BOSTON REVIEW

We Can End Qualified Immunity Tomorrow

Alex Reinert

June 23, 2020

The discourse around the criminal legal system, and policing and punishment in particular, has shifted considerably in the wake of George Floyd's murder by a Minneapolis police officers. To longtime critics of the criminal legal system, the killing was yet another confirmation of the racism endemic to U.S. policing—part and parcel of the over-policing and dehumanization of people of color, black and brown people in specific. For many members of the public, however, the event has been consciousness-raising. The confluence of voices has amplified wide-ranging calls for reform aimed at increasing police accountability and, in some corners, decreasing the footprint of law enforcement as much as possible.

Government lawyers have the power and obligation to determine whether particular litigating positions are in the public's interest. They can exercise their discretion not to raise certain defenses in civil rights litigation.

Advocates see courts as one key to ensuring accountability and have rightly focused their energy on dismantling the substantial barriers that the United States Supreme Court has erected that stop many civil rights lawsuits in their tracks. Among the targets that have garnered the most attention in this respect is the doctrine of qualified immunity—a common law defense (i.e., created and modified by judges, not legislatures) that protects law enforcement officers from damages liability, even when they violate constitutional rights. Officers can claim this immunity if the specific right they violated was not "clearly established" by prior precedent at the time they acted or if the officers reasonably believed they were not acting unconstitutionally.

In the wake of today's protests, there is renewed optimism from many corners that the Supreme Court will abandon the doctrine or that Congress will overrule it through legislation. It is understandable to look to judicial and legislative change to increase access to justice for victims of civil rights violations. But this road will surely be long and challenging. The Supreme Court has repeatedly declined opportunities to revisit qualified immunity (continuing the trend **last week**), and Republican leadership in the Senate has already **made clear** that they will not take up legislation to end qualified immunity.

There is another approach, however, that could well be implemented tomorrow. The courts and Congress would be irrelevant if state attorneys general and city law departments took one simple step: stop deploying the powerful weapons the Supreme Court has provided to civil rights defendants over the past five decades, qualified immunity among them. These are tools that the government is permitted, but not *required*, to use as roadblocks against valid constitutional claims. If progressive officials, at any level of government, are truly committed to accountability and to the Black Lives Matter movement, they can lay down these weapons and let citizens whose constitutional rights have been violated be heard in court.

Incrementally, since the doctrine of qualified immunity was first introduced in **1967**, the Supreme Court has made the defense more and more powerful by making it easier for officers to show that they behaved reasonably or that the relevant law was not clear enough for them to know that they were violating the Constitution. In the words of the Supreme Court, it now protects all but "**plainly incompetent**" officials. Indeed, over the past twenty years, in nearly every case heard by the Court, including many involving the use of deadly force by police officers, a majority of justices has found that officers should have been granted qualified immunity.

Qualified immunity not only shields constitutional wrongdoers from accountability and prevents injured people from recovering compensation; it also stunts the development of constitutional law because a court can decide that a right is not "clearly established" first, without deciding whether an officer violated the Constitution. If a court finds a lack of clear precedent, it never decides whether the actual conduct violates the Constitution, which means that no new clearly established law is created. Rights become frozen in past precedent, leaving citizens unprotected when officers violate the Constitution unless they act so outrageously to justify denying them qualified immunity.

So-called progressives in the executive branch at all levels of government have exhibited a distinct failure of imagination when it comes to defending law enforcement officers against alleged unconstitutional behavior.

Qualified immunity is not the only barrier that the Supreme Court has created to enforcing civil rights. **Absolute immunity for prosecutors**, limitations on municipal liability, and the increasing difficulty of suing high level officials because of strict supervisory liability standards have all been the subject of concern and criticism by scholars and civil rights advocates over the years. If we step back and consider the overlap of all of these doctrines, one conclusion is inescapable: whether plaintiffs are suing for damages or trying to create changes to policy, whether they are suing individual officers, their supervisors, or their employing entities, the Supreme Court has increasingly narrowed the pathway for plaintiffs to succeed, even when a constitutional violation is established.

Because all of these barriers have been announced and expanded by an activist conservative Supreme Court, through statutory interpretation or federal common law, there are currently calls for Congress to take action to respond. In particular, both conservative and liberal lawmakers have expressed openness to reversing the Supreme Court's expansion of qualified immunity. Democrat Ayanna Pressley and former Republican (now Libertarian) Justin Amash have introduced the "**Ending Qualified Immunity Act**" in the House. Non-governmental organizations like the Cato Institute and the ACLU, with diverse political commitments, have joined the call for abolishing the defense. Although some Republican Senators expressed openness to revisiting the doctrine, Republican leadership has declared it is a nonstarter, making it clear that any reform is a long-range prospect. Nor has the Supreme Court shown any inclination to revisit the issue despite many recent high-profile opportunities.

Whatever the prospects of success for these efforts, the debate assumes that change to the governing legal regime is the only way to eliminate or mitigate qualified immunity and ensure

accountability in our criminal legal system. This narrative, however, is only partially accurate. It is undeniable that qualified immunity and other barriers make it harder to ensure accountability and to transform our criminal legal system. But qualified immunity and similar defenses share a common element: they are so-called "affirmative defenses," which means that courts may only consider them if the parties raise them. In other words, in order to be effective, they must be deployed in litigation by government lawyers, usually lawyers in state attorney general offices or city or county law departments. It is these individuals who raise qualified or absolute immunity as a defense, or who argue against municipality and supervisory liability.

But the lawyers charged with defending governmental actors who are alleged to have violated the Constitution have a choice. They can forgo the tools the Supreme Court has provided to prevent those cases from addressing the underlying constitutional violations at issue. They can and should decline to invoke qualified immunity or absolute immunity as a defense in litigation. They can and should permit supervisors and municipal entities to be held liable when subordinates or line officers violate constitutional rights. As a practical matter, how government attorneys can take this step will vary by jurisdiction, because individual officers may claim a right to raise these defenses, which could implicate the professional obligations of government attorneys. In some cities and states, mayors, governors, or elected attorneys general could make it a condition of representation and indemnification that government attorneys are free to decline to raise qualified immunity. In other jurisdictions, elected officials may choose to substitute other forms of liability that displace individual liability while still permitting courts to determine whether an officer acted unconstitutionally.

Whatever the necessary practical steps, the point remains that mayors, governors, and state attorneys general who claim the mantle of civil rights can make that commitment real. When progressives are elected to these positions, they should actively embrace reform and accountability by changing how the government defends against accusations of unconstitutional conduct.

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In the state of New York, for example, Governor Andrew Cuomo, Attorney General Letitia James, and mayors like New York City's Bill de Blasio have embraced, to various degrees, the Black Lives Matter movement. But none of them has shied away from having their lawyers use the doctrines of qualified immunity, absolute immunity, and limited municipal and supervisory liability in court to defend their officers or their cities. Under Attorney General James's leadership, her office has asserted qualified immunity for parole officers who **beat and falsely charged** a parolee because he was wearing a hat indoors. Mayor de Blasio's administration has argued for qualified immunity in cases where a police officer **shot and killed** an unarmed victim without warning, and where officers shot an emotionally disturbed man more than four times, **killing him**. The same is true in cities and states across the country.

This blind spot has, unfortunately, long been the case. Even while the Obama administration, to its credit, declined to defend the constitutionality of the Defense of Marriage Act in the United States Supreme Court, it still **argued** that a border patrol officer who shot and killed an unarmed Mexican boy should be entitled to qualified immunity. So-called progressives in the executive branch at all levels of government have exhibited a distinct failure of imagination when it comes

to defending law enforcement officers against alleged unconstitutional behavior. They must be held to account for it.

To be clear, public officials need not concede liability in civil rights cases. A city could decline to invoke qualified immunity in suits against police officers accusing them of excessive force, and still argue that officers have behaved within constitutional bounds. Similarly, if a city stipulated that municipal or supervisory liability could flow from the unconstitutional conduct of a line officer, it could still argue that the officer's conduct was legal.

Individual officers could hardly complain about this state of affairs, because government entities across the country routinely defend and indemnify officers in civil rights litigation brought seeking damages. But government lawyers have the power and obligation to determine whether particular litigating positions are in the public's interest. If progressive prosecutors can exercise their discretion not to prosecute certain categories of offenses, than progressive mayors, governors, or attorneys general can exercise their discretion not to raise certain defenses in civil rights litigation.

If progressive officials, at any level of government, are truly committed to accountability, they can lay down weapons like qualified immunity and let citizens whose constitutional rights have been violated be heard in court.

Significant benefits would follow if progressive elected officials, nominally committed to movements like Black Lives Matter, took this step. First, and most directly, it would ensure that victims of constitutional violations are able to secure compensation and in some cases forward-looking relief that would prevent future violations. Second, even if only some jurisdictions adopted these changes, it would allow for the articulation and development of legal norms that has been stilted by first-order barriers like qualified immunity—in some jurisdictions, rights would no longer be trapped in the amber of prior "clearly established" law, allowing constitutional law to develop and become established for future cases. Third, it might restore some faith in the law as a tool for addressing systemic racism and brutality that permeates the criminal legal system. Fourth, and perhaps most importantly, unlike changes proposed through legislation or attempts to convince the Supreme Court to revisit doctrine, it can be accomplished tomorrow.

Being a progressive elected official means more than marching with protesters and mouthing the words of reform. If progressives in state and local executive branches are truly committed to securing accountability and transformation of the criminal legal system, they should lower the weapons they have so effectively deployed in the past.