EQUALITYMATTERS

The Government Cracks Down On White House Protests - But Is It Legal?

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Protests in front of the White House are nearly as commonplace as lies in Washington – nary a week goes by without a handful of some decent ones. But actions taken by the U.S. Park Police and government lawyers in two separate demonstrations at the White House – one with LGBT activists and the other with environmentalists - suggest the government may be imposing stricter responses in order to dissuade peaceful protesters from staging certain demonstrations at 1600 Pennsylvania Avenue.

Though both of those demonstrations were designed to be actions in which the protesters risked arrest, the treatment of the activists who were arrested strays from the usual way in which acts of civil disobedience in front of the White House have been handled over the last few decades.

Here are the basic rules of the road: Protesters know that if they stop moving on the White House sidewalk within 10 yards to the right or left of the center line – the "picture postcard zone" – they will risk being arrested if they don't respond to verbal warnings. Once arrested, peaceful protesters can have typically been offered what's known as the "post-and-forfeit" option where they can post bail (around $50 to $100) and then choose to forfeit it without a trial. It involves no admission of guilt, leaves civil protesters with no criminal conviction, keeps the D.C. jail facilities from being clogged with non-violent offenders, and saves the court the trouble of adjudicating the cases in its already crammed schedule.

But "those days are over," says Mark Goldstone, a Washington lawyer who has defended non-violent activists for about 25 years.

"The predictability of being able to exercise your rights in the picture postcard zone and coming out of there basically unscathed," he says, "I think those rules that have been built up over the last 25-30 years appear to be breaking down."

Goldstone says he first suspected something was amiss when he took a case involving Lt. Dan Choi and 12 other activists who had handcuffed themselves to the fence surrounding the perimeter of the White House to protest the military's "don't ask, don't tell" policy. Part of what made the case different is that instead of being charged under the District of Columbia Municipal Regulations (DCMR) – like Choi was in two previous protests – the activists were charged with a federal offense under the Code of Federal Regulations (CFR). But additionally, and more importantly, they were not provided the post-and-forfeit option and were charged with "failure to obey a lawful order," which under federal code can result in a permanent criminal conviction along with 6 months of jail time and a $500 fine.

The government has enormous discretion over when to offer the post-and-forfeit option and, since it was not originally provided to the 13 demonstrators immediately following their arrests, Goldstone spent a good bit of time negotiating with government lawyers to find a way out of risking a federal conviction.

"It was just sort of one hurdle after another," recalls Goldstone, "and we eventually came to realization that they did not want to give us a post-and-forfeit. But they never came out and said that."

But as Goldstone noted when he went before U.S. Magistrate Judge John Facciola on March 18, 2011, charging the White House demonstrators with "failure to obey a lawful order" under federal regulations was highly unusual. The charge had "really never been tested out," Goldstone said, as he lobbied Judge Facciola and the U.S. Attorney for a plea bargain that would not result in these protesters carrying a criminal record. (All transcripts for Choi's case **are posted here** on the website Firedoglake.com).

After Goldstone offered several alternatives to trying all 13 defendants for a federal offense, Judge Facciola seemed equally eager to find an alternate solution and pressed the government's lawyer, Assistant U.S. Attorney Angela George, to seriously consider one of Goldstone's suggestions.

"And I take it, Ms. George, you are going to give each of those active consideration," Facciola said of the options Goldstone laid out.

George ultimately did come through with a deal and 12 of the protesters accepted a plea bargain in which, if they pled "guilty," their cases would be dismissed as long as they avoided being arrested for a period of four months. Dan Choi, however, declined to plead "guilty," and the government moved forward with prosecuting him.

Months later on the witness stand in Choi's trial, a veteran officer for the U.S. Park Police – the arresting authority for the protest – also gave an indication of just how rare it was to follow through with the prosecution of the federal charge on a White House protest. Officer Jerome Stoudamire testified that he had assisted in about 2,000 arrests of White House protesters over his 22 years with the agency but had never had one of those cases end up in federal court.

"I would have to say, this is the first time," Stoudamire told Judge Facciola on August 29.

Stoudamire had never testified in federal court about a White House protest precisely because the post-and-forfeit option is the overriding norm and it's also the option Choi and his fellow protesters were given at two previous White House protests on March 18 and April 20, 2010. At both actions, the activists also handcuffed themselves to the fence, were charged with counts of "failing to obey a lawful order" under the District of Columbia Municipal Regulations (DCMR), and were given the option to pay a $100 fine and have the charges dropped without a trial.

So when the 13 protesters from the November action were charged with a federal offense rather than a D.C. violation and also not afforded the post-and-forfeit option, that was exceptional. It also meant the defendants now ran the risk of being saddled with a criminal record for the rest of their lives for engaging in an act of civil disobedience.
Goldstone says that it may be "presumptively legal" for the government to attempt to enforce harsher codes in front of the White House. But he adds, "I think it violates a sense of fair play that's developed over the years between the demonstrators and the government."

Still in question though is where exactly the courts will fall on the government's more aggressive tactics. Government lawyers suffered a setback a couple months ago when the D.C. Court of Appeals ruled the U.S. Park Police had violated the First Amendment rights of a group of protester who joined over 200 demonstrators at prayer vigils in 2007 outside of the White House and Cannon House Office Building to protest the Iraq war. In that case, the protesters were offered the post-and-forfeit option after being arrested but about 40 of them declined to plead guilty and went to court. The D.C. Superior Court originally found the police had acted within their discretion to make the arrests. But 14 of those demonstrators appealed the initial decision and the appeals court ruled the Park Police had unlawfully arrested and charged the activists with "failure to obey a lawful order" and "crossing a police line" under the DCMR.

The outcome of Lt. Choi's case will surely add to the body of law that's evolving around these protests and Choi's lawyer, Robert Feldman, is similarly persuaded that his client's First Amendment rights were violated on November 15, 2010.

"It's my client's belief, and I concur, that this particular administration is very similar to previous administrations throughout history in violating protesters' civil rights – much like they violated the Vietnam protesters' rights, much like they violated African American people's rights, and much like they have violated all types of people who have engaged in free speech throughout history," says Robert Feldman, Choi's lead counsel.

Environmentally Speaking

Another group of protesters that met with unexpected resistance at the White House included 53 environmentalists who staged a sit-in on the first day of a demonstration that extended about two weeks in total. The environmental advocates were asking President Barack Obama to decline approval of the Keystone XLP Pipeline that would funnel a particularly dirty type of oil known as "tar sands" from Canada to the Gulf of Mexico.

All said and done, about 1,250 people were arrested at the White House in a two-week stretch that began August 20, 2011. Choi happened to be among the 53 activists who were processed on the first day and, according to protest organizers, the U.S. Park Police specifically attempted to make an example of that group by holding them in jail for two days.

Matt Leonard, who officially served as the liaison to the Park Police for the direct action, said Park Police officers had originally agreed to use what he calls the "fairly standard protocol" of providing the post-and-forfeit option to all demonstrators for the entirety of the protest.

"We had met several times with Park Police officials in the lead up and they had agreed that that was indeed their plan for how they were going to treat us," explains Leonard. "They were fully aware of our intentions - that we had a two-week demonstration and what the number [of arrests] were that we were looking at each day."

Leonard, who has served in the capacity of being a police liaison in dozens of direct actions around the country as well as a handful in DC, had initially been dealing with Sgt. Chris Cunningham.

But he says that when the environmentalists showed up for the first day of the demonstration on August 20 with 65 people risking arrest, Captain Philip Beck took over.

"He was extremely angry and upset," Leonard recalls, "and he, to our faces, told us that people were going to be spending the night in jail, that they were not going to allow us to continue this protest, that they'd do whatever it took to deter us from coming back – ad nauseum veiled threat after veiled threat."

Leonard and his colleagues were stunned.

"We'd had a really healthy relationship with the Park Police up to that point, and they basically had gone counter to what their stated intentions were," he says.

Following the first day of arrests, Leonard made repeated calls to the Park Police, including Sgt. Cunningham, and the police representatives reiterated what Captain Beck had said.

"This was absolutely being done to deter protesting from continuing," Leonard remembers them saying. "They couldn't allow this to happen for two weeks – they'd do whatever it takes to shut it down by any means they had at their disposal. It was very explicit."

In total, 65 peaceful protesters were arrested on August 20, but Leonard said a dozen of them who were locals were promptly released under the post-and-forfeit option while the remaining 53, who flew in from different parts of the country, were jailed. Nonetheless, the environmentalist showed up the next day with 45 more people prepared to risk arrest, and at that point the Park Police altered their strategy.

"They did a complete 180 degree flip-flop and were very friendly," Leonard says. "They wanted to negotiate with us and figure out how to expedite the entire process for everyone. I think they had to recalculate their decision and realize that they didn't have the means nor the ability to jail people every day for two weeks."

The desire of the park police to jail the first round of arrestees also seemed at odds with the wishes of the D.C. Metropolitan Police Department (MPD), which runs the jailing facility where the protesters were being held.

"They seemed rather unhappy about the situation," Leonard says of the MPD. "We had reports from our lawyers that the Metro police wanted to release everyone on Sunday without seeing a judge because they thought it wasn't worth the resources to hold everybody in jail."

Neither the Park Police nor the Metro Police would go into detail about the situation or the reason that most of the first round of protesters was held. The public information officer (PIO) for the U.S. Park Police, Sgt. David Schlosser, affirmed the agency's commitment to protecting First Amendment speech.

"The U.S. Park Police strongly encourage people to exercise their constitutional rights, and we do nothing to suppress the free exercise of those rights," Schlosser said.

He also suggested that the Park Police did not make the final decision as to whether to hold the environmental activists.

"We don't determine the conditions of the release," Schlosser said, referring *Equality Matters* to the PIO at the Metro Police Department, Gwendolyn Crump.

But Ms. Crump said MPD was not responsible for the decision to hold the protesters and suggested checking with the U.S. Attorney's Office or the Pretrial Services Agency, which assists judicial officers with determining release recommendations for defendants.

Pretrial Services did not respond to inquiries, but U.S. Attorney spokesperson Bill Miller said, “Our office did not handle that case.” Miller suggested contacting the D.C. Attorney General’s office to see if it processed the case.

D.C. Attorney General spokesperson Ted Gest declined to officially comment but indicated that the AG’s office doesn’t initially make decision on whether to hold people who have been arrested.

The AG's office typically wouldn't get involved until a case has been "papered" – the process where the arresting officer presents the evidence of the case to an attorney in the office and then that attorney decides whether the Attorney General's office should move forward with a prosecution and under what charge.

In this case, Leonard said he believed the 53 protesters were "no papered" but were instead held without being officially charged.

As Leonard and his colleagues attempted to secure the activists' release, he said Park Police officials sent him down the same dead-end road to determine who was ultimately calling the shots – MPD, Pretrial Services, the U.S. Attorney's office, the D.C. Attorney General's office.

"However, once we resumed more cordial relations in the following days," Leonard said, the Park Police “made it very clear that their authority determines what happens to low-level arrests like this – and that if we cooperated with them (by giving them a heads-up on numbers each day, minimizing people's personal property, etc.), they could ensure people were released same-day, and quickly."

The Choi Case

Whether the number of arrests in front of the White House has risen over the last several years remains an open question. The Park Police's Sgt. Schlosser said those numbers were available but the agency failed to provide them after repeated requests from *Equality Matters*. Certainly, the environmental action spiked that number, but without the data it's impossible to discern if the trend lines were already headed north. The point of inquiry isn't whether the Park Police are readily arresting more people but, rather, if the number of arrestable actions in front of the White House has been on the rise.

What is clear is that the Park Police had advance notice of the November 15, 2010, demonstration against "don't ask, don't tell" and the agency also had help determining how to charge those protesters in advance of making the arrests.

Lt. Robert LaChance testified in the Choi trial that he received email notification from the U.S. Secret Service prior to the protest indicating a group of activists intended to stage a direct action at the White House on the 15th. Captain Philip Beck further testified that the Secret Service doesn't typically involve itself with White House protests.

An email obtained through subpoena by the defense later revealed that the Secret Service had been notified of the protest by White House officials.

“I have it on pretty good authority that Get Equal is planning to do a major protest Monday in front of the White House to ‘kick off’ lame duck – Choi will be a part of it – and if my sources are right – looks like they are planning on having 10-15 people handcuffed and arrested,” Brian Bond, the White House’s de facto liaison to the LGBT community, **wrote to eight fellow White House officials** on Nov. 12. “Probably would be good to give Service the heads up.”

Bond added, “Also there are likely two more brilliant moves that day – they are supposedly planning to do sit-ins in Reid and Levin Senate offices as well.”

Bond’s colleague, Brad Kiley, White House director of the Office of Management and Administration, **then forwarded the email** to advise the Secret Service.

On the morning of November 15 – shortly before the protest – the Park Police received another noteworthy email sent to Detective Sgt. Timothy Hodge from the Assistant Solicitor General within the Department of Interior, Randolph Myers. **In that communication**, Myers provided the Park Police with his legal opinion about the federal violations with which the protesters could be charged.

Thee email subject line read, "At least two CFR citations may be invoked against protesters who chain themselves to the White House fence."

Myers ultimately offered three potential charges under the Code of Federal Regulations, then added, "we will defer to prosecutor's assessment of the facts of the particular case as to what charge they proceed with." Feldman is hoping to look through government documents in order to establish that the protesters were unconstitutionally targeted for harsher prosecution based on the content of their speech.

"We will be looking for a paper trail and a testimonial trail as to how the government was violating my client's rights as well as the rights of James Pietrangelo II as well as all the other defendants involved in this particular civil disobedience protest of November 15, 2010."

James Pietrangelo II was arrested with Choi in two previous actions at the White House on March 18 and April 20, but he did not risk arrest during the November 15 action. The twelve other protesters arrested that day were: Michael Bedwell, Mara E. Boyd, Justin Elzie, Raphael Jeffrey Farrow, Ian Finkenbinder, Daniel Fotou, Robin McGehee, Autumn Sandeen, Mirium Ben Shalom, Robert Carl Smith, Evelyn Thomas, and Scott Wooledge.

But in order to make those inquiries, Feldman will need an assist from the U.S. District Court. Remember, Feldman is currently defending his client, Lt. Choi, against a criminal charge being prosecuted by the government. However, he claims that his client has been the victim of what's known as "selective" or "vindictive prosecution" by the government.

Often times, that charge is made on behalf of a minority who is being treated differently relative to other people based on some sort of discrimination. But in this case, the crux of what the defense is claiming that Choi was targeted for the content of his speech against the Obama administration, the White House and President Barack Obama – which, if found to be true, would be a First Amendment violation. The defense is further charging that Choi was treated arbitrarily relative to other protesters who were similarly situated – including himself. As Choi pointed out during his testimony August 30, he was charged under Municipal regulations – not federal ones – the first two times he was arrested for protesting, but charged under federal regulations the third time.

"I think that [what] our experience shows was clearly that Captain Pietrangelo and myself, Lieutenant Choi, were arrested in both March and April 2010, we were not before a federal court," Choi said on the stand while being cross-examined by Assistant U.S. Attorney Angela George.

Based on Choi's testimony, Judge Facciola was persuaded that the defense had met the initial threshold of evidence to allow Choi's lawyers to further explore whether he was the object of a "selective" or "vindictive" prosecution, which would essentially turn the tables on the government and allow the defense to search for conclusive evidence about whether Choi and his compatriots were singled out and, if so, why.

"The issue presented by the testimony of the defendant yesterday in my view creates a prima facie case for the proposition that the difference in the manner in which he was prosecuted for his behavior in November as opposed to his behavior in March and April would permit the inference that that difference was a function of the nature of his speech or what he said," Facciola said. In other words, if the evidence Choi presented was not sufficiently countered by evidence to the contrary, the defense would prove that Choi had been selectively and/or vindictively prosecuted.

Facciola said he would allow both sides to seek evidence for why Choi's first two arrests were processed under the D.C. Municipal Regulations while his November arrest was handled in federal court under the Code of Federal Regulations.

"In November, he was treated much more harshly in his view and he insists that that was done vindictively. It was done to single him out and to punish him for the exercise of his First Amendment rights," Facciola explained.

"It is impermissible," the judge stated, "for the United States to differentiate among people and the manner in which it prosecutes them on the basis of the speech they have stated."

And that is where the trial was halted on August 31. Once government lawyers understood that Judge Facciola was going to allow the defense to pursue a selective/vindictive prosecution, George said the government would petition a higher judge through what's known as a "writ of mandamus" to overrule Judge Facciola's decision.

Without getting overly legalistic, government lawyers argue that Facciola should have made a determination about allowing selective/vindictive prosecution as a defense before the trial began instead of making his decision mid-trial. **In the petition**, which they filed on September 12, government lawyers stress that they offered Choi a plea bargain, which he rejected, and they also flatly reject the claim that the charges were vindictive in any way.

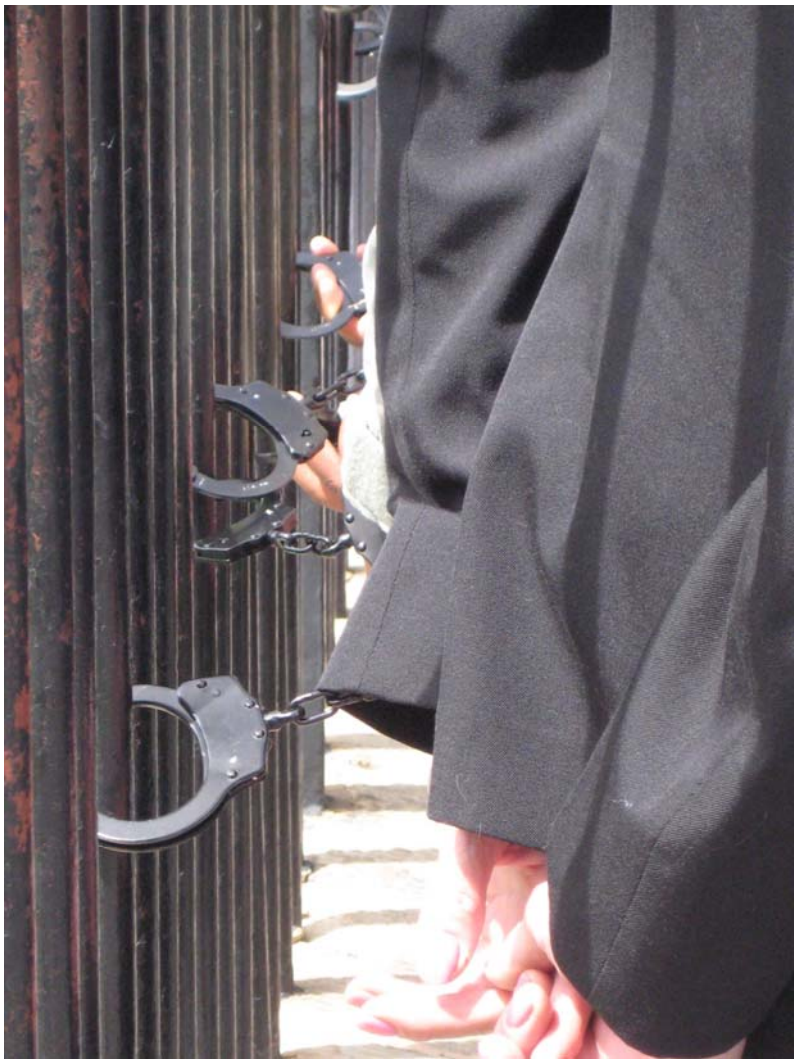
"The fact that Choi was arrested in March and April based on the same conduct that led to his arrest in November, but was not prosecuted in federal court on either of the two previous occasions, does not raise the inference that he was prosecuted vindictively based on the nature of his speech," wrote government lawyers. "Each arrest was made during a DADT protest, in which the subject matter of the protest was the same. It is well within the broad discretion afforded the prosecutor to bring any charges for which probable cause exists against a person who has three times in nine months engaged in the same illegal conduct."

Lynne Bernabei, a civil rights lawyer who is not involved in the case, agrees that the government has broad discretion about how it charges defendants and says the lawyers were likely trying to dissuade the activists from continuing to chain themselves to the White House fence. But that's not where her interest lies in the case.

"I think what's more interesting and what buttresses the idea they were trying to suppress the speech is when you look at these emails," Bernabei says. "You have a window into how they exercised their prosecutorial discretion."

Security concerns alone, she says, should be driving the policy on how and why you charge someone.

"If you've got a policy, then you carry out the policy. If you think this is a really serious offense because of the security concerns, then you have to do it across the board, no matter what demonstration, no matter what people," says Bernabei. "And they did choose to prosecute in a different way than they had in lots of other cases."



Two weeks ago, Feldman and his co-counsel, Norman Kent, **filed their response** to the government's petition to overrule Facciola and **the government responded** last week. U.S. District Court Chief Judge Royce Lamberth will likely rule within a week or two on whether Judge Facciola can allow the selective/vindictive prosecution defense to move forward.

"If the higher judge rules in Judge Facciola's favor," Feldman explained, "Judge Facciola, in his discretion, can permit us to seek discovery and basically turn the trial of Dan Choi against the prosecution. Now that's my viewpoint – that will be my strategy."

Alternatively, if Judge Lamberth rules against Facciola's decision, the U.S. Attorney's Office will continue its attempt to secure a federal criminal conviction against Choi.

Though government lawyers declined to drop the charges when Judge Facciola gave them the option, they also expressed concern about the direction of the case in their September 12 writ filing.

If the court were to conclude that Choi had in fact been the object of a selective/vindictive prosecution, government lawyers wrote, "Such a finding could cause irreparable damage to the reputation of the U.S. Attorney's Office, as it would directly attack the very integrity of the institution."

The PIO for the U.S. Attorney's Office, Bill Miller, declined to comment an ongoing case, but forwarded the government's petition.

But Feldman, who said he is not a conspiracy theorist, strongly believes there was an attempt to muffle Choi and his fellow protesters on November 15 because of the political implications of their protest.

"I believe that all of these unprecedented arrests are just an attempt to stifle the free speech of progressives," Feldman said. "I personally did not believe the Obama administration was capable of this."