What Is Qualified Immunity and Why Do Some Want To End It?

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Viral video of former Minneapolis police officer Derek Chauvin pressing his knee into the neck of George Floyd, a Black man, for nearly nine minutes before his death resulted in widespread outrage and weeks of civil rights protests across the U.S. Amid a groundswell of popular pressure, prosecutors took the unusual step of arresting and **charging** Chauvin with second-degree murder and also charging three other officers at the scene with aiding and abetting him.

But even if Chauvin is found guilty, attorneys we spoke to who are experts in a legal doctrine called "qualified immunity" told us it would still be an uphill battle for Floyd's family to successfully sue for restitution.

That's because qualified immunity, though obscure, is a significant legal hurdle for civilians who try to sue police for claims of constitutional violations, such as the Fourth Amendment protection against unlawful search and seizure, when police kill or injure someone. To get past it, plaintiffs in lawsuits have to show that the exact manner in which a police officer violated their rights has been "clearly established" as wrongful by legal precedent. That means they must be able to point to another court case with circumstances nearly identical to theirs, and in which a court ruled that an officer had violated the Constitution.

"This doctrine encourages police to act with impunity because they know there will be no consequences," said Scott Michelman, legal director for the American Civil Liberties Union of Washington, D.C.

Though the immunity has been in place for more than 50 years, opposition to it is growing, with Floyd's death driving discussions about police accountability and violence, particularly against the Black community. Protesters at Black Lives Matter rallies have carried signs calling for an end to qualified immunity, as have **legislators** and **professional athletes**. But when the matter came before the U.S. Supreme Court on June 15, 2020, the high court punted, leaving the issue to Congress.

Nonetheless, on June 19, 2020, the state of Colorado took matters into its own hands, with Gov. Jared Polis **signing into law** a bill that ends qualified immunity as a defense for violent police officers.

What is Qualified Immunity?

Qualified immunity grants government officials like police officers legal protection from financial liability in civil cases. It was invented out of "whole cloth" by the U.S. Supreme Court, meaning it represents "judicial policy making," Clark Neily, vice president of criminal justice for the Cato Institute, a libertarian think tank, told us, adding that the judicial branch making public policy goes against the Constitution.

"The way the Constitution does it, is it allocates responsibility among different branches of government. People who are elected and have to stand for reelection are the ones who should make policy," Neily said. "People who have lifetime appointments and serve in a branch of government that the Constitution doesn't give any policy making power to [i.e., the judicial branch], shouldn't because they are not politically accountable. And simply because the Constitution doesn't give them that authority. The Constitution is 100% clear on that."

Writing for the legal website **The Appeal**, Amir Ali and Emily Clark, the deputy director for the Supreme Court and the appellate program at the MacArthur Justice Center and appellate research specialist at the Center, respectively, trace the history of qualified immunity to 1967, writing that over time, the interpretation of qualified immunity has become more narrow, favoring police:

The Supreme Court invented qualified immunity in 1967, describing it as a modest exception for public officials who had acted in "good faith" and believed that their conduct was authorized by law. Fifteen years later, in **Harlow v. Fitzgerald**, the Court drastically expanded the defense. The protection afforded to public officials would no longer turn on whether the official acted in "good faith." Instead, even officials who violate peoples' rights maliciously will be immune unless the victim can show that his or her right was "clearly established." Since the Harlow decision, the Court has made it exceedingly difficult for victims to satisfy this standard. To show that the law is "clearly established," the Court has said, a victim must point to a previously decided case that involves the same "specific context" and "particular conduct." Unless the victim can point to a judicial decision that happened to involve the same context and conduct, the officer will be shielded from liability.

The difficulty of meeting this standard, and the dearth of other options for seeking justice, leaves many plaintiffs in such cases with no recourse, even when video evidence would seem to make the case clear.

What Is the Argument Against Qualified Immunity?

Qualified immunity has the effect of closing off all avenues of redress for citizens who accuse police of violating their constitutional rights, Neily told us.

This is important because it is extremely rare for police who kill people on duty to be convicted of a crime, according to research. While a **database** maintained by The Washington Post since 2015 has logged an average of nearly 1,000 fatal police shootings every year, criminologist Philip Stinson **determined** that between 2005 and 2019, out of "104 state and local law enforcement officers who have been arrested for murder or manslaughter for fatal on-duty shootings since 2005, 36 have been convicted of a crime."

"The only time you see a police officer prosecuted criminally is when the thing they did was caught on video or gets picked up by the media," Neily told us by phone. "Prosecutors have a massive conflict of interest. They work together. They depend on cops to bring them cases and testify in court. So criminal law is not going to do it."

Police can also conduct internal investigations into an officer's behavior, but Neily noted they are ineffective because "you're asking police to decide if the police did anything wrong. And they almost always say no."

Lawsuits, then, are the only route citizens can initiate themselves to seek justice. But qualified immunity throws up a hurdle so big, most cases never see their day in court.

In May 2020, **Reuters** conducted a study in which reporters analyzed "529 federal circuit court opinions published from 2005 through 2019 on appeals of cases in which cops accused of excessive force raised a qualified immunity defense." Reuters concluded:

Our analysis of this data showed the appellate courts' growing tendency, influenced by guidance from the Supreme Court, to grant police immunity. More than ever, they are ignoring the question of whether cops have violated a plaintiff's constitutional rights, thereby avoiding establishing a precedent for future cases and making it harder to win cases against the police. The failure to set precedents is particularly challenging for plaintiffs because the data also showed that appellate courts are increasingly requiring a nearly identical case from the past to serve as a precedent that clearly establishes an officer's actions as illegal — a high standard that again makes it hard to win against the police.

"The hardest thing for lawyers to do is try to get their clients to understand how they can never even get to a trial even though the evidence is clear that their rights were violated," said Jeremy Beaver, an Oklahoma-based attorney who represented the family of **Johnny Leija**. Leija was a 34-year-old man hospitalized for pneumonia. Police were called when Leija became disoriented and tried to leave the hospital to go home. He died of suffocation when responding police officers tackled him and used stun weapons on him.

"You have to find a case with exactly the same facts where another court has said this is a violation, or you can't get past qualified immunity," Beaver said. In the case of Leija's family, Beaver told us the case was eventually thrown out because there wasn't another case in which "a mentally, physically compromised patient wanted to leave a hospital against medical advice, and had been shot with a taser" and died.

"On a very basic level, even if you've been wronged and everyone agrees you've been wronged in a very harmful way, you can't have a remedy. Not because of a legislative process or law, but because of a Supreme Court doctrine that says you can't," Beaver continued. "There is no deterrent to the police, and the people who have been wronged have no recourse."

What Are the Arguments in Favor of Qualified Immunity?

In **testimony** before the U.S. Senate on June 16, 2020, Fraternal Order of Police President Patrick Yoes said that his organization, a lobbying group that represents 330,000 member police officers, is "strongly opposed" to any legislative effort to end qualified immunity, because in the field, police are often faced with a wide range of split-second decisions.

"Every single factual scenario an officer encounters is different and unknown," Yoes said during his testimony. "It is extremely difficult for an officer to determine how a legal doctrine will apply to a split-second factual scenario that the officer confronts. Thus, unless there is existing precedent that squarely governs the facts [laid out] before the officer, the reasonable officer

needs to be afforded a certain degree of discretion to make split-second decision in situations that could put lives, including their own, at risk. Officers should not be punished for doing so."

According to the legal blog **Lawfare**, the Supreme Court justified qualified immunity by stating broadly that it gives government officials "breathing room" to avoid fear of being sued when performing public services, but in regards to police:

Also at the core of the Supreme Court's jurisprudence is the contention that it would be unfair to hold government officials to constitutional rules they were not aware of at the time of the violation. The court first articulated this idea in a pre-*Harlow* **decision**, stating that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Then in Harlow, the court wrote: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." And a recent case described "the focus" of qualified immunity as "whether the officer had fair notice that her conduct was unlawful."

What Does the Future Hold for Qualified Immunity?

The phrase "qualified immunity" was probably unknown to most until the protests of spring 2020. But in a phone interview, Ali told us he is somewhat optimistic that recent increased public awareness and engagement could bring change.

"Once people understand what it is, it's not hard for them to see it makes very little sense and is in fact quite perverse," Ali, the MacArthur Justice Center's deputy director of the Supreme Court and Appellate Program, told us by phone.

Qualified immunity has opponents from the full spectrum of political ideology, with liberal Supreme Court Justice Sonia Sotomayor and conservative Justice Clarence Thomas voicing opposition to it, and organizations like the libertarian Cato Institute and the NAACP fighting to overturn it in court.

The Supreme Court's decision not to hear a case challenging qualified immunity has left the question to Congress, Ali noted. As protests against institutional racism and police violence swept the country in 2020, both the U.S. House of Representatives and the Senate set upon crafting police-reform legislation.

But U.S. Sen. Tim Scott, R-South Carolina, said any legislation addressing qualified immunity is a "**poison pill**" for Republicans, who control the Senate. And that's because "the White House has stated the President will not sign a bill that repeals Qualified Immunity," said Sean Smith, a spokesman for Scott, in an email.

"I think [President Trump] will reconsider, and I think so will the Republicans on the Hill once they truly understand what we're talking about here," Ali told us by phone.

Ali also said that local and state governments can also create their own laws, independent of the federal government, so that qualified immunity is no longer used in defense in cases of alleged police misconduct, like the state of **Colorado** did.

Ali connected qualified immunity to the death of Floyd, stating he believed the ongoing lack of accountability for police who commit acts of misconduct had created an environment in which they don't view themselves as being accountable for their actions:

If you study qualified immunity cases, you can't help but draw a pretty clear connection to what we all saw in the video tape of Derek Chauvin murdering George Floyd. You can find cases of police officers putting their knees on people's necks in the absence of a threat. And when people have tried to hold these precursors to Chauvin accountable, they have been kicked out of court, not because anyone thinks the officer acted reasonably or constitutionally, but because the [the court says] the officer is entitled to immunity even if what he did violated the Constitution.

So when you look into the eyes of Derek Chauvin and see that he didn't have a care in the world — many observed he had his hands in his pocket, sunglasses peacefully resting on his head — as he slowly took the life of George Floyd, the question is, why does this officer clearly think he can get away with murder? Part of the answer to that is that courts through qualified immunity have communicated to officers that they can get away with this. I think we all can't help but be shocked and should be shocked when we see the video. But at the same time I don't think that we can pretend to be surprised.