Tolan v. Cotton — when should the Supreme Court interfere in 'factbound' cases?

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By Will Baude

On Monday, the Supreme Court issued a noteworthy summary reversal in *Tolan v. Cotton*, a case in which it said that the Fifth Circuit had wrongly granted summary judgment to a police officer in a civil rights case. (I call the case a summary "reversal" even though technically it only vacated the judgment below rather than reversing it, because it's basically the equivalent.) I call the case noteworthy because by my count it's the first time in 10 years that the court has ruled against a police officer in a qualified immunity case — (*Hope v. Pelzer* and *Groh v. Ramirez* are the most recent previous occasions, from 2003 and 2004).

It is also noteworthy because Justice Samuel Alito concurred in the judgment, noting that he thought this kind of error correction did not fit the court's normal certiorari criteria:

> *[T]he granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. … In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.*

Alito was joined in his concurrence by Justice Antonin Scalia. The odd thing about this is the contrast with Scalia's dissent from denial (joined by Alito) in *Cash v. Maxwell* two years ago. There Scalia explained his willingness to take fact-specific AEDPA cases that had been decided in a defendant's favor:

> *It is a regrettable reality that some federal judges like to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit.*

And on Monday, Alito again dissented from the court's denial of cert. in a similar AEDPA case, citing his Tolan concurrence.

So what explains Alito's and Scalia's willingness to take "factbound" cases where lower courts have erroneously granted habeas relief to prisoners, but not factbound cases where lower courts have erroneously granted qualified immunity to officers? I see two hypotheses:

Possibility one. Alito and Scalia think there are different costs to the different kinds of errors. Put crudely, they like police officers and don't like prisoners, so they care more about correcting windfalls for prisoners than for the police.

Possibility two. Alito and Scalia believe there is an unusual epidemic of judges willfully refusing to apply AEDPA — which justifies an unusual posture of Supreme Court review — but don't think there's a comparable systematic bias in favor of qualified immunity.

I suppose that possibility two strikes me as more likely than one, but in either event, I think the view is mistaken. Ultimately this is an empirical question, but I think mistaken grants of summary judgment are probably at least as common as mistaken grants of habeas. If the court is going to spend time reviewing individual habeas cases to ensure that the Ninth Circuit is following the habeas statute, it seems reasonable for it to also spend time reviewing individual civil rights cases to ensure that other circuits are following the summary judgment standard.