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New House Bill Would Revoke ‘Qualified Immunity’ for Police

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A bill that would make it easier to sue police officers and other government officials for violating people’s civil rights was introduced in the U.S. House Thursday by Representatives Ayanna Pressley (D-MA) and Justin Amash of Michigan, a former Republican who joined the Libertarian Party in April.

The bill would eliminate qualified immunity, the ability of police officers to argue they acted in good faith when they violated someone’s constitutional rights. It also allows police to be sued for enforcing a law if the law is subsequently changed. The doctrine has come under attack recently by both liberal and conservative scholars.

Several current Supreme Court justices have expressed concerns about qualified immunity. Justice Sonia Sotomayor has complained that in practice the doctrine amounts to an “absolute shield” protecting police officers who are accused of using excessive force and once described it as “sanctioning a shoot first, think later approach to policing.”

At the other end of the ideological spectrum, Justice Clarence Thomas said he has “growing concern with our qualified immunity jurisprudence” and suggested that the defense was never intended by Congress.

Qualified immunity has a legitimate purpose but it has “gotten out of control” and courts “have taken what was a modest defense and turned it into a rule where most of the time you can’t sue,” said professor William Baude of the University of Chicago Law School, an author of a law review article on the topic.

The Supreme Court first allowed police officers to use qualified immunity back in 1967 in a case where police arrested a group of black and white clergymen for using a segregated bus terminal. The Mississippi law that allowed the arrests was later declared unconstitutional. But the court said police couldn’t be held liable if they acted in good faith and they weren’t required to predict that the law would eventually be struck down.

The Supreme Court changed the rules in 1982, saying that what mattered was not the police officer’s subjective good faith but rather whether the constitutional right at issue was “clearly established” at the time.

Recently the Reuters news agency analyzed 529 federal appeals court cases and found a “growing trend” toward judges excusing police brutality under the qualified immunity doctrine. “More than ever, they are ignoring the question of whether cops have violated a plaintiff’s constitutional rights” and “increasingly requiring a nearly identical case from the past to serve as

a precedent that clearly establishes an officer's actions as illegal – a high standard that again makes it hard to win against the police,” the report said.

The Supreme Court is currently considering a case in which a suspected burglar claims he put his hands up and yet officers still released a police dog that attacked him. The officers say they didn't see his hands, and in any event they didn't violate any clearly established rights. The suspected burglar is being supported by a diverse group, including the NAACP Legal Defense Fund, the libertarian Cato Institute, the ACLU and the Alliance Defending Freedom, a conservative Christian organization.

“Qualified immunity shields police from accountability, impedes true justice, and undermines the constitutional rights of every person in this country,” Pressley said in a joint statement with Amash.

The doctrine “protects police and other officials from consequences even for horrific rights abuses,” Amash added. “It prevents accountability for the ‘bad apples’ and undermines the public's faith in law enforcement.”

“It shall not be a defense ... that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time,” the bill's text reads.

It would also not support a defense stating that the plaintiff's rights were not yet clearly established “or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.”

Even Baude thinks this goes too far. He believes that a government official who was following the law at the time shouldn't be able to be sued for damages just because the law was later changed, and he gives the example of officials who denied marriage licenses to gay couples before the Supreme Court recognized a right to gay marriage.

If a police officer can be sued for enforcing a valid law, “Why would I even want to work?” asked David Thomas, a professor of justice studies at Florida Gulf Coast University.

He said he thinks immunity has gone too far, but he hopes legislators will “come to their senses and find some middle ground.”

On the other hand, Baude notes, police officers who violate people's rights seldom personally pay legal damages; they are usually covered by the state or municipality.

Interestingly, the bill applies to state and local officials but not to federal officials who violate people's constitutional rights.

That's because “there are more abuses” at state and local agencies, Thomas said. He said federal oversight of local law enforcement has been sharply curtailed by the Trump administration and as a result, some larger agencies “have run amuck.”

But “federal government officials can violate people's rights as well, as we've seen earlier this week outside the White House,” said Joanna Schwartz, a professor at UCLA School of Law.

Some scholars have suggested that qualified immunity is necessary in order to prevent law enforcement officials from being burdened with discovery in large numbers of frivolous cases.

But a 2017 article in the Yale Law Journal authored by Schwartz found that qualified immunity resulted in dismissals in fewer than 4% of cases – although the article suggested that the doctrine nevertheless warped the process by discouraging plaintiffs from filing suit or encouraging them to file suit on other grounds.

In addition to a number of liberal groups, the bill is supported by several libertarian organizations including the Republican Liberty Caucus and Young Americans for Liberty.