

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org
(202) 795-9301

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By email

June 29, 2020

The Honorable Raúl Grijalva
Chairman, U.S. House Committee on Natural Resources
1324 Longworth House Office Building
Washington, DC 20515

The Honorable Rob Bishop
Ranking Member, U.S. House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Full Committee Hearing: “The U.S. Park Police Attack on
Peaceful Protesters at Lafayette Square.”

Dear Chairman Grijalva and Ranking Member Bishop:

As an organization that advocates for the rights of journalists to gather and report the news, the Reporters Committee for Freedom of the Press writes to express grave concerns about the series of police attacks on journalists during the George Floyd protests, including the illegal and unconstitutional assault on an Australian news crew by the U.S. Park Police on June 1, 2020, as officers cleared Lafayette Square of protesters. Accordingly, we thank the Committee for holding this important hearing.

The Lafayette Square incident occurred as, across the country, police arrested, detained, and threatened journalists, and physically assaulted them with rubber and foam bullets, pepper spray and pellets, paintball rounds, tear gas, batons, and fists.

In the case of the assault on Australian journalists Amelia Brace and Tim Myers, Brace and Myers clearly identified themselves as press, were standing to the side of the protests and the advancing police line, and Brace was in the middle of reporting live on an Australian morning show while Myers held a large news camera. Based on video footage, no reasonable officer could have believed Brace and Myers were not press.

Law enforcement officers do not have legal immunity when they violate clearly established rights under the First Amendment. The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. Beyond, however, the Constitution and the law, any targeting of reporters for doing their jobs—keeping the public informed during an extraordinary period of civil unrest—is beyond the pale in a free society.

The challenges that officers face in policing during times of civil protest do not supersede any of the rights guaranteed by the First Amendment, and moments of crisis demand that we protect the bedrock American ideal of a free press even more zealously.

As Chairman Grijalva and Vice Chair Debra Haaland said, in a letter written with Senator Ron Wyden, “The First Amendment rights to free speech, peaceful assembly, and free press are the building blocks of all other rights. Any action by the Park Police to muzzle these rights is an affront to all Americans and should be swiftly addressed.” Chairman Grijalva, Vice Chair Haaland, and Senator Wyden are correct.

When a police officer knows a journalist is a journalist, just one arrest or assault is a profound and clear violation of the First Amendment.

On June 1, approximately 25 minutes before Washington, D.C.’s 7 p.m. curfew went into effect, officers in riot gear began dispersing protesters in Lafayette Square with batons, tear gas, rubber bullets, and flash-bang explosives. *See* Dalton Bennett et al., *The Crackdown Before Trump’s Photo Op*, Wash. Post (June 8, 2020), <https://wapo.st/2B5WX6a>. During the dispersal, the Australian crew was in the middle of a live report on the morning show Sunrise, airing on Seven Network, one of five major television networks in Australia. *See* Rachel Abrams and Katie Robertson, *Australia Asks for Investigation After Police Attack 2 Journalists in U.S.*, N.Y. Times (June 4, 2020), <https://nyti.ms/2VIFn1A>.

Myers was holding a large news camera in front of his face, and Brace was clearly in the middle of reporting. Both Brace and Myers were standing to the side of the protest behind a wall; indeed, they were on a raised piece of concrete off the sidewalk and not among the protesters at all. *See* Sunrise (@sunriseon7), Twitter (June 1, 2020, 6:44 PM), <https://bit.ly/3i5pNnF> (footage from Brace and Myers); Victoria Sanchez, *Australian Journalists ‘Brutally Attacked’ by U.S. Park Police While Covering DC Protest*, ABC7 WJLA (June 2, 2020), <https://bit.ly/3eEWKFi> (footage from ABC7).

As documented in the video footage, officers turned directly toward Brace and Myers. *Id.* One Park Police officer swung a riot shield at Myers’ stomach and punched his camera lens, forcing the camera into his face, as Brace shouted that they were members of the media. *Id.* As Myers and Brace attempted to move away, another Park Police officer swung a baton at Brace’s back. *Id.* At least two videos of the incident exist: one from the live footage gathered by Myers, and the other from ABC7 in D.C. *Id.*

Officers on the ground must understand that gathering news and recording police activities are not crimes, and that journalists who are complying with reasonable law enforcement directions when covering civil unrest are protected by the First Amendment. In the Lafayette Square incident, Brace and Myers were clearly identifiable as journalists and were indisputably in compliance with the law.

Additionally, officers should recognize that training for journalists and documentarians who cover protests or civil unrest provides guidance on how to interact with law enforcement. They know to comply with an order to move, they will not resist arrest, and they will identify themselves as a member of the news media. At the same time, officers properly trained in crowd control should know that an identifiable journalist may not be arrested or assaulted.

A. The right to report on police activities is clearly established and officers have no immunity when they directly target reporters covering protests.

The right of the press to report on government activity has long been protected by the First Amendment. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (“[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”).

News reporting on police conduct serves the crucial First Amendment interest in promoting the “free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The right to record police activity, by the press and public, has been held repeatedly to be “clearly established” by many courts around the country. Therefore, a state or local police officer or official who violates that right, especially through the use of force, cannot claim legal immunity. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *see also Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (citing cases); *Toole v. Atlanta*, 798 Fed. Appx. 381, 388 (11th Cir. 2019) (finding right to record police at protest clearly established); *see also American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (finding eavesdropping statute barring recording of police activity in public violated First Amendment).

The Department of Justice has taken the position that this right to record law enforcement is a crucial First Amendment protection that should apply across the country. *See* Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL (D. Md. filed Jan. 10, 2012) (“[The right to record is] not only required by the Constitution . . . [it is] consistent with our fundamental notions of liberty, promote[s] the accountability of our governmental officers, and instill[s] public confidence in the police officers who serve us daily.”); *see also* Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592-JFM (D. Md. filed March 4, 2013) (arguing that discretionary charges like disorderly conduct or disturbing the peace should be viewed skeptically when based on recording police activity).

Journalists, photojournalists, and documentarians deprived of that right must be entitled to relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which permits individuals whose constitutional rights are violated by a federal officer acting under color of federal law to seek money damages.

While the U.S. Supreme Court has not explicitly recognized First Amendment *Bivens* actions, a *Bivens* suit may proceed so long as the officials involved violated a “clearly established” right and provided that no “special factors,” such as an available alternative remedy, would prevent the extension of *Bivens* to a new context. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017).

As there was a clear constitutional violation here and *Bivens* is the most effective remedy to deter future violations such as this one, *Bivens* applies. Indeed, this is the type of case that *Bivens* exists to remedy, where damages against the individual officers who violate the First Amendment under color of law would deter future violations.¹ *See, e.g., Patterson v. United States*, 999 F. Supp. 2d 300, 309 (D.D.C. 2013) (listing and discussing cases in the D.C. Circuit and other federal circuits that recognized a *Bivens* claim based on a First Amendment violation).

Though physical restraints on newsgathering, such as the Lafayette Square incident, are thankfully rare and therefore seldom litigated, there is little question that a court would find a “clearly established” First Amendment right of journalists to be free from physical attack. Further, the facts presented here counsel strongly in favor of recognizing a *Bivens* remedy for violations of the First Amendment right to gather and report news on police conduct.

While law enforcement may impose reasonable restrictions on newsgathering to prevent undue interference with legitimate police work, journalists who comply with those restrictions—who stand at a fair remove from any police activity, who obey orders to disperse, and who conspicuously identify themselves as journalists—may not be subject to physical attack, the quintessential “unreasonable” restriction.

¹ Though federal agencies may also be sued under the Federal Tort Claims Act, 28 U.S.C. § 2674 (2012), for tortious acts of federal officers, the U.S. Supreme Court has held that the FTCA does not provide a remedy that could replace a remedy under *Bivens* for constitutional violations. *Carlson v. Green*, 446 U.S. 14, 15 (1980). Indeed, recent decisions confirm that “the FTCA supplements, but does not supplant, the availability of a *Bivens* action.” *Bloem v. Unknown Dep’t of the Interior Employees*, 920 F. Supp. 2d 154, 164 (D.D.C. 2013) (denying the government’s motion to dismiss and allowing the First Amendment *Bivens* claim to proceed); *see also Wilkie v. Robbins*, 551 U.S. 537, 553-55 (2007); *Doe v. United States*, 381 F. Supp. 3d 573, 615 (M.D.N.C. 2019).

B. Federal law enforcement agencies in Washington, D.C., should immediately implement protocols to protect reporters and ensure the public is informed.

Accordingly, the U.S. Park Police and other federal agencies involved in the Lafayette Square clearing should:

- Instruct officers and staff that the arrest or physical attack of a journalist who is compliant with reasonable police orders is a clearly established First Amendment violation;
- Take swift action to discipline any officer who is found to have arrested or assaulted a journalist engaged in newsgathering;
- Inform officers that they themselves could be subject to legal liability for violating these rights;
- Ensure that crowd control tactics are appropriate and proportional, and are designed to prevent collateral harm to journalists covering protests; and
- Release all information about arrests of or physical interactions with the press to the public to allow it to evaluate the legitimacy of police conduct.

We very much appreciate the Committee's oversight efforts today, and we stand ready to work with the Committee and with the relevant agencies to ensure that brazen First Amendment violations like the arrest or assault of a journalist engaged in lawful newsgathering do not recur.

We also attach a letter the Reporters Committee and 126 news organizations and press freedom advocates sent to officials in New York City concerning police arrests and assaults of journalists during the protests there, which demonstrates the breadth and depth of concern coast to coast over these constitutional violations.

Please do not hesitate to contact Bruce Brown, Executive Director of the Reporters Committee, with any questions at bbrown@rcfp.org.

Sincerely,

The Reporters Committee
for Freedom of the Press

cc: Members of the House Natural Resources Committee

Chief Gregory Monahan
Acting Chief, U.S. Park Police
Department of the Interior

The Honorable William Barr
Attorney General of the United States
United States Department of Justice

The Honorable Muriel Bowser
Mayor, District of Columbia

The Honorable Karl Racine
Attorney General, District of Columbia

Chief Peter Newsham
Chief, Metropolitan Police Department

ATTACHMENT

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The New York Times

PAUL STEIGER
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By email

June 6, 2020

The Honorable Bill de Blasio
Mayor, City of New York
City Hall
New York, NY 10007

Commissioner Dermot F. Shea
New York City Police Department
1 Police Plaza
New York, NY 10038

Re: Law enforcement targeting journalists during protests

Dear Mayor de Blasio and Commissioner Shea:

As members of the news media and organizations that protect the rights of journalists to gather and report news, the undersigned write to ask that you take immediate, concrete steps to end the series of police arrests and attacks on credentialed and clearly identifiable journalists in New York City in recent days. These incidents occur as, across the country, police have arrested, detained, and threatened journalists, and have physically assaulted them with rubber bullets, pepper spray, tear gas, batons, and fists.

In the cases of threats, arrests, and assaults that we are aware of in New York City, there are indications, many strong, that officers knew the journalist was a member of the press.

Law enforcement officers do not have legal immunity when they violate clearly established rights under the First Amendment. The right of the press to document police activity is foundational to our democracy and has long been recognized and protected by the courts. Beyond, however, the Constitution and the law, any targeting of reporters for doing their jobs—keeping the public informed during an extraordinary period of civil unrest—is beyond the pale in a free society.

The challenges that officers face in policing during times of civil protest do not supersede any of the rights guaranteed by the First Amendment, and moments of crisis demand that we protect the bedrock American ideal of a free press even more zealously.

As Governor Cuomo rightly tweeted on June 3, “A free press is the lifeblood of democracy. Now more than ever, it is critical that reporters & photographers can safely document protests without fear of harm or targeting.” Governor Cuomo confirmed that journalists are “essential—and they must be able to do their jobs. We all depend on them.” Governor

Cuomo is correct. When an officer knows a journalist is a journalist, just one arrest or assault is a profound and clear violation of the First Amendment.

In New York City alone, among other incidents:

- Brendan McDermid, a Reuters photographer, was assaulted by police while taking pictures of arrests at a protest in downtown Brooklyn. McDermid was wearing a vest marked “PRESS,” was carrying a professional camera, and was clearly displaying his press credentials. An officer asked him to move, he complied, and without provocation, the officer lunged at McDermid with a baton, knocked him down, kicked him in the leg, beat his helmet with the baton, and laughed;
- Chris Mathias, a senior reporter on assignment for HuffPost, was violently taken into custody by New York Police Department officers, even though he identified himself as a reporter and was wearing a clearly visible press pass;
- Writer Keith Boykin, while freelancing, said that as he was taking videos and photos of protests, and after informing NYPD officers he was with the press, he was arrested, and only released hours later;
- Robert Bumsted and Maye-E Wong, a videographer and photographer for the Associated Press wearing identification, were surrounded and shoved by NYPD officers, who also shouted expletives at the journalists, while the journalists attempted to explain the press was exempt from curfew. Bumsted and Wong were forced to leave the scene entirely;
- Tyler Blint-Welsh, a reporter for the Wall Street Journal, was hit in the face multiple times with riot shields and pushed to the ground by NYPD, even though his NYPD-issued press badge was clearly visible;
- A Newsday multimedia producer with a press pass taking video of the protests in lower Manhattan was struck with a baton in the back and pushed down, hitting a metal fence. He had on a bike helmet, which cracked. He complained to an officer about what happened, who walked away.

The Reporters Committee for Freedom of the Press has documented at least four other incidents in New York City where police detained or assaulted journalists who appear to have been clearly identified as members of the news media and were not physically located among protesters. The U.S. Press Freedom Tracker has confirmed almost thirty incidents of arrest or assault by the police around the country, and the Reporters Committee and the Tracker are investigating several hundred more.

Officers on the ground must understand that gathering news and recording police activities are not crimes, and that journalists who are complying with reasonable law enforcement directions when covering civil unrest are protected by the First Amendment.

In incidents captured on camera in New York City, the journalists were clearly identified as such and indisputably in compliance with the law.

Additionally, officers should recognize that training for journalists and documentarians who cover protests or civil unrest provides guidance on how to interact with law enforcement. They know to comply with an order to move, they will not resist arrest, and they will identify themselves as a member of the news media. At the same time, officers properly trained in crowd control should know that an identifiable journalist may not be arrested or assaulted.

We also strongly urge you to affirmatively order all commanders to instruct their officers that the news media is exempt from curfew orders in New York City, as was clearly stated in the “Finest Message” of June 1.

A general curfew order that fails to provide an exemption for *all* members of the press would violate the First Amendment, and gives law enforcement a potent tool to silence reporting through assaults or arrests of journalists, as we have seen over the past several days. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraint of expression comes before this Court bearing a heavy presumption against its constitutional validity.”). Furthermore, that arrest or detention of a reporter during a curfew would itself violate the First Amendment. *See id.*

We appreciate Mayor de Blasio’s tweet early on June 5 confirming that media personnel are essential and exempt from the curfew, and his pledge to “get NYPD to fix this immediately,” but that message *must* filter down to the officers on the ground.

A. The right to report on police activities is clearly established and officers have no immunity when they directly target reporters covering protests.

The right of the press to document police activities in public has long been protected by the First Amendment. *See Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (“Because Iacobucci’s [journalistic] activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights [police] lacked the authority to stop them.”). News reporting on police conduct serves the crucial First Amendment interest in promoting the “free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The right to record police activity, by the press and public, has been held repeatedly to be “clearly established” by many courts around the country. Therefore, a police officer or official who violates that right, especially through the use of force, cannot claim legal immunity. *See Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (citing cases); *see also American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (finding eavesdropping statute barring recording of police activity in public violated First Amendment).

The Department of Justice has taken the position that this right to record law enforcement is a crucial First Amendment protection that should apply across the

country. See Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep't*, No. 1:11-cv-02888-BEL (D. Md. filed Jan. 10, 2012) (“[The right to record is] not only required by the Constitution . . . [it is] consistent with our fundamental notions of liberty, promote[s] the accountability of our governmental officers, and instill[s] public confidence in the police officers who serve us daily.”); see also Statement of Interest of the United States, *Garcia v. Montgomery County*, No. 8:12-cv-03592-JFM (D. Md. filed March 4, 2013) (arguing that discretionary charges like disorderly conduct or disturbing the peace should be viewed skeptically when based on recording police activity).

Journalists, photojournalists, and documentarians deprived of that right are entitled to relief under 42 U.S.C. § 1983, which permits individuals whose rights are violated under color of law to sue the government official responsible. See *Higginbotham v. New York*, 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015) (finding reporter forcibly arrested covering protest stated clearly established First Amendment right-to-record claim sufficient to defeat qualified immunity); see also *Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014) (“Even if this Court has not explicitly held a course of conduct to be unconstitutional, *we may nonetheless treat the law as clearly established* if decisions from this and other circuits *clearly foreshadow a particular ruling on the issue.*”) (emphasis added and internal quotations and citations omitted).

While law enforcement may impose reasonable restrictions on newsgathering to prevent undue interference with legitimate police work, journalists who comply with those restrictions—who stand at a fair remove from any police activity, who obey orders to disperse, and who conspicuously identify themselves as journalists—may not be subject to arrest or physical attack, the quintessential “unreasonable” restriction.

Though physical restraints on newsgathering, such as those which we have seen in New York City in recent days, are thankfully rare and therefore seldom litigated, there is little question that a court would find a “clearly established” First Amendment right of journalists to be free from arrest and the baton.

B. New York City should immediately implement protocols to protect reporters and ensure the public is informed.

Accordingly, we urge you to:

- Instruct your officers and staff that the arrest or physical attack of a journalist who is compliant with reasonable police orders is a clearly established First Amendment violation;
- Take swift action to discipline any officer who is found to have arrested or assaulted a journalist engaged in newsgathering;
- Inform your officers that they themselves could be subject to legal liability for violating these rights;

- Ensure that crowd control tactics are appropriate and proportional, and are designed to prevent collateral harm to journalists covering the protests;
- Continue to exempt members of the news media from mobility restrictions, including, and especially, curfews; and
- Release all information about arrests of or physical interactions with the press to the public to allow it to evaluate the legitimacy of police conduct.

Please do not hesitate to contact Bruce Brown, Executive Director of the Reporters Committee, with any questions at bbrown@rcfp.org.

Sincerely,

The Reporters Committee
for Freedom of the Press

American Broadcasting Companies, Inc.
on behalf of ABC News and WABC-TV, New York
Advance Publications, Inc.
ALM Media, LLC
America's Newspapers
American Journalism Project
Article 19
The Associated Press
Association of Alternative Newsmedia
The Atlantic Monthly Group LLC
Bloomberg News
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 Vice Media Group
 Virginia Press Association
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cc: The Honorable Andrew Cuomo
Governor, State of New York

The Honorable Letitia James
Attorney General, State of New York

The Honorable Cyrus R. Vance, Jr.
District Attorney of New York County, Borough of Manhattan

The Honorable Darcel D. Clark
District Attorney of Bronx County, Borough of the Bronx

The Honorable Eric Gonzalez
District Attorney of Kings County, Borough of Brooklyn

The Honorable Melinda Katz
District Attorney of Queens County, Borough of Queens

The Honorable Michael E. McMahon
District Attorney of Richmond County, Borough of Staten Island