



George Floyd case revives 'qualified immunity' debate, as Supreme Court could soon take up issue

Tyler Olson
May 30, 2020

The death of George Floyd at the hands of a Minneapolis police officer has done more than just trigger massive protests and riots -- it's brought a simmering debate on "qualified immunity" for government officials to a veritable boil, and there's a chance the Supreme Court could accept a case on the issue in the near future.

Qualified immunity is a concept developed by the Supreme Court that gives government officials immunity from harms caused by their actions under a wide range of circumstances that may happen as they perform their official duties. It was described in a 1982 Supreme Court case as reflecting "the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority."

But the concept has come under attack in recent years, especially in libertarian-leaning legal circles, as essentially giving government officials a free pass to violate peoples' rights without facing legal recourse. The libertarian Cato Institute's vice president, Clark Neily, described it as "our near-zero-accountability policy for law enforcement," in a blog post Wednesday reacting to Floyd's death.

With Minneapolis burning, it's important to know who's responsible. A large measure of blame goes to SCOTUS, which has imposed on us a judicially invented policy of near-zero accountability for law enforcement that it steadfastly refuses to reconsider.
[https://www.cato.org/blog/officer-involved-killing-george-floyd ...](https://www.cato.org/blog/officer-involved-killing-george-floyd)

"I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime," Willett said in a 2018 opinion. "To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable."

Willett, in the "concurring dubitante" opinion -- dubitante is Latin for "doubting" -- went on to criticize the element of qualified immunity doctrine that makes it so plaintiffs who say they've had their rights violated must find a case with nearly identical facts in the same jurisdiction in order to get any relief.

The plaintiff in Willett's case alleged that his office had been searched unconstitutionally, and the court agreed that his rights had been violated. But because there was no case with nearly identical facts to his that the court could refer to, confirming that a "clearly established" right had been violated, the law enforcement officers were let off the hook.

This, Willet said, presents a "Catch-22" for people who say the government violated their rights: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose."

Neily echoed Willett's concern in his Wednesday blog.

MINNEAPOLIS MAYOR GIVES MASKS TO CROWDING RIOTERS AFTER WARNING IN-PERSON WORSHIP WOULD BE 'PUBLIC HEALTH DISASTER'

"Thus, if Mr. Floyd's family wants to sue the officer who took his life, they will need to find an existing case from the Eighth U.S. Circuit Court of Appeals holding that a police officer may not kneel on a unresisting suspect's neck, ignoring his pleas for help, until he passes out," he said. "If no such case happens to be on the books, their case will be summarily tossed out of court."

The Supreme Court has long resisted efforts by the legal opponents of qualified immunity to get the justices to reconsider the issue. On May 18 alone, the court denied petitions in three different qualified immunity cases it could have accepted to hear.

And it has explicitly defended qualified immunity as recently as 2019 in an opinion in an excessive force case, arguing that it is difficult for officers to know in the heat of the moment whether their actions might violate a person's rights, and therefore they should not be subject to liability unless the violation is "clearly established."

'To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable.'

— Judge Don Willett, U.S. Court of Appeals for the 5th Circuit

"Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue," the justices wrote in an unsigned opinion, quoting a 2018 case. "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."

Qualified immunity's opponents, however, would say that the way the principle is applied has become far from reasonable. And there are other such cases that are pending, which if the Supreme Court chooses could be accepted as early as Monday, stemming from the court's Thursday conference. Neily says that the Supreme Court, the body which created qualified immunity, needs to step up and kill it.

"The senseless brutalization of George Floyd, along with countless others, reminds us that this is not just a legal but a moral imperative," he said.

Tyler Olson covers politics for FoxNews.com. You can contact him at tyler.olson@foxnews.com and follow him on Twitter at [@TylerOlson1791](https://twitter.com/TylerOlson1791).