the public's business. Others, such as the League of California Cities, argued that disclosure of these messages is impractical because the public agency has no access to the messages.

In 2013, the trial court ordered the Mayor and City Council members to turn over e-mails, voicemails, and text messages sent or received on private electronic devices and related to downtown redevelopment.

HELD: The Court of Appeal reversed the trial court's order, relying on the CPRA's definition of "public records," which are writings relating to the public's business "prepared, owned, used, or retained" by a state or local agency. (Government Code § 6252(e).)

DISCUSSION: The court concluded that because a public agency cannot access or control messages on private accounts or devices, the agency itself cannot prepare, own, use or retain them. The court acknowledged that the decision might result in public officials using private accounts or devices to conduct public business. However, the court noted that the legislature is best equipped to address this issue, as well as the practicality and privacy concerns involved in disclosing records from private accounts and devices.

It is likely this case is not the end of the matter; Smith will probably request a hearing before the Supreme Court, which the Court has the discretion to grant or deny. The California legislature may also take up the appellate court's invitation to address this matter.

http://www.courts.ca.gov/opinions/documents/H039498.PDF (last accessed Apr. 3, 2014).

Search and Seizure: Where Fourth Amendment Violations Arose Out of Novel Fact Pattern, Rights Were Not "Clearly Established"

Bray v. Planned Parenthood Columbia-Willamette, Inc., No. 12-4476 (6th Cir. Mar. 21, 2014)

In a case involving obvious violations of plaintiffs' Fourth Amendment rights, the Court of Appeals for the Sixth Circuit has nevertheless cleared U.S. Marshals executing a writ of execution because the legal and factual scenario had no precedent within the Circuit or before the Supreme Court.

"If the facts as alleged in the complaint are true, this case involves an incident that is more like the home raids by Red Guards during China's Cultural Revolution than like

what we should expect in the United States of America." So begins the opinion by Sixth Circuit Judge Rogers in this case.

Michael Bray is an ardent anti-abortionist. In 1985 he was convicted in Maryland for damaging several abortion clinics and spent four years in prison. In 1995 he was among several defendants sued by Planned Parenthood Columbia-Willamette (PCCW) for intimidation by threat of use of force under the Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248). A jury found the anti-abortion activists liable for $110 million; after appeals, PCCW was left with an $850,000 award against Bray.

A district court in Ohio subsequently issued a writ of execution authorizing U.S. Marshals to seize specified property from Bray. The writ authorized seizure of Bray's residence in Wilmington, Ohio as well as computers, cameras, other electronics and books within the residence. Aware of the writ and seeking to avoid trauma to their young children, Bray and his wife contacted the Marshals Service and were received with what they described as a spirit of "professional cooperation."

However, at 10:00 am on October 1, 2007, execution of the writ took place without warning. Four U.S. Marshals, at least two County Sheriffs, an agent for the Bureau of Alcohol Tobacco and Firearms, lawyers for PCCW and other unidentified participants appeared at the Bray home. Most of the law enforcement officers were wearing flak jackets. Bray was ordered to remain on a sofa in his front room while various people moved around his house, videotaping its contents and removing numerous boxes of personal property, including family photo albums. When Bray's wife and children returned to the home after school, they too were confined to the house.

In November 2007 a magistrate judge ordered that numerous seized items belonging to the Bray children or third parties be returned to the Brays. PCCW did not comply until July 2009.

The Brays brought suit for unreasonable search (of the home) and unreasonable seizure (of Bray) against PCCW, its law firm (Squire, Sanders & Dempsey), and three U.S. Marshals. Among other things, the Brays alleged that seven armed, flak-jacketed officers came to their home; they required Bray to sit on his sofa for four hours, denying him the use of his cell phone to contact his lawyer; and various unknown individuals roamed around the house, filming its contents.

The marshals moved to dismiss on grounds of immunity (quasi-judicial or qualified) and the lack of a *Bivens* remedy. The district court agreed, reasoning that the writ of execution gave the marshals "authority to exercise a degree of control over both the property being seized, the location wherein the property is located, and, by extension, those present at the location" and finding that the detention of Bray "served reasonable and legitimate safety and operational concerns." Absolute quasi-judicial immunity was appropriate, in addition to qualified immunity, because performing the writ of execution was "so intertwined with the judicial process" that those involved were "considered an

arm of the judicial officer who is immune." Finally, filming the home was reasonable to record the condition of the property prior to its sale.

The Brays settled with PCCW and the Squire, Sanders firm but appealed the judgment in favor of the marshals.

HELD: The Sixth Circuit found that the marshals had clearly violated the Brays' Fourth Amendment rights but were nevertheless protected by qualified immunity because those rights were not clearly established at the time of the misconduct.

DISCUSSION: The Court of Appeals catalogued numerous violations of the Bray family's Fourth Amendment rights. First, detaining Michael Bray for four hours without access to his cell phone or lawyer was presumptively improper. He posed no threat whatsoever, as evidenced by the fact that the marshals allowed numerous unarmed strangers into the house. Second, allowing unauthorized persons to enter and roam the house was also a constitutional violation. The writ had merely provided for 'a' representative of the PCCW to be present to help identify proper items for execution. Third, given that the PCCW retinue had no legal right to be one the scene, the wholesale filming of the house and its contents—as well as the Bray family--by other PCCW representatives was clearly unauthorized. Fourth, authorization in the writ to seize all materials written by Bray "both in published and unpublished form" created a strong inference that the real purpose of the raid was constitutionally suspect: to intimidate Bray and confiscate his disfavored writings, which were of negligible commercial value.

Nevertheless, the officers were protected under qualified immunity. In order to avoid this result, the Brays had to allege facts confirming the violation of a constitutional right that was clearly established at the time of the misconduct. Therein lay the problem: the legal question was whether "every reasonable officer" would have known that his actions violated such a right and whether "existing precedent . . . placed the statutory or constitutional question beyond debate."

Here, the legal and factual scenarios presented in the Brays' circumstances had not been addressed previously by the Sixth Circuit or the Supreme Court, so the question was not "beyond debate." While the Court had previously spoken on the issue of detaining occupants in a criminal context—the search for evidence or contraband—it had not dealt with qualified immunity in the case of a civil writ of execution. Therefore a reasonable officer might not have known that his actions were impermissible.
Similarly, the marshals might have thought it acceptable to invite additional PCCW representatives to join the raid; one Sixth Circuit precedent had allowed telephone company representatives to assist officers in the execution of a warrant relating to wiretapping. And if those additional personnel were permissible on the premises, their videotaping of the execution of the warrant was not unequivocally prohibited.

http://www.ca6.uscourts.gov/opinions.pdf/14a0051p-06.pdf (last accessed Apr. 3, 2014)