Columbian College of Arts & Sciences
THE GEORGE WASHINGTON UNIVERSITY
History News Network
Because the past is the present and the future too

We Can End Qualified Immunity Tomorrow

June 23, 2020

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.

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.