Bill Barr Gets Away With Busting Heads in Lafayette Square Because He's a Fed

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A federal judge on Monday partially rejected a group of lawsuits against local police and fully dismissed claims against federal officials who ordered and oversaw the violent clearing of protesters from Lafayette Park in Washington, D.C., on June 1, 2020.

The four groups of plaintiffs sued former President Donald Trump, former Attorney General William Barr, several former federal agency heads, as well as representatives from the Metropolitan Police Department and the Arlington County (Virginia) Police Department. The plaintiffs sought damages and injunctive relief for constitutional violations and claimed that, in violently clearing Lafayette Park with little notice allegedly so that Trump could take a photo in front of St. John's Episcopal Church, he and the other defendants committed conspiracy and violated the Posse Comitatus Act.

A recently released report from the Office of Inspector General for the Interior Department found that law enforcement acted against the protesters so that contractors could install a fence, and that Barr only asked that they *expedite* the process for Trump.

However, Judge Dabney Friedrich of the U.S. District Court for the District of Columbia did not dismiss the case because of the OIG report, but rather because her reading of the precedents cited by the plaintiffs led her to grant the federal actors official immunity.

Specifically, Friedrich relied on the *Bivens* doctrine, a court-constructed avenue that is supposed to provide recourse for people whose rights are violated by the government. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971), the Supreme Court permitted a victim to sue federal cops who conducted a warrantless search of his apartment to look for drugs, shackled him, and strip-searched him in a courthouse. But that standard has become increasingly diluted with subsequent decisions, like the one in *Ziglar v. Abbasi* (2017), in which the Supreme Court ruled that judges should look for "special factors counseling hesitation" when "the case is different in a meaningful way from previous *Bivens* cases decided by this Court."

In other words, if the judiciary pinpoints any highly subjective measure that differentiates a case from those already on the books, then the ruling judge can use his or her discretion in shielding a

federal official from accountability. It is essentially a federal and even more rigorous version of qualified immunity, the legal construct which allows state and local government actors to violate your rights unless the exact way they misbehaved has been outlined and published in a previous court precedent.

The "special factor" here, according to Friedrich, was "national security." Because no prior *Bivens* decision dealt with protesters outside the White House, Trump, Barr, and the other federal defendants of the four lawsuits will not have to face a jury in civil court. She adds that it is of no import whether or not presidential safety was actually under threat. "What [does] matter," Friederich writes, "is whether the claims in this case arise in a similar context to *Bivens*." Indeed, she even acknowledges later that she "is unable at this time to credit the defendants' assertion that the clearing of the Square was done in the interest of presidential security."

Unless Congress legislates an avenue for plaintiffs to bring civil claims against federal actors who violate our rights in novel ways and circumstances, then future federal officials will also be shielded from responsibility for misconduct. "There's a gaping hole in the Constitution" when it comes to holding federal actors to account, says Scott Michelman, legal director for the American Civil Liberties Union of the District of Columbia and the attorney representing the plaintiffs. "That hole was [just] expanded to encompass the territory of one of the most important sites in the nation for protests, because if anything federal officials do there implicates presidential security, then they can never be sued."

The immunity enjoyed by government employees isn't particularly new, especially when it comes to law enforcement. "In lower courts' view, [a] federal badge now equals absolute immunity," says Anya Bidwell of the Institute for Justice, a libertarian-leaning public interest law firm. "We see it all the time these days. No matter how outrageous the conduct by federal police, they cannot be sued for violations of constitutional rights, even if plaintiffs can overcome qualified immunity."

Last month, the Supreme Court declined to consider a case brought by José Oliva, who, at 70 years old, was placed in a chokehold and slammed to the ground by federal cops at a Department of Veterans Affairs hospital because he did not furnish his identification quickly enough. (It was in a metal detector bin.) Those officers were shielded by *Bivens*, a lower court ruled, giving Oliva no way to bring his claims before a jury in civil court to argue for damages after he sustained a permanent shoulder injury.

D.C. and Arlington County police were only partially so fortunate.

They will not receive the legal protections against protesters' First Amendment claims, Friederich concluded. "The right to be free from government violence for the peaceful exercise of protected speech is so fundamental to our system of ordered liberty that it is 'beyond debate,'" she writes. The order does not provide the plaintiffs with any sort of damages but merely allows them to make their case before a jury.

The saga will not end there. "Unfortunately, one of the many double-standards created by the qualified immunity doctrine is that it gives government officials the ability to appeal non-final rulings like this one, even though ordinary people cannot," says Clark Neily, senior vice president for legal studies at the Cato Institute. "It seems very likely that the DC and Arlington

County police defendants will take advantage of that special privilege to appeal the trial court's ruling denying them qualified immunity on the First Amendment claims."

The plaintiffs will also not be able to argue before a jury that police violated their Fourth Amendment rights when they used excessive force to remove them from the square. The police received qualified immunity because such force was used to *disperse* the protesters and not to *restrain* the protesters. "Even assuming that the plaintiffs were seized by being forced to leave Lafayette Square," Friedrich adds, "the plaintiffs have not pointed to a case clearly establishing that attempting to move members of a crowd (rather than keep them in a location) can constitute a seizure."

It's a fitting reminder of just how myopic a standard qualified immunity can be, put in place by the government to protect the government.