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Legal Sidebar

First Amendment: Government Retaliation for Protected Expression

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The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The clause applies to any government action, whether federal, state, or local. Individuals may be able to challenge violations of their free speech rights in a variety of ways. One basis for such a challenge may be that an official took adverse action against an individual in response to the individual engaging in protected speech—often known as a *First Amendment retaliation* claim.

First Amendment retaliation may arise in a variety of circumstances. For example, during its 2023 term, the U.S. Supreme Court heard a case involving an alleged retaliatory arrest of a former city councilmember. In 2025, law firms have raised First Amendment retaliation claims against the Trump Administration based on the President's executive orders aimed at specific firms.

This Legal Sidebar first provides an overview of the elements of First Amendment retaliation. Although lower courts vary in their precise formulation of these elements, the Supreme Court has identified three general considerations. To demonstrate First Amendment retaliation, an individual must show that (1) they have engaged in expression protected by the First Amendment, (2) a government official took an adverse action against the individual, and (3) the individual's protected expression motivated the official to take the adverse action. The Legal Sidebar concludes with a brief discussion of the relief available for First Amendment retaliation claims.

Protected Expression

Plaintiffs claiming First Amendment retaliation must first demonstrate that they have engaged in expression subject to the protection of the First Amendment's Free Speech Clause. The written and spoken word are paradigmatic examples of "speech" protected by the First Amendment. As discussed in this essay in the *Constitution Annotated*, the Free Speech Clause applies to a range of expressive conduct beyond what might typically be referred to as "speech." The Supreme Court has observed that there is a "kernel of expression" in almost everything a person does, but a kernel of expression alone "is not sufficient to bring the activity within the protection of the First Amendment." Courts frequently look to (1) whether the allegedly expressive conduct evinces "an intent to convey a particularized message," and (2) whether such a particularized message is likely to be understood.

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Even if a plaintiff alleging First Amendment retaliation has engaged in expression, some forms of expression may not warrant the First Amendment's protection. A frequent issue in employment retaliation cases is whether a public employee's speech is protected by the First Amendment. For example, a recent First Amendment retaliation case in the U.S. Court of Appeals for the Seventh Circuit turned in part on whether a university professor's exam questions and in-class remarks were constitutionally protected expression. The Seventh Circuit allowed the professor's First Amendment retaliation claim to proceed without conclusively determining whether the questions and remarks were protected expression. The tests for determining whether a public employee's speech is constitutionally protected are discussed in this essay in the *Constitution Annotated*.

Adverse Action

To successfully allege First Amendment retaliation, a plaintiff must show that an official took an "adverse action." Not every adverse action will be "material" enough to support a lawsuit; as the Supreme Court put it, "no one would think that a mere frown from a supervisor constitutes a sufficiently adverse action to give rise to an actionable First Amendment claim." For example, in *Houston Community College System v. Wilson*, the Court held that a board of trustees' public censure of one of its members was not a "materially adverse action," preventing the board member's First Amendment retaliation claim from moving forward.

Some actions are so plainly adverse that courts spend little time discussing whether they may support a First Amendment claim. For example, the Supreme Court has observed that arrests, prosecutions, and dismissals from government employment are "easy to identify" as adverse actions, and the Court has spent little or no time discussing whether these actions are sufficiently adverse to support a claim. The Supreme Court has also developed standards for adverse actions in non-retaliation cases. For example, in a case involving claims that government employees were denied promotions, transfers, and recalls after layoffs for failing to affiliate with a state political party, the Court held that these denials could support a First Amendment claim even though they were "less harsh than dismissal."

Causation

Even if a plaintiff demonstrates the prior two elements, a First Amendment retaliation claim will succeed only if the adverse action occurred *because of* the individual's protected expression. Proving a causal link between protected expression and adverse action may be difficult, especially if an official offers reasons for taking the adverse action that are unrelated to the constitutionally protected activity. The Supreme Court addressed this issue in *Mt. Healthy City School District Board of Education v. Doyle*, an employment retaliation case. The Court in *Mt. Healthy* held that a plaintiff claiming to have suffered First Amendment retaliation must provide evidence that their protected expression was a "motivating factor" behind the official's adverse action. If the plaintiff makes that demonstration, the burden then shifts to the official to show by a preponderance of the evidence that the official would have taken the same action absent the protected expression. In an employment retaliation case, this might include evidence of employee misconduct unrelated to the protected conduct.

Cases involving retaliatory prosecution require an additional element of proof. In *Hartman v. Moore*, the Supreme Court observed that retaliatory prosecution "presents an additional difficulty" when proving causation: that the individual initiating the prosecution generally will not be the person who allegedly harbors the improper motive, but instead will be a different official whose prosecutorial decisions are presumed lawful. In part because of the disconnect between the prosecutor and the retaliating official, and because of the so-called "presumption of prosecutorial regularity," the Court held that an individual alleging retaliatory prosecution must also prove that their prosecution was not supported by probable cause.

In *Nieves v. Bartlett*, the Court extended the *Hartman* no-probable-cause requirement to retaliatory arrest claims. However, the Court also identified an exception to that requirement, holding that a plaintiff need not prove a lack of probable cause in a retaliatory arrest case if the plaintiff "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." In *Gonzalez v. Trevino*, the Supreme Court recognized that evidence "that no one has ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel"—is sufficient to invoke this exception.

Lozman v. City of Riviera Beach, a Supreme Court case decided one year before *Nieves*, provides another possible (though more limited) exception to the no-probable-cause requirement in retaliatory arrest cases. In *Lozman*, the Supreme Court held that a plaintiff alleging an "official municipal policy" motivated by retaliation against the plaintiff need not demonstrate a lack of probable cause for their arrest. The Court noted that the allegations in *Lozman* were "far afield from the typical retaliatory arrest claim."

Relief Available

The relief available to an individual alleging First Amendment retaliation may depend in part on whether the official who engaged in the allegedly retaliatory activity is a state or federal official. 42 U.S.C. § 1983, a federal law originally enacted as part of the Enforcement Act of 1871, permits recovery of damages—that is, monetary relief—against a state or local official whose conduct results in a deprivation of rights "secured by the Constitution." Many of the First Amendment retaliation cases that have reached the Supreme Court, including all of the retaliatory arrest cases previously mentioned, were actions for damages under 42 U.S.C. § 1983.

There is no direct analogue in federal statute permitting recovery of damages from a federal official who has violated the Constitution. In the 1971 decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court held that in certain circumstances, an individual may recover damages for injuries suffered as a result of a constitutional violation. *Bivens* dealt only with the constitutional violation at issue in the case—a violation of the Fourth Amendment's prohibition of unreasonable searches and seizures—and left open whether other constitutional violations would allow for recovery of damages. In *Hartman*, the Supreme Court assumed that *Bivens* would apply to claims of First Amendment retaliation. However, the Court's 2022 decision in *Egbert v. Boule* confronted this question directly and held that *Bivens* does not apply to First Amendment retaliation. Consequently, individuals alleging First Amendment retaliation by federal officials may be limited to seeking *injunctive relief*—that is, a court order restraining the officials from engaging in the retaliatory conduct. For example, a case brought by a law firm against the Trump Administration, alleging that the Administration's executive order targeting the firm constitutes First Amendment retaliation, seeks injunctive relief.

Federal employees alleging employment retaliation may be further limited in their ability to raise constitutional claims in court if their claims fall under the Civil Service Reform Act (CSRA). The CSRA prescribes the method for most non-appointed federal employees to challenge any removal, suspension of greater than 14 days, reduction in grade or pay, or furlough for 30 days or less. The Supreme Court has held that the CSRA provides the exclusive mechanism for relief for employees and employment actions covered by its statutory scheme, even when the claims raise constitutional issues.

First Amendment retaliation claims for damages may fail if the official engaged in the allegedly retaliatory conduct is entitled to qualified immunity. Qualified immunity protects an official from civil liability if the official's actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." An official facing constitutional claims will thus be entitled to qualified immunity if either (1) the official did not engage in unconstitutional conduct, or (2) the unconstitutional nature of the official's conduct was not "clearly established" at the time it occurred.

Judges deciding issues of qualified immunity may choose to decide that a constitutional right was not "clearly established" without determining whether the official's conduct was unconstitutional. For example, in a retaliatory arrest case predating *Nieves*, where the Supreme Court extended the no-probable-cause requirement to retaliatory arrests, the Supreme Court held that it was not clearly established that an arrest supported by probable cause violated the First Amendment. The Court thus avoided answering whether the official's conduct actually violated the First Amendment, as well as whether claims of retaliatory arrest must be supported by a lack of probable cause. As discussed above, the Court decided this issue several years later in *Nieves*. For more information on qualified immunity, see this CRS Legal Sidebar.

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