The Volokh Conspiracy

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

By Will Baude May 7

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

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> 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.

Will Baude is an assistant professor at the University of Chicago Law School, where he teaches constitutional law and federal courts. His recent articles include Rethinking the Federal Eminent Domain Power, (Yale Law Journal, 2013), and

Beyond DOMA: State Choice of Law in Federal Statutes, (Stanford Law Review, 2012).

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So, now, the Supreme Court is going to put itself into the minds of lower court judges as to how they view the facts? Interpreting the law is one thing, telling them that their view of the facts is another.

Sounds like legal big brotherism.

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chri1720
5/7/2014 11:56 PM PST

Agreed with Will on this.

If the court is going to take factbound cases from the 9th/6th because they misapply the law, I see no reason to stop there. I am pretty sure one can find outlier factbound cases in every circuit.

Even Alito's opinion agrees that there are parts of this case where the 5th was wrong.

A more interesting question is which chambers/clerk did the cert memo for this case, not easy to recommend something like this given the default rule of not being an error correcting court.

Finally, always been curious on the author of per curiam opinions, completely done by clerk or by one of the justices?

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Bernard11
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"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."

What exactly are these respective windfalls?

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cs0718
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"Windfall" for the prisoner: life in prison, usually.

Windfall for the police: needn't even defend a civil-rights case, where legal fees and any award of damages will be covered by their employer anyway.

I think there are different costs here, but my calculation comes out the opposite way from the (hypothetical) calculation

attributed to Scalia and Alito.

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This actually reminded me quite a bit of Kyles v. Whitley where Scalia also complained it was unnecessary fact correction in a case where the majority thought the violation was clear and that there needed to be some kind of intervention to prevent lower courts from slacking in enforcing Brady violations. The trend had been for years to cut back on Brady violations, often due to the Supreme Court's own decisions. I think this case is kind of the same.

But I do think Justice Scalia wants to preserve finality of criminal convictions and to minimize liability for police officers. Therefore, his dissents are consistent, even if I do think he's also a touch hypocritical.

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Scalia & Alito's willingness to call out the infamous Ninth Circuit on AEDPA cases, including their factbound outlier decisions, may have something to do with the leader of that court's thumb-in-your-eye attitude: "They can't reverse everything," he says with a glint in his eye. (Heather K. Gerken, Judge Stories, 120 Yale L.J. 529, 530 (2010).)

It may also have something to do with the fact that in AEDPA cases some circuit courts (in particular the Ninth and the Sixth) are issuing factbound decisions overturning the reasonable, but contrary, factbound decisions of equally competent state court judges.

Finally, in Cash v. Maxwell not only did an extremist three judge panel contort the facts to reach the result they wanted. But, as Scalia points out in his dissent from cert., they completely misapplied the Court's clearly established holding in Napue and other due process cases.

AEDPA is a world onto itself, especially in the Ninth. Thus, your trying to analogize it to other situations where the Court is reticent to review factbound decisions doesn't cut it.

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We should just admit the obvious -- judges on both sides of the aisle are glorified political hacks with lifetime tenure. Not only does that admission explain a lot, it also saves a whole lot of unnecessary posturing and analysis.

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