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DAILY NEWS

# Will the Supreme Court rectify its qualified immunity mistake?

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May 14, 2020

WASHINGTON – The table around which the Supreme Court justices gather for conferences might groan Friday beneath the weight of cert petitions – requests for the court to accept 13 cases arising from lower court decisions involving plaintiffs seeking redress for violations of their civil rights. In 11 of the cases – in all but one, the government defendants were in law enforcement – the civil rights claims were dismissed because courts granted the defendants qualified immunity. In two cases the courts denied immunity.

The Supreme Court's consideration of this avalanche of petitions suggests that the court is reconsidering its mistake in creating qualified immunity. This doctrine has essentially nullified accountability for law enforcement and other government officers even in cases where violations of constitutional rights are indisputable. Friday's cases include:

A police officer, eager to administer an alcohol breath test to a man on misdemeanor probation, parked his patrol car in front of the man's house with its siren roaring for over an hour, covered the house's security camera with tape and repeatedly circled the house, knocking on windows. A lower court held that this warrantless invasion violated the Fourth Amendment but granted the rogue officer immunity from civil liability because no "clearly established law" forbade his behavior. Meaning there were minor factual differences between this case and prior cases in the circuit.

A court granted immunity to officers who stole $225,000 in cash and rare coins while executing a search warrant because this behavior was not covered by any previous decision, involving virtually identical facts and circumstances, within that court's circuit. Because of trivial factual distinctions from earlier cases, a court granted immunity to a deputy sheriff who, while repeatedly attempting to shoot a pet dog that posed no threat, shot a 10-year-old child lying on the ground. For similar reasons a court granted immunity to officers who used tasers – nine times, and fatally – on an unarmed man having an acute mental-health episode.

A court granted immunity to state investigators who, without notice or a warrant, entered a doctor's office and searched the medical records of 16 patients. Again immunity was justified by there being no "clearly established law." A dissenting judge noted that qualified immunity amounts to "unqualified impunity, letting public officials duck consequences for bad behavior – no matter how palpably unreasonable – as long as they were the *first* to behave" in a distinctively egregious way.

The Supreme Court's conference table might splinter beneath the weight of public records of hundreds of comparably appalling episodes that raise questions of qualified immunity. Since 1982, this doctrine has become a major impediment to the protection of constitutional rights because of three inappropriate words.

In the 1871 Ku Klux Klan Act, Congress said that government officials who violate a citizen's constitutional rights "shall be liable to the party injured." In 1967, however, the court began subverting Congress's clear intent by diluting the right to civil remedies. In 1982 the court almost nullified the right by holding that the official's conduct must be measured against – here are the three words – "clearly established law."

This was in no meaningful sense an "interpretation" of the 1871 statute. In effect, law is "clearly established" only regarding single instances, hence it is hardly law. Trivial factual distinctions between indisputably unconstitutional behavior in case A and such behavior in a prior case B in the same circuit can mean that the official in case A has immunity even though the violation of a plaintiff's rights is clear.

Perversely, the more gross the unconstitutional behavior is, the harder it is to persuade courts to deny immunity, because what the perpetrator did does not precisely fit the fact pattern of any prior case. In its last 30 cases, the Supreme Court, applying its “clearly established law” doctrine, has denied immunity only twice.

Clark Neily and Jay Schweikert of the Cato Institute’s Project on Criminal Justice, joined by amicus (friend of the court) briefs representing an astonishing ideological diversity, have helped to bring qualified immunity’s consequences to the attention of the court that, in creating it, created “a culture of near-zero accountability for law enforcement.” Its victims include not just those whose civil rights have been violated, but the overwhelming majority of law-abiding law enforcement officers and other public officials who are tainted by the unpunished unconstitutional behavior of a few. On Friday, the court can serve civil rights and law enforcement by deciding to rethink the mistakes it made regarding qualified immunity.