

Police Reform Faces Key Test at Supreme Court

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The new national push to reform police practices will face an early test at the Supreme Court in the coming weeks, as the justices decide whether to revisit a legal rule that protects police officers from lawsuits involving constitutional violations.

Congressional Democrats and criminal justice reform advocates are pushing to abolish qualified immunity, a defense available to police in civil rights cases that is extremely difficult for plaintiffs to surmount. Lifting immunity would leave law enforcement financially responsible for wrongdoing, which advocates say would help curb wrongdoing by cops.

While a cross-ideological body of critics say the doctrine has made it impossible to hold cops accountable in court, the prospects of a legislative compromise look dim.

The legislative bottleneck is putting heightened attention in the Court's decision. About a dozen petitions now pending before the justices urge the Court to rein in qualified immunity or rescind it altogether.

The Court could announce whether it will hear one of those cases as soon as Monday. Arguments would take place in the winter, with a decision to follow by summer 2021.

But there are reasons the justices might defer to the political branches, at least for the time being. The Court generally resists putting itself between Congress and the president, particularly on issues subject to active deliberations. Yet refusing to act could extract its own costs.

"I think it puts the Court in a tough spot," Dan Epps, a law professor at Washington University in St. Louis, told the *Washington Free Beacon*. "Chief Justice Roberts seems to love dodging controversial issues when there's a chance the Court won't have to decide the question because of what the political branches might do. But here it's not clear what the Court can do that won't make the justices part of the story."

"It wouldn't surprise me to see the cases get held without action for some time, or perhaps denied with some kind of statement by one or more justices explaining that they remain interested in the issue," Epps added.

Eliminating qualified immunity is a signature provision of the new Justice in Policing Act, a Democratic reform bill House leaders have fast tracked for a June 25 floor vote. Police unions have signaled ambivalence about the change. Fraternal Order of Police president Patrick Yoes said he was "heartened" by the legislation in a statement Tuesday, but urged House Democrats to produce a bipartisan bill.

Congressional Republicans are not formally involved with the House effort. Sen. Tim Scott (R., S.C.), who is leading a working group of Republican lawmakers expected to introduce a

competing proposal, told reporters Thursday that he has trouble seeing how an overhaul to police immunities would survive in the Senate.

White House press secretary Kayleigh McEnany was more emphatic, calling it a "nonstarter" for President Donald Trump.

To overcome qualified immunity, plaintiffs must show that an officer violated "clearly established law." It's a hard test to pass. As the rule operates today, plaintiffs must point to an earlier decision with near-identical facts that makes clear the misconduct alleged in their case is indeed unlawful.

Judge Don Willett of the Fifth U.S. Circuit Court of Appeals summarized the doctrine with a useful shorthand: "No precedent = no clearly established law = no liability."

One of the challenges to police immunity now before the justices arose when Nashville cops deployed a police dog against a suspect, Alexander Baxter, who had already surrendered. Baxter was burglarizing a home when police arrived on scene. The responding officers tracked him to a nearby basement. According to his petition, Baxter was sitting on the ground with his hands in the air when police unleashed the dog.

A lower court granted immunity to the officers after Baxter sued for excessive force.

"Baxter is especially noteworthy because it illustrates just how exacting and, frankly, farcical, the 'clearly established law' standard has become," the Cato Institute's Jay Schweikert, who has written critically of qualified immunity, told the *Free Beacon*.

"A prior case had already held that it was unlawful to use a police dog without warning against an unarmed suspect laying on the ground with his hands at his sides," Schweikert said. "But despite the apparent factual similarity, the Baxter court found this prior case insufficient to overcome qualified immunity because in the prior case, the suspect was laying on the ground, whereas Baxter was sitting on the ground with his hands up."

The Supreme Court has not hesitated to correct lower courts who wrongly withhold immunity from officers. In more than half a dozen cases since 2013, the justices have overturned decisions denying police immunity without argument. That rarely used procedural mechanism is called summary reversal.

In a 2018 case, Justice Sonia Sotomayor said that trend of pro-police summary reversals has fatal consequences.

"Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," she wrote, warning it encourages police to "shoot first and think later."

Sotomayor has an unexpected fellow traveler in Justice Clarence Thomas, who shared his own doubts about qualified immunity in a 2017 case involving the detention of Muslim men after 9/11. The pair have attacked the practice from different directions. While Sotomayor catalogues the real-world effects of the doctrine, Thomas has questioned whether the "clearly established law" standard has any basis in the text or history of federal civil rights law.

Were qualified immunity scaled back or rescinded, reformers predict police officers will be more cautious about using force. And since many police departments pay out judgments for officers

who lose court cases, cops will face continuous institutional pressure to make good choices. Some judges question how that would play out in the field.

In a 2019 dissent, Judge Edith Brown Clement warned that it's easy to second guess cops on the beat. Qualified immunity, she explained, accurately reflects the dangerous, fast-moving nature of police work. The threat of a lawsuit "seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force," she wrote.

"When a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences," she added.