



## **‘Qualified immunity’ for police getting fresh look by Supreme Court after George Floyd death**

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With police misconduct in the spotlight, the U.S. Supreme Court on Thursday will consider whether to revisit its 50-year-old doctrine of "qualified immunity" for law enforcement officers, which has shielded cops from civil lawsuits even in cases where a citizen's rights have been violated.

"This is the cornerstone of our culture of near-zero accountability for law enforcement," Jay Schweikert, a criminal justice policy analyst at the Cato Institute, said of the doctrine created by the court in the late 1960s.

While the Civil Rights Act of 1871 gives Americans the unambiguous ability to sue public officials over civil rights violations, the Supreme Court has subsequently limited liability to only those rights that have become "clearly established law."

Critics say the standard is near-impossible to meet.

"In order for a plaintiff to defeat qualified immunity, they have to find a prior case that has held unconstitutional an incident with virtually identical facts to the one the plaintiff is bringing," said UCLA law professor Joanna Schwartz. "And over the last 15 years, the court has made it a more and more difficult standard for plaintiffs to overcome to go to trial."

The issue has been percolating in lower courts for years and drawn increasing scrutiny from across the political spectrum. It returns to the Supreme Court now by coincidence, as the country grapples with fallout from the death of George Floyd while he was in Minneapolis police custody on Memorial Day.

During their private weekly conference, the justices are expected to review petitions in eight different cases involving qualified immunity, which the court established in an attempt to curb gratuitous litigation.

In one case, a Tennessee man suspected of burglary was mauled by a police dog that was released by officers after he was sitting on the ground with his hands raised in surrender.

Another involves a Georgia mother whose 10-year-old son was inadvertently shot in the leg by a deputy pursuing a suspect into the family's yard.

An Idaho woman who gave police permission -- and the keys -- to search her home for a fugitive, wants to sue the officers who instead spent hours bombarding it from the outside with tear-gas grenades that destroyed her property. The fugitive was not inside.

In each case, federal courts dismissed lawsuits against the officers in light of the qualified immunity doctrine.

"It must be the case that this is weighing heavily on the justices' minds," said Schweikert. "They are smart enough to recognize the direct connection between the doctrine of qualified immunity and the outrage over the lack of accountability for law enforcement motivating so many people to the demonstrations that we're seeing."

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.

In a 2018 dissent, Justice Sonia Sotomayor warned that qualified immunity had become an "absolute shield" for law enforcement, "gutting the deterrent effect of the Fourth Amendment."

"It tells officers that they can shoot first and think later," she wrote, in a statement joined by Justice Ruth Bader Ginsburg.

Justice Clarence Thomas has also been publicly skeptical of the policy, writing in 2017 that qualified immunity does not have a solid foundation in the Constitution or common law.

"Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress," Thomas said. "In an appropriate case, we should reconsider our qualified immunity jurisprudence."

The justices now have that opportunity to clarify or curtail its precedent. It takes at least four justices to vote to take up a case for it to be added for oral argument later this year.

"I don't pretend to read Supreme Court tea leaves with any expertise, but it does seem like there's something that the court is trying to do," Schwartz said.

Former Minneapolis police officer Derek Chauvin has been charged with second- and third-degree murder and manslaughter charges in the death of Floyd. Three other officers have also been charged with aiding and abetting second-degree murder and aiding and abetting manslaughter.

Regardless of the outcome in those criminal cases, the Floyd family may also choose to seek civil damages against the officers.

Such a case would likely have to overcome the "exacting standard" of qualified immunity, Schweikert said.

"That's going to turn on whether the Eighth Circuit has cases that they've already decided in which police officers have held an unresisting, helpless suspect for a sufficiently long period of time to be close enough to the eight or nine minutes that we saw in George Floyd's case," he said. "I don't know if there are any such cases, and if there aren't, then immunity could stand."

Between 2017 and 2019, police won 56% of excessive force cases in federal courts when they claimed qualified immunity, a recent Reuters investigation found. During the three prior years, police won just 43% of the time.

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.

Legal immunity for officers was originally devised out of concern about legal harassment 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.

"You're trying to strike a balance," said Chris Walker, law professor at The Ohio State University, who has offered a qualified defense of the doctrine. "You don't want to have a legal system or an officer who is going to shirk from doing their duty. And so if you're afraid of liability or being dragged into court, you might not actually faithfully execute the law."

If it takes up qualified immunity, the Supreme Court will have to grapple with the fact that it is well-established precedent, Walker added.

"Justices (Elena) Kagan, (Stephen) Breyer, and even Ginsburg are going to be really worried about stare decisis," Walker said, referring to the legal principle of respecting precedent when deciding a case. "If we just get rid of a doctrine that was established in the 1960s and that we've repeatedly reaffirmed, what do we do with *Roe v. Wade*?"

Several legal scholars have speculated that the court could be poised to clarify the meaning of qualified immunity in a way that would scale back protections for law enforcement.

"I would see Kagan or (Chief Justice John) Roberts saying, it's part of our law; we're not going to get rid of it. But here are some principles to guide courts, and those principles actually really narrow the doctrine in a pro-plaintiff way," Walker said.