

End Qualified Immunity to Increase Police Accountability

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On Aug. 26, the Milwaukee Bucks decided to forego their playoff game to bring attention to the police shooting of Jacob Blake the previous Sunday in Kenosha, Wisconsin. As the rest of the NBA games scheduled for that night were postponed, the WNBA, MLB and MLS also postponed their remaining schedule for the evening in a show of unity. According to ESPN, the Bucks players used the time to call the Wisconsin Attorney General and Lieutenant Governor and asked how to help enact police reform, to which the Lieutenant Governor recommended pushing for “action at every level of government.” One of the most effective reforms the players could use their platforms to advocate for is the elimination of qualified immunity, a legal doctrine that often prevents people from suing when their constitutional rights have been violated by government officials, including police officers.

After the Civil War, African Americans in Southern states were subjected to denial of their newly acquired constitutional rights as local and state officials failed to prevent racial violence. As part of Reconstruction, Congress passed the Ku Klux Klan Act of 1871, which contained a provision, now known as Section 1983, providing a path for citizens to sue government officials for violating their constitutional rights. The law was a critical step in protecting individuals’ constitutional rights because it empowered citizens to recover damages when those rights were violated. Today, Section 1983 is the main avenue through which individuals can hold their government accountable if they are a victim of police brutality; this is typically done through a lawsuit alleging a violation of their Fourth Amendment right to be free from unreasonable search and seizure. However, through a series of cases since the 1960s, the Supreme Court has invented the doctrine of qualified immunity, which has become a significant barrier to citizens’ ability to successfully sue on the basis of a violation of their rights. The Supreme Court qualified immunity precedent holds that government officials cannot be sued even if someone’s rights have been violated unless the infringement is “clearly established law.” As the Cato Institute has explained, this means “it is entirely possible—and quite common—for courts to hold that government agents did violate someone’s rights, but that the illegality of their conduct wasn’t sufficiently obvious for them to be held liable to the victim of their misconduct.”

While the legal jargon may obscure to the untrained eye how the doctrine prevents accountability, a few examples demonstrate its untenability and why it is imperative for it to be abolished. Under the doctrine, the “clearly established” standard means that unless there is a

practically identical case demonstrating the conduct was unconstitutional, the government official in question will be granted immunity. Take the case of Alexander Baxter, who sued two police officers who in the course of his arrest sicced their canine on him after he surrendered. One might think it is clearly a violation of one's Fourth Amendment rights to have a police dog released on you after you have surrendered and have your hands in the air, as Baxter did. However, as the Institute for Justice explains, the officers were "entitled to qualified immunity because—while an earlier case had held that officers were not allowed to sic a dog on someone lying down—no case had ever discussed whether they could do so to a suspect who was sitting down with his hands up." Additionally, the court further explained, according to the Cato Institute, that while "an earlier case had established that the use of an attack dog against a suspect who was not fleeing was an excessive use of force, the court distinguished that case because the dog in Baxter's case had better training and police had warned Baxter they might use the dog before he surrendered." Or consider the case where police shot a 10-year-old child while trying to shoot the family's non-threatening dog. The officer was granted immunity because, according to the Institute for Justice, "no earlier case held it was unconstitutional for a police officer to recklessly fire his gun into a group of children without justification. The Court also declined to establish that rule. Not only was the officer let off the hook in that case, but the very same officer could act the same way again, and would still be entitled to qualified immunity."

Recognizing the problems with qualified immunity, public interest legal organizations across the ideological spectrum, such as the Cato Institute, Institute for Justice, ACLU, Alliance Defending Freedom, and NAACP Legal Defense Fund, have all taken steps to rein it in by supporting litigation that seeks to chip away at the doctrine. Instead of waiting for the Supreme Court to correct its mistake—a process that could take years—the doctrine could be eliminated through an act of Congress at any time. In fact, Representatives Justin Amash (L-MI) and Ayanna Pressley (D-MA) have introduced such a bill, aptly named the Ending Qualified Immunity Act. Additionally, state legislatures can take action to curtail qualified immunity within state courts, just as Colorado did earlier this summer in response to the police killing of George Floyd. Eliminating qualified immunity would have the immediate effect of giving citizens a way to collect damages as a remedy for a violation of their constitutional rights, introducing much needed accountability. Additionally, the threat of such liability would have the long-term effect of making governments bear the cost of violating an individual's rights, providing a strong incentive for governments to improve hiring, training, and disciplinary practices of officials, especially police officers.

Ending qualified immunity would mean that the government and citizens would be on equal footing: the citizens are responsible to obey the laws, and the government will be held accountable to follow the Constitution. There cannot be two sets of laws in this country where the citizenry is held to a stricter standard than the government officials who serve at the will of the citizens. Abolishing qualified immunity will bring us one step closer to making that principle a reality.