



How the Supreme Court could change policing in an instant

Bonnie Kristian

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If a genie of criminal justice reform, in a stingy variation on the standard package, offered a single wish for reforming policing in America, ending the doctrine of qualified immunity would be a very strong pick.

Established by the Supreme Court in 1967, qualified immunity protects police from liability for civil rights violations committed in their official capacity. The rule says prosecutable offenses must concern rights guarded by "clearly established law." In theory, this sounds straightforward — aren't *all* our constitutional rights enshrined in clearly established law? — but in practice, the standard is extremely difficult to satisfy because of the specificity required. As I wrote on the subject last year, any violation deemed novel cannot be sued over, and that lack of accountability is self-perpetuating, as barring the initial suit will in turn fail to set the precedent needed for future instances of the same type of violation. As a result, it's almost impossible for victims of police misconduct (or families of the deceased) to successfully sue for damages.

Now, in a timely coincidence with the protests of George Floyd's death at the hands of Minneapolis officers, the Supreme Court has been asked to review a slate of qualified immunity cases, including several questioning the doctrine in its entirety. A SCOTUS decision ending this shield for abusive policing would be an enormous win, but the court has repeatedly put off deciding whether to accept the petitions. While justices deliberated on the matter yet again on Thursday, I spoke with Cato Institute lawyer and criminal justice policy analyst Jay Schweikert about the Supreme Court's likely next move as well as other options for eliminating qualified immunity if the court delays again.

"Given the way the court has been repeatedly rescheduling the major qualified immunity cert petitions, it seems clear at least that the justices are looking closely at this question, and I'm sure the national turmoil following the death of George Floyd is weighing heavily on their minds," Schweikert told me over email. "We know that Justice Clarence Thomas has explicitly called for the court to reconsider qualified immunity, and Justice Sonia Sotomayor, in a recent dissent joined by Justice Ruth Bader Ginsburg, called the doctrine an 'absolute shield for law enforcement officers' that has 'gutt[ed] the deterrent effect of the Fourth Amendment.'" (See Thomas on the subject here, and the Sotomayor dissent here.) Trump administration addition Justice Neil Gorsuch has also shown willingness to reconsider longstanding precedent,

Schweikert added, but he cautioned that the court might prefer to move slowly here, first curtailing the doctrine instead of outright reversing it.

Legislative solutions are a possibility, too. Though the text of the bill has yet to be released as of this writing, so the exact provisions remain unknown, Rep. Justin Amash (L-Mich.) is partnering with Rep. Ayanna Pressley (D-Mass.) to introduce the "End Qualified Immunity Act." "Qualified immunity was created by the Supreme Court in contravention of the text of the [Civil Rights Act of 1871] and the intent of Congress," Amash argued in a letter urging colleagues to support his bill. "It is time for us to correct their mistake [... and] ensure that those whose rights are violated by the police aren't forced to suffer the added injustice of being denied their day in court."

So far, the legislation's growing list of cosponsors appears to be entirely Democratic, aside from Amash, a former Republican who is now the only congressional Libertarian. In the Senate, Sen. Edward Markey (D-Mass.) introduced a similar resolution several days after Amash's announcement, also with initial cosponsors exclusively from the Democratic caucus.

That's not to say the proposals can't get cross-partisan momentum. Ending qualified immunity has supporters on the right, too, and this issue is well within congressional purview. "Qualified immunity is not a constitutional doctrine, so there's nothing stopping Congress from" rejecting it as a defense of official misconduct, Schweikert said. Whether such legislation would need a veto-proof majority to become law is not clear, he told me: "To my knowledge, President Trump has never said anything one way or another about qualified immunity, [... but] I think it would be perfectly reasonable to expect that a bill [eliminating it] would enjoy the same bipartisan support we recently saw with regard to the FIRST STEP Act," the prison reform law Trump signed in late 2018.

Ending qualified immunity is one of relatively few policing reforms that could be accomplished in one fell swoop from Washington, whether via the Supreme Court or Congress, instead of requiring state- or local-level change. This makes it especially attractive as an agenda item for national-level criminal justice advocacy.

But if neither the Supreme Court nor Congress eliminate qualified immunity in short order, Schweikert noted, state and local reform efforts will continue to seeking new ways to hold police accountable when they violate our civil rights.