ShortCircuit344

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Jury trial, qualified immunity, Second Circuit, Fifth Circuit, video evidence, death threats, constitutional violation, structural error, harmless error, Abraham Lincoln, excessive force, police officer, qualified immunity standard, jury deliberation, legal interpretation.

SPEAKERS

Bob McNamara, Anya Bidwell, Anthony Sanders

A **Anthony Sanders** 00:17

"All right, this has to be a twelve to nothing vote either way. That's the law. Okay, we ready? All those voting guilty, raise your hands." Seven or eight hands go up immediately. Several others go up more slowly. Everyone looks around the table as the foreman begins to count hands. Number nine's hand goes up now and all hands are raised, save for juror number eight. "Nine, ten, eleven. That's eleven for guilty. Okay, not guilty." Juror number eight slowly raises his hand. "One, right, okay, eleven to one, guilty. Now we know where we are. Boy, oh boy. There's always one." Well, that was from the 1957 classic, 12 Angry Men, with Peter Fonda starring as juror number eight. We're going to learn this week about a jury of only 11 angrier, non angry jurors, and whether that was enough. That's from the Second Circuit. And then we also have our bread and butter of this show, a qualified immunity case from the Fifth Circuit, today on Short Circuit: your podcast on the Federal Courts of Appeal. 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 16, 2024 so you in the future will be watching the show just a couple weeks from now when it's released, and that will be after tomorrow, September 17, which is Constitution Day. So for us, it's in the future. For you, it's in the past, but for everyone, I want to wish a happy Constitution Day. Now to celebrate Constitution Day, what would be more perfect than discussing the requirement for a jury trial and what that means numerically, and also the First and Fourth amendments. So we got all of that in the mix this week with a special treat, two of our powerhouse litigators at the Institute for Justice, Anya Bidwell and Deputy Director of Litigation, Bob McNamara. Welcome to you both.

B **Bob McNamara** 02:30

Thanks for having us.

A **Anya Bidwell** 02:33

Great to be here.

A Anthony Sanders 02:34

We're gonna get to Anya a little bit. This is the first time Anya—well, Bob too,but especially for Anya, because she's on the show so much—first time on the YouTube channel for those of you watching,

A Anya Bidwell 02:47

I better behave myself.

A Anthony Sanders 02:48

That's because she is at our headquarters in Arlington, Virginia, in one of our studios. So it's a special treat for all of our viewers, but also listeners, of course. But first we're going to go to Bob with this case from the Second Circuit and jury trial and whether almost a dozen is enough for a jury. So Bob, is it enough?

B Bob McNamara 03:13

Sometimes. Though, I will note, Anthony that you did not tell people it was a special treat to be able to see me, and that hurts my feelings, though, it is also accurate.

A Anthony Sanders 03:23

The Bob fans out there know who they are.

B Bob McNamara 03:27

I call them mom and dad. [Laughter]. So that brings us to United States v. Johnson out of the Second Circuit. I love this case. It has fun facts. It has a compelling legal issue. It has Abraham Lincoln. It's a ride. So it's a prosecution for making death threats. And most of the time in constitutional law, when there's a case about true threats, there's a bunch of debate about how these threats should be interpreted, what they really mean, what the full context of the statements was, and kudos to this defendant, because his threats are along the lines of "Laura Ingraham, I'm going to personally kill you. I am going to kill you with my bare hands." So like he's not going to be in any con law hypos. He is making death threats, and he makes no bones about it. He apparently makes a series of death threats uploaded to his Instagram account with only one follower threatening to kill various Fox News hosts and Republican office holders, and is, as often happens—

A Anya Bidwell 04:25

And Joe Manchin.

B Bob McNamara 04:27

And Joe Manchin. He apparently was watching television and just making death threats on his phone as he watched the TV.

A Anthony Sanders 04:35

As one does, you know.

B Bob McNamara 04:36

It's an interactive society, but that gets him in some trouble, gets him arraigned on federal charges. And so a jury is impaneled, and over the course of the jury, they have 12 jurors. They have two alternates. They lose two of the alternates for sort of childcare and medical reasons, so they're down to 12, but one of the jurors on the first day of trial makes this sort of impassioned speech, and it's not totally clear who he's talking to at the beginning, but by the end of the speech, sort of everyone has moved away, except for this one NYPD detective. And everyone has moved away because the speech is about how, you know, Americans have stolen Indian land, and also how Abraham Lincoln didn't want to free the slaves, but was forced to free the slaves. Juror number two has a lot of feelings, and so the NYPD detective, since everyone else has kind of left, has had this weird conversation with a juror and goes to the judge to say, like, I had contact with a juror. You're not supposed to talk to the jury once the trial is going on.

A Anthony Sanders 05:38

And he was a factual witness in the case, right?

B Bob McNamara 05:42

Yeah, he's affiliated with the prosecution.

A Anthony Sanders 05:44

How was he even close to the jury? That's what I'm wondering.

B Bob McNamara 05:46

It sounds, from the context of the opinion, like it was just a really loud speech made to, initially made to like the other jurors, but the other jurors seem to have kind of sheepishly walked away. You've been in federal courthouse hallways where there are just, there are a bunch of

people in the hallway, and if somebody starts yelling about Abraham Lincoln, that crowd's gonna thin. [Laughter]. I think the only one left is this poor NYPD detective who probably was thinking, like, I should stand near here in case he starts, you know, taking swings at people. You can understand why the NYPD detective thinks, like, maybe I should monitor the situation. But he goes to the judge, and is like, look, you should know this happened. And so the judge brings juror number two in and says, you know, I understand you've had a conversation with one of the witnesses in the case. And things get worse. The juror number two is outraged. He's been accused of a heinous crime, and he demands to know who his accuser was, even though he's been accused of talking to this specific detective, so like he knows, but he appears to kind of lose his mind. The judge, like, tells him to calm down. And at this point the government, not unreasonably, is like, look, juror number two thinks a member of our team has accused him of a heinous crime. He's probably not impartial anymore. And the judge says, No, like we're gonna keep him. I'll instruct him. It'll be fine. But then the judge sleeps on it. Speaking of sleeping on it, juror number two also apparently sleeps through part of the rest of the day's proceedings, which is not really part of the case.

A Anya Bidwell 07:18

He says he didn't, he didn't.

A Anthony Sanders 07:19

He was just resting his eyes.

B Bob McNamara 07:23

He says his eyes were open, and the judge says, No, they were not, sir.

A Anya Bidwell 07:32

We know a couple of people like that.

B Bob McNamara 07:34

This trial seems amazing. I'm sad I wasn't there. But anyway, on the next day, kind of before the jury starts deliberating, they're down to 12. They've lost their alternates, and the judge says, Look, I have thought about it. There's absolutely no way this juror can be unbiased. He thinks the prosecution is out to get him personally. We have to strike him. I'm allowed to strike him, and we're going to try this case with 11 jurors. And the problem—pretty much everything the judge said was true, except "I'm allowed to strike him." He's not. Under the Rules of Criminal Procedure, if you want to try a case to 11 jurors, you have to have the stipulation of the parties that says they're okay with that. He did not get that. He was not actually allowed to strike juror number two. And so the question is, what happens next? What do we do with that? And the Second Circuit kind of splits. There's a two judge majority and a one judge dissent, and the majority says, look, the Supreme Court has told us that you don't need 12 people on a jury.

That the common law tradition of 12 member juries is an arbitrary number, and that's not part of your constitutional right to a jury trial. Question whether our current Supreme Court would do the same thing faced with that question of how much the common law matters, but it's what they said in 1970. And so the court says, look, there are two kinds of error. There's a structural error—and a structural error means we just have to overturn the verdict no matter what, because there was a problem with the way you ran the trial—and if it's not a structural error, we need to see whether it caused any harm or whether it was just a harmless error, and the same thing would have turned out anyway. And the majority says, Look, this isn't a structural error, because you weren't deprived of a constitutional right. The rules could say you get 11 member juries, and then you just have an 11 member jury. The judge didn't follow the rules in giving you an 11 member jury. But you don't have a constitutional right to that. That's probably fine. The only question is whether it hurt you, and it couldn't possibly have hurt you because you said on Instagram: Laura Ingraham, I'm going to personally kill you. And that's not like a—that's not a tough thing to figure out. Like no reasonable juror would look at that and say, Oh man, I bet he meant he doesn't like her. That's a death threat. Any reasonable juror would know that's a death threat. You would have been convicted anyway. Nothing to it. Judge Chin dissents and he says two things: like, look this is obviously a structural error. I don't care if the Supreme Court said you can, in theory, have 11 member juries; the rules say you have 12 member juries, and that's the structure of the proceeding, and that you can't change the structure of the proceeding without creating a structural error. You broke the rules. You had too few jurors. That has to be it. And in any event, if it's not a structural error, I don't know how we can say it's harmless. This jury, even with only 11 people on it, seems to have deliberated for two days. And this seems super easy to us, but I wasn't in that jury room. And how am I to know what would have happened if they'd had a 12th person? Maybe those two days would have been even harder. Maybe they would have honed. I don't know, and so I can't say this was harmless error, and it's a difficult question, right? I have to admit, I have some sympathy with Judge Chin's position, because the defendant isn't saying I would have been acquitted by a reasonable juror. He didn't have a reasonable juror. He had the Abraham Lincoln guy. He wants to know what the Abraham Lincoln guy would have done in that room, and I don't think it would have been reasonable. That's really sort of the core problem. It's what gives me some sympathy to calling this a structural error, because how in the world—like juries do stuff, right? Like we all know, juries go in a room and they come out and, like, often, when you talk to jurors afterwards, their deliberation didn't hinge on the parts of the case that you thought were the most important and hinged on, you know, other stuff.

A Anya Bidwell 11:31

They were asking things like whether he was mentally disturbed, those kind of questions that, you know...

B Bob McNamara 11:39

Yeah, well, they had a bunch of questions. It was, apparently, it was a one day trial, and the jury deliberated for two full days.

A Anthony Sanders 11:46

I mean, they wanted to let him off for insanity, basically.

B Bob McNamara 11:49

It sounds like the jury wanted to let him off for insanity, but the defense actually didn't make an insanity argument, which honestly, just as these statements seem obviously true threats, they also seem on their face like an insanity defense. I don't know, I'm just a poor country lawyer, but...So it was a super weird case, and Judge Chin is right that, like, if 11 people had to deliberate for two days, it seems really hard to say that no reasonable juror could think you'd have to acquit because, like, somebody in that room thought something, and they did acquit on one of the charges, which also doesn't make any sense, because basically he was charged with making four threats. They're all substantially the same threats. The jury convicts on three, acquits on one. That doesn't seem to make any sense on the face of it either, because sometimes juries don't make sense, and that's why you have 12 people and not kind of an appellate court saying, Well, you seem pretty super guilty, so I doubt that 12th guy would have made any difference. So it is, it's a difficult question. It's a question on which there's a circuit split. So Abraham Lincoln guy maybe going to the show. But it's, it sounds like it was just a wild trial. I also, like, frankly, I have a lot of sympathy with just the trial judge, because what do you do with a wildly disruptive juror who thinks he's personally being prosecuted? He was a tough spot.

A Anthony Sanders 13:13

That's where it comes down for me is, if I was a trial judge, you only have two alternates, you have these 12 jurors, something comes up and you let them go. I mean, I guess the alternative, if we're really going to be sticklers about the 12 jury requirement, the the alternative is you just delay. If a juror can't show up, you just delay trial and and you delay and delay and everything else. I guess you just reschedule in two weeks. Somehow you need to bring the jury back. But if you can't, if we don't live in that world, and there's a busy schedule and all that, then sometimes, I guess you go to an 11 member jury. Like they pointed out, under the rules— Constitution is another thing, but under the rules— if they had let the jury go in the room and then immediately got juror number two out of there that would have been okay, right? Because it goes to the jury, and then you can strike people without agreement from both sides. So, you know, is that really any different?

B Bob McNamara 14:12

I mean, I think the idea behind the rule is like, once they're deliberating, the trial is over, and if someone cannot serve at that point and has to be removed for cause, then you want to preserve the trial. You want to keep things going. And just because one juror gets sick doesn't mean the whole trial gets thrown out. So the counterpoint to that, as Judge Shin pointed out, is this was a one day trial. You could just do this again if everybody really wanted to do it again. Or also, you can just ask the parties like, do you really want to do this again, or are you willing to go with 11 people? And the thing you can't do, according to Judge Chin, is just tell Mr. Johnson, sorry, Abraham Lincoln guy is kind of freaking me out, so you only get 11 jurors, even though the rules tell you, you get 12. And I do have some sympathy with the idea that that's just that's unknowable thing. I don't know what juror number two would have been if he were the 12th guy in that room, and maybe you get to find out, even if it means we have to have

another somewhat silly one day trial about your Instagram posts that were seen by more people in the course of the trial than they were seen when they were actually on Instagram. But you know, there are procedures in place for a reason, even if the outcome seems preordained, and like the majority is not wrong that the outcome seems pretty pre ordained here.

A Anya Bidwell 15:31

And the guy, he ended up serving his sentence, right? At least the custodial part of it, and it wasn't an extremely long sentence, I think partially because those were threats from an insane person, really, fundamentally.

B Bob McNamara 15:45

Yeah, I mean, it's, you know, people shouldn't be able to make death threats, and it's good that death threats are prosecuted, so I'm glad there was some punishment, but also like, I don't think anyone can look at this one follower Instagram account and be like, This guy needs to be locked away for life.

A Anthony Sanders 15:58

I think it was two years, right, that he got and it's already over by now. So it's the probation, really, that we're talking about.

A Anya Bidwell 16:05

Yeah, he's out and he wants justice. I get it. My favorite part was actually the discussion of hearsay and exceptions to hearsay.

B Bob McNamara 16:14

[Laughter]. Every true lawyer's favorite part.

A Anya Bidwell 16:16

My favorite professor in law school was my evidence professor. Steve Good, if you're listening, you were my favorite professor and so, reading all that stuff, really brought back some serious memories about excited utterance.

B Bob McNamara 16:31

The email from the Fox News host is an excited utterance.

A Anya Bidwell 16:35

I am so excited.

B Bob McNamara 16:36

That is, like, I don't know if you can have an excited utterance via email, like you're sitting there typing the email. I've never read cases about this, but it does seem like, how excited can you be when you're typing an email.

A Anthony Sanders 16:48

Actually in some ways, like an email, or a text, or a tweet seems like more of an excited utterance than a letter you might have had in a case from the old days. So you know, we all have dashed off things in email excitedly that maybe later we wish we hadn't...

A Anya Bidwell 17:05

Speak for yourself. [Laughter].

A Anthony Sanders 17:07

Finally, I will say: Judge Chin cites to Blackstone about 12 people on a jury. And actually, I brought that up, I was curious. It's actually, I mean, he didn't cite it incorrectly. He didn't quote it incorrectly. But if you look at the wider context, it's about capital cases. So you can only convict someone to death with 12 members. I think that is a hard and fast rule. I'm sure SCOTUS has, you know, adopted that too.

B Bob McNamara 17:36

So though, in fairness, when Blackstone was writing, all felonies were potentially capital. So you have to be careful making those translations from Blackstone to modern criminal procedure. This is a whole fight Justice Gorsuch wants to have on this exact issue.

A Anya Bidwell 17:55

Unfortunately, we don't have the Court to vote for that yet.

A Anthony Sanders 17:59

Yeah, I don't think there's five votes for a hard and fast 12 member jury, but to me, it comes down to, is it that strong a rule that the trial management of this trial judge means you just

need to delay it? Maybe it's true. But I think, you know, as we do these days, we would look a little bit more at the history before the Supreme Court decides this again, once and for all. But maybe that's going to happen. So another thing that may happen is the Supreme Court revisiting this thing about video evidence, which seems to be all over the place these days, in how judges review video evidence, that is, weigh evidence before it gets to a jury which is supposed to weigh evidence. And in the Fifth Circuit, we have quite a different set of views about one particular piece of video evidence, let alone what the law means about how we weigh that evidence. So Anya, if you could splice out this opinion from the Fifth Circuit, which has three different opinions, all very interesting.

A Anya Bidwell 19:15

Yes, listen, confirmation bias lives on, video evidence or not. And it actually reminded me, before I go into the facts, of our own case at IJ, that Bob and I both worked on, Pollreis, where there was video evidence of the police officer saying, step back. Step back. Cassi, our client, she is stepping sideways because there is actually a car in the back, and if she steps back, she's gonna fall backwards on the car. So she complies by stepping sideways. And then, you know, the Eighth Circuit looks at it, and it says, Listen, she didn't step back, even though she was complying with what the officer was saying, and a dissenting judge was saying, listen, she didn't step back because she couldn't step back, so she had to step sideways. So this is not an uncommon occurrence, I think, in the circuit courts when they are arguing over video evidence. And it just shows you that, fundamentally, some video evidence is just up to interpretation, and it should go to the jury. We had the same situation with the Gonzalez video. The First Amendment retaliation case, 72 year old grandma thrown in jail for petitioning the city manager. And there also, there is a video of Sylvia taking a piece of paper from one side of the dais and putting it to the other side of the dais. That's what video shows. The question is, did she know that it was a government document? Did she intend to steal it by putting it inside a binder while thanking a person for giving her water and standing next to the mayor, like, what's going on, right? This kind of stuff is open to interpretation. Just because you have video evidence doesn't mean that everybody agrees on the truth. And this is a really, really good case for this. That's why we have three opinions. We really have Judge Dennis writing for the majority, with Judge Willett agreeing with him 100% and then really writing a concurrence to respond to the dissent. And the dissent is by Judge Jones. The facts are very interesting. This woman, she is in a one car accident, essentially, on the highway. She calls her boyfriend. Boyfriend comes to help her with the car. It's 5:00 in the morning, cold pre-Christmas, December morning. So the boyfriend comes to help her, and then police officers also arrive, two of the three police officers, that is. And when the police officers arrive, they have a really good exchange of ideas. [Laughter.} officers

A Anthony Sanders 22:10

The marketplace of ideas right on the roadside. [Laughter].

A Anya Bidwell 22:14

Right there on the Houston highway. And the officers are helping these two guys to get the car off the highway, and get it on its way. And then finally, the supervisor arrives, and that's when things become really tense, because the supervisor is now starting to order people around

things become really tense, because the supervisor is now starting to order people around. He's asking questions. Mr. Spiller, he kind of gets offended by those questions, especially on behalf of his girlfriend. So he kind of pushes back against the supervisor. He starts questioning the supervisor why he is ordering certain things to be done, and all of that is recorded on the video. So finally, you can see on the video, there is an elbow somewhere, and then there is grabbing the guy by his throat and shoving him to the ground. Then there is a fight, and then there is some of the officers tasing Mr. Spiller. And so Mr. Spiller then goes on to file an excessive force lawsuit for violations of his Fourth Amendment rights. And the question really is, what do we do with the video evidence? And video evidence really comes in both at step one, at step one of qualified immunity, whether there is a constitutional violation in the first place, and at step two, is the right clearly established. And what the majority says is that at this point, we take all the facts in favor of Mr. Spiller and we analyze it with that lens, including when we look at the video evidence, and they're saying it looks like the guy really wasn't threatening when you used excessive force on him, that's a violation of the Fourth Amendment. And we have case law that specifically says that if a person is not threatening when you are arresting him, you shouldn't be using excessive force. And that's really what Judge Dennis writes about, and says that qualified immunity does not shield the supervisor at this point. What happens then is Judge Willett writes a concurrence, and in that concurrence, then he starts getting into this question about video evidence, and he says, Listen, Judge Jones and I both are looking at this evidence, and we're seeing two completely different things. And he says that really shows that it should be going to the jury if we're seeing two different things. And he even—let me see if I can pull this up—he lists the disgreements that he and Jones have with the video evidence. So he says first, "according to the dissent, Spiller clenched his fist and elbowed Sgt. Lindsay in the chest." End quote. "With respect," says Willett, "I do not see either of those things up until Sergeant Lindsay grabbed Spiller by his neck. One of Spiller's hands was in his jacket pocket, and the other was gesturing toward Moore, his girlfriend. So it is unclear where the dissent spies a clenched fist. As far as I can tell, it doesn't register on the video at all." So that's one of the disagreements he points out. Then he points out that dissent says that Spiller elbowed Sgt Lindsay in the chest, essentially initiating the confrontation. So according to Jones, actually he was threatening because he was elbowing him and Willett says, "I take that to be an overstated way of simply saying that Spiller moved his elbow in a way that created space between him and Sergeant Lindsay, a natural reaction when someone larger than you, officer or not, suddenly gets in your face for the purpose of intimidation." Then there is all this discussion about Spiller being drunk or not, because Officer Lindsay says, you know, I smelled alcohol, and Willett actually says, Well, clearly you weren't worried about it, because you told Spiller to follow you in your car, right? So Officer Lindsay allowed this guy to drive. So it can't be that he thought that the guy was drunk. Judge Jones dissents, and it's really interesting how she kind of describes the facts. Her opening paragraph is "Sergeant Lindsay arrived at the scene of a traffic accident and got interrupted repeatedly by Spiller, who elbowed him in the ribs, fought with him and eventually bloodied his lip—and Spiller can go to trial for damages? This is an absurd result on the facts before the panel." and her disagreements all stem from her very different reading of the video evidence, and because she thinks that he actually was threatening, because she thinks that he initiated the aggressive interaction, she thinks that clearly all the cases that the Fifth Circuit is citing about non threatening individuals don't apply here. And the majority says, Wait a minute. At this point, we should be interpreting facts in favor of Mr. Spiller and allowing the case to proceed. So it's really a straightforward demonstration of what we are seeing very much going on in the lower court on the regular basis. There is video evidence and it confirms whatever it is that you are thinking as a judge. And fundamentally, I agree with Judge Willett that what it shows is that it should go to the jury. When there is a disagreement like that, it is up to the jury to interpret that, given all the evidence that's provided.

B Bob McNamara 25:18

But you can understand kind of like the temptation that judges feel to do the other thing. Because, like, at a certain level, like, our primate brains are not ready to deal with video. And so like, you watch a video and it makes you an eyewitness. You're like, I saw the video. I know what happened. I saw it like, how could you disagree with me? I know what happened. And it's very difficult; I have no idea what this video shows, but I actually, I strongly suspect, if I watched the video, the same thing would happen to me, like I would have an opinion about whether Mr. Spiller elbowed the cop or not, and it would be very difficult to shake that opinion, because I would have seen it. I would have seen it myself, and I would just know, because it seems odd that two people could watch a video and just not agree whether someone elbowed someone else, until you think to like half the trials you've seen where there are actual eyewitnesses, and some of them say he elbowed the guy, and some say he didn't elbow the guy, and the video is just one more eyewitness that you know, maybe doesn't have the best angle. And it makes it very tempting, I think, to just resolve these things. Because now, instead of weighing four or five different witnesses, just I myself as the judge am an eyewitness. Why am I listening to you people when I saw what happened?

A Anthony Sanders 29:37

It seems, it seems like it's compounded with the qualified immunity angle, where we're not talking about what the jury would be talking about whether there was a constitutional transgression here, we're talking about whether it's clearly established. And so you give leniency, of course, to the officer because of that and the standard, and then you get this grainy video and it 's dark, or you know, whatever it is. You know, I'm reminded, people disagree about whether a call should be reversed in the NFL when we look at the instant replay. And there you have these state of the art cameras from all different angles, and sometimes we still can't figure it out. And yet, this is probably not the quality they would hope for in a NFL game, you know, where the lighting is whatever it is, the camera is probably at an angle, but yet judges are kind of doing this instant replay when it's about someone's personal freedom, or about damages for a civil rights violation. It just seems like it all kind of flows into letting it go to the jury. Now, I'm biased, because we're all very pro let it go to the jury here at IJ, but this is a little bit wanting to play the Monday morning quarterback and not actually adjudicating the law and the facts.

B Bob McNamara 29:59

Yeah, the weird thing is, this is technically a qualified immunity case, but I don't know that this really rises and falls on qualified immunity at all. The question is really whether this guy elbowed the cop in the chest. If you elbowed the cop in the chest, every judge in America is going to say the cop gets to take you down. And if he didn't elbow the cop in the chest, then I don't think anyone's making the argument that the cop is allowed to choke slam him on his own initiative. It's just this basic factual dispute that it is super tempting to resolve on your own, kind of regardless of what the standard is, it's just like he elbowed him or he didn't. And I saw the replay and it sounds like from the opinions that going frame by frame, like they are watching an NFL replay. And just, like, you know what you can see. And it's very hard, I think,

to divorce "this is what I see in the video" from "this is what I can imagine someone could take from the video," which is kind of the question you're supposed to answer in this context, like what could a juror think if they looked at this tape?

A Anya Bidwell 34:35

And it really fundamentally messes up the clearly established prong of qualified immunity because you don't know what precedents to look for.

A Anthony Sanders 34:52

You don't have the videos of all the other cases. [Laughter].

A Anya Bidwell 34:52

But it's very much, like, if you're looking for a precedent about a non-threatening suspect being arrested, then you're going to find one set of precedents. And if you're looking for a video of a threatening being arrested, then that precedent goes out of the window and does not apply. And essentially, Jones is in a completely different reality universe than Willett and Dennis and there is no way they are going to agree, because in her head, she sees facts one way, and they're seeing facts the other way, and it affects qualified immunity analysis from top to bottom, and really is a good demonstration of how facts really really matter when you do these kinds of things, and video evidence is not going to help very much.

B Bob McNamara 34:55

But I do have to say, I am a little curious. Like, Judge Jones's position is that the defendant elbowed the cop, and Judge Willett's position seems to be that he used his elbow to create space. And I don't see how those two things are different. [Laughter]. I don't know what actually happened.

A Anya Bidwell 34:58

Agreed! Agreed. But there's also this discussion of punching, which Willett is like, I don't see how he possibly could have punched. And in Jones's head, it's like No, there was clearly punching. There was a bloody lip. Well, we were saying certainly that it's ripe, in the Pollreis case we petitioned the Supreme Court specifically on this, because the video, again—we are saying clearly she complied, and at this point, the facts should be taken in our favor and you shouldn't look at the video evidence and say No, we are interpreting it as her not complying, so case out. But it really all stems from this precedentScott v. Harris, where Justice Scalia said, listen, sometimes when you look at the video, it clearly doesn't match what the person is saying. And in that case, when there is a clear mismatch, when you look at the video and you see that it's not at all the way the facts are described in the complaint, you can just go ahead and credit that video. But very often that's not the case. Scott v. Harris type of situations are, you know, one among many. And just in my cases, you know, I have two cases involving video

dispute where you pretty much can just look at what's going on and it's open to interpretation. And I think with police cases especially, that would be the case. So we do think that it's ripe for the court to maybe provide more guidance, because otherwise they can just cite Scott v. Harris, Scott v. Harris, Scott v. Harris, we get to do this kind of thing, and move on.

B **Bob McNamara** 34:58

Yeah, I mean the Jones opinion says he was on the ground, which I feel like you could tell from the video...like, like, I'm genuinely tempted to go find the video in this case, because from reading the opinions, I have no idea what happened; which is maybe again, a reason for it to go to the jury, that three smart people can watch that video and come away with three wildly disparate understandings of what it seems to show.

A **Anthony Sanders** 34:58

Anya, so the Supreme Court in the past has addressed video evidence, although it's been a few years now and I'm sure video technology is different. Could you tell us where the splits are on this issue or issues? Qualified immunity, video evidence, when circuit judges can review it, and do you think that it's ripe for courts to take another look at this? And some other circuits right have been a bit more friendly to the jury or friendly to the plaintiff when it comes to questionable video evidence?

A **Anya Bidwell** 36:29

Some have, including the Fifth Circuit. But here we have the Fifth Circuit doing a completely different thing.

B **Bob McNamara** 36:35

The Fifth sends to the jury there.

A **Anthony Sanders** 36:38

Yeah, in this case.

A **Anya Bidwell** 36:39

Oh I'm sorry, you're right. Now I'm thinking, Jones, no, you're right. You're right. Yes, yes, thank you. [Laughter]. So now the Fifth Circuit continues, continues to be a circuit that is, you know, very suspicious of judicial interpretations of video evidence, unlike the Eighth Circuit.

B **Bob McNamara** 37:48

Well it's a hard circuit split to build, right? Because any court that's deciding this will just say Oh, well the video was super clear. It's not like the videos on YouTube, like I don't know if it's right or wrong. I mean, I remember the oral argument in Scott and you could hear the fear in the justice's voice, like "They were driving so fast. This is unbelievable." That seems to have been a striking video. But it's hard to tell which courts are being more forgiving of video evidence, leaving more room for interpretation. Because all you have usually, unless you have multiple judges publically disagreeing like this, is just a cold paper description of what's on the video. And I'm pretty sure that whichever lawywer lost that case views the video differently, but we don't know because we just have the opinion.

A Anthony Sanders 38:05

Well, we may know soon, or it may be a little longer before this issue goes up but video is getting easier and easier to produce in our society. Of course this doesn't even get into, you know, multiple videos, which happens sometimes.

A Anya Bidwell 38:05

And then there is not just video, guys, like going into the future, right? You could have something like earbuds that police officers would be wearing instead of body cams. And then earbuds would be reading their ECG data. And combined with artificial intelligence, you actually would be able to say this is what the officer was thinking at the time they were doing it.

B Bob McNamara 38:26

The officer said he was afraid. But the data shows otherwise.

A Anya Bidwell 38:30

Exactly. [Laughter]

B Bob McNamara 38:33

If we start trying those cases, I'm retiring.

A Anthony Sanders 38:36

Okay, well, we will do that show in about 10 years, hopefully...probably be about two years. Anyway, until that time this is, this is Short Circuit for this week. So thank you for sticking with us, everyone. Thank you Bob and Anya for coming to the show. Please be sure to follow Short Circuit on YouTube, Apple podcast, Spotify, and all other podcast platforms. And remember to get engaged.