Supreme Court: Police Can't Brutalize Your Elderly Mother

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Today's hypothetical: Police officers come to your home at 2 a.m., insist (as a result of their own clerical error) that the car you're driving is stolen property, order you to lie on your belly, slam your mother against a garage door, and then shoot you three times from 15 feet away when you protest. Is there some chance—some very slight chance—that their conduct violates a "clearly established" constitutional right?

The Supreme Court on Monday said "yes." All nine justices agreed that a lower court that blew off the claim needs to go back and take a fresh look at the issue.

Tolan v. Cotton began early in the morning of December 31, 2008, when John C. Edwards, a police officer in Bellaire, Texas (a close-in suburb of Houston), saw a black SUV make an "abrupt turn" into a cul de sac. This struck him as suspicious. He watched as two African American men parked in front of a house and got out.

The police computer reported that the car had been stolen. In fact, it hadn't; it belonged to Bobby Tolan, the owner of the house. Bobby Tolan is a local celebrity with a 14-year career in Major League Baseball, including a spot in the outfield for the 1967 World Champion St. Louis Cardinals. The driver was his son, Robbie, then a 23-year-old minor-leaguer with big-league hopes of his own. Robbie lived at the house, too. He was unarmed. He and a friend had been to a Jack in the Box.

Edwards had triggered the stolen-car report by typing the wrong license plate number into the computer.

Edwards drew his pistol and ordered Robbie and his friend down on their bellies. Bobby Tolan and his wife, Marian, came onto the porch in their pajamas. Robbie's father told Edwards the car was his; the officer ignored him. He also urged their son and his friend to remain compliant; Robbie's mother, Marian, however, began to complain about the police entering their property and threatening her son.

Unfortunately, at this point "help" arrived in the person of Bellaire Police Sergeant Jeffrey Wayne Cotton. Without hesitation, he slammed Mrs. Tolan against her garage door (bruises persisted for days). When Robbie, 15 to 20 feet away, rose to his knees and said, "Get your fucking hands off my mom!" Sergeant Cotton shot him three times.

He had been on the scene 32 seconds.

Robbie lived, but he reports persistent pain, and his professional baseball career is almost certainly over.

Local district attorneys must work with police, and they are reluctant to move against them except in extreme cases. But even by Texas standards, Cotton's behavior was so egregious that the local state prosecutor brought criminal charges against him. Cotton was acquitted, but the indictment itself spoke volumes.

Two federal courts, however—the U.S. District Courts for the Southern District of Texas and the Fifth Circuit—decided the case wasn't even worth listening to. There would be no trial, no jury, no real finding of fact.

The federal courts' decision was based on special rules of civil-rights litigation. When a government official violates a citizens' rights, federal statutes allow the citizens to bring a federal lawsuit. The most important, 42 U.S.C. § 1983, is the basis of the *Tolan* case. It provides a civil action against any person who deprives another of any legal or constitutional right "under color of" law.

But individuals—prisoners, defendants, "sovereign citizens," and just people who have had a bad encounter with a cop—like to sue law enforcement, especially since, if they win, the government will pay their legal fees. To prevent baseless suits, the Supreme Court evolved a doctrine called "qualified immunity." Government officials are presumed to be immune from suit for their official acts. Unless the plaintiffs can allege facts that, if true, would violate "clearly established" rights, official defendants are *entitled* to immediate dismissal.

So, for example, if a cop arrests me, grabs the key to my house, drives there, and uses the key to search without a warrant, I can sue for damages, because any reasonable officer would know the Fourth Amendment forbids that. If, on the other hand, a cop arrests me, grabs my cellphone, and searches my call log, I probably can't sue, because that issue hasn't been resolved.

So the issue for the Fifth Circuit was, could a reasonable police officer believe he was legally justified in shooting Robbie Tolan? To decide that, the courts are required by the federal rules to *believe all the factual allegations made by the plaintiffs against Sergeant Cotton.* A ruling of "qualified immunity" means "even if you can prove everything you say, the shooting was still reasonable." Only if the court finds against "qualified immunity" will there be a trial, and real findings of fact.

The Fifth Circuit claimed to be applying that standard. It still dismissed the case because it believed, as the Supreme Court summarized it:

the front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, and that Cotton therefore could reasonably have feared for his life.

Reading the record in *Tolan,* I'd find it hard to reach that conclusion. The Tolans' testimony—true or not—directly contradicted a lot of the Fifth Circuit's version. No one disputes Robbie was unarmed. By his account, he rose only to his knees; a man he had never seen before had just barged onto his property and thrown his mother against a garage door. That man then shot him without warning.

The Supreme Court, in a 9-0 opinion, said that the appeals court had put a thumb on the scales. "By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of" Sergeant Cotton—which the rules forbid." (Justice Samuel Alito, by far the most pro-prosecution Justice on the Court, wrote separately to emphasize that the Court shouldn't overturn decisions like this often, but even he agreed that in this case, "there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.")

The Court's decision was narrower than some had hoped. Eric Del Pozo of Jenner & Block, the author of an amicus brief on behalf of the NAACP Legal Defense & Education Fund, Inc., told me there's a perception that the Fifth Circuit, and some other courts around the country, have begun to alter the test for "qualified immunity." Instead of asking, as the cases hold, whether a reasonable officer should have known he was violating the plaintiffs' rights, some judges, in some cases, have begun to view cases from the particular view of the specific officer involved. As they imagine what that officer was thinking or feeling, they have begun to "play with the facts," Del Pozo said, deciding "whether they think the officer's perspective was reasonable even if a jury could find for the plaintiffs."

The Court did not directly address the "qualified immunity" issue. But the decision may send a signal to the lower courts to apply the immunity test as written. "It rights the ship a little bit," Del Pozo said—and in a case that has been closely watched by civil-rights lawyers nationwide. He speculates that the court didn't want "to foster a perception that the courthouse doors are closed to persons with meritorious claims."

My own perception is that many federal judges seem to have little capacity for outrage—no real gut feeling that, when police storm onto private property, brutalize a woman, and shoot her unarmed son, there really might be something very badly wrong. The kind of "review" this case got in the courts below is hardly worthy of being called "law."

The Court sent a quiet signal that this kind of thing won't do; it was, as Will Baude notes, the first time in a decade it has held against law enforcement in a "qualified immunity" case. Let's hope that signal is received.