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Supreme Court Could Create New Government Immunity In Its Latest Police Brutality Case

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After a summer that saw cities erupt in protest over police brutality and the U.S. Department of Justice deploy federal agents to combat violent crime, the Supreme Court held oral argument on Monday in a particularly timely case. The High Court considered whether James King, who was brutally beaten and nearly choked unconscious by a police detective and FBI agent more than six years ago, can hold the officers accountable by requiring them to defend their actions in court.

A ruling for James would merely allow him to have his date in court. But a decision against James would spawn an enormous legal loophole that would let federal officers escape constitutional accountability, no matter how blatant their violations.

Back in 2014, James was a 21-year-old college student walking between two summer internships in Grand Rapids, Michigan, when plainclothes members of a state-federal task force misidentified him as a fugitive wanted for stealing soda cans. Without identifying themselves, the officers asked James who he was and grabbed his wallet. Thinking the men were muggers, James tried to run. But after a few steps, the officers tackled, choked and beat James so badly he had to be hospitalized.

When uniformed reinforcements arrived, James was jailed and charged with several felonies. Thankfully, a jury found James not guilty on all charges. With his acquittal, James could now sue the officers and the federal government for infringing on his rights. But James soon found himself caught in a Kafkaesque tale of special procedures and immunities that shield the government and its employees from accountability in court.

For starters, James had to bypass sovereign immunity, which shields the government from any liability. Thanks to this doctrine, throughout most of the nation's history, those harmed by federal officials could only obtain compensation by directly petitioning Congress for relief. To streamline these petitions (between 2,000-3,000 separate bills were filed each year), in 1946, Congress enacted the Federal Tort Claims Act (FTCA), a groundbreaking law that largely waives sovereign immunity and lets individuals sue the federal government over the actions of its employees. In fiscal 2018, the federal government paid out more than \$318 million in FTCA claims.

Although many FTCA claims are rather mundane (e.g. car crashes with mail trucks, slip and falls on federal property), the Act also lets people like James sue federal law enforcement officers over intentional torts like assault, battery, or false imprisonment.

Another pathway to accountability was opened 25 years after FTCA's enactment when the Supreme Court handed down its decision in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, which allowed individuals to sue federal officers for damages who violated their Fourth Amendment rights. Unlike the FTCA, a *Bivens* claim includes the right to a trial by jury and the ability to sue for punitive damages.

On the other hand, a successful *Bivens* claim has to overcome a barrier not present for FTCA claims: qualified immunity. Crafted whole-cloth by the Supreme Court, this doctrine shields government employees from any liability for violating someone's constitutional rights, unless the right in question was "clearly established."

Since the two remedy different injuries, victims harmed by federal agents routinely file both FTCA and *Bivens* claims. In fact, the Supreme Court declared more than 40 years ago that it is "crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."

So did James, which is why he sued the government and the officers who attacked him under the FTCA and *Bivens*. His FTCA claims were tossed for sovereign immunity, and his *Bivens* claims were tossed for qualified immunity. But on appeal, the Sixth Circuit U.S. Court of Appeals rejected qualified immunity for the officers, reinstating James's constitutional claims under *Bivens*. At that point, James expected that his case could finally be heard on the merits at trial.

Instead, the Justice Department asked the Supreme Court to grant the government another protection that would further shield federal officials from constitutional accountability. Since James's FTCA claims were thrown out for technical reasons, Assistant to the Solicitor General Michael Huston argued on Monday that this should trigger the Act's "judgment bar" on lawsuits involving the "same subject matter," which, they claim, should bar James's *Bivens* lawsuit.

If the Supreme Court adopts this argument, it would forever block James's constitutional claims on a technicality that has nothing to do with whether or not the officers violated the Constitution, effectively creating a new form of immunity for federal employees. An adverse ruling from the Supreme Court would thwart government accountability nationwide, making it much more difficult to sue federal officers for excessive force.

Victims would effectively be forced to choose between filing a FTCA or *Bivens* claim, greatly limiting their opportunity to seek redress (and contrary to congressional intent). Plaintiffs could also risk filing a *Bivens* claim first, though it would have to be resolved incredibly quickly, since any FTCA claim must be brought within two years.

Ironically, while this system of legal redress was designed to prevent "duplicative litigation," adopting the government's position would encourage even more lawsuits, further clogging up court dockets. Although this case touches on issues of qualified immunity and police brutality, *Brownback v. King* hinges on whether the government can effectively rewrite the FTCA and turn a law designed to secure justice into a weapon against those whose rights its employees have violated.

Worse still, if the Justice Department's proposition is accepted it would shield all federal officials, all local police working on the more-than-1,000 joint state-federal task forces and all those cross-deputized as state and federal officers, granting hundreds of thousands of officers yet another way to dodge accountability.

As the Cato Institute and National Police Accountability Project explained in an amicus brief, this would make it "harder to hold law enforcement accountable at a time when more federal officers are engaged in local policing efforts and more state and local officers are being treated as federal officers for purposes of litigation" and "risks emboldening officers who are already pushing the envelope."

"The dangerous and ironic thing here is that the FTCA is a law that was supposed to provide a means for Americans to hold their government accountable when government employees violate their rights," noted Institute for Justice Attorney Patrick Jaicomo, who argued on behalf of James before the Supreme Court. "Now, the government is trying to weaponize the FTCA and use it to prevent ordinary citizens from ever having their day in court, even for gross constitutional abuses of authority like those James endured."