, and the guy actually got hurt, and I feel bad about it, so hopefully we can give him a little justice here. So this case is called Sanderlin v. Dwyer, and like Anthony mentioned, this comes out of the protests in the summer of 2020, after George Floyd's killing. This protest was in San Jose, and Derek Sanderlin is out there, he's out on the sidewalk. He's not blocking traffic or anything. He's out on the sidewalk with a big sign in his hands, you know, stop oppression, I'm not sure what the sign said. So he's standing there, or he's sitting on the sidewalk, not bothering anybody, not like, threatening officers or anything. All of a sudden this officer, Michael Panighetti, he fires a 40 millimeter foam baton round directly at Derek. I had to go look at what a 40 millimeter foam baton round is, because it both sounds like really fun, like a nerf toy, and also devestating, and it turns out

it's actually the latter, because that 40 millimeter baton round hit Derek Sanderlin right in his groin. That was the cue the Simpsons bit, but it caused him serious injuries. In fact, he had to actually go get emergency surgery as a result. I mean, yeah, I know—foam, this is no joke.

M Michael Perloff 20:21

This isn't Nerf guns in the backyard.

R Rob Frommer 20:23

Exactly. So after he gets better, Sanderlin sues this officer, Panighetti, and he says, oh, Panighetti, you violated my First and Fourth Amendment rights here. You violated my First Amendment rights because basically, you're retaliating against me for just doing protesting when I'm not causing anyone any problems. And he said, and you violated my Fourth Amendment rights because you can't shoot me in the groin with a 40 millimeter baton round just because you don't like that I'm protesting. And so, of course, Panighetti claims qualified immunity. He says, Oh, I didn't retaliate. Oh, the baton round somehow wasn't a seizure. And even if it was a seizure, it was reasonable. Didn't violate clearly established law. Didn't go so well for him in the District Court, loses that motion. So Panighetti, you know, most people would have to wait to appeal, but Panighetti here, he has a special power of being able to immediately appeal the denial of qualified immunity right up to the Ninth Circuit, and that's what he does. But guess what? His arguments gained absolutely no ground in the Ninth Circuit. The panel of judges said there were genuine issues of material fact, and the case needed to go to the jury. Now first, on the First Amendment side, the panel said, you know, there's pretty plausible circumstantial evidence here that the officer retaliated against Derek Sanderlin for his protesting. It recognized that if Sanderlin wasn't interfering with the officers or wasn't causing any other kind of public safety issue, a jury could pretty easily conclude that Panighetti acted out of retaliatory animus. And then the court went and looked at the Fourth Amendment claim. It noted that in 2021 there was a Supreme Court case that said a seizure quote "requires the use of force with intent to restrain" but the panel recognized that well the jury could, through objective evidence, find that intent. And that jury, at the same time, could look at the evidence and say that Panighetti, by shooting Sanderlin in the groin with this 40 millimeter baton round, wanted to impede his movements, wanted to restrain him, wanted to basically keep him from moving. And they said similarly, you know, a jury could look at these facts and say that this seizure was constitutionally unreasonable. Now, there's something that's really interesting here in this analysis, and it's about the clearly established element of qualified immunity, because back in 2012 the Ninth Circuit decided a case called Nelson v. City of Davis where it denied qualified immunity to an officer who had fired some pepper balls into a crowd of students. And in that decision, the court said that quote "the intentional application of force, which terminates an individual's freedom of movement is a seizure." That's a little bit broader than the Torres v. Madrid standard, which requires an intent to restrain.

A Anthony Sanders 23:33

Right, and thats the case from the U.S. Supreme Court case from 2021 right, that you were referring to earlier, Torres?

R Rob Frommer 23:39

Yes. And so Panighetti tried to rely on this Torres case, and the court said, no, no, you don't get to rely on that. After all, the whole point of this qualified immunity analysis is supposed to give you notice. So how could you be on notice of a case that didn't happen until a year after the event? You know, the fact that it might have slightly shrank what would be an unconstitutional seizure—you couldn't, you're not a mind reader, you can't have known that a year ahead of time. If the whole point here is notice and what you're on notice of, you shouldn't get to take advantage of a case that might have narrowed the range of bad behavior or unconstitutional behavior. So the court said, you know, these subsequent legal rulings, we should just ignore them, regardless of whether they help the plaintiff or the defendant. So at the end of the day, the court said, Well, the important thing that matters is what happened as of May 2020, and it said as of May 2020, it was clearly established that law enforcement officers couldn't use force like this against peaceful protestors. So now the case goes back, goes to a jury, and we'll see if they think if Panighetti's actions were justified.

A Anthony Sanders 24:51

Michael, does this case speak to you on any seizure issues?

M Michael Perloff 24:57

Well, you know, obviously this just an egregious action that the officer is alleged to have committed. It's interesting to me the way that the court analyzed the qualified immunity issue. And I just think, and I'm interested in your thoughts too: it seems that it points out the sort of absurdity of qualified immunity because the law has changed, and yet we have to look at what the law was at the time the officer acted, as opposed to what the law is now. And it's a very strange form of analysis that you really don't see in any other domain of law, where we are unable to just apply the Supreme Court's precedents as they are, you know, maybe there are some areas, I suppose, where you've got concerns about retroactivity, but this really is going to hypothetical state of mind that an officer might have had about a written decision they probably never read. So to me this whole case, and the analysis the Ninth Circuit has to engage in, which I've actually never seen in a qualified immunity case, but it just goes to show the sort of strangeness of this doctrine. And I'm curious if that was your reaction, Rob, and if you feel like this is maybe an exhibit that can be used as part of the growing movement to push back against qualified immunity.

R Rob Frommer 26:22

I think that's exactly right. I've always thought that qualified immunity is, I mean, it's invented. They just invented it out of whole cloth. There's no qualified immunity written in the Constitution, but beyond that. I've always thought that it's landed uncomfortably in the courts, and for years and years, we saw them sort of go along with it. Now, I think you're right. We're seeing more judicial recognition of the problems, not just the jurisprudential problems, like with how qualified immunity is conceived, but just the actual on the ground problems. And so we're seeing courts really wrestle with these issues in a way they haven't before. But I agree with you this entire qualified immunity analysis, what was in the mind of the officer? What could he have

been aware of at the time of the action? It's just crazy talk. You're right that they generally don't read these opinions. And what it should be is, after all, like, especially with this Fourth Amendment stuff, the reasonableness is already baked in the cake, right? Like if the officers actions were reasonable, then they wouldn't be unconstitutional. So we're already past that point. So why can't we, when we're deciding whether an officer is liable, just say, did he act constitutionally unreasonably? And that's it. I agree with you that all this additional work just makes it more and more confusing and more difficult. And I think courts are recognizing that.

M Michael Perloff 27:44

You know, we had a period where it seemed like the Court was receiving many cert petitions encouraging it to reconsider qualified immunity as a doctrine, and it seemed like it was considering some of them. But then back in that summer of 2020, that moment, in some ways, it felt like it faded. So do you feel like this is, there's a window reopening for the court to reconsider qualified immunity, or is that ship still in unsolved waters?

R Rob Frommer 28:17

I mean, I wish I could be more sanguine. I wish I could say the end of QI is nigh, but I don't know. I mean, it seems to me that there's a continuing appetite at the court to excuse officials' behaviors and to invent doctrines to excuse those behaviors, even to create an additional layer beyond the actual restrictions of the Constitution itself. I would hope so, but—and I obviously will try, we at the Institute for Justice and our Project for Immunity and Accountability will keep pushing to try to get courts to change the law. But it's going to be an uphill climb, I think.

A Anthony Sanders 28:59

I do see the kind of metaphysical issue you guys have been talking about, about the case law actually getting—I mean, this is the argument, I don't think it's actually true—but the case on this specific point getting better for the officer after this happened, and so he should get the benefit of that, not just on the on the law, but on the qualified immunity analysis. I think that this little quirk really highlights the absurdity of qualified immunity in the first place. And so I don't think this is a case that is going to make it to the Supreme Court, but I kind of hope it would, because it might be something that just... What might have to happen in the medium term for pushback on qualified immunity and other doctrines—and this, I think, is what you're driving at, Michael—is maybe it's not what we expect is going to happen. It's not a cert petition that's going to be filed that says qualified immunity is actually bad; please reverse all these other cases, like the typical way we think about a court reversing its doctrine, and does sometimes. I think it might be something that kind of comes sideways, like this, where the court says, What? What? That can't be, right? That wouldn't happen. Wait a minute. Oh, we've been doing all these other things, and, you know, there could be some pushback in that way. And so it's, I don't think it's going to be this case, but it could be. It could be some other case like that, where we start to see some improvement. Maybe I'm just a sunny optimist, though, Rob.

R Rob Frommer 30:41

I know I'm just, I'm just jaded. But, no, I think you can feel the tide is changing. I just wish it'd be rolling in a bit faster.

A **Anthony Sanders** 30:52

Yeah, well it certainly is I think coming to—I mean, if Anya or Patrick were here, our colleagues at the Project, they would be highlighting this—I think, in the lower courts, we do see more and more convergence that something's got to be done about this, and I think that is going to percolate up to the Supreme Court, but it is taking longer than maybe we thought it might.

R **Rob Frommer** 31:16

Yeah, but you're absolutely right. There has been a massive vibe shift in the lower courts.

A **Anthony Sanders** 31:21

Yes. All about the vibes, as we know. Well, Michael, we are sending you good vibes for this case, which is not over yet. So we're a little unclear what, how the government's going to appeal as of recording this, but it may happen in some way, there may be a cert petition, and so we'll, of course, be keeping a close eye on it. But otherwise, best of luck to you and your work at the ACLDC on this and other matters. And thanks for coming on.

M **Michael Perloff** 31:52

Thanks for having me.

A **Anthony Sanders** 31:54

And Rob, aways great to have you on. Rob and I were little baby lawyers together, like pre-zygote lawyers basically, worked at IJ, and now we are older lawyers. You might say. But, thanks for coming on.

R **Rob Frommer** 32:11

We're well-seasoned attorneys.

A **Anthony Sanders** 32:14

Yes. Yes, some of the best seasoning, actually. And thank you all for listening to this version of Short Circuit. Please be sure to follow Short Circuit on YouTube, Apple podcast, Spotify, and all other podcast platforms. And remember to get engaged.