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Andy 00:17
Recording live from FYP studios east and west. Transmitting across the internets. This is episode 231 of Registry Matters. Happy Saturday. Good evening to you, sir. How are you?

Larry 00:29
Awesome. Thank you. Internets? Is there more than one internet now?

Andy 00:33
Well, I mean, I think probably that, technically, it would be true because the government has their like private CIPA Net, I think. Something like that. There's a secure internet. I don't know that that runs over the normal internet. That might be its own set of wires and tubes.

Larry 00:52
Okay.

Andy 00:53
I can't remember what that one was called. Anyway, a friend of mine has to go into a special room without his phone or anything else to use certain secured communication stuff for him to do his work. He's in the Air Force. Do you want to banter anything? How about how about we banter about the EPA case, and how it may or may not relate to Gundy? It will take like, I don't know, five minutes before we go dive into everything before with this little bit of information that came out a couple days ago. (Larry: Sure.) So I saw a post from someone that said… so this came on the NARSOL social media site. And he said, "So I heard this morning that the EPA cannot make up their own rules with how to interpret the laws. That is for Congress to clarify. I'm sure and of course, it's been said by commentary on the news and other federal agencies have to do the same thing. Therefore, it should clamp down on other government agencies making up rules as to how to interpret laws passed by Congress. So here's the question: what can we and the agencies that fight for registrants bring about in challenges against the Adam Walsh Act and international Megan's Law? What guidance, rules, and instructions have been made to interpret these laws by agencies that we feel should be interpreted by Congress? Sorry, my mind is always running and turning on avenues to fighting these things. Would love to hear what everyone else thinks." So, what would be the intersection between Gundy? That was 2019, Maryland, Pennsylvania, New York, if I did my homework as I was reading, what does that have to do with the administrative state? Compare that against the EPA?

Larry 02:36
How does it intersect? In my opinion, not very well, because the Congress actually did make the Adam Walsh Act. They did pass it. What's at issue with the EPA is that they are actually creating the law. They are taking an administration who wants to go clean energy who cannot pass that agenda through the legislative process, and they're imposing their desire to see us move to clean energy more rapidly. And they're doing that by imposing regulations. That is not even close to what the Adam Walsh Act was about. The Adam Walsh Act was passed by Congress. Every single aspect of it was passed. I mean, I think if you look at the DropBox folder, there's one called Adam Walsh Act as passed by Congress. (Andy: I have seen it.) Yes, it's sitting there right now. So Congress did pass the Adam Walsh Act. The only thing that was delegated was trying to figure out how to constitutionally carry out the will of the people as decided by Congress in the 64 page Act that was signed in 2006. And there had already

been significant litigation against registration when they started registering people, other than California, had been doing it since ’47, and I think Washington state since 1990. But when they passed the Wetterling act in ‘94, there had been a good decade of states having registration schemes, and there had been significant litigation; people rebelling against these registration schemes saying they were unconstitutional. So Congress recognized that there may be constitutional issues in terms of how broadly they can do this in certain states because of adverse court decisions that had already been issued and handed down. So the Congress said, Yes, we do recognize that you may have some issues. And they thought about who they would refer that to try to figure it out. And they thought about it very carefully, and it seemed like the Department of Justice, with all the vast amount of legal talent they have, would be best suited to figure out how to constitutionally apply and enforce the will of the people. That is not the same thing as what these regulatory agencies like the EPA and OSHA are doing. The Congress doesn't tell you specifically what OSHA should do to eliminate particular work hazards in the workplace, because the workplace is constantly evolving. The technology that we were running in the cotton mills in 1910, that technology would probably not be causing many work hazards today, because I don't know how many mill operations are similar to what was happening in 1910. I mean do you? I'm not an expert in this, but what would you say what’s similar to the workplace of 1910 would be to 2022?

Andy 05:30
I would go for pretty much zero.

Larry 05:33
So therefore, as the occupations have evolved, Congress can't constantly update what to do about reading the workplace of unreasonable hazards. So therefore, the Congress has told that particular department to figure it out and keep workers safe. That is not what they did on the Adam Walsh Act. They passed every provision that’s in the Adam Walsh Act.

Andy 06:01
If Congress had said - I'm just gonna throw out some numbers - if they said 40 parts per million, you know, whatever, like, would they then be able to go, Hey, you have to go fix your sh*t, because we're exceeding 40 parts per million, whatever; however they would actually go about it. If Congress had done that, would it be okay then? So if Congress had written into it something to the effect of like 40 parts per million for these particulates or whatever, like, however, that would go down, would that be the equivalent to then saying people convicted of sexual offences?

Larry 06:38
Yes. If Congress had actually specified, but- and I haven't read this case. It’s too long, and I haven't read it yet. So, I don't know exactly what the issues were. But I know that, in general, what the Conservatives oppose about the administrative state is that Congress has not defined these things. They've left it to the agency. In the case of the Adam Walsh Act, Congress defined every bit of it.

Andy 07:07
Where you just went, saying OSHA, it sounds like then people could file a claim saying OSHA violates, I don't know, my constitutional right to have an unsafe work environment. Therefore, I want to not wear masks and hearing protection and so forth.

Larry 07:29
Well, I guess I'm not following and tracking with that question. OSHA tries to keep the workplace safer. It's not about your rights as the worker. The OSHA, their requirements are imposed on the employer. The employer tells you that you wear this equipment. The employer is told what type of equipment they can have, and whether it has to have a protective cover or whatever, and how

rapidly they can run this equipment. I mean, all this stuff is geared toward the employer. There's very little in OSHA that tells the employee what to do.

Andy 08:01
Sure. Huh. Alright. I'll come up with better questions to ask you. Anyway, the whole point is if people think that if, with the EPA case, saying that the administrative state, these executive agencies, they are not allowed to go do these things that is unconstitutional, then that would also then apply to the Department of Justice and AWA should then collapse?

Larry 08:25
I don't see it that way. I hear people saying that, but I don't see it that way because it's not the same comparison. If you didn't ask the Department of Justice… Congress would be remiss if they knew that there were constitutional problems in some of the states with retroactively imposing registration obligations on populations. Would you have been happier if Congress would have said to heck with that, we're just going to pass it anyway. So they did pass it, but they said, "Look, Attorney General, you have expertise we don't have. You decide if there are states and jurisdictions that this can't apply yet. That's your job." And in fact, there's a provision on the Adam Walsh Act that says if a state cannot implement parts of it because of a ruling from the highest court in the state, they don't lose their precious Byrn grants. That's the law itself as written by Congress. So asking an agency that is in the administration of justice business to try to figure out if something can be done across the nation seems like a fairly rational approach to me.

Andy 09:39
How about this one final point, one thing to finally ask. Can you give like a one liner? What would you tell someone to then go look up in there to ask themselves a question in making these comparisons? So I guess an example would be when you look at the AWA, it says people convicted of a sexual offense. That's a binary, that's a yes or no. You either is or you isn't convicted of. And, by comparison, there's nothing that says the EPA should regulate this thing specifically other than to go, Hey, go make the air cleaner and keep the water safe.

Larry 10:18
I'm saying that generally without having read the decision, my understanding of what the EPA mission is, as it was created in 1970 under the conservative Nixon administration, with his acquiescence- for those who don't remember how the EPA came into existence- it was under a Democrat Congress with a Republican president who had very conservative credentials and was accepted as being pro-business. That that agency was created back in 1970, I believe. But I believe its overall mission is very generalized. Therefore, it does have rulemaking authority, because the need of the environment… I wouldn't say the need is changing. The need is to have a cleaner, safer environment. But as we evolve in technology that we can- Power plants running in 1970 were a lot different in terms of their pollution scrubbing and their technology that they were running in 1970 compared today. So if you left the standards of the equipment that they were upgrading in 1970 in place, the air would be much dirtier than it is today. So therefore, Congress, as I've explained in the disability determination process, Congress would never be able to be sufficiently informed about all the different technological changes that would allow them to adjust those requirements as technology evolves. I'm not an expert in pollution control by any means. But technology, I listened to enough legislative committee hearings to understand that the technology at our four corners… We got two power plants at our four corners. In New Mexico, we've got San Juan generating station, and I forget the name of the other one, but there's two power plants. And the technology has evolved dramatically since 1970. But San Juan is still dirty compared to what they would like for it to be, and they've decided that they're just going to

close the plant. Those facilities are going to be taken offline because they can't meet those standards, as I understand it. But Congress would never be able to do that. On the other hand, Congress clearly defined what constitutes a sexual offender, and they clearly defined the two tiers, and the duration of the two tiers, and how quickly a person should have to register upon conviction, and upon changes of the address, and all this stuff is in the Adam Walsh Act. That wasn't delegated. The only thing that was delegated was trying to figure out how to do it constitutionally, because you're going to have problems in some states. And if it wasn't the Department of Justice, who would you have referred it to? The Department of Defense? (Andy: Yes, I understand.) I can't think of a better agency to ask for help to figure out how to do something than the Department of Justice. That's supposedly to the business they're in.

Andy 13:11
I don't want to drag this out. The only thing though was the EPA would be the scientists and things that are related to environment. And I'm not saying that for your benefit, I'm saying that for everybody else. The EPA is the environment people, right? OSHA would be for occupational safety.

Larry 13:30
So that's the way I understand it.

Andy 13:33
I hear you. Alright, we'll move along, then because, well, yeah. So we're just gonna dive right into the May case? You think that this is going to cover, this and the Seventh Circuit is going to cover the whole rest of the of the night?

Larry 13:47
It depends on how much you take from the audience and how much you come up with on your own volition.

Andy 13:56
All right, so people in chat, I need help. I need questions from you to make sure that this goes along and is fully covered. And so, I didn't ask you what's going on tonight, but I think this will cover it. So there are two cases that you wanted to discuss this evening. The first case is of Stephen May from the Ninth Circuit Court of Appeals. And the case is May versus Shinn, and that's Shinn with two N's. The second is a recent decision from the Seventh Circuit of appeals dealing with GPS monitoring for PFRs. The name of that case is Benjamin Braam and others vs. Kevin Carr. And that's Carr with two R's, Wisconsin Secretary of Corrections. Let's do the May case first, because it will probably take less time. Let me set this up, if I can. The case has been going on for years and years. May initially won in federal habeas court a declaration that Arizona's CM was unconstitutional. And of course, the state appealed to the ninth circuit. The Ninth Circuit initially affirmed the habeas judge, but it did not last. The state asked for reconsideration. The three-judge panel changed their mind and decided that habeas judge was incorrect in his decision and especially for releasing Stephen from custody. I do recall that he was out for a period of time, like six months or a year or something like that, Larry? (Larry: Four years.) Oh, geez, okay. So I must have met him in between all of that. And then so now, he is serving a 75 year sentence. Is that pretty much like the overview of the synopsis of what's going on?

Larry 15:27
You're doing a fantastic job.

Andy 15:31
Fantastic. All right. So what in particular do you want to add to this long running saga now? Didn't Stephen's legal team, we talked about this a bunch of times, everything possible under the sun has been filed and tried in every angle? And even the Supreme Court has denied cert?

Larry 15:49
Yes. They recently, in 2022, they filed a motion to recall the mandate of the ninth circuit. So that's what they filed.

Andy 15:57
Okay. So recall the mandate. So what would that be, a recall of a mandate?

Larry 16:06
Well, the mandate was that they had, initially, as you said, they had affirmed the trial judge- the habeas Judge, I should say, not the trial judge. And then they on reconsideration, they reversed themselves. So they issued what's called a mandate to send that case back to the habeas judge and saying, “Hey, you got it wrong, put this guy back into custody, the conviction stands.” So that's what the mandate was. So they had filed a motion to recall that mandate of the Court of Appeals.

Andy 16:36
How often is that granted?

Larry 16:39
I don't think I've ever heard of one being granted.

Andy 16:44
Alright. And when I was reading it, it appears that they were arguing that there was no jurisdiction because Stephen had been released from custody. And does this mean that it would have been better if Stephen had remained in prison? Like, I can't imagine that there's ever a case where it's better to remain in prison? Should he refuse to leave when the trial judge ordered his immediate release?

Larry 17:04
Did you read the motion?

Andy 17:06
I read pieces of it.

Larry 17:07
I thought you read the whole motion. But yes, it does mean that… Well, nobody's going to refuse being released from custody. But I don't think it would have really made any difference in the final outcome of this case. But it is interesting, but yeah, we will dig deeper as you go.

Andy 17:28
Um, let's see. So, the petitioner, from what I read, the petitioner Stephen May respectfully request that this Court recall its mandate filed on March 30 of 2021 and vacate this court's judgment because the entire proceeding in this court is and was from the beginning void for lack of subject matter jurisdiction. I'm not an attorney, Larry, but this does seem strange. Were they arguing that the federal district judge that ruled in May’s favor had jurisdiction and suddenly inexplicably, somehow the Court of Appeals would not have the authority to review the work of the lower federal court?

Larry 18:04
You got that correct. That is precisely what they argued.

Andy 18:08
I first thought I was not reading it right from what I was reading. Anyway, the order states May’s motion to recall the mandate is denied. Motions that assert a judgment is void because of a jurisdictional defect generally must show that the court that rendered judgment lacked even an arguable basis for jurisdiction, relying on United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010). May has not met that standard, arguing that the statutory in custody requirement was unsatisfied. Seriously, what is in custody requirement? What are they referencing there?

Larry 18:46
Well, in order for a person to avail themselves of a federal habeas proceeding, they must be in custody. And federal habeas takes a much

broader look at what constitutes in custody, and they include probation, but May was no longer on probation, and we can certainly say he was not in custody. I mean, you were seeing him in the in the flesh, right? (Andy: Yeah, totally.) Yeah. So he was not in custody, and he was not on any type of probation supervision because his conviction had been voided by the habeas judge, because the habeas judge had found that the statute, the child molestation statute in Arizona, was unconstitutional. But they were asserting that May being out of custody rendered the federal court powerless. In essence, they were attempting to exploit the fact that the federal judge had ordered his release and combining that with the fact that the statute had been declared unconstitutional. The argument at least did have some merit, but unfortunately, not much because the Ninth Circuit had reversed the habeas judge's determination that the statute was unconstitutional. Now that's a whole discussion that I didn't know if we were gonna get into tonight, but they had decided that he had been foreclosed on making that constitutional argument because he had not raised it below. So therefore, I disagree with that. But the constitutionality was no longer questioned because the federal habeas judge had been reversed. He said you didn't have the jurisdiction. You considered an argument that had been foreclosed.

Andy 20:20
Do you mind if I read something from the judges extended comments?

Larry 20:25
Oh, I love to hear your read. That means I don't have to think.

Andy 20:29
I think the point of his commentary is that we sometimes need activist judges. “In 1968 I was a young solo practitioner in Suffolk County, New York, when the New York State Court of Appeals assigned me to represent Robert Clayton. It was just a few years after the Supreme Court had held in Jackson v. Denno that those who had been convicted based on a confession had the right to a hearing to determine if it was voluntary. Clayton had been indicted and convicted for murder as a result of a fight he had with a fellow migrant farm worker. Pursuant to People v. Huntley—the New York equivalent to Jackson—the trial court held a hearing to determine whether his confession was voluntary. I was assigned to handle this appeal. Ultimately, Clayton’s conviction was ruled to be the product of ‘a pattern of police dominance and coercion.’ Clayton had spent about 20 years in jail when I gave him the good news: Rather than retry him, the Suffolk County District Attorney had agreed to allow him to plead to involuntary manslaughter. With credit for time served, Clayton would be a free man. To my surprise, he rejected the offer. He told me that he had adjusted to a life in prison and wasn’t sure he could adjust to a life out of prison as a convicted felon. I didn’t know what to do, but the trial court, on its own motion, dismissed the indictment in the interests of justice pursuant to N.Y. Crim. Proc. Law § 210.40.” Is that what he was suggesting should occur in this case?

Larry 22:01
Yes, that is precisely what this judge has suggested should occur. But the government appealed, arguing before the intermediate appellate court, that never in the annals of the law, had a had a murder indictment been dismissed on the court’s own motion, and in the absence of the District Attorney’s consent, in the so-called interests of justice. In a precedent-making decision, Judge Hopkins, writing for a unanimous court, affirmed the power of a court to dismiss any indictment, upon its own initiative, in the interests of justice, established the substantive standards to be henceforth employed in evaluating when principles of justice required dismissal, and asserted that a hearing must be held to determine if dismissal was warranted. (See Clayton, 342 N.Y.S.2d at 109–111). And that was pursuant to Clayton, the case that was

referred to a New York case many, many years ago. So that's exactly what he's saying, that we might need just a little bit of judicial activism here.

Andy 23:01
That's something that people always rail against saying, No, we don't want activist judges. You know, ones that would overturn 50-year-old precedents, right?

Larry 23:10
Right. But this instance here with May, that's exactly what you need. You need an activist Court that will say, Hey, this is wrong. But if you want your textualists that most of our audience say that they're so fond of, well, they are following the text of the law. They are working within the anti-terrorism and effective death penalty Act, which we'll get to in a little bit.

Andy 23:32
You know, just to expand on that for just a minute. If we are to talk about the absolute, the biggest issues of the land, we'll talk about second amendment and those things, it wouldn't be hard to make the text correct. But how many laws, how many bills are attempted to be passed in your state annually? I'm sure you knot that number. Hundreds, right?

Larry 23:52
Many hundreds, yes.

Andy 23:53
How would you - across 50 states, the territories, federal government, across whatever that is. 60-something jurisdictions plus then everything at the county levels, everything that's trying to be passed, you could not account for every individual condition and thing that would come down the pike at you to be a textualist. You would have to interpret things because you can't plan for everything across all those things all in one shot. You can't.

Larry 24:19
Actually, if you're a textualist, you don't care about all that. You care about what the text says.

Andy 24:23
Yeah, okay. All right, fine. Um, so then we'll move along. The New York court specified seven factors that must be considered such a hearing, the nature of the crime, the available evidence of guilt, the prior record of the defendant, the punishment already suffered by the defendant, the purpose and effect of further punishment, any prejudice resulting to the defendant by passage of time, and the impact of general public interest of a dismissal of the indictment. As the Court wrote, the dismissal of an indictment dependent only on principles of justice, not the legal or factual merits of the case or even on the guilt or innocence of the defendant. Could they not do that in May's case also?

Larry 25:03
No. A federal habeas court does not have that discretion due to the limitations of the anti-terrorism and effective death penalty Act passed back in 1996?

Andy 25:12
Does that mean they used the wrong vehicle to bring this?

Larry 25:15
No, it does not. They didn't have any other vehicle.

Andy 25:18
So we got on the right train, but the train is just not possible to take you where you want to go?

Larry 25:23
Yes, a Habeas court can't do under AEDPA what needs to be done. Unless they're activist judges.

Andy 25:33
Back to that. On page 12 of the order denying May's motion, it states. "Although Clayton hearings abound to this day in New York State, there is no federal counterpart. The concept of justice tempering the strictures of the law is anathema to the federal justice system. Accordingly, as Judge Friedland laments, 'this case, and in particular May's sentence, reflects poorly on our legal system.'" This is such a tragedy. So had this been written, more gooder, May might not be… like if he had done this in a different state. So just something that's written just differently, he might not be locked up for effectively the rest of his life.

Larry 26:13
Well, that would depend on the penalty schemes of the state. In most states, they don't have a burden shifting where the Arizona statute was so bad that the accused had to prove his innocence. But I think you're getting deeper than that in terms of the federal habeas is a last resort in state convictions. And that's what AEDPA wanted to limit. Because these people, they don't like the fact they're convicted in the state courts. And they protest that, and they go on and on and on with these needless appeals. So, when the Conservatives were running the Congress in '96, they said, Enough is enough. Our federal courts are already overburdened, and they don't need to be looking at state convictions. Our state courts have done a fine job on most of these cases, and we're done with it. So, if he had been in another state, and he had to take this course of action by federal habeas- say he was in prison under a similarly burden shifting statute, like maybe exist in Arkansas; they have one similar to the one in Arizona- he would have the same result, because the same standard applies on federal habeas. This is a federal law. So a habeas judge sitting is a US District Judge, when they sit as a federal habeas judge, like in a state conviction, they're constrained by the AEDPA.

Andy 27:33
Is there anything else that May can do at this point to try and gain some kind of relief?

Larry 27:41
Not much. He can seek executive clemency from the governor of Arizona.

Andy 27:45
I gotta think that when you go ask the governor saying, Hey, I'm convicted on multiple counts of whatever, that the governor is gonna be like, yeah, sure, let's take care of that one for you. I can't imagine that that's a thing that happens with any level of regularity.

Larry 28:01
It is not.

Andy 28:03
The court also noted May has now apparently run the gamut of any judicial recourse that might have been available. The only chance he has of not being incarcerated for the rest of his life would seem to be executive commutation. The Arizona board of executive clemency, comprising five members appointed by the governor may recommend the commutation of a sentence to the governor after finding by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender, and that there is a substantial probability that when released, the offender will conform to the offender's conduct to the requirements of the law. Any chance there?

Larry 28:41
I think you've got a clip you can play right here.

Andy 28:44
Oh, yeah. You want me to play that one? Is it this one?

Audio Clip: I fail to see what purpose that would serve.

Larry 28:48
I was thinking about the Clinton one but yeah.

President Clinton laughing

Andy 28:59
Just quickly, remind me what clear and convincing level of evidence standard in there is?

Larry 29:11
That's a standard that's slightly below beyond a reasonable doubt, but above preponderance of the evidence. It's a high standard to meet. But what he's got working against him are a number of things. Just look at the statistics. I know you're big statistic guy, and you love your statistics. But the clemency board, the statistics between 2004 and 2016, it heard an average of 594.9 clemency request, and recommended a yearly average of only 48.2, which is less than 10% according to my math. And in turn, the governor granted only 6.7 per year of those 48 that were recommended, which is just slightly more than 10%.

Andy 29:53
10% of the 48, right.

Larry 29:57
So the court went on to say that given the nature of his offense, it is unlikely that the clemency board would recommend that the governor commute May's sentence. And that's on the see the order at page 24. And, folks, you know, I'm the bearer of bad news. I'm not the one who makes the rules. A governor is elected by the people. And unless that Governor… I can explain to you why governors are not inclined to do this, unless that Governor has decided that he or she has no desire to hold any other public office ever in their life, they can't take that risk of letting something that's such a sensitive offender… this type of offense is very sensitive. We're talking about multiple children that May is convicted of having offended against. Not one, but multiple. You just can't take that risk, because all you have to do is look at Willie Horton, which Dukakis had no idea that they were giving weekend furloughs. You just can't take the risk. So the governor of Arizona is very unlikely, unless that Governor has no ambitions, and the governor's office is convinced that this is a miscarriage of justice. But barring the person having no political ambitions, you just can't do it.

Andy 31:20
Yeah, I'm gonna just go with it. This is pretty much a sh*t show. There's probably a pretty good number of people that are in this particular condition as well.

Larry 31:31
There are indeed a number of people. Through our years of having relations with Stephen, we found out that there were quite a lot in that were dependent upon his success. And there were many that were happy when he won. But all that excitement is gone now because he has now lost.

Andy 31:48
One other thing, remind me of this burden shifting. This is where the burden of proof moves from one party to another?

Larry 31:59
Yeah, correct. Like in the case of Arizona statute, similar to the Arkansas statute, if you touch a child, a minor, on certain parts of their body, it's presumed to be sexually motivated. And you as the accused, under the law as it existed at the time- they have since taken out the affirmative defense- but they had what's called an affirmative defense. You would say, Yes, I did touch the child on the butt on the boobs or wherever, but it was not sexually motivated. And you had to convince the jury that there was no sexual motivation. That spins the burden upside down. Because you could touch a miner for any number of reasons that would have no sexual motivation whatsoever. I mean, in this case, he was a lifeguard. You could be pulling them out of the pool, I don't give a damn where I'm touching you. I'm trying to save

your life. I'll grab whatever I can grab, and I'm not a lifeguard, but I just imagine that I'm grabbing whatever I can get a hold of to get you out of out of danger. And if it happens to be your crotch, so be yet if that's all I can get my hands on. But you had to carry that burden under the Arizona laws as it existed at that time. The prosecution did not have to show that you had motivation of a sexual nature. They just had to show that you touched, and then the burden shifted to you to show that that, Yes, I did touch, but I didn't do it with a motivation. Well, what was your motivation? And that forced you to have to testify. When you have to declare under oath what your motivation was, then you have surrendered your right to remain silent. Remember, you have the right not to testify, but the only way you can effectively use that affirmative defense is to testify.

Andy 33:21
I see. All right. Um, then anything more here before we move on to the Seventh Circuit Court?

Larry 33:29
No, I think we've done this. It's a tragedy. We're sad. We got to know Stephen.

Andy 33:35
Yeah. I met him at couple conferences. You took him to one of the attorney conferences. I can't remember what it is.

Larry 33:43
We did indeed. He went to Vegas and accompanied us on an exhibit? Sure did.

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Andy 34:37
All right, well then, we've discussed GPS a whole bunch of times. And in Wisconsin, Wisconsin is a place that makes you pay your PFR fee even after you've left. Is that right? (Larry: Correct. Yeah, Wisconsin. Okay. Wisconsin law requires PFRs to wear GPS tracking for life. Is that all of them or just tier three people?

Larry 34:58
No, it's just recidivists.

Andy 35:01
Okay. So, they have to wear them for life, even after they've completed post confinement supervision. The tracking device is attached to an ankle bracelet. You can't hide that one. That would be really awkward to go out on a date with that. The tracking data is not monitored in real time, but rather, officials review it every 24 hours or so to determine if an offender has been near a school, a playground, or other place that might raise concern. The program is administered by the Secretary of Wisconsin Department of Corrections. Thus, he is named as the defendant. I know you people have strong feelings about this. What is the issue that you have with this?

Larry 35:35
Well, I don't believe it's constitutional to search a person and seize their private location data unless that person has had some due process. It's the same if the authorities went to search a person, the person's vehicle, their home, or anything, they need to seek authorization from a court in order to intrude on the person after that person has paid his or her debt to society. So, I have great consternation with this, because these people that were the plaintiffs in this lawsuit, they were not paying their debt to society. It was already paid.

Andy 36:10
Wouldn't the due process Part be from where they were convicted of the thing?

Larry 36:17
No. That's as silly as saying that when you've been convicted of a crime, that they will continue to be able to search your house for contraband and evidence of other criminality if you'd paid your debt. You've had the due process, but that due process starts afresh when you've paid your debt in full. You've paid your debt in full. Would you be okay with them coming and searching your computer & your cell phone now?

Andy 36:38
I mean, isn't that like probably the biggest benefit that I have been removed from all the things that I have, effectively, full permissions back other than like gun toting rights? I think that's the only thing that I would need to get back at this point if I cared for it.

Larry 36:51
Right. But I'm making your argument back to you. Would you be okay with that?

Andy 36:57
No. Obviously the seventh circuit does not agree with you, Larry. And I've heard you pontificate for years about having the right plaintiffs. Oh, we're plaintiff shopping now. Did they have the right plaintiff in this case?

Larry 37:10
Well, according to the court, the plaintiffs are repeat PFRs who must comply with lifetime monitoring, and Wisconsin statute § 301.48(2)(a)(7) requires lifetime monitoring of offenders who have been convicted of a sex offense on two or more separate occasions. So they sued the secretary of corrections alleging that the statute violates their rights under the Fourth Amendment. I'm not sure if they did have the right plaintiffs. Each of the plaintiffs has been convicted of multiple sexual offenses involving children. That starts giving you some dubiosity, but according to the opinion, Benjamin Braam assaulted a 14-year-old boy multiple times over a four month period between 1999 and 2000, and was convicted of two counts of sexual contact or intercourse with a child under age 16. Alton Antrim has twice been convicted of first degree sexual assault of a child under the age of 13. Once in 1991 for his five year old cousin and again in 1999 for molesting another child. Daniel Olszewski was convicted in 2014 of two counts possession of CP. Now, the first tho really don't sound like all that attractive of plaintiffs. But you know, I wasn't the one who did development this case, but it sounds like that you would not want to use these as posters.

Andy 38:23
It shouldn't matter, though. No, I don't see that that's true. The plaintiffs served prison terms and completed their post confinement supervision. It is only because they have been convicted of PFR offenses on two or more separate occasions that they are subjected to a lifetime GPS monitoring. This can't be constitutional. They also sought an injunction barring enforcement of the requirement. Hey, was that granted?

Larry 38:47
No, it was not. The court noted that it has addressed this issue once before in *Belleau v. Wall*. And that's, for the legal gurus, 811 F.3d 929 (7th Cir. 2016). They upheld a subsection of the statute, the same subsection that imposes lifetime monitoring on PFRS who had been released from post prison civil commitment. Applying the Fourth Amendment's reasonableness standard, they held that the government's interest in deterring recidivism by these dangerous offenders outweighs the offenders' diminished expectation of privacy." And that again is in Belleau, 811 F.3d at 935–36. But I take issue with that because I think your privacy is restored back to your previous level once you've paid your debt to society. But they

argued to the contrary that the registry, the existence of the registry, they used the very thing the state says, Well, since they don't have full privacy, because they are on the registry, they shouldn't have an expectation of privacy. Now, even you have to admit that that's funny.

Andy 39:53
It's not funny. No, I'm not admitting any of this is funny, because when you talk about privacy, and that stuff, I think about people with their monitoring apps to monitor their monthly cycles in the female gender, and that that might have their privacy violated. So, I'm not really in favor of these privacy conversations. I mean, I'm in favor of them, but the argument is bothering me.

Larry 40:17
But if the state gets to have it both ways… they get to say that you have a diminished expectation of privacy, because of the registry, and then the registry itself is, in most cases, in my view, unconstitutional, and all the disabilities and restraints that it imposes on you. So they get to the benefit of saying that, well, you shouldn't expect privacy, you've got the registry, you're already on it. So therefore, you have a diminished expectation of privacy. That is, I mean, funny is not the word, but that is ridiculously absurd.

Andy 40:52
Yes. I got you. So the court stated, "We begin with the background Fourth Amendment principles. The Fourth Amendment prohibits 'unreasonable searches,' and as a general matter, warrantless searches are presumptively unreasonable." This should have ended the inquiry by the court. There is no warrant. This is simply a blanket statute in Wisconsin that mandates that recidivist PFRs be monitored for life. Why did this not end the inquiry and result in victory for the plaintiffs?

Larry 41:24
Well, not so fast here. The United States Supreme Court- I mean, that's the big court- held in Grady versus North Carolina that warrantless GPS monitoring of some PFRs could be reasonable under the Fourth Amendment, depending on an evaluation of the nature and purpose of the search and the degree of intrusion on reasonable privacy expectations. The narrow question before the court in Grady was whether the satellite based monitoring oversight of the sexual offenders qualifies as a search in a brief, very short per curiam opinion. Per curiam means from the entire court. The court said yes, it is, but went no further. That is the court did not decide whether this type of search is reasonable, but instead it remanded to the North Carolina courts to make that determination with the following instructions: "The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." So, there's where they got their claws when I said right above that the person didn't have privacy expectations. Well, they took that straight from Grady, and they said, Well, if you're on the PFR registry, you don't really have the privacy expectations. Well, I've maintained that it's a civil regulatory scheme. And that's what I've always argued. It has nothing to do with anything here. My punishment is over. And I have the same expectations of constitutional privacy in terms of my person, my effects, and my vehicle, because it's an extension of my home, and my home. I have all these expectations of privacy, and, no, you can't monitor me without an individualized articulable reason, and the fact that I have a conviction 20, 30, 40 years ago is not enough. But that's what the court said.

Andy 43:19
Isn't that kind of due process, though? I mean, because the way that this read is that it's some of the people get this. So they get some kind of evaluation to determine which ones get it?

Larry 43:31
No, just being a recidivist. That's the only thing you've had to determine that. The recidivist, they could have been decades apart. Like in the first guy, '99 I think was the last time. So we're talking about more than 20 years ago. Do you stay stagnant and not able to change in 20 years? I don't think the experts would say that.

Andy 43:46
Leopards don't change their spots, Larry. *kidding* Alright, let's get a bit into the Belleau case since this decision appears to have been decided based on that precedent. Michael Belleau was convicted of second degree sexual assault of a child and sentenced to 10 years in prison. He was paroled after six years, but his parole was revoked, and he was returned to prison after admitting to having fantasies of two young girls. Just before he finished his prison term, the state sought to have him civilly committed as a SVP under Chapter 980 of the Wisconsin statute. A court made the necessary findings, and he was committed. When he was discharged from civil confinement five years later, he became subject to lifetime GPS monitoring. Belleau challenged the statutory monitoring requirement under the Fourth Amendment. Ruling on cross-motions for summary judgment, the district court found the statute unconstitutional and issued declaratory and injunctive relief in his favor. And of course, the state appealed, correct?

Larry 44:46
Correct. But I want to just point out that he was civilly committed after he had admitted to having fantasies about two young girls. (Andy: yeah, that's not recidivism.) Yeah, okay. But now all the people out there who believe that this treatment, when I say it's nothing more than a collaborative phishing expedition... (Andy: It's total kabuki.) Alright, well, who do you think he made those admissions to? (Andy: To the Kabuki doctor.) Okay, but then the Kabuki doctor went and told them to the PO. And then the PO used that against him in this great, pristine system we have that supposedly helps rehabilitate people. Now, would he have been better off- now we can examine this because we've got all the data we need in front of us. Would he have been better off to have kept his damn mouth shut?

Andy 45:32
Absolutely. I mean, I know where you're going. So I had conversations with our good friend that got locked up for the pictures. And he was like, really troubled by this of what do I tell the treatment people? I was like, you tell them as little as possible, including lying to them. But he's like, I'm a Christian. I can't lie. I was like, I understand what you're saying. But you have to find that balance of like, you're going to make mistakes. You're going to think things. You may look at something, but you have to tell them what they want to hear. Like, I don't want to lie. Sorry, dude, you got to figure that one out. And now he's in prison.

Larry 46:02
This is, clearly, to me, I'm taking the court at its word that it has everything before it that it needs. And I don't think it would have printed this as being factual without the parties having stipulated. If state had said no, there was more to this revocation than his fantasies, that would have not been put forth as a fact. So as a factual matter, he was violated for expressing a fantasy. And I'm guessing- he may have been nutty enough to express it to his PO- But I'm guessing he probably expressed that fantasy in treatment. So you people out there, you just go ahead and keep telling your treatment provider everything they want to hear, and don't learn a damn thing from what we did today. But anyway, I got to answer your questions. Yes, they did appeal, and they prevailed. The Seventh Circuit reversed and upheld the statute. They began by explaining that the state has a strong interest in monitoring PFR is like Belleau. His crimes, evinced that he was a- I don't even want to say that- predisposed to commit sexually violent acts, but it starts with a P. Expert testimony had suggested that his

particularized risk of reoffending was between eight and 16%. That generally aligned with empirical studies estimating that as many as 15% of child molesters released from prison molest again, although they also noted, the court that is, that there are serious underreporting of sexual crimes. They concluded that convicted PFRs like Belleau thus pose a significant danger to the public even after they're released from prison or civil commitment.

Andy 47:38
Alright. Recognizing the difficulty of distinguishing Belleau from their case, the plaintiffs in this case sought to undermine its foundations. They argued that Packingham v. North Carolina calls Belleau into question. In Packingham, the Supreme Court addressed a North Carolina statute that prohibited PFRs from accessing websites of which minors are members. The Supreme Court held that the statute was impermissibly overbroad in violation of the First Amendment. How did the court respond to the suggestions that Packingham overruled Belleau?

Larry 48:08
Not very well. And too many people want to read far more into Packingham than they should. The court stated, “The plaintiffs’ reliance on Packingham is misplaced. That case involved an application of the First Amendment’s overbreadth doctrine.” That’s Packingham. “This is a Fourth Amendment case. As we’ve explained, the application of the Fourth Amendment’s reasonableness requirement has long involved balancing the government’s interests against the individual’s reasonable privacy expectations—not overbreadth analysis. Packingham thus has no relevance here.” Opinion at 12. Now, that's not crazy ol’ Larry's saying that. That's what the court said.

Andy 48:50
So, can they appeal it?

Larry 48:55
They can. They could ask for reconsideration by the panel. They could ask for hearing en banc, which means the full court. I don't think that either would be granted because the court relied on existing precedent from within the circuit. And as a general, a panel on the same circuit does not overturn another panel on the same issue. And they have decided that that Belleau and this case are essentially the same. So, I would say the challengers just didn't do a very good job of distinguishing themselves in this case, and they might have had more hope. But there might be other options.

Andy 49:33
Is this another one of those cases, like we talk about so frequently, where no one within our sphere that we know was informed of this kind of case to try and help them tailor it and structure it and so forth. Like I don't want to just call you out as being the expert, but you are the expert, and I don't know of many others. Were you talk to about this case?

Larry 49:55
I was aware of it, but I was not in any way involved with it. But a new case would probably be better. You would initiate a new case with different plaintiffs asserting that lifetime search is a due process violation because there's no mechanism for relief from the monitoring for the remainder of your life. And I would hate to stipulate that you should be searched after you've paid your debt to society. Well, within the Seventh Circuit, that's the existing state of the law. So you're not going to get anywhere of filing a new action claiming that any search beyond your sentence is unconstitutional. You're going to lose on that. So you've got to come in with a different type of claim with different plaintiffs in my opinion. And you would say, the due process clause of the Constitution mandates that if you're going to continue to intrude, that there's got to be some review mechanism. We've had a number of decisions recently, including South Carolina.

That's how the case was won in South Carolina. Or there's another option, they could just simply go to the legislative process and change the statute in Wisconsin.

Andy 50:59
Right, they could make it so that this is part of the statute, correct? Like the regulatory scheme is that if you have these conditions, then this is what happens to you?

Larry 51:09
Well, they could remove this part of the statute that requires the GPS monitoring. I mean, that would be no problem selling that with the legislators. You wouldn't think that they would… I mean, these good conservative people would like to save money, and having all these expenditures of monitoring and reviewing this data is bound to cost money. So, I'm sure they would be very receptive to an argument that you could save some state resources by not burdening the Department of Corrections for monitoring people that have 20, 30, 40, 50 year old convictions.

Andy 51:37
The technology that they're using seems super antiquated, and like shaming on its own that when you run around with this little box on your ankle, there are other ways of doing this that they do employ. I'm not encouraging them to do this, because I would rather see them not have it. But it's super obvious that you know, you can't really wear shorts when you have an ankle monitor. I mean, you can, but everyone would see you have an ankle monitor. Can't they do it with some sort of cell phone technology instead?

Larry 52:08
Well, they probably could, but who's gonna pay for it?

Andy 52:14
They're gonna make the offender pay for it. I'm sure they're paying for this. The state's not paying for this. They're charging you, whatever, 100 bucks a month, or whatever that crap is.

Larry 52:21
I'm not sure they are in this case. I don't know the details of that. But I'm not sure that they're having to pay for this.

Andy 52:26
And then so do they have any other options at this point?

Larry 52:32
I mean, they could ask for the panel to reconsider. That's not going anywhere. They can ask for a full court review. That's not going anywhere. (Andy: That's en banc, right?) Yep. So they could do that. Or they could take a direct appeal to Supreme Court.

Andy 52:47
Do you believe that this is a constitutional violation?

Larry 52:54
I would not be really hesitant to take this to the Supreme Court, like I am on some things, because I think the Supreme Court, based on what they said in Grady, that this is obviously a search. So there's no doubt. We wouldn't have to prove that to the Supreme Court. We would go in with them understanding that this is a search, and that the Constitution's Fourth Amendment is in play. And you would only get into the weeds in terms of the reasonableness of the search. So we would get a question answered of can you search people after they've paid their debt to society, and does being on the registry diminish your expectations of privacy? So you would frame the case around does being on the registry give you diminished expectations of liberty? And that will put the Supreme Court of the United States in a very awkward position, because maintained that it was

nothing but a pure regulatory civil regulatory scheme, nothing more than just reaffirming existing public information. So if you force them now to say, well, people are suffering the indignity of having a search done on them for in perpetuity for the remainder of their life because of the civil regulatory scheme, what say you now? I think that this case would have the possibility of getting some traction at the Supreme Court. They might come up with the four justices to grant it cert. The question would be, would the well be poisoned by the type of plaintiffs that they have, the type of challengers that they have here. But I think, you know, I'm normally negative, but I think this one would be okay to take to the Supreme Court.

Andy 54:22
This sounds almost like what the current, the six-three majority would be interested in because of the privacy aspect, the unconstitutionality of it. They might not like who the case is about, but it seems like something that the conservative right would be in favor of hearing and ruling in our favor for.

Larry 54:43
I'm not sure that they give a damn about privacy. But you've got the question between the conflict between what they said in ’03 in Smith versus Doe, and then what they said in Grady in 2017 in North Carolina. And I think that they would almost feel obligated to try to straighten out and clarify what is a reasonable search, because otherwise, there's no clarity. And you've got the possibility of having dozens and maybe 50-plus different interpretations of what is a reasonable search for a PFR. So I think this one might present an important enough question that they would grant cert, and they might actually get this one right. But I don't think privacy is the a thing that they are concerned about.

Andy 55:21
There was a Supreme Court case in 2010-ish with the putting the trackers on cars, and you said a name. That wasn't Grady, was it?

Larry 55:30
No. Grady was the satellite-based monitoring in North Carolina.

Andy 55:35
I recall, forgive me on the details of it, but something about police just taking, you know, a magnetic kind of GPS and sticking it on their car. And now they're surveilling you, even with a warrant. And this is like, no, this is overbroad. You're going to search them, you're going to actually tail them and go through the burden of having boots on the ground to go follow somebody around, this sounds exactly the same way as far as you just have a GPS and they're just passively watching where you go, instead of like, having you report in and so forth. Like this is totally stepping on their civil liberties, especially what you're saying is after they've paid their debt to society, blah, blah, blah.

Larry 56:12
Yes, you've got a good petition here in terms of how you can frame up a cert petition, because you can point out their dicta in Packingham, even though it's not completely on point. They said they were concerned about people who had paid their debt to society. So you would throw that back at them in the cert petition that they're concerned about people who’ve paid their debt to society. You've got the 2003 decision where they said it was nothing more to the registry than simply publishing information that's already in existence. But then you say, well, wait a minute, wait a minute, wait a minute, in 2022, we have a state that intruding with an electronic devices strapped to my client that monitors their every move, and it relays to the state where they have visited. And then they're subject to questioning about where they have been, and they're supposedly free of that, because they paid their

debt to society. You've got a decent petition to work here. You've just got not very good candidates. But this is some decent material to work with.

Andy 57:11
I gotcha. All right, then. Anything else before we close things down? I got a new speaker to play. And I have your little extra clip if you want to. We haven't played that yet. Let's cover your little extra clip. Set that up.

Larry 57:25
Well, we had the mystery speaker last week, and the mystery speaker in the little clip I'm playing this week is one in the same person. Did anybody get the mystery speaker? I'm sure a couple of people might have.

Andy 57:39
I never saw anybody come by with any sort of answers. I've been a little busy. But I'm just saying, I didn't see anything come by.

Larry 57:46
What I'm attempting to show is, I'm not trying to have a debate about the subject matter, I'm trying to have a debate, or at least an acceptance that people can evolve in their position. And they do that all the time. And I have insults hurled at me because someone has evolved and they're stating a different position. I was for it, before I was against it and whatnot. Well, the mystery speaker, we're gonna play the same speaker articulating two different positions.

Andy 58:16
Okay, so I'll combine this all together. So we'll have a little extended Who's that Speaker. But last week, this is what I played.

Trump 58:23
I would, I would, I am, I am pro-choice in every respect, and as far as it goes, but I just hate it.

Andy 58:31
And then this time, this is what you gave me to play. But this is not the Who's that speaker. This is just to tack onto it.

Unknown Speaker 58:39
You're pro-life. But I want to ask you specifically, do you want the court, including the justices that you will name to overturn Roe v. Wade, which includes, in fact, states a woman's right to abortion?

Trump 58:52
Well, if that would happen, because I am pro-life, and I will be appointing pro-life judges, I would think that that would go back to the individual states.

Andy 59:02
Well, all right. So one time he said one thing and another time he said another thing.

Larry 59:07
That is correct. Now, in fairness, I don't know the year he said the first clip. I do know the year he said the second clip. That was in a debate in 2016. But when he said the first one, in fairness to him, I do not know when he said that. But just because someone articulates a different view does not mean they're lying. The only time you can say they're lying is if their view shifts from audience to audience, not from a period of time and an evolution in how you evaluate an issue. I've evolved in issues. I used to be pro-death penalty. But I'm not lying now when I say I'm anti death penalty. I have learned stuff I didn't know when I was pro death penalty in terms of how the death penalty is imposed, and the unfairness. I didn't know all this stuff then. I've matured and I've gotten wiser. And now I don't think that a civilized society should do that. But just don't condemn people because they have two different views. If you're going to do that, just make sure you're fair, and you can condemn the people that you support when they do the same thing.

Andy 1:00:08
I was gonna bring up to you that I just sort of like passively remember that, during the initial years of Obama's terms, he was anti same sex marriage. And then towards the end, he was… I mean, that could have been lame duck related, he could have just been saying either side of it for political points, or he ultimately did evolve and change his point of view.

Larry 1:00:35
I don't particularly remember his view on that. But we have to put it in the context of 2008 versus the year he was first elected. If he did articulate those views, he was running against the backdrop of being portrayed as a very, very liberal out of touch candidate. And he was trying to come across as a moderate, and he governed as a moderate. He turned out to be a very moderate president in my estimation. There will be some that'll say that he was the most liberal radical we ever had. And they said that for the whole eight years he was president, but he was not by any means that. And so he may have been trying to appeal to the middle of the country. I don't know. I just don't remember him taking that position. But if he did, he could have evolved just as the former president evolved in whatever period of time he did from being pro-choice to be pro-life.

Andy 1:01:27
Then to move on, then this is for episode 231. This is the Who's that Speaker for this week. Send me an email and put in WTS 231, or Who's that Speaker, something like that so I can track it down somewhat easily. And some of you are going to definitely recognize this one.

Who's that Speaker? 1:01:44
The world is going to end in 12 years if we don't address climate change, and your biggest issue is how are we going to pay for it?

Andy 1:01:54
Any idea who that is Larry? (Larry: Oh, I know who that is.) Okay, since we were talking about the EPA, I figured I would bring that one in, because that's a pretty funny statement. I got no confidence, I have zero confidence as my layperson level of understanding of science, the Earth is not going to end in 12 years, and which is probably still like, four years, three years less than when she said that. So if you know who that is- I'm sure someone's gonna say it in chat and mess it all up. So, is there anything else before we close out, Larry?

Larry 1:02:29
Well, I think we might have some new patrons or some subscribers to the podcast transcript.

Andy 1:02:35
I don't have any new patrons. I looked before we loaded. Somebody renewed, but I didn't take them as being a new patron. So I don't have anybody to report on that side of things. Did we get any new snail mail subscribers?

Larry 1:02:48
No, I think we got one, but my memory is failing at the moment. (Thank you Kevin for becoming a subscriber!) We're getting a lot more inquiries now. So at least people are asking for samples.

Andy 1:02:57
And I'll just point this out to you if you can look up on the screen for just a minute. I have this little section here. It says new transcripts subscribers. You could put them there as a reminder, just saying.

Larry 1:03:11
I could if I could just find the time.

Andy 1:03:14
I understand. So I think that'll close out the show for the evening. And I appreciate everybody listening. I'm going to try and push this up here. And hopefully nothing breaks when I do this. I'm going to remind everyone that they need to like and subscribe and do all those things on the YouTube channel. Because I often forget to play

this little doohickey. See, and it didn't even make the sound this time, which is awesome, because all my stuff is broken and messed up. So Larry, if you want to find all the show notes, it's over at registrymatters.co and voicemail. 747-227-4477. registrymatterscast@gmail.com. You can also find stuff over at FYPeducation.org. And if you want to support the program to help us keep on with the work we're doing here, it's patreon.com/registrymatters. And join us for a buck a month and you get the podcast as soon as I release it. And if you want to come in at higher levels, you can send transcripts to your best friends, and at some of the higher levels you can actually harass Larry and talk to him on the phone. How about that?

Larry 1:04:15
Talk to me on the what?

Andy 1:04:17
On the phone. You know that thing? That antiquated thing that people just text with?

Larry 1:04:21
I don't talk on phones anymore.

Andy 1:04:23
Okay. Alright, then. Well, that's all I got Larry, and I hope you have a splendid evening out there in the West-West. Not quite west. Southwest. That's where you are. And I hope you have a great weekend. Happy Fourth of July. (Larry: Thank you.) Take care buddy.

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