



Supreme Court won't revisit qualified immunity for police, leaving it to Congress

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The U.S. Supreme Court on Monday officially took a pass on revisiting its 50-year-old doctrine of “qualified immunity” for law enforcement officers, despite intense national outcry over police misconduct and legal protections that shield cops from liability.

“The Supreme Court has made clear that they are not prepared to reconsider qualified immunity at this moment,” said Joanna Schwartz, an expert on the doctrine at UCLA School of Law.

Without explanation, the justices declined to take up the case of Norman Cooper, a 33-year-old black father, who was tased nine times by two San Antonio police officers while having an acute mental-health episode inside his parents’ home in 2015 and later died.

Cooper’s family filed an excessive force claim, but the Fifth Circuit U.S. Court of Appeals said the officers enjoyed qualified immunity for their actions. That decision now stands.

The case was one of 10 involving qualified immunity that the Supreme Court had examined this spring for possible review but ultimately rejected.

“The court is likely very aware of the activity in Congress around this issue, and it is something Congress could fix,” said Jay Schweikert, a criminal justice policy analyst at the Cato Institute and leading critic of qualified immunity. “But the fact that Congress could fix this does not absolve the court from addressing a mess it created.”

While the Civil Rights Act of 1871 gives Americans the unambiguous ability to sue public officials over civil rights violations, the Supreme Court subsequently limited liability to only those rights that have become “clearly established law.” Critics say the standard is near-impossible to meet.

Police officers accused of misconduct can face criminal charges, but convictions are exceedingly rare. That leaves civil lawsuits as one of the few avenues for alleged victims to pursue their claims.

“Advocates will keep bringing petitions to the Supreme Court, so they will have the chance to take up the issue in the fall,” said Schwartz.

Qualified immunity has drawn scrutiny from across the political spectrum -- and the Supreme Court bench. Justices Sonia Sotomayor and Clarence Thomas have both publicly supported steps to clarify or curtail the policy.

“I have previously expressed my doubts about our qualified immunity jurisprudence,” Thomas wrote last week in a dissent from the court’s decision not to take up the issue, “because our qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.”

At least four justices need to agree for a case to be accepted for review.

“The Court doesn’t make their votes public. But we know that fewer than four Justices were willing to reconsider qualified immunity, despite having numerous petitions to choose from at the conference. I perceive that action as the Court sending a strong message that, absent changed circumstances, it does not intend to reconsider qualified immunity anytime soon,” said Christopher Walker, a professor at The Ohio State University Law School.

“The ball is now definitively in Congress’s court. And state governments can also respond by limiting the immunities their officers enjoy under state law,” Walker said.

House Democrats have introduced legislation that would significantly curtail qualified immunity for law enforcement officers, but many Republicans remain staunchly opposed.

“We certainly don’t have the votes on qualified immunity to move it forward. The truth is suing the officer is harder to do than suing the department or the city. That’s where the resources are anyway. So, I think that’s the right path to go on,” said Sen. Tim Scott of South Carolina, the only black Republican in the U.S. Senate.

Police confront protesters as demonstrations continue in Brooklyn on May 29, 2020 in New York City. Spencer Platt/Getty Images

White House press secretary Kayleigh McEnany said President Trump is also opposed to the idea of limiting qualified immunity.

“Taking away qualified immunity would make the streets of this country a whole lot less secure,” McEnany told reporters last week. “The Supreme Court has litigated this for decades and has approached what they think is the appropriate balance with qualified immunity.”

Legal immunity for officers was originally devised out of concern about harassment from lawsuits and potential for personal bankruptcies. Some experts have also warned about the erosion of a deterrent effect from police if they became hesitant about enforcing certain laws because of potential legal liability.

Of the 30 qualified immunity cases that reached the Supreme Court between 1982 and 2017, just twice did the justices find immunity did not apply to official conduct, according to University of Chicago law professor William Baude.

Many legal experts argue that the policy has become overly broad, ineffective and unfair.

“One might think that the threat of civil liability will cause officers to act more cautiously. But in practice, officers almost never personally pay judgments when they are found liable,” wrote Daniel Epps, an associate law professor at Washington University in St. Louis, in a New York Times op-ed.

“Qualified immunity routinely requires courts to say that there will be no penalty for a police officer who has violated the Constitution. That sends the message — to officers and the public — that the police are above the law,” Epps wrote.