‘They get a get-out-of-jail-free card’: Why law-enforcement and other government officials are protected from civil lawsuits

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As the deaths of unarmed Black people such as George Floyd, Breonna Taylor and Rayshard Brooks have reignited the national debate on excessive force and police accountability, activists have called for an end to qualified immunity, a legal doctrine that protects law-enforcement officers and other government officials from lawsuits over their conduct.

The Supreme Court this month declined to hear a handful of cases related to qualified immunity, putting the ball squarely in Congress’s court.

MarketWatch spoke with legal experts about how qualified immunity works, how it came to be, what it looks like in practice, and how critics across the ideological spectrum are working to challenge it:

What is qualified immunity?

Qualified immunity, a type of legal immunity, is a defense that a government actor can pose to defend against a civil lawsuit, said Taryn Merkl, senior counsel at the Brennan Center for Justice and a former assistant U.S. attorney in the Eastern District of New York. It essentially protects a government official from a lawsuit unless that official violated a statutory or constitutional right that was “clearly established,” Merkl told MarketWatch, and it “can be posed very early on in a case to prevent the lawsuit from going forward at all.”

Supreme Court Justice Samuel Alito wrote in an opinion for the 2009 case Pearson v. Callahan that qualified immunity balanced two key interests: “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”

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Many courts have interpreted the “clearly established” piece of qualified immunity to mean that there needs to be a prior case that held that somebody’s actions in similar circumstances violated a person’s rights, Merkl said. “Some courts have held that unless there are facts that almost

match the facts of an alleged violation, it wasn't clear to the officer that what he did was unconstitutional," she said.

Qualified immunity is only applicable in civil lawsuits — which, as the libertarian Institute for Justice points out, are often families' and individuals' only means of seeking relief in the absence of criminal charges being brought.

Amir Ali, the director of the MacArthur Justice Center's Washington, D.C. office and a Harvard Law School lecturer, sees it this way: "Qualified immunity is basically a rule that police officers, correctional officials and other public officials are above the law and above the Constitution," he told MarketWatch. "It says that even when a police officer engages in gross misconduct, whether it be police brutality or murder as we've seen time and time again in video after video, that they're granted immunity from any suits trying to hold them accountable for their conduct."

Why do critics want to end qualified immunity?

Qualified immunity has united skeptics and critics across the ideological spectrum, including conservative Supreme Court Justice Clarence Thomas, liberal Justice Sonia Sotomayor, the American Civil Liberties Union and the libertarian Cato Institute. A principal concern is the idea that it insulates officers from liability for potential constitutional and statutory wrongs, "but also that it encourages a culture of lack of accountability," Merkl said.

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— Robert McNamara, a senior attorney at the Institute for Justice

"Whether you subscribe to a world of bad apples or you think the whole tree is rotten, we're already talking about somebody who is a bad enough apple that they've done something that no reasonable officer in the circumstance would have done," Ali said. "But qualified immunity says even that person is going to walk away with impunity — if the victim isn't able to find a case out there that happens to look pretty much exactly like this case."

Robert McNamara, a senior attorney at the Institute for Justice, argued that qualified immunity "makes it almost impossible to hold government officials accountable for violating the Constitution" — and in a certain way, he added, "it makes it more difficult to make a government official liable the more unusual and egregious their conduct is."

"They get a get-out-of-jail-free card simply because they violated your rights in a way that is slightly different," McNamara told MarketWatch. "Qualified immunity gives government officials a rubber stamp to violate your rights, as long as they do so in a way that no one has ever thought of before."

The 2001 Supreme Court decision Saucier v. Katz outlined a two-step test to determine whether an official would receive qualified immunity: A court must first consider whether the facts alleged demonstrate that a constitutional right was violated, and if so, it must examine whether

that right was “clearly established.” Qualified immunity applied unless the official’s conduct violated a clearly established right. But eight years later in Pearson v. Callahan, the Court held that while this two-step protocol was “often beneficial,” it wasn’t mandatory.

“What the Supreme Court has said is that in evaluating a qualified-immunity defense, courts can skip directly to the second prong — meaning if a court thinks that the law is not clearly established, they don’t have to address the question of whether this person’s constitutional rights were violated,” Ali said.

“ In 1982, the Supreme Court redefined the qualified-immunity doctrine so that it no longer turned on evidence of an officer’s good faith but, instead, focused on whether the law was ‘clearly established.’ ”

This effectively deprives families seeking some legal remedy and accountability of their day in court, Ali said. It also leads to a “perverse outcome” for people whose rights are violated in the future, he added: If the courts never decide in a certain case whether there was a constitutional violation, they don’t create the precedent necessary to show that the law was clearly established — thus leaving the door open for another government actor to do the same thing down the line.

“You end up in this Catch-22 where courts are saying, ‘Well, you’ve got to point to a case that looks just like this one where we said it was a constitutional violation’ — but then they’re never creating those cases or issuing those decisions which made clear it was a constitutional violation,” he said.

In the years since the 2009 Pearson case, “appeals courts have increasingly ignored the question of excessive force,” according to a Reuters investigation published in May.

“In such cases, when the court declines to establish whether police used excessive force in violation of the Fourth Amendment, it avoids setting a clearly established precedent for future cases, even for the most egregious acts of police violence,” the report said. “In effect, the same conduct can repeatedly go unpunished.”

What was the doctrine originally intended to do?

The 1871 Civil Rights Act, a Reconstruction-era law largely aimed at protecting Black Americans from violence, allowed people who were deprived of their constitutional rights by state or local officials acting “under color of law” to sue in federal court. This provision launched the U.S. Code’s Section 1983, which would form the basis for many cases against police officers.

Nine decades later, the Supreme Court created qualified immunity in 1967 “on the ground that it reflected common-law, good-faith immunities available under state law,” Joanna Schwartz, a professor at the UCLA School of Law, told MarketWatch in an email.

“At the time, the Court described the immunity as necessary to protect officers from personal liability when they have acted in good faith,” she said. “The justifications for the doctrine have

changed over time — now the Court focuses not only on financial liability for officers but also on the need to shield them from the costs and burdens of defending themselves from insubstantial cases."

The qualified-immunity doctrine, she added, "has shifted a great deal in the decades of its existence."

"It originally just protected good-faith behavior. Then in 1982, the Court redefined the doctrine so that it no longer turned on evidence of an officer's good faith but, instead, focused on whether the law was 'clearly established,'" she said. "And the definition of 'clearly established' law has shifted over time. Now, law is only clearly established if the Supreme Court or a court of appeals has held unconstitutional virtually identical conduct to the case on point."

How has this played out in practice?

Critics of qualified immunity say a number of cases highlight the doctrine's shortcomings. For example, there's Jessop v. City of Fresno, Calif., in which a pair of businessmen alleged that police officers had stolen some $225,000 in cash and rare coins they had seized while executing search warrants. The officers were deemed entitled to qualified immunity because "at the time of the incident, there was no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant."

"Not only does that show you how absurd the doctrine is — because officers shouldn't need a case where other officers have stolen something pursuant to a warrant to know that it is wrong — but what it tells you is that if you live in the Ninth Circuit, which actually governs a huge part of this country, that officers are free to go do it again and they won't be held accountable," Ali said. "So the next officer who executes a search warrant in the Ninth Circuit is free to pocket some of the proceeds."

Another prominent case is Baxter v. Bracey, in which a court granted qualified immunity to officers who released a police dog on a burglary suspect who was sitting on the ground surrendering with his hands in the air. A prior case, meanwhile, had established that "the Fourth Amendment prohibited unleashing a dog to attack a suspect who had surrendered by lying on the ground."

"But the court nevertheless held that the police had not 'knowingly' violated Baxter's rights, because in that prior case, the suspect was laying on the ground, whereas Baxter was sitting on the ground with his hands up," writes Jay Schweikert, a policy analyst at the libertarian Cato Institute.

What are the best arguments for keeping qualified immunity in place?

The International Association of Chiefs of Police, a professional association of more than 31,000 members in 165 countries, calls the doctrine "an essential part of policing and American jurisprudence" that "allows police officers to respond to incidents without pause, make split-second decisions, and rely on the current state of the law in making those decisions."

“This protection is essential because it ensures officers that good faith actions, based on their understanding of the law at the time of the action, will not later be found to be unconstitutional,” the IACP said in a statement. “The loss of this protection would have a profoundly chilling effect on police officers and limit their ability and willingness to respond to critical incidents without hesitation.”

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Attorney General William Barr spoke out against reducing qualified immunity earlier this month, and White House Press Secretary Kayleigh McEnany later called the idea a non-starter. South Carolina Sen. Tim Scott, who is leading Republican senators’ police-reform efforts, said the prospect of ending qualified immunity would be a legislative “poison pill” for the GOP.

“I don’t think you need to reduce immunity to go after the bad cops, because that would result certainly in police pulling back,” Barr told CBS News. “Policing is the toughest job in the country, and I frankly think that we have — generally, the vast, overwhelming majority of police are good people. They’re civic-minded people who believe in serving the public. They do so bravely. They do so righteously.”

McNamara argues that the concern over law-enforcement officers’ need to make split-second decisions under pressure “is already baked into the constitutional standard” with its question of reasonableness. The Fourth Amendment specifically prohibits “unreasonable” searches and seizures, he pointed out.

“All qualified immunity does is take a government official who made a decision that we can all agree was unreasonable and ask whether that unreasonable decision is new,” McNamara said. “I just don’t see why it should matter whether it was new — what should matter is whether it was unconstitutional.”

Could employees be bankrupted by lawsuits if not for qualified immunity?

“No,” Schwartz said. “Officers are virtually always indemnified, meaning that they don’t pay anything in settlements and judgments against them.” In Schwartz’s 2014 study of police-misconduct settlements and judgments across 81 U.S. law-enforcement agencies between 2006 and 2011, she found that governments had paid about 99.98% of the millions of dollars awarded to plaintiffs in civil-rights lawsuits.

“Law enforcement officers in my study never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments — even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct,” she wrote in the study.

What’s one big misconception about qualified immunity?

“The idea that removal of the doctrine will have an immediate effect on officer behavior is not likely to be the case,” Merkl said. “Removal of the doctrine could, however, cause municipalities and departments to reconsider their training strategies and their policies to increase officer accountability, because they may be subject to additional financial risk.”

How could qualified immunity be ended?

Rep. Justin Amash, a former Republican turned libertarian, and Rep. Ayanna Pressley, a Massachusetts Democrat, this month introduced the “Ending Qualified Immunity Act,” while House Democrats’ “Justice in Policing Act” calls for eliminating qualified immunity for law enforcement. Democratic Sens. Ed Markey of Massachusetts, Kamala Harris of California and Cory Booker of New Jersey are leading a similar effort on the Senate side. And Sen. Mike Braun of Indiana, a Republican, introduced a bill Tuesday to limit qualified immunity for police officers.

States are also “perfectly capable” of passing laws that hold officers accountable for constitutional violations, Ali said. A Colorado police-reform bill recently signed into law says that “qualified immunity is not a defense to liability.”

At the national level, “it could happen through congressional action,” Schwartz said. “The Supreme Court could also decide to take this up in the fall.”