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Push to End 'Qualified Immunity' for Police in Vermont Falls Short

By COLIN FLANDERS
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Vermont police reform advocates began the year with one main legislative priority: ending the legal doctrine that shields cops from lawsuits.

At press conferences and public rallies, they argued that "qualified immunity" undermines public trust because it allows abusive cops to go unpunished. The advocates earned support from national figures and won over some of the most influential state lawmakers, who sponsored legislation targeting the legal doctrine. For a time, it appeared that Vermont might become one of the only states in the nation to ban qualified immunity.

But the momentum didn't last. Faced with the prospect of losing their marquee civil protection, local officials and law enforcement leaders launched an aggressive opposition campaign. They painted the bill as a solution to a nonexistent problem and predicted dire consequences should it pass, saying it would encourage frivolous lawsuits, fuel anti-police sentiment, exacerbate recruitment struggles and even bankrupt some towns.

"This is, quite simply, a back door to dismantling law enforcement operations and to defunding," Vermont Public Safety Commissioner Michael Schirling told lawmakers.

"What happened to all that energy we had when America saw the murder of a Black man on national television?"MIA SCHULTZ

The intense lobbying effort paid off. After watering down the bill to the point where even advocates opposed it, the Senate Judiciary Committee finally scrapped the proposal last week, voting 3-2 to request a report on the subject instead.

"I still support the idea of the elimination of qualified immunity," Sen. Dick Sears (D-Bennington) said before the vote. He's the committee chair and sponsored the initial bill. "But it's become clear to me that to try to do that this year would be next to impossible."

Qualified immunity has become a flash point in the debate over policing in Vermont, testing the resolve of the Democrat-dominated legislature in the post-George Floyd era. And to some advocates, the body's failure to advance the measure is representative of members' withering appetite for reform in the two years since Floyd, a Black man, was murdered by Minneapolis police.

"What happened to all that energy we had when America saw the murder of a Black man on national television?" Mia Schultz, president of the Rutland-area chapter of the NAACP, asked at a press conference last week. "Where is that same energy that they took to the streets and started painting Black Lives Matter in the streets?"

Kiah Morris, a former state legislator who now leads the progressive advocacy group **Rights & Democracy**, expressed similar disappointment at another press conference earlier this month on Burlington's Church Street, the site of numerous protests during the summer of 2020.

"That bill has been gutted because the power of the people has not been in the people's house, and the urgency, the cries and the fear are not felt anymore," Morris told the few dozen people in attendance, including supportive lawmakers.

Established by a 55-year-old U.S. Supreme Court ruling, the patchwork of legal precedents known as qualified immunity poses a formidable hurdle in lawsuits against government officials — most often, police.

Plaintiffs must prove that police violated a constitutional right *and* that the right in question was "clearly established" in a previous ruling. That usually means they must find a case with virtually identical facts to their own in which an officer was held responsible.

Vermont's law would have done away with that standard in state court, lowering the bar for lawsuits against police for alleged misconduct.

Qualified immunity is intended to prevent police from going bankrupt for split-second decisions in their often dangerous jobs, and proponents say many cops would leave the profession without it. Critics, however, say it gives a free pass to officers who abuse their powers.

"We see this doctrine as the single biggest stumbling block to meaningful accountability in the criminal justice system," Jay Schweikert, a policy analyst with the Washington, D.C., think tank **Cato Institute**, told Vermont lawmakers.

The doctrine does not shield cops from criminal charges, though those are exceedingly rare. Instead, victims of alleged police brutality often view lawsuits as the only way to pursue justice. But qualified immunity looms over every part of the civil process.

Attorneys can be reluctant to take on police brutality cases in which qualified immunity may apply, while judges toss some lawsuits before they can reach a jury.

"Even if you pass through all these hurdles, qualified immunity can still be the death knell of the most egregious rights violation," said Jay Diaz, general counsel with the American Civil Liberties Union of Vermont.

Diaz cited several cases, including one in which a jury found that a Colchester officer used excessive force when he broke a suspect's wrist during a 1996 drunk driving arrest. But the jury still granted the officer qualified immunity after he testified that he believed his use of force was legal.

In another case, a state trooper opened and read a woman's mail during a warrantless search of her car. The U.S. Court of Appeals for the Second Circuit agreed that the trooper had violated the woman's rights, but the appellate judges granted the trooper qualified immunity because no clearly established law showed that the action was illegal.

Police and their advocates argue that such cases represent the exception, not the rule. They note that the U.S. Court of Appeals for the Second Circuit, which has jurisdiction over Vermont, has denied officers qualified immunity in eight of the last 10 excessive-force lawsuits to cite it as a defense. And they say municipalities have paid out at least $2 million in settlements over the last 15 years.

A nationwide push to ditch the doctrine in the wake of Floyd's murder has stalled in Congress, shifting the debate to statehouses. But while the campaigns are popular in polls, law enforcement groups have vigorously opposed them, and legislation has failed in at least 35 states over the last two years, according to **a *Washington Post* analysis**. Only one state, Colorado, has completely barred the legal defense for police.

The campaign to save qualified immunity in Vermont was wide-ranging, drawing support from all levels of government. More than a dozen police unions signed on to **a lengthy policy brief** from the Vermont Department of Public Safety that offered 10 bullet points explaining why the bill was a poor idea. Local officials and their advocacy group, the Vermont League of Cities & Towns, argued that municipalities would spend tens of thousands of dollars a year defending lawsuits targeting local police.

"We are not here to try to make a bill better. We are here to tell you this is not a good pieceof public policy." PUBLIC SAFETY COMMISSIONER MICHAEL SCHIRLING

Burlington Mayor Miro Weinberger even dispatched city attorney Dan Richardson to argue against the bill. The city recently cited qualified immunity in trying to dismiss **a pair of civil rights lawsuits** brought in federal court by two Black men against Burlington police officers. Richardson made no mention of that in his testimony.

Among the most impassioned critics was Schirling, a former Burlington police chief who now oversees public safety for Gov. Phil Scott's administration. Speaking to lawmakers on the first day of testimony, Schirling said law enforcement's opposition to the bill was as unified as he had ever seen during his two-decade career.

"We are not here to try to make a bill better," he said. "We are here to tell you this is not a good piece of public policy."

Vermont does not have the same problems with policing as other states, he said, arguing that egregious national cases of violence and misconduct "don't bear resemblance, in most instances, to what happens here."

Schirling said lawmakers should be investing in police departments on the front end rather than increasing the punishment after misconduct. "We don't do that when it comes to things like health care or education," he said. "We are not talking about disinvesting and figuring out how to sue teachers and health care workers for bad outcomes."

"I can't overstress the level of concern — and, frankly, sadness — that this is where we're at," he added.

Supporters of ending qualified immunity viewed Schirling's testimony as emblematic of a coordinated fearmongering campaign meant to confuse and distract lawmakers from the issue.

James Lyall, executive director of the ACLU of Vermont, said it was "striking" to hear top law enforcement officials argue that the state does not have policing problems. "That suggests a degree of obliviousness and denial that is hard to fathom at this stage in our history," he said.

Lyall pointed to **recent data from left-leaning Public Policy Polling** that shows three-fourths of Vermonters support ending qualified immunity. And he said allowing victims of police abuse to sue for damages is precisely what it will take to encourage departments to enact the hiring, training and disciplinary policies that Schirling wants.

Lyall took particular issue with a line of argument from Wilda White, an attorney and advocate for psychiatric survivors who is a paid consultant for the state police. As part of her sweeping criticism of the bill, White challenged supporters' claim that it would further racial justice efforts, saying anyone who believed that was "naïve or self-serving."

"Black people and psychiatric survivors have no access to the courts, and it's not just qualified immunity that's keeping these two groups of people outside," White told lawmakers. "We have a very difficult time finding attorneys. We can't afford attorneys. Attorneys don't understand our lives."

The idea that ending qualified immunity would open the doors for these groups "is just a false promise," White said.

Lyall called the argument "bizarre" and "incoherent" and said it showed him that opponents of the bill were "willing to say anything, regardless of whether it was true or whether it made any sense."

As the testimony dragged on, the bill became a shell of its former self. A provision stating that officers may be forced to pay 5 percent of a judgment in state court, up to $25,000, disappeared. New limitations were introduced, including a $500,000 cap on damages and a requirement that plaintiffs declare their intent to sue within a year. Most alarming to advocates was the introduction of language that would essentially codify the status quo by still requiring plaintiffs to prove that officers violated "clearly established" law.

Walking through that version of the bill last week, Sears, the Judiciary Committee chair, said he was attempting to find middle ground. "Given some of my emails from both sides, I would say I failed to accomplish [that]," he said.

The push finally sputtered out last Friday, which was "crossover," or the deadline for bills to make it out of committee this session.

Sears' new draft of the measure commissioned a report about qualified immunity and mandated law enforcement agencies to maintain a list of all legal settlements. He called qualified immunity one of the most difficult issues he's worked on and said he hoped the new version would at least allow lawmakers to get past the "back-and-forth" sparring that made it impossible for the committee to know who was right.

"I realize that the proponents of the bill will not be happy," Sears told his colleagues before Friday's vote. "And I realize that the opponents may not be completely happy that the issue is still out there. But, for me, anyway, we need to understand: Does Vermont have a problem?"