Civil Rights—Immunity
Secret Service Agents Protecting Cheney Shielded From War Protestor's Lawsuit

By Alisa A. Johnson and Tom P. Taylor

Avoiding potentially thorny constitutional questions, the U.S. Supreme Court held June 4 that, in the absence of clearly established law, Secret Service agents are entitled to qualified immunity against claims that they violated a plaintiff's First Amendment rights by arresting him in retaliation for his political speech at a public event involving the vice president (Reichle v. Howards, U.S., No. 11-262, 6/4/12).

Legal experts who spoke with BNA about the court's decision focused more on what the court did not resolve than what it did.

Confrontation With Vice President

The events that gave rise to the lawsuit began at a shopping mall where then-Vice President Dick Cheney was meeting the public. The plaintiff was talking on his cell phone when a Secret Service agent overheard him say he was going to ask Cheney "how many kids he's killed today." The agent told other agents, who decided to "keep an eye on" the plaintiff.

The plaintiff did meet Cheney and told him his policies on Iraq were "disgusting," to which Cheney responded, "Thank you." As the plaintiff left Cheney, he allegedly touched the vice president with his open hand. The plaintiff left the scene, but he was later approached by an agent who had been sent to conduct an interview. The encounter led to the plaintiff's arrest for assaulting the vice president.

The plaintiff was turned over to the local sheriff's office and charged with harassment. The charges were ultimately dismissed.

The plaintiff sued the agents involved, claiming that they violated his First Amendment rights by retaliating against him for engaging in constitutionally protected speech.

The U.S. Court of Appeals for the Tenth Circuit held that the agents were not entitled to qualified immunity. It rejected the agents' reliance on Hartman v. Moore, 547 U.S. 250 (2006), which held that a plaintiff suing under the First Amendment for retaliatory prosecution must plead and prove the absence of probable cause.

The circuit court declined to extend Hartman's "no probable cause" requirement to retaliatory arrest. Under Hartman, it said, "even if an official's action would be 'unexceptionable if taken on other grounds,' when retaliation against Constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and 'subject to recovery.'"

Narrowest Grounds

During oral argument in the Supreme Court, the parties discussed whether Secret Service agents protecting high government officials should be subject to a special immunity standard. The court, in an opinion by Justice Clarence Thomas, decided the case without addressing that issue. Instead, the court held that the agents were entitled to qualified immunity because it was not clearly established at the time of the incident that their actions would violate the First Amendment.

That finding allowed the court to avoid deciding whether Hartman applies to a First Amendment retaliatory...
arrest claim.

At the time of the plaintiff’s arrest, it was at least arguable that Hartman applied to retaliatory arrests, the court explained. Moreover, it said, “this Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards’ arrest.”

Hartman was decided against a backdrop of caselaw that involved both arrests and prosecutions that were allegedly in retaliation for the exercise of First Amendment rights, the court noted. As in retaliatory prosecution cases, evidence supporting or disproving probable cause will be available in almost all retaliatory arrest cases, it pointed out. In these cases, the arresting officer might be hostile to the arrestee's views, but he or she might also correctly view the speech as evidence of a crime or an indication of a potential threat, it said.

**Unresolved Issue**

Even so, the court stressed that it was not suggesting Hartman applies in the context of retaliatory arrest or that, if it does apply, it would apply in its entirety.

Hartman rested on the understanding that the causal connection in retaliatory prosecution cases is attenuated due to the fact that the animus resides in one person and the injurious action is taken by another.

An arrest is different in that the person bearing the animus and the person making the arrest are often one and the same, the court explained. Another distinction is that there is a presumption of regularity accorded to prosecutorial decisionmaking that does not apply in the context of an arrest, it said.

Justice Ruth Bader Ginsburg, joined by Justice Stephen G. Breyer, concurred in the judgment but went further than the majority, saying that, “if rational,” the officers’ assessment that the plaintiff posed a danger to the vice president “should not expose them to claims for civil damages.” She added, “Officers assigned to protect public officials … rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge.”

**Reactions**

Ruthann Robson, a professor at City University of New York School of Law, Long Island City, N.Y., told BNA that the decision “leaves the law unsettled.” She said she is bothered by the fact that “the court is resting qualified immunity on whether this court has said something in a very narrow and specific way, and then when they have the chance they don't say it in a narrow and particular way.”

Ken Paulson, president and chief executive officer of the First Amendment Center at Vanderbilt University in Nashville, Tenn., was also underwhelmed by the decision. “By reaching this decision the way they did the Supreme Court pretty much short-circuited the First Amendment issues,” Paulson told BNA. “When the Supreme Court takes a case there is always a chance that history will change—this is a decidedly unhistoric decision,” he said.

Some other observers expressed a more favorable view of the opinion. Steven R. Shapiro, legal director of the American Civil Liberties Union, New York, which filed an amicus curiae brief in the case, told BNA: “Today's decision is narrowly written. One can only assume that if there were five votes to hold that an officer's retaliatory motives are irrelevant so long as there is probable cause to arrest, the court would simply have rejected the First Amendment claim in this case. The fact that it didn't is encouraging,” he said.

“On the other hand, the court's unwillingness to address the issue is disappointing because it perpetuates a state of legal uncertainty that will inevitably give rise to the same qualified immunity issues in the next case,” Shapiro added.

Konrad Motyka, president of the FBI Agents Association, told BNA, "The court's ruling will help to ensure that all law enforcement officers can rely on probable cause to make the quick decisions that are necessary to protect public safety.”

In that same vein, Lisa Soronen, executive director of the State and Local Legal Center, Washington, D.C., which provides Supreme Court advocacy for state and local government, told BNA, “It is difficult for lawyers, much less police officers, to determine whether new Supreme Court precedent on a particular issue unsettles circuit court precedent on a related issue.” She said her organization is “disappointed that the Supreme Court did not rule on the issue of whether probable cause bars First Amendment retaliatory arrest claims.”
She added, “Local police officers in particular have been the target of a number of First Amendment retaliatory arrest claims nationally.”

Sean R. Gallagher, Polsinelli Shughart PC, Denver, argued for the agents. David A. Lane, Killmer, Lane & Newman, LLP, Denver, argued for the plaintiff. Principal Deputy Solicitor General Sri Srinivasan argued for the government as amicus curiae.

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