

## Police immunity: yes or no?

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Changing the police's right of qualified immunity is one objective of the Justice in Policing Act of 2020 sponsored by House Democrats. Some Senate Republicans and the president are opposed. What is qualified immunity and why you should care?

The Supreme Court's doctrine of "qualified immunity," shields public officials or police from being personally liable for monetary damages for constitutional violations of a citizen's rights. Specifically, it protects police from civil lawsuits alleging excessive force if they do not violate "clearly established" law.

Without such a doctrine, it would be hard to recruit officers as many would balk at taking on additional personal liability. And we taxpayers would pay to defend more lawsuits, whether frivolous or consequential. Therefore, qualified immunity is in the best interest of taxpayers.

At least, that's the theory.

If we're the ones being violated, then we can sue, but we must overcome the hurdle of "clearly established" law to avoid having our suit thrown out, which is where it goes catawampus.

Qualified immunity and "clearly established" law were clarified by the landmark Harlow v. Fitzgerald case in 1982, with the intent to protect police from frivolous lawsuits and prevent judges from having to second-guess decisions a law enforcement officer makes.

Turns out overcoming it is murkier than it sounds, because not only must our rights be violated (i.e. police used excessive force), but the conduct must have been found unconstitutional in a previous case that is similar. In other words, a precedent must have been set. And if a prior case doesn't exist that's similar enough — as often happens — then the suit is thrown out.

Pete Williams, writing for nbcnews.com, reported one of the cases being considered for hearing by the Supreme Court is that of Shaniz West. She gave police the keys to her house to search for her ex-boyfriend, a fugitive. The police bombarded the house for hours with tear gas before entering, destroying everything inside. Oops. Sorry. To add insult to injury, the suspect wasn't there. She sued but lost.

Why? Williams reports there wasn't a previous case where the police asked and were given permission to enter a residence, only to bombard it with tear gas before they entered. So, without a prior decision to cite, she lost.

A federal appeals court ruled against a Georgia mother whose 10-year-old son was wounded by a deputy sheriff looking for a suspect who had wandered into her yard. After ordering her and her children to lie on the ground while the unarmed suspect was arrested, the deputy fired at the nonthreatening family dog. He missed but struck the child. She sued and lost for lack of a prior decision.

Clark Neily of the libertarian Cato Institute speculated that if family members of George Floyd sued Minnesota police officer Derek Chauvin, they would need to find an existing court ruling saying a police officer may not kneel on a compliant suspect's neck, ignoring his pleas for help, until he passes out.

Otherwise it would be tossed, he claims.

Robert Verbruggen, writing in the National Review, says the court should consider these cases, but shouldn't have the final say. He writes, "Going forward, Congress should rewrite the law ... only Congress can reform qualified immunity in a way that fully addresses our current situation and concerns. Courts are limited to applying the law as it currently exists, and we need more than that right now."

That brings us to the Justice in Policing Act of 2020. Its intent is to not only limit qualified immunity, but to ban police from using chokeholds, limit the transfer of military weapons to police departments, define lynching as a federal hate crime and establish a national police misconduct registry.

Among all, unraveling the knot of qualified immunity and "clearly established" law will be most difficult, but necessary. And will cause the most yammering.