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Thomas says he 'doubts' qualified immunity precedent that protects police from lawsuits

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Supreme Court Justice Clarence Thomas on Monday said he disagreed with a decision by other justices to ignore a case about "qualified immunity," the Supreme Court doctrine that often gives police officers accused of egregious misconduct a legal way to avoid personal accountability.

The doctrine has come under scrutiny in the wake of the death of George Floyd in the custody of the Minneapolis Police Department, an event that has caused the reexamination of a number of elements of the American criminal justice system. The court has consistently passed on qualified immunity-related petitions in recent years despite efforts to get the justices to consider the issue.

"I continue to have strong doubts about our … qualified immunity doctrine," Thomas said in his dissent. "Given the importance of this question, I would grant the petition for certiorari."

The dissent by Thomas, the only black Supreme Court justice, is an indication that at least one member of the high court believes it should reconsider the doctrine that has been decried in recent years from both sides of the aisle — from Senate Democrats to Trump Supreme Court shortlisters.

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

Sen. Kamala Harris, D-Calif., registered her dislike of qualified immunity as Senate Democrats released a resolution on the doctrine this month.

"Law enforcement should not be completely shielded from accountability when they violate someone's civil rights," she said. "It is clear that the Supreme Court's qualified immunity doctrine is broken and in need of reform. It is time that we say clearly that police officers should be held accountable to the law and to the people they are sworn to protect, period."

And Carrie Severino, the president of the conservative Judicial Crisis Network — which is regularly at odds with Harris and her fellow Senate Democrats — lauded Thomas's dissent.

“The Supreme Court’s approach to qualified immunity is a house of cards of judge made law dating back to the Warren Court,” she told Fox News. “The interconnected doctrines are devoid of any originalist approach or reference to the common law, and Justice Thomas is right that the entire area of law is in need of re-examination.”

Severino is a former clerk for the justice.

Thomas’ opinion was short, technical and straightforward, a departure from some of the more florid opinions he and fellow justices sometimes put forward — Justice Neil Gorsuch worked in a New York Yankees analogy to his opinion Monday on a case about gay and transgender rights. Thomas also didn’t say he felt strongly about the issue one way or another, simply emphasizing that he thinks it’s important the court address the question.

“Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer’s jurisdiction,” Thomas said. “An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.”

He added: “Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity ‘was ‘historically accorded the relevant official’ in an analogous situation ‘at common law.’”

The case Thomas dissented in involved a man who was bitten by a police dog even though he “alleged that he had already surrendered when the dog was released.” The man sued for damages, but was unable to be compensated because the qualified immunity doctrine protected the officers “because their conduct did not violate a clearly established right.”

The “clearly established right” element of the qualified immunity doctrine is highly controversial. Jay Schweikert, a policy analyst for the libertarian-leaning Cato Institute, said it leads to “moral injustices and practical absurdities” in a statement that lambasted the Supreme Court for “a shocking dereliction of duty” in not taking up a qualified immunity case.

Willett, in his 2018 opinion, described a cycle that ends with officers rarely being held accountable for egregious conduct thanks to the “clearly established right” requirement under qualified immunity.

“Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered,” he wrote. “Courts then rely on that judicial silence to conclude there’s no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose.”

The court on Monday also passed on two gun rights cases as such disputes continue to pile up on its doorstep, eliciting a dissent from Thomas on one of them. Rather than take on the constitutional issue, Thomas wrote, “the Court simply looks the other way.”

Qualified immunity has become a hot topic in Congress as the body considers a potential statutory fix, but Republican Sen. Tim Scott, R-S.C., the only black Republican in the chamber, told CBS' "Face the Nation" that qualified immunity would be a "poison pill" for Republicans on potential legislation. But Sen. Cory Booker, D-N.J., said that Republican Sen. Mike Braun of Indiana had told him the issue was "on the table."
Thomas closed by emphasizing that he believes the Supreme Court's treatment of qualified immunity has evolved past a reasonable interpretation of the law.

"I have previously expressed my doubts about our qualified immunity jurisprudence," Thomas said. "Because our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition."