ShortCircuit280

Mon, Dec 18, 2023 1:01PM 44:18

SUMMARY KEYWORDS

bivens, case, congress, claims, snowden, seventh circuit, westfall, constitution, judge, excessive force, court, supreme court, officers, violations, sue, constitutional, protesters, remedy, action, doctrine

SPEAKERS

Anthony Sanders, Scott Michelman, Anya Bidwell

A Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Thursday, July 13, 2023. And we're going to pick up with a theme that we left off just a few weeks ago about the Constitution, implied remedies, this old case called Bivens, that us on Short Circuit like to talk about often, and a few Bivens cases that have been very much in the news recently, especially one that was really in the news about three years ago, and just keeps coming back. So joining me today is someone who has been on Short Circuit before and we're very excited to have him back. I'll first introduce Scott Michelman, who is the Legal Director of the American Civil Liberties Union for the District of Columbia. Scott, welcome back to Short Circuit.

S Scott Michelman 01:25

Thank you so much for having me back.

A Anthony Sanders 01:28

And also coming back a much more than familiar voice for Short Circuit listeners, Anya Bidwell. Anya will be discussing a case in the Seventh Circuit that recently actually said Bivens is still a precedent that it can follow. So Anya, welcome back to Short Circuit.

A Anya Bidwell 01:47

I'm all about good news. So hey, good to be back.

A Anthony Sanders 01:52

All right. That's why we bring you on here. Well, Scott has some not good news for fans of remedies under the Constitution. But it provides some seeds of hope, as well. And it relates to something that most of you probably remember, which is when, during the Black Lives Matter protests and all the ensuing riots that were going on, in 2020, President Trump wanted to have a photo op with an upside down copy of the Bible. And so they cleared Lafayette Square of peaceful protesters. And a lot of bad things happen. Later on, those people tried to get some redress in the courts, and that's where Scott Michelman comes in because he recently argued a case that was just disposed of by the the US Court of Appeals for the District of Columbia, and he's going to tell us all about it. So Scott, take it away.

S Scott Michelman 02:53

Thanks, Anthony. So I represent the plaintiffs in Black Lives Matter DC v Barr, an appeal of our case, seeking both damages and injunctive relief for the unprecedented, unprovoked brutal attack on the civil rights demonstrators by federal officers and some others working with them on June 1 2020, at the height of the protests in the wake of George Floyd's murder. Now, many of you may remember these images because they're they're pretty shocking images. They don't look like images that should have been recorded in the United States. You see one minute, protesters not not doing a whole lot; speaking chanting, waving signs but you know, completely peaceful, in some instances almost motionless. And then suddenly, there is a sharp wave of violence that breaks as the officers of the US Park Police, the Secret Service, and other federal officials shoot tear gas, pepper spray, rubber bullets at the protesters, charge them with batons raised and swinging, hitting people in the back, hitting people in the head, hitting people on the ground. There was pursuit on horseback. Protesters were run down and beaten. It was a shocking scene, and one that you would imagine the Constitution would have a lot to say about in particular in terms of the Fourth Amendment as an excessive force and the First Amendment, the right to to speak and to peaceably assemble. But it gets more complicated than that, of course, as your listeners know because of the problem of Bivens. Bivens, of course, the 50 year old case in which the Supreme Court said that the Constitution could be enforced for damages against federal officers when they violate the Constitution. And that precedent has been under sustained attack from the Supreme Court, in particular over the last six years, which has narrowed Bivens from a somewhat shrunken state as it existed six years ago to almost nothing. And so you have this case in which it seems like the Constitution was egregiously violated, in fact, it was egregiously violated. The court, the one court that has opined on that said that, and yet, there is no remedy in damages against the federal officers for their constitutional violations. And that is because of the withered state of the Bivens doctrine where the Supreme Court has basically said, unless things look like one of three Bivens cases that we happen to decide, in the first decade of Bivens, you're out of luck. And that's where this decision comes in, as we tried to revive our claims against the federal officers for the egregious constitutional violations against protesters.

A Anya Bidwell 06:08

I just wanted to ask about the contrast between federal officials and local officials because you guys sue them too, right? And I think that kind of makes it a good kind of example of where officials engage in very similar conduct. The federal officials engaged in conduct that's worse,

but the treatment is very different. And that seems kind of very strange, right, given that, you know, all of them are employees of some kind of a government and all of them are violating people's rights. So how does it make sense that the treatment is different?

S Scott Michelman 06:45

Absolutely. That's a terrific point. It's a concerning point, particularly in light of thinking about the history of the Constitution, which was originally written to restrain the federal government. And wasn't until after the Civil War that it started being applied against the states, at least as to the guarantees of the Bill of Rights, which are at issue here. In our case, we sued both federal officials for their role in attacking the protesters and also local officials, many of whom were stationed about a block away and fired further tear gas on the protesters who fled west. That is, in the direction where those officials were lined up. And some of our clients encountered those officials and got another head full of tear gas. But the fate of their legal claims, even if the violence was similar, the fate of their legal claims is very different. In the District Court, we sued both the federal and the local officials, alleging the same constitutional violations, First Amendment, Fourth Amendment. And the court said even though the claims against the local officials survived and survived so forcefully that they survived qualified immunity. That is, the local official said these weren't clearly established constitutional violations. The judge said no, of course it is. Can't do that to protesters. And she said the violations were clearly established into the local official claims go forward. But the Federal officers nonetheless escape because prior to, analytically, prior to getting to this defense of qualified immunity, and before you even reach the merits, you have to answer the question of whether there is a cause of action, and the District Court said no, Bivens barely exists anymore. It does not protect against, it does not cover the constitutional violations of the federal officers attacking demonstrators in this way. And so the claims were dismissed, we appealed, and the DC Circuit in late June affirmed, holding that in fact, yes, the District Court was was right in terms of its interpretation of Supreme Court precedent. Bivens is barely in existence and doesn't cover again, any facts scenarios outside of those early three from the first decade of Bivens way back in the 70s. And those three were the three that happened to reach the Supreme Court at that time. Now, we argued, that's crazy. And in particular, we argued, it's crazy because Congress has accepted Bivens. Congress has endorsed Bivens in legislation. And the reason we say that is because of a 1988 law called the Westfall Act in which Congress limited the liability in many ways of federal officers, but had a carve out that explicitly preserved claims brought for a violation of the Constitution in the United States. That's the statutory language. Well, what is that? What does that mean? Well, at the time, it meant Bivens claims, and it still does. In fact, the Supreme Court has recognized that it means Bivens claims. And if you apply ordinary tools of statutory interpretation, what you get when you read statutory language like that, is a reference to the constitutional doctrine as it existed at the time. The constitutional claims that were allowed under Bivens, in 1988, when Congress enacted the Westfall Act, were claims that Congress thought should remain. And so what's really ironic about the Supreme Court's narrowing of Bivens in recent years, is it has done so in the name of respecting separation of powers and the judicial role. It says, well, it's not for us, the courts, to come in and create "new causes of action" when Congress hasn't done that. The problem is Congress did do that, or at the very least, it endorsed the cause of action that already exists. I mean, the court may have been the one to start it, but when Congress says this should continue, it's the courts' duty to take them at their word. And what was particularly concerning about, about the dismissal of the claims here is there was a case from the 1970s, that is before the Westfall Act was passed, in which the DC Circuit recognized that breaking up a protest at the headquarters of a branch of the federal government, in that case it was

Congress, in this case, it was the White House, is subject to a Bivens claim. And there was a huge demonstration on the steps of the Capitol. There were Fourth Amendment claims, there were First Amendment claims, and the DC Circuit says those get to proceed. And I'd said that in 1977, it was so well known to Congress that it was brought up in congressional debates, and in fact, a member of Congress was the lead plaintiff in the DC Circuit case, which by the way, was also brought by my office, the ACLU of the District of Columbia. So there's a beautiful symmetry in terms of what we're seeking, in the way of constitutional accountability. And it would seem under again, normal statutory interpretation, that when Congress preserved Bivens, in the Westfall Act, as it existed in 1988, it preserved those claims that had been recognized. And so we said to the DC Circuit, if you're serious about separation of powers, if you're serious about respecting Congress, as the Supreme Court has said we must be, you can't limit the Bivens universe to the three cases that happened to reach the Supreme Court. You have to take into account everything that was available under Bivens in 1988. But the DC Circuit found that the Supreme Court's precedent of today just did not make room for that.

A Anya Bidwell 13:02

So Scott, if you were to kind of zero in on the gravamen of the reasoning here,what do you think it would be? What is kind of like the main point that they're trying to make?

S Scott Michelman 13:17

The main point that I take away from the Court's majority opinion is the the Westfall Act doesn't matter because the Supreme Court has said, any cases that came before its current, extremely narrow, analytic approach, are not valid guides to the scope of Biven's, and that any current Biven's case, must pass through the narrow Supreme Court doctrine that exists today, regardless of what may have come before. And that's a very strange way to treat precedent in a common law system. Usually precedent means, a system of precedent means that like cases should be decided alike, and that if case worked in the DC Circuit in the 1970s, it should work today, and it particularly should work today, if Congress said it should continue to work, and that's where we get to the concerns of Judge Wilkins who concurred, join the majority opinion, joining the panel opinion, but pointed out some problems with with the result and specifically said, look, I think we're constrained to apply the Supreme Courts doctrine here. And I guess the test today means these have to fail. But boy, there's a big tension between the reason the Supreme Court says that it has this narrow doctrine. That is, to respect Congress, to respect what Congress has said to, respect the separation of powers. And the result we're coming to here, which seems to do the opposite of what Congress said it wanted in 1988. And indeed, we had dozens of members of Congress writing as amici, members of both parties, some of whom were in the 100th Congress, the Congress that passed the Westfall Act, saying, of course, we thought Bivens was preserved. Of course, we thought Bivens included the types of claims that are at issue in this case. I wanted to ask you, Scott, about this idea of the separation of powers that Judge Wilkins talks about in his concurrence. And the way it struck me when I read his concurrence is that he's basically saying that it is consistent with the separation of powers to recognize the right of action here, and that he essentially has to go against the separation of powers, because the Supreme Court created this test that cannot be overcome, even though Congress did endorse this precise cause of action for these types of plaintiffs. That's right, I think Judge Wilkins makes a critical point about where the Supreme Court's doctrine has really gone off the rails. And that is, even if you take as, as your starting points, that courts should

not be in the business of enforcing the Constitution unless they're told to do so by Congress, a proposition that I take issue with and that I don't think was was at all true in the Founding, and is not true in other ways, as well, still. But even if you take that as your starting point, it can't possibly be that the test for enforcing the Constitution should be narrower than what Congress would have wanted. And so the Court has been talking about separation of powers and its whole, its whole reason for constricting Bivens is the separation of powers into this very narrow test that focuses on the the three prior Supreme Court cases from the early days, but in fact, that test functions as a straightjacket that prevents the Supreme Court and lower courts from looking at what actually Congress would have wanted in this situation, because Congress hasn't said nothing about it. Congress said something very clear in the Westfall Act, in referring to claims brought for a violation of the Constitution of the United States. The Supreme Court has repeatedly recognized that that statutory language means Bivens. And so perhaps there's a world in which the Supreme Court's test makes sense, in a vacuum, if you don't care what Congress said, or if you're not listening to what Congress said. But for the Supreme Court, whose whole purpose, whose whole animating goal in this doctrine, has been to respect Congress, or so they've said, to then ignore what Congress has actually said or forced courts to ignore it is, is deeply in Congress. And I think that's that's Judge Wilkins' profound point, and it really points to the need to re-examine the structure of the doctrine to make sure at the very minimum, it permits courts to enforce rights where Congress itself wanted them to be enforced, based on what it has said.

A Anthony Sanders 18:19

And with all that said, in this case, it seems like the junior judge on the panel, Judge Walker, thinks there's a needle that can be threaded through all of these doctrines and acts and so on. But that it just didn't happen to be argued, in this case, is how I read what he's saying. Scott, can you translate his musings for us?

S Scott Michelman 18:45

Well, it certainly wasn't argued. And this is a theory that was proposed by two law professors, two terrific law professors, Steve Vladeck and Carlos Vazquez, about 10 years ago. And what they said is, well, even if you constrict the scope of Bivens, and a Bivens claim, recall, the definition of that is a direct action, a direct cause of action to enforce constitutional rights for damages. Even if you believe that sort of thing is now inappropriate, what the Westfall Act leaves open in the words in its exception to preserve claims "brought for a violation of the Constitution of the United States" is ordinary state tort claims where those claims are brought for a constitutional violation. Now, what does it mean to be brought for a constitutional violation? That is somewhat murkier, and Judge Walker gives us some ideas of how that might be so, following Professors Vladeck and Vazquez, but it's not totally fleshed out because he says we didn't argue it. It's true, we didn't argue it. I'm not aware that any court has accepted that theory, so this would be.

A Anthony Sanders 20:03

Why didn't you argue a theory that no court has ever talked about before? That was kind of my response to like, oh, come on, casting some shade on the attorneys in this case that they didn't argue something no one's ever had in court before.

S Scott Michelman 20:18

Well, you know, usually when courts say an argument is novel, they're not giving a compliment. But, you know, in a world where the Bivens doctrine is shrunken almost to nothing, and constitutional rights are therefore unenforceable against those that most need to be held accountable, it's understandable that the judges are starting to chafe against that, are starting to call that out, are starting to express concerns. One way to go with it, as Judge Wilkins did to say, well, something is wrong here. Something is rotten in the state of Denmark. Another way to go at it is say, well okay, I'm not gonna worry about what's done, what the Supreme Court has has already told us. I'm going to apply what I'm told to apply. Let me look for another way. And so I certainly don't don't fault Judge Walker for articulating that other way, and I think we should take him up on it. I mean, I think, plaintiffs lawyers should find ways to bring those types of claims, to flesh out what it means to bring a state tort claim for a constitutional violation, and really to reclaim something that, as Judge Walker points out, following Professors Vladeck and Vazquez, was done at the Founding, which is it used to be you, you could sue federal officers under local law, and the constitutional aspect of it would arise by way of defense. They would, or by way of response to a defense, you would you would sue the officer, let's say for a battery. He violated your Fourth Amendment rights by using excessive force. You'd sue him for a battery. He'd say, no, my battery was privileged because I'm a law enforcement officer. And the plaintiff would respond, no, it's not, because you can't be privileged to violate the Constitution. And so the Constitution would sort of come in a side door, perhaps, but the constitutional right still could be vindicated in that circumstance. Now, what that leaves out, I think, and why that isn't sort of the ideal regime, and why implementing what Congress said in the Westfall Act, it wanted in terms of constitutional claims would be better, I think, overall, not just more faithful to Congress, is that some constitutional claims don't line up neatly with torts. So, in this case, there were Fourth and First Amendment violations consisting of the dispersal of a crowd by battery. But what if it changed the facts a little bit? Imagine if the federal officers had dispersed the crowd, peacefully. Now, that wouldn't have been a battery. If they had just said everybody go home, it's time to leave now. But it still would have been a First Amendment violation, because there would have been the dispersal of a demonstration without meeting the strict clear and present danger test that the Supreme Court articulated all the way back in the 60s for dispersing a demonstration. And so, there could still be a First Amendment violation in circumstances that tort law would have a more difficult time reaching. I'm not saying Judge Walker's wrong. I hope he's right. But I do think that ultimately, the solution here is that we do need a constitutional cause of action, or a statutory one, if Congress sees

A Anya Bidwell 23:50

Amend Section ID 83!

S Scott Michelman 23:53

Yes, to basically amend Section ID 83, to add, unconstitutional acts taken under color of law, the United States should be very simple. There are two bills, one in each House, currently pending to do exactly that. And since the courts have not gotten the message that Congress was trying to send in the Westfall Act in terms of preserving these claims, Congress apparently

needs to be more explicit now and say, yes, in the cause of action, that is the vehicle for enforcing constitutional rights, we're going to include violations by federal officers, because it shouldn't be the case under the rule of law in the United States of America, that any any officer under any color of any government's law, can violate the Constitution and not be held accountable.

A Anthony Sanders 24:42

Anya, do you know of any cases that maybe are brewing that bring up the Westfall Act in that way?

A Anya Bidwell 24:51

Well, that's a great question, and I do, Anthony. One of the cases that IJ is working on right now involves this kind of a setup, right? We are suing USPS for unreasonably seizing masks that our client, who was a mask printer, was sending to protesters in Minnesota, among other places, with messages like Black Lives Matter emblazoned on them. And we sued USPS officials in their individual capacity under Bivens, but we also sued them under the idea of common law torts. Now, here's an interesting thing to add to this, which is kind of like an in between area, and that's some state constitutions have causes of action, right? They have these baby 1983 Civil Rights types of statutes that allow suits for violations of the state constitution, as well as the federal Constitution. So for example, in California, there is a civil rights act called the Bane Act. And that Act basically says if an government official is violating either your California constitutional rights or United States constitutional right, you can sue them under the Bane Act. So I want to ask you, Scott, what do you think about this idea? Because that's kind of addressing the problem that you are validly expressing about certain constitutional rights that are not covered by torts. So what if, you know, states actually enact civil rights statutes that provide for a cause of action explicitly for violations of the United States Constitution? Could that potentially be a solution? Because that's very consistent with the Westfall Act language that says brought for a violation of the United States Constitution. So then you go to state court and you say, I'm suing under baby 1983, in your state, under the Bane Act, for violations of the United States Constitution. Could that be something that potentially would gain momentum in the current environment?

S Scott Michelman 27:08

I think it might. And I think Judge Walker's concurrence, actually identify several different pads by which plaintiffs could get into court with state claims "brought for a violation of the Constitution of the United States", and one of them is, is just the type of law you're thinking of. So I think, you know, I think that that is an area that deserves more, more exploration, particularly as, you know, as plaintiffs and plaintiffs' lawyers are struggling in the current environment to hold constitutional wrongdoers accountable. I think that's right. And I think it's responsive to a deep intuition that is really at the heart of our Constitution, the heart of our legal system. This rule of law idea that where there is a right, there must be a remedy. When people break the law, there should be accountability. When people abuse their power and violate the Constitution as government officials, there's no more important time for accountability. And so it really runs contrary to what I think most of us think of the Constitution

is doing to say that, that nobody can sue over these things. And so I think that's why you see judges of different ideological stripes appointed by different presidents. You had a very strong concurring opinion a few years ago by Judge Willett, a Trump appointee on the Fifth Circuit, lamenting the diminution of Bivens. And, you know, tracing the inconsistency between that idea and the very fundamental principle in Marbury that there needs to be remedies for violations of rights. And then, again, here you have two judges, again, appointed by different presidents, one an Obama appointee, one a Trump appointee, concurring to say, yes, we think we're doing what the Supreme Court requires us to do, but, boy, it makes us uncomfortable, and it should.

A Anya Bidwell 27:46

It is so telling, Scott, that you have a three judge panel, and you have two concurrences. And both of those concurrences are basically saying, something is wrong here, right? And both of those concurrences are trying to figure out some sort of a solution. That, that to me is very telling where you have basically judges saying, Yeah, given the Supreme Court case law at this point, Egbert v. Boule, there's nothing we can do. But two out of three of us are gonna go out of our way, and try to think about this some more and try to ring their alarm bell.

A Anthony Sanders 29:58

Well, one thing that's uncomfortable is what happened to Webster Bivens, and that is being beaten by federal narcotics officers. And it seems that if you are beaten by federal narcotics officers, you still might actually have a Bivens cause of action, and we learned that recently from the Seventh Circuit. So Anya, tell us this little bit of a good news when it comes to causes of action under the Constitution, and what's going on with our friends in Chicago? By friends, I mean the judges, the funny judges they have there.

A Anya Bidwell 30:41

Yeah, little good news here is kind of the operative phrase, because it's, if anything, it's baby steps. I wouldn't even say forward, but at least you see the court trying to figure out the situation here, unlike some of the other circuits. It's an interesting case, Snowden v. Henning, again, a super rare victory in the Bivens sphere. It is similar to Hicks v. Ferreyra, and it's the Fourth Circuit decision authorizing a Bivens remedy against officers of the United States Secret Service, who unlawfully performed traffic stops. So the Seventh Circuit, and the force, really seemed to at least try to allow, you know, traditional excessive force types of claims to go forward. But these two cases are really examples of fun, where circuit courts are reaching to let the cases proceed. Generally speaking, these days, it's just really easy to say, like the Fifth Circuit does on a regular basis, speaking of Judge Willett's concurrence, you know, that there is no Bivens cause of action, and frankly, like what the District Court did in this case, again, when facts are not exactly like in Bivens, judges can always say there is no Bivens cause of actions. So our judges in this case are Diane Sykes, she is a George W. Bush appointee, Joel Flaum, a Ronald Reagan appointee, and Candace Jackson-Akiwumi, a Joe Biden appointee. And to me, that's very telling because, just a couple of years ago, we only saw Democratic appointees speak, you know, in favor of recognizing Bivens remedies. And it's really refreshing to now see kind of movement in the other direction and Judge Willett was one of the first judges in case, Byrd v. Lamb, who started to, you know, talk about it from his position as a conservative judge.

So the facts of this case are pretty straightforward. Donald Snowden, or Snowden, that's a famous name, I'm trying to distinguish it a little. Donald Snowden, he was wanted by the DEA for methamphetamine distribution. A federal grand jury indicted Snowden and there was a warrant for his arrest. So when Snowden was staying at the Quality Inn in Illinois, this DEA agent, Henning, got a front desk clerk to call the room and ask Snowden to come downstairs and pay the bill. Once Snowden showed up downstairs, Henning rushed at him, pushed him into a door and onto the ground. Henning then punched unresisting Snowden in the face several times causing significant injuries. So when Snowden sued for excessive force, the District Court unsurprisingly said new context and found plenty of factors canceling hesitation. The District Court didn't even allow Snowden to ask for the production of the video, which corroborated his account. In District Court's view, there was essentially no point. So why did the District Court say it was new context? Because it wasn't factually identical to Bivens. Because the location of the arrest was in hotel, not private home, there was an arrest warrant, and there was only one officer involved in the incident. The District Court also said that the Fourth Amendment violations were distinct from each other; privacy in Bivens and excessive force here. See how they're doing this? But that's pretty typical stuff these days. And then of course, it found additional special factors, like there was an alternative remedy under the FTCA, for example, which the Supreme Court specifically said can't be used as a reason to deny Bivens cause of action. But again, no surprise, that's what courts do these days. That's why it's so interesting that the Seventh Circuit came in and reversed. The Court acknowledged that once the Bivens inquiry moves into step two, special factors, there is almost no way for a plaintiff to prevail. Very rarely, if ever, a court would hold that there is no rational reason, as Egbert v. Boule says, to think that Congress is better suited to weigh the costs and benefits of allowing a damages action to proceed. But the Court here said it didn't need to go to step two. The Court said the case was not meaningfully different from Bivens, even though it was factually distinguishable. To figure out what meaningfully different means, the Court went to cases that the Supreme Court decided, like Ziglar. It was meaningfully different because the case involve the different constitutional amendment, and there was an alternative remedy. In Hernandez, case was meaningfully different because it was a cross-border shooting and national security concerns. In Minneci, a case was meaningfully different because it was a new class of defendants that actually could be sued in state law under state law, because those were private prisons. So the Court looked at those cases and the Court drew a line between all the new context at whether, in recognizing a grievance remedy, a Court would have to reweigh the costs and benefits of a damages remedy against federal officials. If you do have to reweigh, that's going against the separation of powers. But if you don't have to reweigh, if for example, a case involves the same principles of constitutional criminal law, prohibiting unjustified warrantless seizure of a person, like in Bivens, then even if the facts are somewhat different, that really doesn't matter. It's still the established context. And so, in this case, while the facts were distinguishable, the Seventh Circuit concluded that the context was not a new one, but an old one. The DEA agent operated under the same legal mandate, as the officers in Bivens, right? It involved the enforcement of federal drug laws. That DEA agent was also the same kind of line level federal narcotics officer as the defendant officers in Bivens, unlike, say somebody like Ziglar v. Abbasi, where you actually had, you know, DOJ employees. Again, like Webster Bivens, Snowden here saw damages for violation of his rights under the Fourth Amendment, and the court just did not buy this distinction between privacy rights versus excessive force because frankly, Bivens also involved excessive force. And then finally, according to the Seventh Circuit, the legal landscape of excessive force claims is well settled with decades of circuit precedent and Supreme Court precedent applying tests announced in cases like Graham v. Connor. So the court said there's really nothing new we're doing here. We don't need to be reweighing costs and benefits of a damages remedy, and the case should be allowed to proceed. It sounds common sense, but it's actually a court going out on a limb to allow a remedy for a violation of a constitutional right.

I've seen cases before where a court would say, the Bureau of Narcotics no longer exists. Therefore, it's distinguishable even if you bring a case against the DEA officer. So again, I'd like to emphasize that this is a rare victory, and it's a great one to have. But fundamentally, it's still extremely difficult, borderline impossible to sue federal officials for violations of constitutional rights.

S Scott Michelman 39:27

What really strikes me about the contrast between the plaintiff's victory and Snowden and our loss in the Lafayette Square case out of the DC Circuit is that it is really the small, discrete constitutional violations that can still be led through because that's what was it issue in Bivens. Bivens is a very straightforward case about officer misconduct in a home excessive force, unlawful search. There was no warrant, but just against one guy. The Lafayette Square protest was hundreds or possibly 1000s of people being dispersed from one of our nation's most important public forums. In constitutional terms, a wrong that produced as grave physical injuries and and much graver injuries to the body politic and to constitutional values across many more dimensions than the very discrete specific encounter between the DEA agent and Mr. Snowden. Now Mr. Snowden sustained a broken bone in his face, I don't want to discount his injuries. But along so many more dimensions, the Lafayette Square case, really, really pushed it fundamental rights that we take for granted, as Americans in terms of the way we can express ourselves and address our government

A Anthony Sanders 41:01

And had binding precedent from the Circuit in which the injuries happened. And yet, that wasn't good enough, you know, in the DC Circuit, but in the Seventh Circuit, because this, this case that started it all was just, just close enough. That's the one that goes through.

S Scott Michelman 41:20

It's ironic that the way the doctrine is now designed, it's some of the smaller injuries that can make it through. And some of the some of the larger and more egregious cases are going to get tossed because they don't look like those original three from the 1970s.

A Anya Bidwell 41:39

That's exactly how the doctrine is designed, right? That's why the court here in the Seventh Circuit is basically saying, because we don't need to push it beyond the established context, they can survive, right? Like by definition, meaningfully different means that it's, you know, factually different from Bivens itself. So if you can argue that it's not meaningfully different, if you can argue that, oh no, it's low level police officer, you know, it's excessive force, it's some sort of unreasonable search and seizure, that's your best bet. And if you don't argue that, if you can't argue that, then you go to the new context. And the Seventh Circuit says, if it's new context, you pretty much dead, it's not going to happen for you. So it's only in the smaller cases, like involving Webster Bivens, and I absolutely agree that that is, that that just makes no sense. The way the doctrine is operating today and the way it broke down.

A Anthony Sanders 42:42

Yes, it truly is a perverse incentive. I mean, just one little part of this would be if I was litigating a case like this, I would have a perverse incentive to not bring too big of a damages claim to not put the dollar figure too large, because you put too large like, oh, that's like going to affect the DEA budget in a big way. But if it's more like, I don't know what the damages claim in Bivens was, but you know, whatever it was, I would take the inflation index and try to have it pretty much like that, which is not good constitutional law, that that's the incentive there. We have another perverse incentive, which is that we are short on time. So I am going to thank both Scott and Anya for joining us. Again, Scott Michelman is the Legal Director of the ACLU of the District of Columbia. We love watching his work, and we wish him all the best in the future. And so, we'd love to have you again on Short Circuit some time. Thanks so much, Scott.

S Scott Michelman 43:40

Thank you so much.

A Anthony Sanders 43:42

And Anya, we will be hearing from soon again, as you all know. So, for now, thanks so much Anya. Yep, yep. We will have more news from Anya soon. And in the meantime, I will be speaking with our listeners next week, but until then, I hope that all of you get engaged.