



ABOVE THE LAW

The Supreme Court's New Rule Ensures Public Trust In Law Enforcement Will Further Erode

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In last week's decision in Nieves v. Bartlett, the United States Supreme Court unilaterally established a rule that will deny citizens their statutory right to relief whenever public officials use their authority to deprive them of their constitutional rights. Indeed, this new rule will prevent claims from preceding before a jury even if all available evidence points to the fact that an arrest was a clear case of retaliation by police officers against protected speech.

The Court's opinion in *Nieves* makes the same fundamental mistake other organizations have made by valuing institutional protection above providing an effective remedy for harms inflicted by members of the institution. Accordingly, this case will only serve to increase public distrust with law enforcement. In fact, the liberty the Court unilaterally decided to ration and restrict here is quite literally, what separates a free society from a police state. Conflict has already sprung out of this void of trust resulting in an obscene amount of violent confrontations that tear whole communities apart.

The distrust before the *Nieves* rule flowed directly from the mammoth discretion given to law enforcement by Congress and state legislatures to dictate and control the personal lives of individual Americans. In the *Nieves* case, the plaintiff Bartlett allegedly violated an absurdly broad disorderly conduct statute that could encompass virtually all forms of common public behavior. Moreover, the Court declared in *Nieves* that sufficient probable cause existed under this type of statute, for an officer to *initiate* — and this is a point worth stressing on — *a violent arrest* (as it was in the facts of this case), based on an obnoxiously vague claim such as that Mr. Bartlett was in a “combative posture”, e.g. Mr. Bartlett raising his arms after *the officer* pushed him, not kidding.

As justification for the rule established in *Nieves*, the Court wrings its hands over the fear first expressed in Lozman v. City of Riviera Beach, of a flood of litigation against officers. Or worse, seemingly in the Court's mind, that cops would have to second guess their decision-making and actually consider in *every* interaction whether they are depriving citizen's of their rights. There are two glaring issues with these concerns: First, viewing the responsibility of an officer taking into account whether they are depriving individuals of their rights as a *burden*, even during split-second decision-making, instead of as an ever-constant *duty* of law enforcement is quite puzzling in its logic. One would think that removal of this duty, especially during split-second decisions, will only result in more unjustified harm to citizens. Categorizing what should be a necessary

and fundamental inquiry by officers as a burden ensures, as Radley Balko has put it the system will be dictated “by the limbic system, not the frontal lobe.”

Second, Congress has lawfully decided to impose this duty on all public officials, including police officers. Yet, a majority of the Court did not even attempt to apply or analyze the language of the statute. As Justice Neil Gorsuch put it in his partial dissent in *Nieves*, it is not for this Court to unilaterally amend such a lawful judgment by Congress, stating the Court could:

“[L]ook at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit. Instead, the statute imposes liability on anyone who, under color of state law, subjects another person “to the deprivation of any rights, privileges, or immunities secured by the Constitution.” Maybe it would be good policy to graft a no-probable-cause requirement onto the statute, as the officers insist; or maybe not. Either way, that’s an appeal better directed to Congress than to this Court. Our job isn’t to write or revise legislative policy but to apply it faithfully.” *Nieves v. Bartlett*, No. 17-1174, at *25 (U.S. May. 28, 2019).

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The Court’s made-up rule established in *Nieves* will likely function in a similar way to the Court’s made-up rule regarding 42 U.S.C. § 1983 claims generally. Their wholesale rewriting of this Congressional statute permits valid, meritorious claims to be unceremoniously tossed out pursuant to court-invented protections. This leaves the victims Congress intended to protect and provide a means to pursue valid grievances left, in the words of a federal judge, “violated but not vindicated.” As organizations such as the Cato Institute have observed such descriptions are “not an exaggeration or a colorful shading, but an exact description of how the Supreme Court has taken a straightforward statute, plainly providing that any state official who violates someone’s rights “shall be liable to the party injured,” and concocted an “atextual, ahistorical doctrine that shields from liability even those officials that break the law.”

Furthermore, under the government’s now-adopted standard, the system will most often be shielding the greater harm at the expense of a miniscule infraction. In other words, when the police retaliate against protected speech depriving citizens of their rights, this is a far worse harm to society than what occurs from a violation of a common misdemeanor. Worse, it easy to see how by utilizing the Court’s rule, police will be able to effectively censor entire viewpoints (such as criticism of police behavior), throughout our communities.

At the risk of not sounding too bitter, I will not keep piling on my criticism even though a review of the issues raised by Justice Sonia Sotomayor’s fantastic dissent are important (for example, her brilliant inquiry at oral argument pointing out how the Court’s now-adopted rule in effect tiers rights, treating racial and First Amendment discrimination differently). I will simply end by saying until we subject public officials to the same values and rules that citizens must observe, and hold the bad cops accountable, the problems created by massive public distrust of law enforcement will only get worse. Most importantly, until and unless the system detaches itself from valuing institutional protection above remedying harms, we will continue to devolve into a police state, leaving behind the great and sustaining values promised to all our citizens.