Amash Announces Legislation to End “Qualified Immunity”

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Libertarian congressman Justin Amash (L-MI) recently announced that he is readying legislation to end the legal doctrine of “qualified immunity.” Amash plans to introduce the Ending Qualified Immunity Act sometime this week in order to "restore Americans’ ability to obtain relief when police officers violate their constitutional secured rights."

Amash, who briefly flirted with a presidential bid for the Libertarian Party nomination in 2020, elaborates in a Twitter thread:

As part of the Civil Rights Act of 1871, Congress allowed individuals to sue state and local officials, including police officers, who violate their rights. Starting in 1967, the Supreme Court began gutting that law by inventing the doctrine of qualified immunity.

Under qualified immunity, police are immune from liability unless the person whose rights they violated can show that there is a previous case in the same jurisdiction, involving the exact same facts, in which a court deemed the actions to be a constitutional violation.

This rule has sharply narrowed the situations in which police can be held liable—even for truly heinous rights violations—and it creates a disincentive to bringing cases in the first place.

If a plaintiff knows there is no prior case that is identical to theirs, they may decline to even file a lawsuit because they are very unlikely to win.

Even if a plaintiff does file a case, a judge may dismiss it on qualified immunity grounds and decline to decide whether the plaintiff’s rights were violated, meaning the constitutional precedent still isn’t established and so the next plaintiff still can’t recover.

This can create a permanent procedural roadblock for plaintiffs, preventing them from obtaining damages for having their rights violated.

Qualified immunity was created by the Supreme Court in contravention of the text of the statute and the intent of Congress. It is time for us to correct their mistake.

My bill, the Ending Qualified Immunity Act, does this by explicitly noting in the statute that the elements of qualified immunity outlined by the Supreme Court are not a defense to liability.

The brutal killing of George Floyd by Minneapolis police is merely the latest in a long line of incidents of egregious police misconduct.

This pattern continues because police are legally, politically, and culturally insulated from consequences for violating the rights of the people whom they have sworn to serve. That must change so that these incidents of brutality stop happening.

Until then, we must ensure that those whose rights are violated by police aren't forced to suffer the added injustice of being denied their day in court.

The proposed legislation comes after days of protests, rioting, and civil unrest following the death of George Floyd at the hands of ex-Minneapolis police officer Derek Chauvin on May 25.

Regardless of where one stands on the public response, it's clear that serious institutional change needs to occur in order to prevent police and other state agents from violating the rights of citizens with impunity. Demilitarizing the police, ending the drug war, addressing powerful police unions, and ending qualified immunity are good places to start.

As Amash states and FEE has explained before, qualified immunity is a legal fiction which essentially shields police from being sued for misconduct unless a previous case similar to the events which occurred has been tried before.

Cato Institute Vice President for Criminal Justice Clark Neily further elaborates:

Enacted in 1871 and referred to as Section 1983 after its placement in the U.S. Code, America's primary civil rights law provides that police and other state actors "shall be liable" to the person injured for "the deprivation of any rights." On its face, Section 1983 creates a standard of strict liability for police and other public officials who violate people's constitutional rights, including the right to be free from the unreasonable use of force. But in a tragic and legally baseless act of judicial policymaking, the Supreme Court radically altered that standard by holding that the right in question must be "clearly established." And thus was born the doctrine of qualified immunity.

In practice, what the "clearly established" gloss on Section 1983 requires is for would-be civil rights plaintiffs to identify a relevant case in the same jurisdiction with nearly identical facts. Thus, if Mr. Floyd's family wants to sue the officer who took his life, they will need to find an existing case from the Eighth U.S. Circuit Court of Appeals holding that a police officer may not kneel on a unresisting suspect's neck, ignoring his pleas for help, until he passes out. If no such case happens to be on the books, their case will be summarily tossed out of court. Such is the perversity of the Supreme Court's qualified immunity doctrine.

Moreover, the Supreme Court could potentially rule on qualified immunity, as it recently considered 13 different petitions involving the matter. The court will make their decision to hear the cases as early as Monday.

Ending qualified immunity will not eliminate police brutality or racial oppression, but it's a step in the right direction. Basic incentives tell us that if individuals are shielded from the consequences of poor behavior, it is more likely to happen.