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Supreme Court asked to reconsider relative immunity available to police accused of brutality

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As protests around the country continue over the death of George Floyd, the Supreme Court is examining a form of immunity that has shielded police from lawsuits about excessive force and other government officials for alleged civil rights violations.

The court could announce as soon as Monday whether to accept for argument challenges to a doctrine called qualified immunity. It protects officers from lawsuits unless plaintiffs can show that the accused violated "clearly established" laws or constitutional rights that they should reasonably have been aware of.

In practice, the "clearly established" test often means that for their lawsuits to proceed, civil rights plaintiffs must identify a nearly identical violation that has been recognized by the Supreme Court or appellate courts in the same jurisdiction.

Clark Neily of the libertarian Cato Institute, one of the groups that has urged the Supreme Court to revisit the issue, wrote that Floyd's death while in the custody of Minneapolis police pointed out the "perversity" of the court's rulings on qualified immunity.

"If Mr. Floyd's family wants to sue the officer who took his life, they will need to find an existing case [from the U.S. Court of Appeals from the 8th Circuit] holding that a police officer may not kneel on a unresisting suspect's neck, ignoring his pleas for help, until he passes out," Neily wrote.

While Floyd's death on May 25 has accelerated calls for the court - and Congress - to act, the court's qualified immunity decisions have raised concerns among lawyers and academics for years.

An extraordinary coalition of organizations on the left, right and middle - one federal judge called it "perhaps the most diverse amici ever assembled" - has called on the court to revisit the issue.

And so have two members of the court itself - Justices Clarence Thomas and Sonia Sotomayor, who represent opposite ideological wings of the court.

Thomas, citing leading conservative academics, questioned in 2017 whether the doctrine was properly grounded in common law and the Constitution.

Sotomayor has frequently dissented when her colleagues have granted or upheld qualified immunity in excessive-force cases, and has said the doctrine has grown from protecting officials from harassing lawsuits into something else.

The court "routinely displays an unflinching willingness" to reverse lower courts that do not give an officer qualified immunity, "but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these same cases," she wrote. "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers."

In one dissent, she said the doctrine encourages an officer to "shoot first and think later."

Numbers bear out Sotomayor's view of the court's decisions. Suffolk University law professor Karen Blum found that the court has considered the issue of qualified immunity in more than 30 cases, and plaintiffs have prevailed only twice. A recent Reuters investigation found similar results.

Institute for Justice lawyer Robert McNamara said that while police officers are the most noticed beneficiaries of qualified immunity, the doctrine is broader.

"Qualified immunity is about the whole Constitution," he said. "It's not about any particular type of employee. It's not about any particular type of constitutional right. It protects all government employees and it allows them to violate all constitutional rights."

Legal scholars - the University of Chicago's Will Baude is often credited with energizing the current debate - say the court has rewritten an important civil rights law meant to ensure that federal courts provide protection to all Americans.

The law is now known to lawyers as Section 1983 of the U.S. Code, and imposes liability on officials who use their positions to deprive anyone of "any rights, privileges or immunities secured by the Constitution."

There is no exception in the law for police. But in the 1980s, the Supreme Court began providing some immunity for officials, saying the rights violated must be "clearly established" for a lawsuit to proceed.

This was intended to provide some "breathing room" for police in tense situations making decisions in the moment, the court said.

"Qualified immunity balances two important interests - the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably," Justice Samuel Alito wrote in a 2009 decision.

But critics say the balance is off.

Judge Don Willett of the U.S. Court of Appeals for the 5th Circuit recently dissented from his court's decision to grant qualified immunity to members of the Texas Medical Board who rifled through records at a doctor's office without a warrant.

"To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior - no matter how palpably unreasonable - as long as they were the first to behave badly," Willett wrote.

Under the doctrine, he said, "it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached."

Willett pointed out the "strange-bedfellows alliance of leading scholars and advocacy groups of every ideological stripe - perhaps the most diverse amici ever assembled - had joined forces to urge the [Supreme] Court to fundamentally reshape immunity doctrine."

The case in which Willett dissented is among those the court is considering. But it may be the least attention-grabbing.

The court is also looking into a police officer who was granted qualified immunity after shooting a 10-year-old boy in the child's backyard while pursuing an unarmed suspect. The officer was shooting at the nonthreatening family dog and accidentally shot the child, who was obeying orders to lie on the ground.

A panel of the U.S. Court of Appeals for the 11th Circuit split 2 to 1 in awarding Georgia officer Michael Vickers immunity. "There was no clearly established law making it apparent to any reasonable officer in Vickers' shoes that his actions in firing at the dog and accidentally shooting [the boy] would violate the 4th Amendment," the judges said in their decision.

Also on the docket: a police officer who body-slammed a woman for walking away from him. An officer who released a police dog on a man who sat with his hands raised over his head. Officers who bombarded a woman's house with tear gas grenades, rendering it uninhabitable, even though she had consented to their request to search the house for a person. She gave the officers keys and told them he was not there; he wasn't.

The court has been considering the cases for several weeks, though that is not always a sign that it will accept one or more for argument next term. The justices recently passed on a case involving officers who stole \$225,000 in cash and rare coins from a house in which they were conducting a search warrant.

If the court wants to take a case, the fact-specific nature of each might be important. McNamara, an Institute of Justice lawyer representing Shaniz West, the woman whose house was destroyed, speculates that the court might be looking for a case in which there could be no disagreement about the constitutional violation involved, regardless of whether there was another case directly on point.