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George Floyd's Death Renews Calls to Revisit 'Qualified Immunity' for Police Misconduct

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Nationwide protests against police violence are still persisting more than a week after George Floyd died while taking a knee to the neck by a Minneapolis police officer. His death has ignited more than just protests and riots—the ongoing debate on a Supreme Court-made legal doctrine that insulates police officers from civil liability has reached a crescendo among the unrest.

That doctrine, known as "qualified immunity," shields government officials from liability for damages claims for harm caused by their actions as they perform official duties even if those actions violated the U.S. Constitution but did not contravene a "clearly established" rule. The "clearly established" rule concept, which is seen to be problematic by critics of the doctrine, requires the party suing the official to show that the facts in their case were sufficiently similar to the facts in prior court cases.

There are several qualified immunity cases, which are seeking review, pending at the Supreme Court and legal experts are hoping that the Floyd case would act as a catalyst to encourage the justices to revisit the doctrine. The top court could decide whether to take up any of those cases as early as this Monday, stemming from discussions made in this Thursday's conference.

"There are eight cases set for this Thursday conference. It's the second time this set of cases has been relisted, which is certainly a signal of interest that at least someone on the court is at least somewhat interested in the issue," Robert McNamara, senior attorney for the Institute for Justice, told The Epoch Times. The Institute for Justice runs a Project on Immunity and Accountability that aims at challenging the qualified immunity doctrine and restoring accountability for officials' misconduct.

The doctrine was created by the Supreme Court in 1982 as part of the top court's interpretation of 42 U.S.C. § 1983, commonly known as Section 1983, which provides a basis for people to sue state officials who violate a person's constitutional rights. However, under the Supreme Court's current interpretation of the law, it is not enough to show that the rights are violated. Victims must also show that the action was "clearly established," and if they fail the official could be granted qualified immunity.

The rationale behind the doctrine is to afford government officials protection from undue interference and threats of liability while they perform their duties. It is meant to protect all but "the plainly incompetent or those who knowingly violate the law."

But legal experts say qualified immunity has routinely shielded those who are either incompetent and who knowingly violate the law, such as when courts granted immunity to officers who stole over $225,000 (pdf) and to an officer who shot a 10-year-old child while trying to shoot a non-threatening family dog (pdf).

"Qualified immunity is a failure—it is a failure as a matter of policy, it is a failure as a matter of law, and it is a failure as a matter of basic morality," McNamara said.

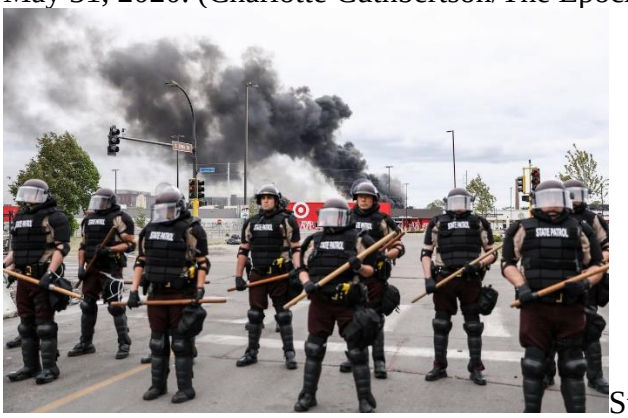
McNamara and other critics see the doctrine as a free pass for police officers and other government officials to violate constitutional rights without having to face the legal consequences of the actions.

"The entire point of having constitutional rights is that they be enforced. Having a doctrine that says your rights may well have been violated, but we're going to choose to do nothing about it, turns the constitution into an empty promise," McNamara said.

Meanwhile, Clark Neily, vice president of the libertarian Cato Institute, described the doctrine as a "near-zero-accountability policy for law enforcement" while reacting to Floyd's death in a blog last week. The Cato Institute has been advocating for the abolishment of the doctrine in the past several years.

A protester is detained by State Police after staying out beyond the governor's 8 p.m. curfew during the sixth

night of protests and violence following the death of George Floyd, in Minneapolis, Minn., on May 31, 2020. (Charlotte Cuthbertson/The Epoch Times)



State Police stand guard as smoke billows from buildings that continue to burn in the aftermath of a night of protests and violence following the death of George Floyd, in Minneapolis, Minn., on May 29, 2020. (Charlotte Cuthbertson/The Epoch Times)

Problems with the 'Clearly Established Law' Test

The courts embark on a two-prong test when deciding when to grant qualified immunity to a government official. They first have to decide whether a constitutional violation had occurred and secondly, whether the right was clearly established.

Legal experts say many cases fail the "clearly established" barrier as it is not easy to show that the conduct and circumstances in the current case are sufficiently similar to ones in another previous case.

Using the Floyd case as an example, Neily said that if his family wants to sue the officer who had kneeled on him, they would have to find an existing case in the 8th Circuit Court that held that a police officer must not kneel on an "unresisting suspect's neck, ignoring his pleas for help, until he passes out."

"If no such case happens to be on the books, their case will be summarily tossed out of court," Neily wrote.

In 2009, the Supreme Court raised the bar even higher for victims to overcome qualified immunity in the case Pearson v. Callahan. They held that judges could choose to ignore the first part of the test and go straight on deciding whether the right was clearly established. Some legal commentators say that the impact of this is that it prevents the recording of new case law that establishes instances of violations needed to decide whether a rule is clearly established.

McNamara said he believes this test has turned the inquiry into constitutional cases "into almost a farce."

“Lower courts engage in this kind of mechanistic quest to find another published federal opinion in which exactly the same facts have occurred, which is frequently impossible to do because the world is complicated and no two cases will have exactly the same facts,” he said. “As a result, the outcome of these cases is essentially arbitrary.”

The doctrine has been criticized by people on both sides of the aisle. Many legal circles, advocacy groups, and members of the judiciary, including Supreme Court justices Clarence Thomas and Sonia Sotomayor, have also raised concerns about its application.

In 2017, Thomas wrote a separate concurring opinion in a case to express his “growing concern with our qualified immunity jurisprudence,” while questioning whether the doctrine is legally justifiable (pdf). Meanwhile, Sotomayor criticized her colleagues (pdf), joined by Justice Ruth Bader Ginsburg, saying that the court was sending a signal that officers “can shoot first and think later” and “tells the public that palpably unreasonable conduct will go unpunished.”

Lawmakers have also joined the debate calling for the elimination of the qualified immunity doctrine. Rep. Justin Amash (L-Mich.) said on May 31 that he is planning to introduce a bill—Ending Qualified Immunity Act—to “eliminate qualified immunity and restore Americans’ ability to obtain relief when police officers violate their constitutionally secured rights.”

Meanwhile on Wednesday, Sen. Ed Markey (D-Mass.) said he and two other senators will introduce a resolution calling for the doctrine an “oppressive tool.” He will be joined by Sens. Cory Booker (D-N.J.) and Kamala Harris (D-Calif.).
Some pending cases that seek certiorari and ask the Supreme Court to reverse or recalibrate the doctrine of qualified immunity include one whether officers deployed a police dog against a suspect who was sitting on the ground with his hands up, and a case where Texas investigators entered a doctor’s office and demanded to go through medical records of 16 patients without notice or warrant.