UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACK LIVES MATTER D.C., et al., *Plaintiffs*, v. JOSEPH R. BIDEN, et al. *Defendants*.	No. 1:20-cv-01469-DLF

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM ON THE INTERIOR DEPARTMENT INSPECTOR GENERAL'S REPORT, IN OPPOSITION TO FEDERAL DEFENDANTS' MOTIONS TO DISMISS

On June 9, 2021, the Inspector General of the Department of the Interior released a report concluding that the attack on Plaintiffs and the other peaceful demonstrators at Lafayette Square was unrelated to the President's walk through Lafayette Square half an hour later. The report, attached to this brief at Exhibit A, is significant because it directly contradicts a central factual contention the individual-capacity federal Defendants made in their briefing and at argument—and thus underscores why their motions to dismiss, ECF 76, 97, 142, 143, 146, should be denied.

As Plaintiffs have stressed throughout their briefing, motions to dismiss cannot be decided based on the factual assertions of defendants. *E.g.*, ECF 98, at 1-2, 14-15; ECF 122, at 1; ECF 150, at 1; *see Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). Nonetheless, a centerpiece of the individual-capacity federal Defendants' briefing and their May 28 argument on these motions has been the claim that their actions were taken "to protect the President's safety." ECF 76, at 12 (Barr); *accord id.* at 1, 5, 10, 14, 15, 34, 36, 41; ECF 97 (Adamchik), at 1, 5, 9, 11, 34, 41; ECF 142 (Kellenberger), at 16, 25, 27; ECF 143-1 (LoCascio), at 8, 11; ECF 146 (Line Officers), at 1, 7, 15-16, 40, 52, 55; Tr. of Oral Argument (attached as Exhibit B), at 13, lines 17-

20 (counsel for federal individual-capacity defendants: "[P]laintiffs seek to hold the attorney general and those who allegedly followed his orders personally liable for damages for acts taken to secure a safety perimeter for the President of the United States."); *id.* at 22, lines 24-25 (arguing that federal officers' alleged actions "pale in comparison to the compelling government interest in presidential security").

This presidential-security claim is not from the complaint, which alleged instead (as part of the § 1985 conspiracy claim) that the invocation of presidential security was just a pretext for an attack motivated by racial animus. *Compare* ECF 52 (Third Amended Complaint), at ¶ 246 ("President Trump, Defendant Barr, and Defendant Esper directed the conspiracy to take these actions because of their adverse effects upon an identifiable group—namely, Black activists and their supporters."), *with id.* at ¶ 4 (noting Defendants' "*professed* purpose" of protecting the President (emphasis added)). The presidential-security explanation is one that the federal Defendants injected into the litigation to invoke a "special factor" under *Bivens*, *see, e.g.*, ECF 76, at 10, 12, 15; ECF 97, at 9, 11, 14; ECF 146, at 7, 15-16, and to try muddy the clearly established law that should have alerted any reasonable officer in Defendants' position that their conduct was unconstitutional, *see, e.g.*, ECF 76, at 34, 41; ECF 97, at 34, 41; ECF 146, at 40, 52, 55.

Now, the Inspector General's report contradicts Defendants' claim that their actions were all about presidential security. *See* Ex. A, at unnumbered introductory page ("The evidence we obtained did not support a finding that the USPP cleared the park to allow the President to survey the damage and walk to St. John's Church."); *id.* at 20-21 ("The USPP acting chief of police and the USPP incident commander told us [the President's plan to visit the church] had no impact on their operational plan, and both denied that the President's potential visit to the park influenced the USPP's decision to clear Lafayette Park and the surrounding areas."); *id.* at 25 ("No one we

interviewed stated that the USPP cleared the park because of a potential visit by the President or that the USPP altered the timeline to accommodate the President's movement.").

Plaintiffs have explained why their clearly established rights were violated even assuming the President's walk was the reason they were attacked. *E.g.*, ECF 98, at 18-21, 30-31; ECF 150, at 13-17, 25. But in any event—as Plaintiffs have also argued, and more to the point here—dismissing the complaint under the *Bivens* or qualified immunity doctrine based on an assumption that the attack occurred to protect the President would be reversible error because it would rely on Defendants' version of the facts rather than the complaint. *E.g.*, ECF 98, at 1-2, 21-23, 31, 48-49; ECF 122, at 9-11, 17-18, 32, 36; ECF 147, at 32; ECF 148, at 12, 19, 36; ECF 150, at 1, 17-18, 26-27, 29, 46-47.

The incompatibility of the Inspector General's account with the factual claims in Defendants' briefs concretely illustrates the importance of the cardinal rule of adjudicating motions to dismiss based on the facts alleged in the complaint. Defendants' own version of the facts is now contradicted by a report from the Inspector General of the parent agency that employs many of the Defendants. At the pleading stage, of course, prior to discovery, the Court is in no position to select among Plaintiffs' and Defendants' competing versions of the facts, much less among the conflicting accounts offered in Defendants' briefs and the new report. Under the Rules of Civil Procedure, the proper mechanisms to resolve factual disputes are discovery and trial.

To be clear, Plaintiffs do not cite the Inspector General's report to endorse its conclusions. Plaintiffs do not ask the Court to take judicial notice of the report—the investigative scope of which was limited (for instance, there were no interviews of Secret Service or White House personnel, *see* Ex. A, at 2) and the conclusions of which are contestable. Instead, Plaintiffs bring the report to the Court's attention to highlight the peril of accepting the Defendants' claims,

contrary to the allegations of the complaint and now publicly disavowed by the Inspector General of the agency that employs many of the Defendants, that the wanton violence Plaintiffs challenge was carried out to protect the President. Resolution of that factual question must await a later stage.

On the facts as alleged in the complaint, no special factors counsel hesitation, and no reasonable officer would have believed Defendants' blitzkrieg to have been lawful. Holding otherwise would (in addition to being wrong on the merits) violate basic tenets of civil procedure. In this case, as in all others, motions to dismiss are not the proper stage at which to resolve disputed questions of fact.

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Respectfully submitted,

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* In accordance with D.D.C. Local Civil Rule 83.2(g), this attorney certifies that she is a member in good standing of the D.C. Bar, is providing representation without compensation, and is personally familiar with the Local Rules of this Court.