Bound By Oath | Season 2 | Episode 9: Closing the Courthouse Doors

John: Hello and welcome to Episode 9 of Season 2 of Bound By Oath. On this episode, my co-producer Anya Bidwell is going to discuss some new developments in the cases and the doctrines that we've talked about on previous episodes. She and our guests will have the latest on the case we talked about in Episode One, *Brownback v. King*.

> **Bystander (Episode 1)**: Oh my god they're pounding him in the head. They're going to kill this man.

John: Picking up where we left off on Episode Two, Anya is going to tell you about an increasingly alarming trend where lower federal courts are functionally -- though not by name -- granting absolute immunity to federal officials for clear violations of constitutional rights -- like the right to be free of excessive force -- resulting in cases that only a few years ago would have been allowed to proceed being dismissed before trial.

> **Prof. Michael Ramsey (Episode 2)**: It certainly would have been inconceivable to the Framers of the Constitution that there would be no remedy. Or that a remedy would depend on the good graces of Congress to create one when federal officers violated the Constitution.

John: Anya and our guests will also take a look at some new petitions that are before the Supreme Court. Thanks for tuning in.

BBO Montage -- Justices saying the oath

Anya Bidwell: Hi, everyone. I'm Anya Bidwell, an IJ lawyer and a co-producer of Bound By Oath. While John Ross is working on bringing you an episode on prosecutorial immunity, we decided this is a good time for us to step back and take stock of where we are in the season. A lot of things are happening with every single doctrine we have talked about. And there are also some updates in cases we have discussed. So join me in welcoming two incredible guests who will help us make sense of it all. Scott Michelman, the Legal Director of ACLU-DC and Patrick Jaicomo, an IJ attorney. Both Scott and Patrick have previously appeared on Bound By Oath. Scott was a guest on Episode Six helping John explain the doctrine of qualified immunity. And Patrick was a guest on the very first episode, where he talked about Brownback versus King, the case he argued before the U.S. Supreme Court involving an innocent college student beaten by task force police in Grand Rapids, Michigan. So let's get right to it. Patrick, very briefly remind us what happened in *Brownback versus King*?

Patrick Jaicomo: Sure. So in *Brownback versus King*, our client, James King, who was a college student at the time, was walking between two summer jobs when two men he did not know approached him and began asking him questions. These men were dressed in plainclothes. They pushed him up against a car. And one of them took his wallet. At which point he believed he was being mugged and tried to run away and was then tackled and choked, and eventually beaten very severely in the face. And as it turned out, these two men were plainclothes members of a state-federal task force. One was a local police detective. The other was an FBI agent. And rather than simply letting James go -- because it turned out they were looking for a fugitive who wasn't James and frankly, didn't look anything like James -- they charged him with three serious felonies. And he had to go through a criminal jury process and was acquitted of all charges. After his acquittal, James sued these officers.

Anya Bidwell: So he filed a constitutional claim against the officers individually. And then he also filed claims against the United States government under the Federal Tort Claims Act in the government's capacity as the employer of these officers.

Patrick Jaicomo: That's right and at the very first step of the lawsuit, the district court threw out all of the claims. So James never got a chance to do discovery. He didn't have a chance to send questions to the defendants or sit them down in deposition, let alone have a trial. His case was completely concluded in the first step. And so James appealed that to the Sixth Circuit, essentially focusing on this issue of *Bivens* versus 1983 and qualified immunity.

Anya Bidwell: Meaning, and I'm seriously simplifying here, that if the officers were acting as federal officers, then the constitutional claims against them would proceed under the *Bivens* doctrine that we talked about on Episode 2. And if they were instead acting more like local police, then the case would go forward under Section 1983. Under either scenario, qualified immunity would be an issue. Patrick, what did James argue? Did he say that the officers acted under Section 1983? Or did he describe them as federal officers?

Patrick Jaicomo: James argued that these officers working together should have been liable under Section 1983. Because the law that they were enforcing, the fugitive they were looking for was wanted for having committed a Michigan crime, and was wanted on a Michigan warrant, and they were looking for him in Michigan. So James argued it doesn't matter that one of these men was an FBI agent. All that matters is the only legal authority they had to arrest the fugitive -- who again wasn't James -- came under color of Michigan law. Well, without much discussion, the Sixth Circuit rejected that argument and just said, essentially, because the federal government has touched this case in any way and has a task force, that both officers can only be pursued under *Bivens*. And then it turned to qualified immunity. And thankfully, James was

able to point to a variety of cases that had already been decided that clearly established that what these officers did at every stage of the interaction -- including stopping him, attempting to arrest him, using excessive force on him -- were clearly established. And therefore the officers were not entitled to qualified immunity.

Anya Bidwell: So the appeals court said, the officer should be treated like federal officers, but that the case can still proceed to trial, which is a miracle all by itself. We'll talk about this more later. But this was a huge victory, not only because James overcame qualified immunity, but also because it's becoming harder and harder to sue under *Bivens*.

Patrick Jaicomo: Right. But the real trick in this case is another set of claims you mentioned under the FTCA, the Federal Tort Claims Act where instead of suing the officers themselves, you sue the United States as their employer. When the district court threw out our FTCA claims against the United States, it said it didn't have subject matter jurisdiction to hear the meaning it didn't have the legal authority to hear them. And that's because -- this gets complicated fast -- in the court's view, the officers would have had immunity from James's claims under Michigan State law, and the way the FTCA works that would doom the claims. So here's the trick. On appeal, the government argued that because the FTCA claims against the government had been dismissed, that automatically meant that our claims against the individual officers had to be dismissed as well.

Anya Bidwell: Right, because of the FTCA judgment bar.

Patrick Jaicomo: Exactly. The FTCA has something called the judgment bar that says if you litigate your FTCA claims to completion -- till you get a judgment -- then you can't file a new lawsuit based on the same facts. The government argued that our claims against the officers

were essentially a new lawsuit, even though they were filed in the very same case, and they never actually reached a judgment. The Sixth Circuit said that was wrong, and we could proceed. But the Solicitor General appealed that ruling to the Supreme Court and asked the Court essentially to create an entirely new immunity doctrine -- in addition to all the others that we've talked about in this season -- by interpreting the FTCA judgment bar in a way that would foreclose other claims brought in the same lawsuits. That's just not how lawsuits work. You bring all the claims that you can, they get winnowed down over the course of litigation, and then the suit can proceed but the mere fact that you brought different kinds of claims together in a single lawsuit can't cancel out other claims in that same case.

Anya Bidwell: So what did you argue before the U.S. Supreme Court?

Patrick Jaicomo: Right, so the U.S. Solicitor General then, after losing in the Sixth Circuit, brought the question to the Supreme Court of whether the judgment bar applied. And so we argued that case in the US Supreme Court almost a year ago now. And the Supreme Court ultimately decided the case in favor of the government but limited its decision to this issue of jurisdiction, which is very tricky and difficult to explain. But, broadly speaking, the Court said, the judgment bar might apply in this case. Because although the district court lacked jurisdiction, it could still enter a judgment that would possibly trigger the judgment bar. But importantly, the Supreme Court rejected the government's request to completely end the case. And so the case is now continuing in the Sixth Circuit, which has asked several questions of the parties about how the case should now proceed on remand. Hopefully, it will either simply hold that the judgment bar doesn't apply to claims brought in the same action, or it will at least asked for more briefing on that point. And then we can go into the Sixth Circuit and argue why James King’s case should stay alive. And just to underscore everything and the difficulty that these doctrines presents, all of this stuff that happened to James happened in 2014. And it's now

2021. And we are still just trying to get our foot in the courthouse door, to go in and have a chance to plead James's case to a jury.

Anya Bidwell: Before we stop with *Brownback*, I just want you to talk about one additional thing, and that's on prosecutorial immunity. Can you tell us more about what the prosecutor in this case did? And also why you chose not to sue them?

Patrick Jaicomo: Yeah, sure. So in this case to cover for themselves after they made this enormous mistake and beat up this poor college student who wasn't the fugitive they were looking for, the officers filed reports and charged James with three felonies. But of course, police can't actually try you for crimes, they need the help of a prosecutor to do that. And so they got that help from a county prosecutor who made James go through a jury trial. And all of this caused, obviously enormous stress in James's life. It caused him to drop out of college and so on and so forth. And James was acquitted of those crimes. And a lot of what the prosecutor did seem to be motivated by the hope that prevailing in that case would have prevented James from suing the officers. In fact, what we see in a lot of these cases is a situation where someone is charged with a crime. And it seems very clear that a lot of the charging decision was motivated by the fact that if that person pleads out to that crime or is convicted, then they will not be able to turn around and sue the police officers who violated their rights. And so that's how there's this sort of very important intersection between prosecutorial behavior and the ability to bring civil rights claims at all. But unfortunately, because of other doctrines that exist that were made up by the Supreme Court, you simply can't sue a prosecutor when they're acting in their prosecutorial capacity, even if they intentionally violate your constitutional rights. And so that avenue was just simply never open to James at all. And one interesting side note is that the prosecutor in James's case resigned in disgrace a couple of years later. He drove down the wrong way of a

one way street crashed into a parked car and broke someone's arm. But when police arrived, they didn't arrest the prosecutor. They just took him home and tried to cover the whole thing up.

Anya Bidwell:There are actually recordings of the police admitting that he was drunk and talking about how they would try to cover it up.

> **Officer Ickes**: Josh Kuiper from the prosecutor’s office. Wrong way. Visibly intox. Says he’s intox. **Lt. Janiskee**: How much of this is on … body cam? **Officer Ickes**: Plenty of it.
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> **Officer Warwick**: Wow. We got him home. He was fucked up. … He blasted this fucking car, goddamnit. … He’s going to get a ticket for driving on a one-way the wrong way and then that’s it. **Lt. Janiskee**: Ummm all the people there are cool? They don’t suspect anything? **Officer Warwick**: Yeah.

Patrick Jaicomo: The officers didn't realize that they were talking on a recorded line. And before that became known publicly, one of the officers at deposition actually said under oath that he didn't think the prosecutor was drunk or he didn't know. And so that's either perjury or something very close to it. And the big picture here is that the police were doing favors for the prosecutor. And so it's not a stretch to imagine that a couple of years earlier, the prosecutor would have been doing favors for police.

Anya Bidwell: Thank you for this, Patrick. By the way, one interesting thing to note about this case is that the government fought really hard to ensure that the Grand Rapids police officer, Officer Allen, was sued as a federal officer and not a local officer. That's because today federal officers are essentially entitled to absolute immunity. Nobody disputes that it is extremely difficult

to sue state and local officers. After all, you have to overcome qualified immunity, which is a very, very high barrier. But federal officers are entitled to an even higher level of protection. They often can be sued at all. That's why we call it absolute immunity. We talked about this on Episode 2 of Bound by Oath. There is absolute immunity for essentially two reasons. First, federal officers can't be sued in state courts if they act within the scope of their employment, which is pretty much every time. And second, the case that allows federal officers to be sued in federal court, *Bivens versus Six Unnamed Agents of Federal Bureau of Narcotics*, is considered to be a disfavored precedent. That's because unlike with Section 1983, where Congress passed a law saying you could sue state and local officials, *Bivens* says you can sue them directly under the Constitution, and there is no need for permission slip from Congress. But according to more recent Supreme Court decisions, it's not a good idea to allow suits directly under the Constitution. So you actually do need a permission slip from Congress before you can go to court and complain about the officers' wrongdoing. Therefore, *Bivens* is disfavored. And if you can sue under *Bivens*, and there isn't an analogue to Section 1983, you are entitled to -- functionally -- absolute immunity. Scott, to put some meat on that *Bivens* bone. Could you tell us about your case, the Lafayette Square case? What is it all about?

Scott Michelman: In the wake of the murder of George Floyd in May of 2020 by a Minneapolis police officer, civil rights demonstrations, demonstrations against police brutality took place around the United States, including in Washington D.C. And one of the most prominent of these was a large demonstration at Lafayette Square, which is right across Pennsylvania Avenue from the White House. It has been a traditional place for people to voice their views, their opposition to government policies, their proposals for change, and to capture the attention of the chief executive who's right across the street. So this is a place with with a long history of First Amendment activity and of great symbolic importance. And on the afternoon and into the evening of Monday, June 1, 2020. There was a large group of protesters. Their goal was to

protest the murder of Mr. Floyd and police brutality generally and to capture the attention of the federal government and say: we need a change in the way people are being policed in this country. It was a protest that wasn't causing a threat to anyone. There were children. There were dogs. There was chanting and singing and kneeling. Now, the mayor of the District of Columbia had imposed a curfew that night that would not begin until 7pm. But at 6:30, the protesters were violently, viciously attacked by a group of mostly federal officers with a few state and local officers joining them. And this was carried out on the orders of federal officials. Now what did they do? Well, first, they charged with batons and with shields swinging. And they chose to have lighter shields that they could use as weapons. They fired tear gas rubber bullets, smoke munitions, and other weapons. So immediately, you had the demonstrators fleeing, getting beaten. Journalists were bashed with batons people were inhaling tear gas. People fell to the ground and were struck on the ground. And it was chaos. The federal officials pursued on horseback. And then a portion of the demonstrators when they fled, fled right into the arms of waiting Metropolitan Police Department officers. These are D.C. police, who further tear gassed the fleeing demonstrators. So this was a vicious, unprovoked blatantly unconstitutional attack on civil rights demonstrators in one of the most important forums in the country.

Anya Bidwell: And now tell us about the lawsuit and especially ~~kind of~~ the claims for retrospective relief?

Scott Michelman: Let me say one other thing about about the context that that will be familiar to many listeners. This was the night that the president, Donald Trump, came out into Lafayette Square, crossed the square, and posed for an infamous photo op with holding a Bible upside down in front of St. John's Church. Now, it has been debated in the press, in inspector general reports, and in the briefing exactly what the connection was between Trump's walk and the clearing of the square. But he did not emerge from the White House grounds for for about a half

an hour after the attack began. So it is clear that none of this violence was necessary to protect the president from harm. There's been some report by the Inspector General of the Department of the Interior that this was part of a pre-planned movement of the security perimeter around Lafayette Square. But whatever it was, it was done with with an incredible amount of force, with little or no warning, and in gross violation of the First and Fourth Amendment rights of the demonstrators. So we sued. Within three days, we rounded up several plaintiffs as well as Black Lives Matter DC. The individual plaintiffs were people who had been there. There was a a woman and her nine year old stepson and her wife there who had been who had been chased away. There was a woman who had her her knee bashed in, where she had previously had surgery, and then was struck when again by a federal officer when she tried to stand. There were people who attempted to help other demonstrators. There were people who were trying to just to deliver food and water to demonstrators and experienced tear gas, beatings, and just tear at the hands of these federal officials. And the main claims that we brought in our lawsuit, were under the *Bivens* doctrine that you just mentioned -- this doctrine that the Supreme Court recognized about 50 years ago, permitting people to sue directly under the Constitution for damages when federal officials violate their rights. Because there's no good reason that federal officials should be able to violate people's constitutional rights with impunity, or that they should be held accountable less frequently than state and local officers for whom Congress has provided a specific statute, the statute you've been discussing all season Section 1983.

Anya Bidwell: Yes, and what did the district court say in its order?

Scott Michelman: So the district court dismissed our *Bivens* claims, the federal government argued that because the president was in the area, and this was close to the White House, this was a situation where presidential security should prevent courts from even hearing the claims. Not not to be clear that, that they're saying you should hear the claim, and we should win on the

merits, because this was justified. But just because presidential security is around this area, had something to do with this, arguably, we should get out of court immediately. And the judge agreed, holding in a startlingly broad opinion that essentially whether or not presidential security was actually the reason for the attack, the the mere possibility that presidential security needed to be considered by federal actors deploying any force in Lafayette Square means that no *Bivens* claim can go forward. So all of the claims for damages against the federal officials under the Constitution were thrown out on that ground. Ironically, the D.C. officers who were a block away remain in the case. We overcame qualified immunity because we said it's obvious that attacking non-threatening demonstrators is not appropriate and unconstitutional and any reasonable officer should have known that. The court agreed and permitted the claims against the DC officials to go forward. But that's a limited victory because it only applies to a subset of the group that fled in that direction where the D.C. officers were. And it really leaves out the the officers who instigated the whole confrontation and the ones who need most to be held accountable.

Anya Bidwell: This is what's fascinating to me, Scott, you have the same type of constitutional violation. And in the same opinion, you have the judge say that when it comes to federal officers, they can't be sued. And when it comes to state officers and local officers, they can be sued. And by the way, qualified immunity can't even shield them. What the court seems to essentially be saying is that the Constitution applies with less rigor to federal officials than it does to everybody else. And it really just boggles my mind because if we think about ~~sort of~~ the founding of this country and what the Constitution was intended to limit, first and foremost was the behavior of federal officials. And the state officials it only started to apply to after the Civil War.

Scott Michelman: There are so many anomalies here. As you say, it's the same conduct or or very similar conduct by two different groups of officials. If anything, I would say the federal officials conduct was worse. And yet, they're treated very differently by the law. And there's there's no good reason for that. And just as you say, the Constitution was originally and the Bill of Rights intended to restrain the conduct of the federal government, not state actors that did not come into place until after the Civil War. And so if anybody should be responsible directly under the Constitution, it should be the federal officers. And in fact, that is our history. There are old cases from around the time of the founding of the Republic, as well as forward from there, that show constitutional claims being brought against federal officers and damages being the appropriate remedy for those. And so to say that state and local officials can be responsible for this conduct and federal officials cannot has it backwards as a matter of history. And it's an arbitrary distinction that doesn't make any logical sense. And it's not fair, either. The other point which I think is really important to recognize as qualified immunity is this incredibly powerful defense. And yet, it didn't shield the D.C. officers. This was so bad that the court held they violated clearly established rights. And yet, still, we could not get into the courthouse door to sue the federal officers. Because before you even get to the question of this qualified immunity defense, is you have to face the question of whether you have any right to sue the federal officers at all.

Anya Bidwell: Yeah, we're going to pause on this a little more with Patrick, this idea of federal cops being able to act essentially, with absolute impunity, frankly, even when qualified immunity can't shield them because their actions are so clearly unconstitutional. Patrick, we have, the Institute for Justice has now two petitions for certiorari pending before the Supreme Court, specifically involving federal officials who couldn't be protected by qualified immunity. And yet the cases against them were thrown out. Could you talk about those two petitions as well as the petition that just got dismissed *Oliva versus Nivar*?

Patrick Jaicomo: Yeah so we filed this summer three separate cert petitions on this issue of whether *Bivens* is available against federal police. The first one, which is now concluded, was called *Oliva versus Nivar*. And in that case, our client José Oliva was a 70-year-old Vietnam veteran who was going to his local VA for a dentist appointment. And when he was passing through security, he didn't hand his ID to the VA police security guard. Instead he placed it in the X-ray bin. And for some reason, this set off the VA police officer. And three VA police officers then brutally assaulted José in the lobby of the VA hospital and seriously injured him. They faced no criminal consequences and no job consequences. So José filed a lawsuit against them. And the trial court, like in Scott's case, held that the officers' actions were so egregious that what they did violated clearly established law, and therefore, they were not entitled to qualified immunity. And again, just because these situations seem like they're happening a lot in this storytelling session, I want to emphasize that getting past qualified immunity is an exceptionally rare thing to accomplish. And here, in Scott's case, he was able to accomplish it. In *Brownback versus King*, we were able to accomplish it. And in *Oliva versus Nivar*, José was able to accomplish it. Nevertheless, when his case went up to the Fifth Circuit in Texas, that court essentially said, well, because José was beaten by federal police, not state police, he simply can't sue them at all, regardless of qualified immunity. And so now, in effect, what courts are doing is, in addition to qualified immunity, which applies to state and federal officers, they've created a de facto absolute immunity. That means that if you have a federal badge, you can't be sued, no matter how badly you violate the Constitution, and no matter whether you're entitled to qualified immunity or not.

Anya Bidwell: Now how about the second petition, *Byrd v. Lamb*?

Patrick Jaicomo: Sure. So *Byrd versus Lamb* is still a live case. We're asking the Supreme Court to take it up. And what happened was a Department of Homeland Security agent stepped in front of our client's car in a parking lot and pointed his gun at our client whose name is Kevin Byrd. The agent then screamed at Kevin that he was going to and this is a quote, “put a bullet through [his] fucking skull.” And then the agent tried to fire his gun. Thankfully, it jammed. He then tried to smash Kevin's window. And when local police showed up, he used his federal badge to have them arrest Kevin and detain him for four hours. Thankfully, there was footage of what had happened in that parking lot. And once the police saw it, they let Kevin go and instead arrested the DHS agent. The agent was actually criminally charged, which makes this case unlike the others we're talking about. But the criminal charges were ultimately dismissed. Probably because state prosecutors can't prosecute federal officials. We don't know for sure what happened here. And I should say that the reason the agent was so mad at Kevin in the first place, was that Kevin had been asking questions about a drunk driving accident that the agent’s son had allegedly caused the night before in the parking lot. So Kevin sued.

Anya Bidwell: So Kevin filed a lawsuit against the agent, and what happened?

Patrick Jaicomo: And just like in José's case, the officer asserted qualified immunity. And just like in José's case, the court said: No, this is so egregious, you're not entitled to qualified immunity. And then sadly, just as in José's case, it went up to the Fifth Circuit again. And the court said: Nope, this is a federal officer, so you simply cannot sue him.

Anya Bidwell: This is amazing, because the Fifth Circuit understood full well -- just as the district court did -- that the officer’s conduct was outrageous. Here’s a clip from oral argument at the Fifth Circuit, where the lawyer for Agent Lamb is arguing with a straight face that Kevin Byrd was not injured.

> **Lawyer**: Factually, there were no injuries in this case. … If an excessive force claim were allowed to continue in this case, based off the facts, then officers all over the country will be liable for merely brandishing their weapon during a stop. That's a dangerous path to take. … There was no harm here. … My client was the one who was arrested and charged with something that then got dismissed. So my client is the one who had the harm really here.
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> **Judge Elrod**: Really? Even though it's your client who threatened him with the gun, yelled he would put a bullet through his skull -- and I edited that -- and continued to yell to roll down his window. And he said he would blow his head off. It's your client who was harmed in this situation? Really?

Patrick Jaicomo: But again, the Fifth Circuit ruled in favor of the agent. And this occasioned a powerful concurrence by Judge Don Willett who explained that under the current rubric in this country, federal officers are effectively operating in a Constitution-free zone.

Anya Bidwell: Yeah, before you talk about the third case, could you explain to us the significance of Judge Willett's concurrence?

Patrick Jaicomo: Yes, so for one reason or another, the hostility towards the *Bivens* doctrine and implied causes of action against federal officers has come almost exclusively from judicial conservatives. So in Kevin Byrd's case, where Judge Willett who is a judicial conservative and appointed to the Fifth Circuit by President Trump, for him to speak out on this really highlights how egregious things have gotten. Because now essentially in the Fifth Circuit, which covers Texas, Louisiana and Mississippi, there is nothing that a federal cop can do to you, that will result in you being able to sue them for it for violating the Constitution. You just are out of luck.

There are more than 100,000 federal police working for a bunch of different agencies across the United States. If they violate your rights in Texas, Mississippi or Louisiana, too bad for you. There's nothing you can do about it.

Scott Michelman: And that's true in Lafayette Square now too. Essentially, the district court's opinion in the Lafayette Square case not only authorizes federal officials to do what they did on June 1, but they could have used live ammunition. They could have shot those demonstrators. And they would have had no recourse. They would have had no constitutional claims. Because the logic of *Bivens* is if you don't have a cause of action, you can't get into court for anything. And that is a really, really scary implication of what's going on here that I think Judge Willett's concurrence captures nicely.

Patrick Jaicomo: I think that's a great point to pause on. Because if you think of the map of the United States as lit up to allow constitutional claims against federal officers, as it was until about 2017. Now with the decisions in the Lafayette Square case, you can turn that light off in the District of Columbia. And with *Oliva* and *Byrd*, you can now turn that light off in Texas, Louisiana, and Mississippi. And then taking us to the third case, *Mohamud versus Weyker*, you can now turn that light off on the rest of the strip of the middle of the country that runs from Minnesota all the way down to Texas. Because that case was decided by the Eighth Circuit. And in that situation, you had this totally insane story where a St. Paul police officer who was also working as a federal task force officer, so call back to the James King situation. She fabricated this interstate crime ring involving Somali refugees. It was completely made up. And then to protect that case, and get a witness out of trouble, she lied about IJ client Hamdi Mohamud. And Hamdi because of this spent about two years in federal prison before charges were eventually dismissed. She, like all the other plaintiffs in our stories here, sued the office for violating her constitutional rights. And like all the other plaintiffs in our story was able to thread that qualified

immunity needle and had a court say it is clearly established that an officer cannot lie to have someone arrested to protect a sham investigation. But nevertheless, the case went up to the Eighth Circuit and they said you can't sue her because she's a federal officer.

Anya Bidwell: Here's a clip from the oral argument in the Eighth Circuit. This is the lawyer from the Department of Justice and he is relying on another case against Officer Weyker involving the same set of claims. It just shows the extent of this barrier to suits, which is pretty much insurmountable:

> **Lawyer**: Last year in *Farah against Weyker* this court held even if a federal law enforcement officer allegedly lies, manipulates witnesses, and falsifies evidence, the person who claims injury from this behavior may not bring a *Bivens* action for damages. This court held that it's up to Congress to decide whether there should be a damages remedy.

Patrick Jaicomo: That leaves Hamdi and many other people that have sued Heather Weyker, because she lied to have a bunch of other people arrested and charged with crimes, are completely out of luck. Officer Weyker, by the way, is still employed, pulling in six figures for the St. Paul Police Department can't be held accountable. Unless, of course, the U.S. Supreme Court grants our cert petition and rights the wrong that is currently being perpetuated across the country.

Anya Bidwell: So the Supreme Court just denied review in our Vietnam veteran case who was beaten by VA police. And what's fascinating to me there is in our petition, we are saying: look there is a precedent on the books, *Bivens*. And the Fifth Circuit giving it an incredible short shrift. It's saying because José was assaulted in a public building rather than a private home in

front of his own family. Because he was put in a chokehold rather than being handcuffed. That for those reasons, *Bivens* is not available. So the Fifth Circuit is disregarding the Supreme Court's own precedent, and yet, the Court denied review, letting the Fifth Circuit do what it wants with the binding case law.

Patrick Jaicomo: Yeah, it's very frustrating. And really, there's some analogy here to the clearly established test for qualified immunity, which our listeners will be familiar with. But just to refresh them to overcome qualified immunity, a plaintiff bears the burden to show that the law violated was clearly established. And that standard generally requires an earlier court decision involving materially similar facts -- so the same facts essentially -- to do that. And so a lot of times what you see in qualified immunity cases is you will point to an analogous case. And then the government will say: Well, yeah, but in that case, it was raining. And here, it was not raining. And so we're seeing the exact same thing happen here as courts are increasingly denying *Bivens* remedies against federal officers. And so you'll see, like in the Fifth Circuit, the court say: well, in *Bivens*, a man was handcuffed in front of his family in his apartment and then taken to a court or a federal courthouse where he was stripped searched. And literally like you said Anya, in the case of José Oliva the court kind of winkingly says: Well, this is different than *Bivens* because he was never stripped searched. Instead, he was putting a chokehold. And he wasn't handcuffed in front of his family. He was handcuffed in the lobby of a VA hospital. And similar distinctions are made in both Hamdi's case, *Mohamud versus Weyker*, and Kevin's case, *Byrd versus Lamb*.

Anya Bidwell: Yeah and to further illustrate that point here's another clip from oral argument. This is the lawyer for Agent Lamb, who tried to shoot our client, Kevin Byrd, in the parking lot.

> **Lawyer**: This was done in a parking lot, not a private home -- just like in *Oliva*. It was a VA hospital, not a private home. … No handcuffs were used in this case. This was not a manacling in front of a family or conducting a strip search. It's also important to know that this would be extending *Bivens* to new defendants. *Bivens* was different officers from ~~a~~ different agencies. *Bivens* has never been applied to a … Department of Homeland Security employee.

Patrick Jaicomo: I mean what an argument. If *Bivens* only applies to agents from the Federal Bureau of Narcotics, which doesn't exist anymore, who does it apply to? Could DHS agents go into someone's home without a warrant, handcuff them in front of their family and say, Sorry, we're DHS, not this defunct agency, so you can't sue us? I mean, how finely can you cut it?

Anya Bidwell: And also in Scott's case the court says that the situation is meaningfully different from *Bivens* and also seems to kind of just distinguish, at least on the first step of the *Bivens* analysis, distinguish your case from the facts of *Bivens* rather than from the law of *Bivens*.

Scott Michelman: Yeah, and one of the things that is surprising about the ruling in our case is there's a long line of D.C. Circuit precedent, not Supreme Court precedent, but D.C. Circuit precedent. This is a federal court of appeals, one of the 13 courts, one level below the Supreme Court, that deals with protests a lot. And it said going back more than 40 years that *Bivens* covers demonstrators' rights. And it covers First Amendment claims, and it covers Fourth Amendment claims. Exactly the sorts of things we were bringing in the Lafayette Square case. And nonetheless, the court said: Well, I don't care about any of that. Because now the Supreme Court has said this as a disfavored doctrine. And so I don't have to worry about those D.C. Circuit cases recognizing *Bivens* claims in exactly this situation. Instead, the fact that his Supreme Court has sort of thrown cold water generally on this doctrine means means all these

federal officials are essentially immune from suit. And one of those old D.C. Circuit cases, by the way, was about a demonstration against the Vietnam War on the steps of Congress. So it's not even like the D.C. Circuit hasn't thought about demonstrations at the seat of government. And yet, the court in our case said: no, no, presidential security trumps all and you can't sue them no matter what they did.

Patrick Jaicomo: And we're seeing I think this this sort of revolution of courts dumping out all of this prior precedent -- as they did in your case, Scott, and as they did in *Oliva* and *Byrd* with the Fifth Circuit -- by just saying: well, we're going to read the tea leaves from these recent Supreme Court opinions that didn't actually say *Bivens* is gone. But effectively read it to mean that *Bivens* is actually gone. So that's the world we're living in now. More and more courts appear to be hopping on the get-rid-of-*Bivens*-entirely bandwagon. And why it's so important right now for the Supreme Court, which started this and needs to finish it one way or another, should be weighing in on these cases, because otherwise it's open season on whether not you can actually sue federal officers.

Anya Bidwell: What's really interesting is that *Bivens* is not alone in getting a stink eye from the Court. It seems like the entire era of civil rights jurisprudence that came about in the 1960s and the 1970s is being marginalized. In a minute, I'm going to ask Scott to talk about *Monroe versus Pape*. But before we go there, let me just bring our listeners up to speed on another case from that era, *Owens versus City of Independence*. We discussed that case on Episode Seven. And it says that qualified immunity cannot shield municipalities. Because neither policy nor history of Section 1983 nor common law immunities available at the time would have allowed for this. As our listeners know, lower courts of appeals have been chipping away at this precedent -- just like they have been chipping away at *Bivens* -- by allowing certain types of municipal liability claims to be defeated by qualified immunity. And the Supreme Court, just as with *Bivens*, seems

content to let that happen. The latest news on this is that the court denied review in *Stewart versus City of Euclid*. We talked about the case with Easha Anand of MacArthur Justice Center. She represented the mother in the case whose son, Luke Stewart, was killed by police. And what the mother argued is that the City of Euclid training, which treated violence by police as a laughing matter, was responsible for this horrible outcome. Just as a reminder, the training featured segments from a Chris Rock sketch entitled “How not to get your ass kicked by the police.” One of the suggestions was get a white friend. And also the training featured cartoons with captions like protecting and serving the poop out of you. In essence, the police department gave the officer who killed Luke Stewart a badge and a gun, joked about the training, and told him to go enforce the law. If *Owens versus City of Independence* had its say, the case it gives the municipality would have been allowed to go forward, even though qualified immunity shielded the officer. But the Sixth Circuit did not look at it this way. It held that in claims involving deliberate indifference, as was the case here, if qualified immunity shields the officer, it also means that the municipality cannot be sued. And the Supreme Court let the decision stand, despite it being inconsistent with its own precedent. Which makes me think what else is out there that the Court does not have an interest in safeguarding? One of the most important cases from that era of the 1960s and 1970s is *Monroe versus Pape*. We talked about it on Episode Five of Bound by Oath. Scott, could you remind us briefly about *Monroe*, what it stands for, and also what some justices are now saying about it. You actually litigated a case, *Baxter*, where Justice Thomas actually had that footnote specifically on *Monroe*.

Scott Michelman: Sure, so *Monroe versus Pape*, as was discussed in one of your earlier episodes, is central to the development of Section 1983. Because what it held is that an officer acts under color of state law -- and therefore can be sued for constitutional violations under Section 1983 -- when the person has a badge of authority or is cloaked with the authority of the government. Not merely where they're acting pursuant to an official policy or custom or practice,

where their action was officially authorized by their government. So that means the rogue officer can be sued. When the when the officer goes rogue in violation of both local law and the Constitution, Section 1983 offers a remedy for the constitutional violation. Justice Frankfurter, in a lone dissent in *Monroe* would have viewed Section 1983 more narrowly and held that it applied only to officer misconduct that was authorized by or endorsed by or carrying out a policy of that officer's government. That's actually very similar to the rule under *Monell* for municipal liability, which you've also talked about on your podcast. So Justice Frankfurter would have held that individuals cannot be sued without that connection to the policy of a government. Nonetheless, the position of the *Monroe* majority has been the law for 60 years and has really been a bedrock of protection for individuals suing individual officers for their bad acts, even when that officer's government wouldn't have approved of it either, didn't know about it, didn't have a policy that that was okay. Now, we have at least one justice on the current Supreme Court saying that we should be revisiting *Monroe*. In a dissent about almost 25 years ago now, in another qualified immunity case, Justice Scalia, joined by Justice Thomas, suggested that *Monroe* had been wrongly decided and Justice Frankfurter was right. Now, Justice Thomas is no friend of qualified immunity, and in that sense, ~~is~~ is a friend to civil rights plaintiffs. And in the *Baxter* case -- in which we the ACLU sought review of an atrocious qualified immunity decision and more broadly reform or abolition of the qualified immunity doctrine -- Justice Thomas dissented from the court's refusal to hear the case and said: we really should look at this. We really should take up this question of the validity of qualified immunity. Is it historically based? Is this an appropriate means of statutory interpretation? But he dropped a footnote as well and said, by the way, while we're revising what we think of Section 1983, and how it works, we really ought to think about also whether the *Monroe* decision is correct. So Justice Thomas what he might give with with one hand for civil rights plaintiffs, he might well take away with the other in terms of what he would like to do. Now, he noted, that issue wasn't raised, in our case, *Baxter*. But it does signal there's at least one member of the Court who's interested in both qualified

immunity reform, but also turning the clock back on a key doctrine that helps plaintiffs in civil rights cases.

Anya Bidwell: You know, I heard some of the ~~kind of~~ conservative jurists and conservative legal scholars basically say that qualified immunity as a doctrine is essentially driven by *Monroe* as a wrong decision. Because *Monroe* opened up the proverbial floodgates of litigation, something else had to come in and try to mitigate those floodgates. So some of them are basically saying, if you fix *Monroe*, then we can fix qualified immunity and put it all back to how it was at the common law. Is there anything to that argument at all?

Scott Michelman: Absolutely not. It reflects an improper baseline. It reflects a baseline of liability where we rely only on the common law. And we don't have a federal cause of action to protect constitutional rights and enable plaintiffs to get into federal court and sue state and local officials who violate their rights. That is precisely what Congress sought to change in 1871 when it enacted Section 1983. So harkening back to the dormancy of 1983 -- the 90 years between its creation and the *Monroe* decision where it did very little -- is not the appropriate baseline to look to. It's not useful to say: well, we should go back to the good old days where 1983 didn't do very much. And we should just make sure we interpret it so that it doesn't do very much when Congress intended this bill to have a sweeping effect to enable plaintiffs to get into court and enforce their rights. Qualified immunity further is a doctrine that the Court made up without any indication in the text, or it turns out in the history, -- although they thought there was -- that it would have been contemplated by Congress or somehow implicitly incorporated into the statute. Whereas the *Monroe* holding on what it means to act under color of law is actually based on the statutory text and the history of the meaning of color of law. And as one of your earlier episodes explored, the *Monroe* majority got that question right. So trying to pair the two, equate the two,

use *Monroe* and qualified immunity to balance each other out doesn't make sense as a matter of history. And it doesn't make sense as a matter of statutory interpretation, either.

Anya Bidwell: You talked about qualified immunity. Let's transition to that and talk about qualified immunity some more. Because that's still very much of a live topic in the halls of Congress, as well as before the United States Supreme Court. Patrick, we discussed the doctrine on Episodes Three and Six. And we talk about some of the petitions for certiorari that were filed more than a year ago. Now, there is a fresh petition for certiorari specifically on qualified immunity before the Court right now in a case called *Frasier vs. Evans*. Could you talk about that? And also tell us why it's important?

Patrick Jaicomo: Yeah, sure. So *Frasier versus Evans* essentially involved a situation where, in 2014, a group of Denver police officers were using force on a suspect. And they were being filmed by a bystander. When they saw they were being filmed, they yelled out “Camera!” and then went over there and hounded this guy until he eventually gave up his his film. It was on a tablet computer. And they got it from him by threatening to arrest him and taking other coercive measures. And he ultimately sued these officers under Section 1983 and said: you violated my First Amendment rights. I have a right to record you. And I have a right to document what was happening here in public. And, after some consternation, the district court in the case ultimately said: qualified immunity doesn't apply to these officers. Because as it turned out, at least seven years earlier, and many times after that, the Denver Police Department policies had stated that doing what the plaintiff did in this case was protected by the First Amendment and police could be recorded in public and could not retaliate against people who recorded them. And there were a variety of other trainings that these officers had been provided. And the officers themselves have testified that they were aware of these trainings. And so the district court said: Okay, well, if the purpose of qualified immunity is to put the defendants on notice that what they were doing

was unconstitutional, this certainly did it. But on appeal the Tenth Circuit disagreed. ~~in~~ In a really breathtakingly broad statement, it said that the only relevant information for deciding whether law is clearly established his earlier judicial decisions. And so in the face of the Supreme Court and others having said that qualified immunity is about providing notice to officers, the Tenth Circuit said we don't care about actual notice. All we care about is whether you can check the box that says: was there an earlier court case in our jurisdiction that says that what these officers did was unconstitutional. And it doesn't matter if the executive branch in the form of the police department, or the Department of Justice, which had put out similar statements in years before this took place, told these officers that what they did was unconstitutional. It doesn't matter if these officers knew what they did was unconstitutional. And frankly, it doesn't matter if they should have known because anyone would know that retaliating against someone to get yourself out of trouble is not a good thing for police to do. So now, the Tenth Circuit has created this terrible precedent where the only thing that can be used to get past qualified immunity is a judicial decision. Actual notice of the constitutional violation is completely irrelevant. Another wrinkle in that case is that -- and we've talked about this in this season as well -- the Tenth Circuit went out of its way to not address whether the underlying action was actually protected by the First Amendment. Instead, they just said we're not going to reach that question. We're going to say it's not clearly established because there wasn't an earlier case. And so now in the Tenth Circuit, police are on notice that they can do this with absolute impunity and immunity. Anytime they're being recorded by someone, they can go take their phones away and delete the recordings. And now they can point to this case, *Frasier vs. Evans*, and say: Look, the Tenth Circuit said it wasn't clearly established. So what can you do about it? So that case is now pending on cert before the United States Supreme Court. And the Court is being asked, obviously, to revisit qualified immunity and certainly to address it in the context of this situation where courts are now becoming intentionally ignorant of the actual knowledge of the officers and granting them qualified immunity based on pure technicality.

Anya Bidwell: I'm reminded of this term's bright spotlight, *Taylor versus Riojas*. Where the Supreme Court actually reversed the Fifth Circuit where the Fifth Circuit said that prison guards who put a person in feces-stuffed cells were not put on proper notice, were not fairly warned that what they were doing was unconstitutional. And the Supreme Court reversed and said: you know what, you shouldn't pay so much attention to this specific case law that's talking about whether three days versus six days versus however else many days would be unconstitutional. But you should look at whether a conduct offends the Constitution. And this clearly offends the Constitution. And therefore there was a violation of the constitutional right. And it was clearly established. Do you think the Court will pay more attention in light of *Taylor versus Riojas* to this case and what it means to put an officer on notice? Provide an officer, a reasonable officer, with fair warning?

Patrick Jaicomo: I'm certainly optimistic that it might. And it certainly should in light of *Taylor*. It seems like the Court is interested at least in pushing back around the edges of the qualified immunity doctrine's most troubling applications. And this certainly becomes one. Because you've got the Tenth Circuit saying, literally, it's irrelevant, unless we the Tenth Circuit have already said this is unconstitutional. And oh, by the way, in this case, we're not going to say whether it's unconstitutional. So I'm hopeful that the Court will pay attention to this case, because it flies in the face of *Taylor versus Riojas*.

Anya Bidwell: Finally, Scott, we just learned that Congress is no longer considering qualified immunity reform. This means that it is essentially up to the United States Supreme Court to grant review and clarify the doctrine if not abolish it altogether. Does that mean that the court the United States Supreme Court is essentially the only one that can act in this space? Or should we continue waiting for Congress to do something about this?

Scott Michelman: I think it's important to recognize that that it's a big step that Congress has started to talk seriously about qualified immunity reform. But I don't think the Court should wait. The ~~the~~ normal rule when when the Supreme Court considers what to do with its old precedents on statutory interpretation is to think: well, if Congress really wants to overrule us on this, they can. They can legislate. But there are reasons to treat Section 1983 differently. First, Congress has been usually unusually inactive in the area. And the Court has been unusually active, several times reversing prior interpretations without congressional action in the past. We've heard about how the qualified immunity doctrine came into existence because of the Supreme Court. It was then modified by the Supreme Court. The municipal liability regime was at first eliminated by the Supreme Court and then reconstituted with a set of elaborate doctrinal twists and turns by the Supreme Court. The question of whether courts are permitted to bypass the merits and only reach a decision on the clearly established nature of a right without saying what the Constitution actually requires is also a subject on which the the the Court has first imposed one rule then reversed itself. And so given the extraordinary level of action by the Court, I think it is appropriate for the Court to continue to take responsibility for this elaborate set of doctrines that the Court itself has created and not put the burden back on Congress to clean up the Court's mess. A second aspect of this is that -- as we've talked about through this whole discussion and as you talk about in your in your whole season of this podcast -- this is an area of constitutional enforcement. This isn't just any old statute. And so for the Court to stay its hand and waiting for Congress, after having been so active in shaping the contours of Section 1983, would really abdicate its responsibility, not only for the doctrine it's created, but to ensure the effective enforcement of constitutional rights. This is a hugely important statute and, in some cases, the only means available for individuals to enforce their constitutional rights against the government to gain compensation for wrongs, to deter future violations. And so in recognition of that the Supreme Court should not wait for Congress. Congress can amend the statute, and it

might. But ~~but~~ the Supreme Court should should clean up its mess, return Section 1983 to what was originally intended and what was originally written by Congress in 1871, when Congress created a broad, exception-less cause of action for plaintiffs to use in enforcing their rights in federal court to prevent violations of the Constitution.

Anya Bidwell: Of course, there have been also efforts at the state level to open the courthouse doors. As a little preview of coming attractions, we will talk about those particular efforts on Episode 11. It is not a substitute to keeping federal courts open for litigants. But at least for some victims, it is an alternative way to get to the remedy. So stay tuned for that. And let's just keep looking at what's happening with the U.S. Supreme Court and whether there are any movements in the right direction in Congress. In the meantime, thank you to our guests for an amazing discussion. Now that we all have our ducks in a row. Let's get back to John Ross. On Episode 10, he will talk about prosecutorial immunity and other species of absolute immunity. See you guys then.