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SPIRIT OF THE LAW: Should Officials Be Allowed To Arrest People For Engaging In

Free Speech?

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By Alexander Schmidt

Federal courts are divided over whether a police officer or government official can be sued for arresting someone merely for exercising their right to free speech. Several courts have created a legal barrier to such suits that makes it almost impossible for wrongly arrested citizens to prevail, even if there is overwhelming evidence that the arrest was made purely to silence a government critic. The United States Supreme Court will consider the issue on February 27, 2018.

Americans have a near-absolute constitutional right to complain about government officials, even to be a constant thorn in an official's side. More often than one would think possible in America, officials try to silence their critics by having them arrested, even if no crime has been committed. If that happens, the wrongly arrested citizen has a right to sue the official and seek compensation under a legal theory called "retaliatory arrest," which discourages officials from violating peoples' free speech rights by making officials personally liable to the wrongly arrested person.



People are being arrested for exercising their free speech rights.

But some courts have made it nearly impossible to successfully bring a retaliatory arrest claim. These courts have given officials with a retaliatory motive for an arrest an escape hatch by immunizing them from suit in any case where there is "probable cause" to believe that the plaintiff may have broken a law—any law, even a minor traffic violation, or not using a crosswalk when crossing a street. The "crime" need not even be the same one that the citizen was supposedly arrested for. If the officer or official can concoct, after the fact, probable cause for some other crime that was not even in the arresting officer's mind at the time of the arrest, the official will get off scot-free.

Probable cause is a very easy standard to meet, and just about everyone at some time has violated a

traffic law or jaywalked. The inevitable result of these courts' rulings is that officials will be emboldened to arrest their critics, and citizens will be less inclined to criticize the government for fear of being arrested. Dare we use the words "Police State"?

The problem is a growing one, especially in small towns and local governments. The briefs submitted to the Supreme Court contain some eye-popping examples of the types of retaliatory arrests that have gone unpunished by the courts:

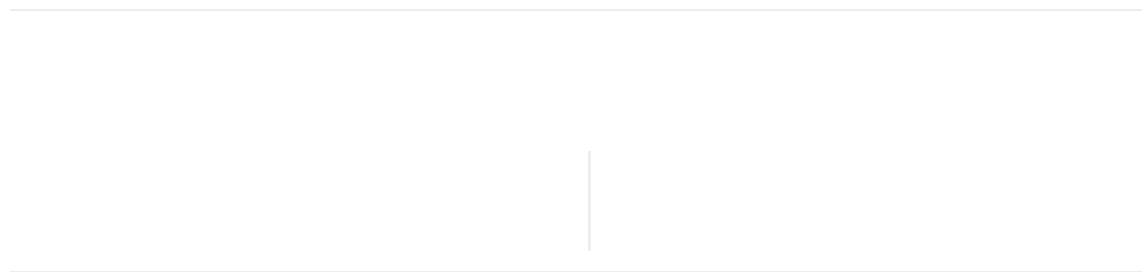
- A Houston street preacher was arrested for filming interactions with police who had asked him to shut up. His retaliatory arrest case was dismissed because he had been carrying a shofar—a ram's horn trumpet—which violated a local ordinance prohibiting street demonstrators from carrying any object more than $\frac{3}{4}$ of an inch thick.
- An Indiana woman argued with a police officer, who at one point pointed his finger at her, which she brushed away. The officer told her he would not arrest her. As she was leaving, the woman said she would report him to the police chief. The officer later arrested her at the station, while she was speaking with the chief, on the ground that she had committed a battery by touching his finger. Although the woman was plainly arrested for exercising her right to complain to the police chief, because there was probable cause that a battery had been committed, her retaliatory arrest case was dismissed.
- After a bridge collapsed in Minnesota, a bridge safety consultant criticized a government agency several times on national TV. After meeting with officials about the collapse in an investigation command center trailer, he walked into another trailer without permission to continue his criticisms and then left. On his way out, a police officer who had said the consultant should be "locked up" for criticizing the government on television, arrested him for having trespassed in the wrong trailer. The consultant's retaliatory arrest case was tossed out.
- In the case before the Supreme Court, a Florida man who had sued his city was targeted by a city councilmember, who had expressed a desire to "intimidate" him and make him feel "unwarranted heat." When the man later rose to speak at a public council meeting, the councilmember said he had no right to criticize another city official from the podium and told an officer to "carry him out." When he refused to leave, saying he had a right to public comment, he was handcuffed and charged with disorderly conduct and resisting arrest. His retaliatory case was dismissed because the court found probable cause for those charges.

The policy rationale offered by the courts that have upheld these brazen pretexts for arrests is that allowing retaliatory arrest suits to proceed when there is probable cause of a crime will open the floodgates and encourage criminals to sue their arresting officers at any time, even when genuinely arrest-worthy crimes have occurred. Courts ruling the other way are unwilling to sacrifice citizens' First Amendment rights in favor of protecting officials who are blatantly motivated to incarcerate people simply because they have been critical of the official or the government.

The current Supreme Court has a record of safeguarding First Amendment rights. It likely took this case because four or more Justices believe that the probable cause rule unconstitutionally chills freedom of speech. We'll see how the argument goes on the 27th.

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