
THE DISPATCH

There's Never Been a Better Time to Abolish Qualified Immunity

Brad Polumbo

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George Floyd's death has outraged the public and received near-universal condemnation across the political spectrum. The riots and looting that have broken out in the aftermath have commanded much of our immediate attention, but right-of-center criminal justice reform activists and sympathetic policymakers are hoping the time is finally right to abolish "qualified immunity," one of the justice system's most pernicious legal provisions that acts as a de facto liability shield for bad cops and other reckless government officials.

In perhaps a high-water mark for the movement against qualified immunity, Rep. Justin Amash, will formally introduce a bill co-sponsored with Massachusetts Democratic Rep. Ayanna Pressley to abolish the practice. The Supreme Court may also soon take up cases to reconsider the doctrine.

Amash called on his colleagues to co-sponsor the "Ending Qualified Immunity Act," which the congressman says will "eliminate qualified immunity and restore Americans' ability to obtain relief when police officers violate their constitutionally secured rights."

"The brutal killing of George Floyd by Minneapolis police is merely the latest in a long line of incidents of egregious police misconduct," Amash and Pressley write. "This pattern continues because police are legally, politically, and culturally insulated from consequences for violating the rights of the people they have sworn to serve."

Of course, "qualified immunity" is a term that many are not familiar with.

Cornell Law defines qualified immunity as "a type of legal immunity... [that] protects a government official from lawsuits alleging that the official violated a plaintiff's rights, only allowing suits where officials violated a 'clearly established' statutory or constitutional right." In practice, this requirement for exact prior cases makes it impossible in most cases to sue a government official who violates your rights in civil court.

This provision is a creation of the judicial branch and is not in line with what Congress intended to set up. As Amash notes, the Civil Rights Act of 1871 specifically permitted Americans to sue officials who violated their rights, and qualified immunity later emerged through judicial invention. The Supreme Court created the doctrine of qualified immunity in the landmark 1982 decision *Harlow v. Fitzgerald*, citing "the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority."

It has resulted in too many such horror stories and unjust anecdotes to count.

Criminal justice reform analyst Molly Davis tells the story of former inmate Larry Hope, who was “forced to spend seven hours chained in burning hot metal to a hitching post outside [under the Alabama sun]” and “had no bathroom breaks... guards taunted him about his thirst, only offering him water twice throughout the day.”

When Hope tried to sue his jailers after his release, qualified immunity shielded the guards from what seems to be a clearcut violation of Hope’s Eighth Amendment rights. Qualified immunity could also make it difficult for George Floyd’s family in any civil proceeding.

“As things currently stand, George Floyd's family may be denied justice in a civil suit unless they can show a substantially similar case where the courts have already agreed that a person's rights were violated,” Libertas Institute President Connor Boyack told me. “Justice shouldn't be denied merely because it wasn't granted to someone else first; the current precedent is extremely problematic and closes the door to the courts for people with legitimate claims of wrongdoing.”

“It’s hard to say for sure whether [officer] Derek Chauvin would be protected by qualified immunity if George Floyd’s family brought a civil suit,” the Cato Institute’s Jay Schweikert said. “But either way, this incident absolutely reinforces the need to abolish qualified immunity.”

Criminal justice reformers like Boyack and Schweikert argue that the pernicious effects of qualified immunity extend far beyond the denial of justice in specific cases. The experts both agreed that the general existence of a liability shield gives government officials, specifically police officers, a sense of impunity that increases recklessness and abuse.

“Whether or not Chauvin himself would be covered by it, the senseless violence we saw here is a product of our culture of near-zero accountability for law enforcement — and qualified immunity is one of the biggest drivers of that culture,” Schweikert said.

“People naturally respond to incentives, so if officers know that they might be accountable should they use excessive force, they'll be incentivized to restrain themselves more than they are under the status quo,” said Boyack.

Both experts support allowing liability-driven market forces to, in absence of qualified immunity, help drive bad actors out of the police force.

“Consider the interesting idea of requiring officers to obtain liability insurance to financially cover cases where they have [been found] responsible for misconduct. If a certain officer has repeated offenses, they may be uninsurable to a point where they could no longer be employed, thus helping weed out the ‘bad cops’ everyone agrees do exist.”

“Abolishing qualified immunity does raise the question of policies we should put into place to actually fund judgments against police officers,” Schweikert concurred. “One proposal that we think is especially promising is requiring police to carry liability insurance, the same way we do with other professionals, like doctors and lawyers. That would mean that, over time, police who *routinely* commit misconduct would simply be priced out of the market, because their premiums would get too high.”

It's, of course, true that no single reform can eliminate racism or repair the structural flaws in our justice system. But within the right-leaning criminal justice reform community, a consensus has formed that eliminating qualified immunity is a great place to start.

Brad Polumbo ([@Brad_Polumbo](#)) is a libertarian-conservative journalist and former fellow at the Washington Examiner.