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Reading the Tea Leaves On Qualified Immunity

In the last several terms, there has been a concerted effort by some groups and scholars to persuade the justices—through petitions for review—to re-evaluate their doctrine of qualified immunity. Two unsigned opinions Monday left some pessimistic and others still hopeful that the justices will reform the controversial doctrine.

The court reversed the Ninth and Tenth circuits, which had refused to grant qualified immunity in separate incidents involving police officers' use of excessive force when responding to domestic disturbances. In both cases, the justices, with no noted dissents, said the plaintiffs failed to show that the officers violated "clearly established law" at the time.

To demonstrate "clearly established law," the justices in their Monday opinions reiterated that a plaintiff must identify a previous judicial decision in a case with nearly identical facts, one that puts an officer on notice "that his specific conduct was unlawful."

The libertarian Cato Institute and the Institute for Justice have qualified immunity projects underway, and are either bringing or supporting cases that ask the justices to re-examine aspects of the doctrine.

Cato's Jay Schweikert said he was as pessimistic Monday about the court engaging in fundamental reform as he has been in prior terms.

"There were so many opportunities for the court to fundamentally reconsider the doctrine," he said. "[Monday's] cases just confirm that basic point." The two cases, he added, are "really pretty banal with nothing extraordinary about the facts and nothing novel in the reasoning. The fact the court is issuing these is more a signal that this is still business as usual."

But Anya Bidwell of the Institute for Justice is still optimistic. “I actually think these two decisions can be very much cabined to a very specific area of Supreme Court jurisprudence,” she said. “When it comes to split-second decisions, the Supreme Court has been deferential to police and unwilling to second guess officers in those situations.”

Her general optimism stems from three high court decisions suggesting the justices are rethinking aspects of their qualified immunity doctrine: *Taylor v. Riojas*, *Tanzin v. Tanvir*, and *McCoy v. Alamu*. Some scholars and experts, Bidwell said, cabin those decisions as “conditions” cases, for example in Taylor, a prison inmate was forced to spend hours in a cell covered with feces and an overflowing drain in the floor.

“The Supreme Court still pointed to them to say there are certain activities that offend the Constitution, especially in situations where you don’t have officers making split-second decisions,” Bidwell said.

Neither lawyer expects major reform from the current Congress since police reform negotiations in the Senate recently fell apart. Schweikert said he is “reasonably optimistic” that Congress may act in the future.

In the meantime, qualified immunity petitions will continue to come to the court. “The court invented qualified immunity as a policy decision,” Schweikert said. “There was no attempt to ground it in the history or text of the statute (Section 1983). If this question came up today, I don’t think a single member of the court would vote to create it.”