Why EFF Supports Repeal of Qualified Immunity

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Our digital rights are only as strong as our power to enforce them. But when we sue government officials for violating our digital rights, they often get away with it because of a dangerous legal doctrine called "qualified immunity."

Do you think you have a First Amendment right to use your cell phone to record on-duty police officers, or to use your social media account to criticize politicians? Do you think you have a Fourth Amendment right to privacy in the content of your personal emails? Courts often protect these rights. But some judges invoke qualified immunity to avoid affirmatively recognizing them, or if they do recognize them, to avoid holding government officials accountable for violating them.

Because of these evasions of judicial responsibility to enforce the Constitution, some government officials continue to invade our digital rights. The time is now for legislatures to repeal this doctrine.

What is Qualified Immunity?

In 1871, at the height of Reconstruction following the Civil War, Congress enacted a landmark law empowering people to sue state and local officials who violated their constitutional rights. This was a direct response to state-sanctioned violence against Black people that continued despite the formal end of slavery. The law is codified today at 42 U.S.C. § 1983.

In 1967, the U.S. Supreme Court first created a "good faith" defense against claims for damages (*i.e.*, monetary compensation) under this law. In 1982, the Court broadened this defense, to create immunity from damages if the legal right at issue was not "clearly established" at the time the official violated it. Thus, even if a judge holds that a constitutional right exists, and finds that a government official violated this right, the official nonetheless is immune from paying damages—if that right was not "clearly established" at the time.

Qualified immunity directly harms people in two ways. First, many victims of constitutional violations are not compensated for their injury. Second, many more people suffer constitutional violations, because the doctrine removes an incentive to government officials to follow the Constitution.

The consequences are shocking. For example, though a judge held that these abusive acts violated the Constitution, the perpetrators evaded responsibility through qualified immunity when:

- Jail officials subjected a detainee to seven months of solitary confinement because he asked to visit the commissary.
- A police officer pointed a gun at a man's head, though he had already been searched, was calmly seated, and was being guarded by a second officer.

It gets worse. Judges had been required to engage in a two-step qualified immunity analysis. First, they determined whether the government official violated a constitutional right—that is, whether the right in fact exists. Second, they determined whether that right was clearly established at the time of the incident in question. But in 2009, the U.S. Supreme Court held that a federal judge may skip the first step, grant an official qualified immunity, and never rule on what the law is going forward.

As a result, many judges shirk their responsibility to interpret the Constitution and protect individual rights. This creates a vicious cycle, in which legal rights are not determined, allowing government officials to continue harming the public because the law is never "clearly established." For example, judges declined to decide whether these abuses were unconstitutional:

- A police officer attempted to shoot a nonthreatening pet dog while it was surrounded by children, and in doing so shot a child.
- Police tear gassed a home, rendering it uninhabitable for several months, after a resident consented to police entry to arrest her ex-boyfriend.

In the words of one frustrated judge:

The inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less *clearly* doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Qualified Immunity Harms Digital Rights

Over and over, qualified immunity has undermined judicial protection of digital rights. This is not surprising. Many police departments and other government agencies use high-tech devices in ways that invade our privacy or censor our speech. Likewise, when members of the public use novel technologies in ways government officials dislike, they often retaliate. Precisely because these abuses concern cutting-edge tools, there might not be clearly established law. This invites qualified immunity defenses against claims of digital rights violations.

Consider the First Amendment right to use our cell phones to record on-duty police officers. Federal appellate courts in the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have directly upheld this right. (EFF has advocated for this right in many amicus briefs.)

Yet last month, in a case called *Frasier v. Evans*, the Tenth Circuit held that this digital right was not clearly established. Frasier had used his tablet to record Denver police officers punching a suspect in the face as his head bounced off the pavement. Officers then retaliated against Frasier by detaining him, searching his tablet, and attempting to delete the video. The court granted the

officers qualified immunity, rejecting Frasier's claim that the officers violated the First Amendment.

Even worse, the Tenth Circuit refused to rule on whether, going forward, the First Amendment protects the right to record on-duty police officers. The court wrote: "we see no reason to risk the possibility of glibly announcing new constitutional rights … that will have no effect whatsoever on the case." But a key function of judicial precedent is to protect the public from *further* governmental abuses. Thus, when the Third Circuit reached this issue in 2017, while it erroneously held that this right was not clearly established, it properly recognized this right going forward.

Qualified immunity has harmed other EFF advocacy for digital rights. To cite just two examples:

- In *Rehberg v. Palk*, we represented a whistleblower subjected to a bogus subpoena for his personal emails. The court erroneously held it was not clearly established that the Fourth Amendment protects email content, and declined to decide this question going forward.
- In *Hunt v. Regents*, we filed an amicus brief arguing that a public university violated the First Amendment by disciplining a student for their political speech on social media. The court erroneously held that the student's rights were not clearly established, and declined to decide the issue going forward.

The Movement to Repeal Qualified Immunity

A growing chorus of diverse stakeholders, ranging from the Cato Institute and the Institute of Justice to the ACLU, is demanding legislation to repeal this destructive legal doctrine. A recent "cross-ideological" amicus brief brought together the NAACP and the Alliance Defending Freedom. Activists against police violence also demand repeal.

This movement is buoyed by legal scholars who show the doctrine has no support in the 1871 law's text and history. Likewise, judges required to follow the doctrine have forcefully condemned it.

Congress is beginning to heed the call. Last month, the U.S. House of Representatives passed the George Floyd Justice in Policing Act (H.R. 1280), which would repeal qualified immunity as to police. Even better, the Ending Qualified Immunity Act (S. 492) would repeal it as to all government officials. It was originally introduced by Rep. Ayanna Pressley (D-Mass.) and Rep. Justin Amash (L-Mich.).

States and cities are doing their part, too. Colorado, New Mexico, and New York City recently enacted laws to allow lawsuits against police misconduct, with no qualified immunity defense. A similar bill is pending in Illinois.

Next Steps

EFF supports legislation to repeal qualified immunity—a necessary measure to ensure that when government officials violate our digital rights, we can turn to the courts for justice. We urge you to do the same.