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THE CASE AGAINST QUALIFIED IMMUNITY:

Policy & Polling



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June 2020

INTRODUCTION

The recent police killings of George Floyd, Breonna Taylor, Rayshard Brooks, and other Black Americans, along with a wave of police violence against protesters across the country, have sparked renewed scrutiny of “qualified immunity,” the court-created rule that makes it nearly impossible to sue police officers for excessive force and other constitutional violations. While a federal civil rights law allows people to bring constitutional claims against law enforcement officers, qualified immunity shields all but the “plainly incompetent or those who knowingly violate the law” from liability—a high bar that effectively excuses egregious, often lethal misconduct, and leaves victims of police violence without legal recourse for the violation of their constitutional rights.

Indeed, qualified immunity could conceivably close the courthouse doors to the family of George Floyd if they sue the former Minneapolis Police Officer who killed him. Given the national and international response to Floyd’s murder, the City of Minneapolis is likely to settle any civil suit brought by his family. But if it sounds outlandish that a lawsuit seeking justice for a murder as horrific as Floyd’s—an on-duty police officer knelt on Floyd’s neck for more than 8 minutes while Floyd lay face down on the ground, handcuffed and begging for his life—could be dismissed on qualified immunity, consider the case of Khari Illidge.

On a cool spring night in 2013, sheriff’s deputies in Lee County, Alabama, found Illidge, a 25-year-old Black man, running in the middle of the street, naked, unarmed, and obviously disoriented. When Illidge failed to stop, the deputies pulled their tasers and forced Illidge to the ground with six electric shocks. Another 13 shocks came while

Illidge was on the ground with two deputies on his back. One officer later testified that tasing him on the ground served no purpose other than to inflict pain and shut down his nervous system.

The officers then handcuffed Illidge, shackled his ankles with leg irons, and fastened the handcuffs and leg irons together, a form of restraint known as a hogtie that many police departments have banned. With a 385-pound police officer kneeling on his back, Illidge suddenly went limp and a mixture of white froth and blood seeped from his mouth. He was pronounced dead soon after.

Illidge’s family sued the deputies in federal court, alleging excessive force in violation of the Fourth Amendment to the U.S. Constitution. But both the trial court and the Eleventh Circuit Court of Appeals ruled that the officers were entitled to qualified immunity, and therefore not liable as a matter of law. Even assuming the officers used excessive force, the courts said, they did not violate rights that were “clearly established” by existing case law, which meant that there was no previous court decision that found a constitutional violation under nearly identical factual circumstances. It did not matter that the Supreme Court has held in multiple cases that law enforcement officers cannot use force that serves no legitimate purpose, or that in this case an officer admitted that the lethal force was punitive and gratuitous. There was no federal appellate or Supreme Court decision with facts virtually identical to what happened to Khari Illidge, so the deputies were immune from suit.

Making things worse, the Eleventh Circuit exercised its discretion—discretion that the Supreme Court created and has encouraged courts to use when analyzing these cases—

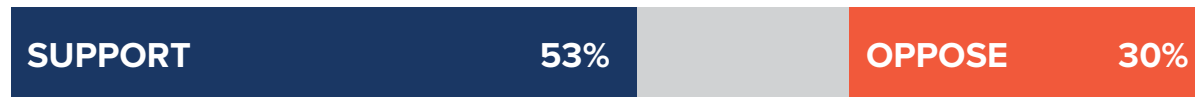
to not decide whether the officers who killed Illidge violated the Fourth Amendment. As a result, the court’s decision in Illidge’s case does not “clearly establish” the law, leaving qualified immunity available to officers who violate people’s rights in similar ways in the future. This outcome is not atypical; it illustrates how qualified immunity often works.

Although a federal court could take a similar approach to Floyd’s case, there is now a growing, bipartisan and cross-ideological demand to end qualified immunity altogether. At least two bills pending in Congress would abolish qualified immunity, including the [Ending Qualified Immunity Act](#) sponsored by Representatives Ayanna Pressley, D-MA, and Justin Amash, I-MI. Those lawmakers are joined by academics, [progressive](#) and [conservative](#) advocacy groups,

a [coalition of NFL players](#), and federal judges appointed by both [Democratic](#) and [Republican](#) presidents who say that qualified immunity is both bad law and bad policy—and ought to be abolished.

Now we can add American voters to that list. A new national poll from Data for Progress and the Justice Collaborative Institute found that, when voters learn how qualified immunity works, **53% of likely voters support ending qualified immunity** “so that police officers [can] be sued for violating a person’s constitutional or federal rights.” These results follow a [Reuters/Ipsos poll showing](#) that 75% Americans, including 60% of Republicans, support “allowing victims of police misconduct to sue police departments for damages.”

Do you support or oppose ending qualified immunity so that police officers can be sued for violating people’s constitutional and federal rights?



BACKGROUND: THE ORIGINS OF QUALIFIED IMMUNITY

During Reconstruction after the Civil War, Congress passed the Civil Rights Act of 1871—also known as the Ku Klux Klan Act—to help enforce the Fourteenth Amendment’s guarantee of equal protection under the law. It created a right to sue members of the Klan and anyone else acting “under color” of state law, including law enforcement officers, for violations of constitutional and other federally-protected rights. That provision, referred to as Section 1983 for its place in the U.S. code, provides that police officers and other officials “shall be liable” for “the deprivation of any rights” secured by the Constitution. The right to sue under Section 1983 went largely unenforced for 80 years, until 1961, when the Supreme Court made clear in Monroe v. Pape that plaintiffs could sue government officials for violations of their constitutional rights.

Section 1983 nowhere mentions qualified immunity. Instead, the Supreme Court created the doctrine nearly 100 years after the law’s passage. Pierson v. Ray, decided in 1967, involved a lawsuit against police officers who had arrested several people under an anti-loitering statute later found void under the First Amendment. The Supreme Court held that because the common-law tort of false arrest allowed the defense of “good faith and probable cause,” the officers should have that same defense against a similar claim brought under the Constitution and Section 1983.

Many scholars have rejected the Court’s argument that qualified immunity is grounded in the common law, and have explained that a good faith exception to liability for defendant police officers is “inconsistent with the common law and many of the Court’s own decisions.” But setting that aside, this initial conception of qualified immunity, limited to officers acting in good faith, was relatively narrow in scope. In subsequent decades the Supreme Court explicitly abandoned the common law justification and took several steps to both expand qualified immunity and make it harder for victims of police violence to clear the rule’s impossibly high standard.

In Scheur v. Rhodes, a 1974 case brought by the families of students killed by the National Guard at Kent State, the Court held that qualified immunity would apply to all suits under Section 1983, not just to constitutional claims similar to common law claims that allowed for a good-faith defense. In 1982, in Harlow v. Fitzgerald, the Court dispensed with any inquiry into an officer’s good faith; all that matters, the Court said, is “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.” In other words, any evidence that an officer acted in bad faith is irrelevant, and qualified immunity is available in all cases, to all defendants, unless the rights they violated were “clearly established.” A few years later, in 1985, the Court explained what this standard means in practice: qualified immunity provides “ample protection to all but the plainly incompetent or those who knowingly violate the law.”

Since Harlow, the Court has repeatedly emphasized that a right is not “clearly established” unless a previous court ruling found a violation under indistinguishable factual circumstances. While the Court has said that it does “not require a case directly on point,” that

assurance has proven hollow, a boilerplate phrase that is of little real significance. Instead, the Court has admonished again and again that “‘clearly established law’ should not be defined ‘at a high level of generality,’ and that government officials violate clearly established law only when “[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right.”

And the Court has been unusually active in enforcing this edict. In recent years, the Court has developed a specialty docket—what law professor Will Baude calls the Court’s “immunity-protection program”—reversing lower court denials of qualified immunity because the lower court “misunderstood the ‘clearly established’ analysis” and “failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment.”

The Court has also made sure that fewer rights will be developed with the requisite specificity to meet the strict “clearly established” standard. In Pearson v. Callahan, decided in 2009, the Court encouraged lower courts to avoid deciding whether the police used excessive force or committed some other constitutional violation, and to instead dispose of lawsuits by finding that, even assuming they did, the law was not “clearly established.” This rule stunts development of the law and puts plaintiffs in an impossible bind: on the one hand, the Supreme Court has told plaintiffs they must find cases where officers acting under similar circumstances were held to have violated the Constitution; on the other hand, the Supreme Court has told courts they can avoid resolving that issue in the name of efficiency. A Reuters investigation found that courts have increasingly taken this route, leaving a dearth of clearly established law that would permit police liability.

QUALIFIED IMMUNITY UNDERMINES POLICE ACCOUNTABILITY

With the current Supreme Court so vigilant in this area of the law, lower courts regularly take the “clearly established” requirement to extremes. Several cases that the Supreme Court recently considered but declined to hear—leaving the lower court decisions intact—illustrate the types of egregious behavior excused by qualified immunity. Last year, the Eighth Circuit granted qualified immunity to an officer who wrapped a small woman in a bear hug and then slammed her to the ground, breaking her collarbone and knocking her unconscious. Although earlier cases held that an officer cannot use force against a nonviolent person simply because they are walking away, the appeals court concluded that the law was not clearly established because in none of those cases did a “deputy ... use a takedown maneuver to arrest a suspect who ignored the deputy’s instruction to ‘get back here’ and continued to walk away from the officer.”

Also last year, the Eleventh Circuit (the same court that gave immunity to the deputies who killed Khari Illidge) gave immunity to a deputy sheriff who repeatedly attempted to shoot a pet dog that was posing no threat, and wound up shooting a nearby ten-year-old child instead. The child’s mother could not sue the deputy to recover medical costs, the Eleventh Circuit said, because she “failed to present us with any materially similar case from the United States Supreme Court, this Court, or the Supreme Court of Georgia that would have given [the deputy] fair warning that his particular conduct violated the Fourth Amendment.”

A recent Sixth Circuit case involved Nashville police officers who released their dog on a burglary suspect who had surrendered and was sitting with his hands raised. A prior decision from the same court had held that officers violated the Fourth Amendment when they released a police dog on a suspect who had surrendered by lying down. But the appeals court ruled that this precedent did not “clearly establish” that it was unconstitutional to release a police dog on a surrendering suspect sitting with his arms raised.

In none of these cases did the court decide whether a constitutional violation occurred. Instead, the courts granted qualified immunity without ruling on the constitutionality of the underlying behavior. As a result, these decisions do not create “clearly established law” that can be used to seek justice for future police misconduct. The result is a raft of qualified immunity decisions—and there are many, many more—that, as Justice Sonia Sotomayor wrote, “tell[] officers that they can shoot first and think later,” and “tell[] the public that palpably unreasonable conduct will go unpunished.”

The Supreme Court recently declined to review these and other cases challenging qualified immunity. Now, the issue is left for Congress to address.

QUALIFIED IMMUNITY SHOULD BE ABOLISHED

Since its inception, scholars have rejected the Court’s argument that qualified immunity is grounded in the common law, and have explained that a good faith exception to liability for defendant police officers is “inconsistent with the common law and many of the Court’s own decisions.” Practically speaking, as Fourth Circuit Judge James Wynn explained, qualified immunity

“effectively nullifies” Section 1983 and the Constitution’s restrictions on police power. It also sends a message that police officers can violate the Constitution and even kill people with impunity.

Along with Judge Wynn and Justice Sotomayor, other members of the federal judiciary, both liberal and conservative, have echoed these concerns. Justice Clarence Thomas, arguably the Court’s most conservative justice, wrote this week that “qualified immunity doctrine appears to stray from the statutory text,” and that he would restrict the doctrine to its earlier, narrower form. Judge Steven Grasz of the Eighth Circuit and Judge Don Willett of the Fifth Circuit, both Trump appointees, have each said that the Court’s qualified immunity doctrine is ripe for reform. Last year Judge Willett lamented that “the real-world functioning of modern immunity practice—essentially ‘heads government wins, tails plaintiffs lose’—leaves many victims violated but not vindicated.”

In the political branches, there remain skeptics of reforming qualified immunity on both sides of the aisle. Some worry that eliminating immunity won’t do enough to curb police violence, while others, including the White House and Senate Republicans, have said that qualified immunity remains necessary. As Attorney General William Barr said, “I don’t think you need to reduce immunity to go after the bad cops, because that would result certainly in police pulling back.”

Having studied the impact of qualified immunity doctrine on civil rights lawsuits around the country, I think that both perspectives are overstated. Senate Republicans and Barr argue that eliminating qualified immunity will overdeter officers, and suggest that a massive influx of cases will subject officers to personal financial liability. But my research shows there are many other barriers that weed out weaker civil rights claims. For one, the Fourth Amendment

already protects officers who act reasonably; the Supreme Court’s test for a Fourth Amendment violation is whether the officer’s conduct was reasonable under the circumstances. Qualified immunity, layered on top of that standard, immunizes conduct that was unreasonable, but not clearly established as such. And even when officers are found liable, [my research](#) shows that police officers are almost always indemnified by the jurisdictions that employ them, and so they rarely contribute to settlements and judgments entered against them.

But it is also wrong to conclude, based on this evidence, that eliminating qualified immunity would have no tangible effects on police accountability. I have [found](#) that, because qualified immunity is a complicated doctrine to learn, and expensive and time-consuming to litigate, eliminating the defense would streamline civil rights suits for plaintiffs, defendants, and courts. It would also focus attention on what should be the issue in these cases: whether government officials violated plaintiffs’ rights. These changes would combine to allow plaintiffs whose constitutional rights have been violated to be made whole.

Eliminating qualified immunity would also mean that courts would clarify the scope of constitutional rights, which would give more guidance to police departments as they craft their policies and trainings. Finally, eliminating qualified immunity would stop the steady stream of Supreme Court and lower court cases denying plaintiffs relief and seeding the message that officers can violate people’s rights with impunity, and that people’s rights do not matter. It’s not a silver bullet, but ending qualified immunity is the most important and wide-reaching first step that Congress can take to improve accountability.

With qualified immunity, the Supreme Court has chosen deference to police power at the expense of the rule of law and the integrity of our courts. The judiciary is supposed to ensure equal justice—to protect the rights of vulnerable, marginalized people when they are victimized by the powerful. By creating a virtually ironclad shield for police officers who violate the Constitution, the Supreme Court has done the opposite. Qualified immunity should be abolished.

POLLING METHODOLOGY

From 6/13/2020 to 6/14/2020 Data for Progress conducted a survey of 1,157 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is ± 2.9 percent.