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The Supreme Court won't reexamine qualified immunity, the controversial legal doctrine protects cops from misconduct lawsuits

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The Supreme Court decided on Monday not to reconsider "qualified immunity," a legal doctrine that has come under renewed scrutiny as tens of thousands of people march against police brutality across America.

Over the past week, the court has reviewed several different cases where qualified immunity was invoked to protect police officers. Four justices must vote in favor of reviewing cases before the court can pursue a formal examination.

In the unsigned order declining to reexamine the doctrine, Justice Clarence Thomas dissented. The "qualified immunity doctrine appears to stray from the statutory text," he wrote.

In plain language, "qualified immunity" means that a public official can't be sued for actions they take while acting in their official capacity — even if they violate someone's constitutional rights.

The doctrine was designed to shield officers and other government officials "from harassment, distraction, and liability" when they do their job, Karen Blum, professor emerita at Suffolk University Law School, wrote in an analysis of the doctrine in the Touro Law Review.

The legal mechanism is used for officers, and all other government employees, "when they perform their duties reasonably," according to the Legal Information Institute at Cornell Law School. It "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," as then-Justice Antonin Scalia wrote in 1986.

Critics say that, in practice, the doctrine often lets public officials who commit egregious offenses off the hook, and it unfairly shields police officers from excessive-force lawsuits and civil rights violations.

It's difficult to convince a court to dismiss qualified immunity

Qualified immunity has evolved in meaning over the past few decades. The Supreme Court defined the contemporary version of it in the 1982 case Harlow v. Fitzgerald, according to Lawfare. According to that ruling, a public official could lose the protections of the immunity only when they have violated "clearly established statutory or constitutional rights."

One of the problems with qualified immunity, critics say, is that legal precedents have set too many obstacles to fight against it in court.

The "clearly established" standard is a high one. An officer could only be found guilty if a judge decided against an officer in a previous case with the same "specific context" and "particular conduct."

Meeting that standard is nearly impossible, according to Clark Neily, vice president for criminal justice at the libertarian Cato Institute and a professor at George Mason University's Antonin Scalia Law School. It would require "would-be civil rights plaintiffs to identify a relevant case in the same jurisdiction with nearly identical facts," he wrote in a Cato Institute blog post.

In other words, the plaintiff would need to find a highly particular legal precedent for their case — and a precedent set in the same jurisdiction where they're seeking justice.

"Thus, if Mr. [George] 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 [an] unresisting suspect's neck, ignoring his pleas for help, until he passes out," Neily wrote. "If no such case happens to be on the books, their case will be summarily tossed out of court."

Of 252 excessive-force cases from 2015 to 2019, police officers were granted qualified immunity in more than half of them, a Reuters investigation found.

In excessive-force cases, courts are granting qualified immunity at an accelerating rate. From 2005 to 2007, the courts favored police in 44% of cases, the investigation found. From 2017 to 2019, they favored police in 57% of cases.

Even if a court rules against a police officer, they can escape without punishment

Qualified immunity has "radically altered" the character of federal civil-rights protections, according to Neily.

Consider the police killing of Gabriel Winzer, a mentally impaired black man, in 2013.

In April of that year, Texas police responded to a call that a black man was shooting a gun at mailboxes in a residential neighborhood. At the scene, officers ordered the man to put down his weapon.

Meanwhile, the 25-year-old Winzer was riding his bicycle nearby. He had a toy gun under his belt. Within six seconds of spottings Winzer, the police fired 17 shots at him. Four shots hit Winzer. He died at the scene.

The Texas Rangers investigated the police officers, and a grand jury didn't find any wrongdoing on their part.

The court ruled that the police killing of Winzer was unconstitutional. But the police were given qualified immunity.

"We cannot conclude that Gabriel's right to be free from excessive force was clearly established here," the decision said.

The current rules allow for a "yes harm, no foul" reality where victims are "violated but not vindicated," US Court of Appeals for the Fifth Circuit Judge Don Willett, a Trump appointee, wrote in 2018.

"Wrongs are not righted, and wrongdoers are not reproached. Owing to a legal *deus ex machina* — the 'clearly established law' prong of qualified-immunity analysis — the violation eludes vindication," he wrote.

Willett was writing in light of a 2013 case in which two Texas Medical Board investigators entered Dr. Joseph Zadeh's medical office in Dallas with a subpoena for the medical records of over a dozen patients. A pair of DEA agents were with the investigators.

A staff member told the four officials that they needed to wait until she contacted a lawyer. The officials threatened that Zadeh's medical license could be revoked if she didn't comply.

She backed down, and the officials tore through patients' medical records for evidence of wrongdoing. They did not have a search warrant.

When Zadeh and an anonymous patient sued over the incident, the Fifth Circuit court ruled that the officials violated Zadeh's civil rights, since they didn't have a search warrant.

But they gave the defendants qualified immunity, saying Zadeh's suit did not point to "clearly established" facts in any similar, previous case.

Qualified immunity means "it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawfully," Willet wrote in his ruling.

Qualified immunity gives police officers 'breathing room'

Why does qualified immunity exist for police officers, anyway?

The idea behind it, as the Supreme Court explained, is to give them "breathing room" in tense and difficult situations, or when they need to make split-second decisions.

It also ensures that the threat of litigation won't deter otherwise reasonable police conduct, by ensuring officers won't be bankrupted by lawsuits or burdened by the demands of a lawsuit.

Whether these defenses hold water is up for debate. A study of more than 80 state and local law enforcement agencies, published in the New York University Law Review, found that individual officers almost never face consequences in cases of "egregious" conduct, and polls increasingly show that Americans want use-of-force by police to undergo scrutiny.

'A strange-bedfellow alliance' of scholars and advocates sought to shift Supreme Court opinion on qualified immunity

Even before the police killing of George Floyd, a wide range of experts and advocates were urging the Supreme Court to critically examine the doctrine.

"A 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 Court to fundamentally reshape immunity doctrine," Willett wrote in 2019.

In June, the Supreme Court examined ten different cases that were dismissed after judges granted qualified immunity to police sued for excessive force, including the 2019 case where Willett dissented. (The police killing of Floyd occurred after the Supreme Court decided to examine the doctrine.)

In one case, a police officer shot and killed a ten-year-old boy in his own backyard while the officer pursued a suspect. The officer said he accidentally shot the boy while aiming at the family dog.

In another, Tennessee police sicced a dog on a man suspected of burglary as he sat on the ground with his hands in the air.

In a third, an Idaho woman gave the police permission to search her house for a suspect. Instead, the police fired teargas at the house for hours, destroying her property. The suspect was not inside the home.

Many were hoping that with a resurgence of nationwide and global protests against police violence, the Supreme Court could help push for real change.

Efforts to reform the doctrine are underway in Congress. The Justice in Policing Act would eliminate it for police officers.

"Qualified immunity is something that has evolved over time. It's not written into any law," New Jersey Democratic Sen. Cory Booker told NPR. "But our highest courts in the land have decided that police officers are immune from civil cases, unless there's been specifically in the past a case of generally the exact circumstances that has led towards a successful action. ... It creates this bar towards civil action against a police officer for violating your civil rights."