# Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable

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As protesters filled the streets last summer to decry the tragic killings by police of George Floyd, Breonna Taylor, Ahmaud Arbery and countless others, they brought signs and slogans with them. Poster board and cardboard pieces were lifted into the air with firm demands scrawled across them: “Justice for George,” “#SayHerName,” “I Can’t Breathe,” and “No Justice, No Peace” were familiar phrases bobbing amongst the sea of activists. As the weeks stretched on, the movement catalyzed by the hideous killing of Floyd caught on video continued to grow, with millions of people taking to the streets. Among the signs, a more specific demand began to appear: Abolish qualified immunity.

Once an obscure legal doctrine, qualified immunity is now in the spotlight — and in the crosshairs of many activists and advocates nationwide. For decades, the doctrine has shielded police officers and other government employees from being held responsible for all sorts of malfeasance. Qualified immunity makes it nearly impossible for individuals to sue public officials by requiring proof that they violated “clearly established law.”

In a rare show of solidarity with protesters in cities like Minneapolis, New York, and Portland, courts and state legislatures began to take notice, too — in June, Colorado lawmakers passed a bill that gutted the doctrine’s power in state courts. Multiple lower federal court decisions have also acknowledged how qualified immunity functions more as absolute immunity, and shields police officers from accountability, with even a conservative Supreme Court justice calling the doctrine into question.

The ACLU is a part of the movement to end qualified immunity once and for all, through our work advancing legislation in statehouses, combating the use of the doctrine in court, and advocating for an end to qualified immunity on the federal level.

**In the Statehouse**

The brunt of law enforcement’s racial terror campaigns is felt by the Black and Brown communities that are forced to deal with outsized police presence every day. The fight to combat that harm is led by a coalition of grasstop groups that organize and advocate in city halls and statehouses across the country. In several states, including Minnesota, the ACLU has fought alongside these groups to advance reform through legislation.

- **Minnesota:** The ACLU of Minnesota is working with the Institute for Justice to develop legislation that would bypass the effect of qualified immunity by making it easier for

people to sue government agencies — not just individual officers — in state courts when police violate their rights. Additionally, the ACLU of Minnesota is advocating to reform the laws that allow officers like Derek Chauvin, who killed George Floyd and who had a long history of civilian complaints on his record, to keep committing violence against the community. Currently under Minnesota state law, civilian oversight boards cannot make findings of fact relating to a complaint against a police officer, impose disciplinary sanctions, or make binding recommendations. H.F. 905 would repeal the law that prevents civilian oversight boards from having these powers, allowing local governments to create empowered boards that can take tangible action against officers accused of misconduct. Removing this barrier at the local level is a first step toward independent, community-informed oversight of policing and public safety.

- **Illinois:** After decades of unacceptable police abuse and horrors, current Illinois law still protects out of control officers from being held accountable for violating people's constitutional rights. These protections do not serve good police officers; they do not serve our communities; they only serve bad apples in Illinois' police ranks. A recent poll shows that 91 percent of Illinois voters are strongly supportive of legislative efforts that hold police accountable for misconduct and 69 percent of voters agree that reform is necessary now because of racial bias in policing. Reflecting this overwhelming public support, the ACLU of Illinois supports H.B. 1727 — the Bad Apples in Law Enforcement Accountability Act — which removes the protections of qualified immunity in state court so that police officers can be held accountable when they violate someone's constitutional rights.

- **New Mexico:** New Mexico has one of the highest rates of fatal police shootings in the country. The New Mexico Civil Rights Act creates an avenue for New Mexicans to bring claims for damages in state court against police officers and other public officials who violate the rights guaranteed to them under the New Mexico Constitution. The bill specifically prohibits the use of qualified immunity.

**In the Courts**

Last term, multiple petitions before the Supreme Court called into question whether qualified immunity should be limited or abolished altogether.

- **The court grouped three petitions together, including ours in *Baxter v. Bracey*, and then repeatedly delayed acting on them.** It seemed possible that maybe the court was finally going to meaningfully tackle qualified immunity. Then, on June 15, 2020, mere weeks after Derek Chauvin killed George Floyd and millions of people flooded the streets to protest police brutality, the Supreme Court denied the petitions. Justice Thomas was the only one to write anything on the occasion of the court declining all the petitions; he wrote to protest the denial of certiorari in our case, *Baxter*. For a brief moment it looked like the cross-ideological coalition we are part of might have convinced four justices to take a case. Then the bubble burst.

- Five months later, a new glimmer of hope emerged. **In November 2020, the court granted, reversed, and remanded a qualified immunity decision out of the Fifth Circuit in *Taylor v. Riojas*.** Trent Taylor was incarcerated in Texas and he spent six days in heinous conditions: The first cell where he was detained was covered almost floor to

ceiling in human feces, and he was forced to sleep naked in sewage in the freezing cold in his second cell. The officers responsible for this gross violation were granted qualified immunity by the court, which reasoned that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste … for only six days."

The Supreme Court disagreed: "No reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." As law professor Joanna Schwartz explains, *Hope v. Pelzer* is the only other case in which "the Supreme Court ruled that qualified immunity could be denied in the absence of a prior court opinion on point … Since 2002, the court had only paid lip service to the notion that qualified immunity can be defeated without a prior case on point."

- **Only a few months later, the court did it again in *McCoy v. Alamu*.** McCoy was incarcerated in Texas when an officer attacked him for no reason. The Fifth Circuit granted qualified immunity based on its understanding that the defense is especially difficult to overcome in excessive force cases. But the Supreme Court granted McCoy's petition, vacated the Fifth Circuit's opinion, and remanded the case to the lower court with instructions to reconsider the case in light of *Taylor*.

- *Taylor* and *McCoy* have ignited a debate among qualified immunity nerds (that's a compliment), as Adam Liptak has reported. Professor Schwartz argues that "the court is indicating a change" and "appears to be sending a message that lower courts can deny qualified immunity for clear misconduct, even without a case with identical facts." Jay Schweikert at the CATO Institute, with whom we have worked closely on qualified immunity reform efforts, believes "the Supreme Court has decided to forgo reconsideration of the doctrine in favor of small doctrinal clarifications." Anya Bidwell and Patrick Jaicomo at the Institute for Justice are the most optimistic, characterizing these as the "early days in the reconsideration — if not ultimate rejection — of the court-created doctrine of qualified immunity."

We're very glad to see that there are cracks developing in the shield of qualified immunity. But these cracks are not nearly enough. The ACLU will continue to fight in court to see the doctrine weakened and ultimately dismantled, as we did recently in yet another horrific Fifth Circuit case.

- **One ongoing case that highlights both the absurdity of qualified immunity and the extent to which officials may go under its protection is *Black Lives Matter D.C. v. Trump*,** the ACLU-DC's class action lawsuit challenging the vicious and unprovoked attack on civil rights demonstrators in Lafayette Square last June. The defendants in the case were sued under Section 1983 and *Bivens*, which is another type of case where officers can use qualified immunity. From the Park Police officer who beat a journalist as she was escaping the protest, all the way to former Attorney General Bill Barr, they have all invoked qualified immunity to avoid liability for their misconduct.

In moving to dismiss our case, defendants have argued that their conduct cannot be "clearly established" as unconstitutional — thus defendants are shielded by qualified immunity — unless plaintiffs can point to a specific case involving "a presidential appearance, an alleged dispersal order emanating from the Attorney General himself, a city-wide curfew and emergency order"

and more. They are wrong, but under qualified immunity, we can't be sure a federal court will see it our way and refuse to countenance brutality with impunity.

**In Congress**

Qualified immunity reform is needed to ensure that police can be held accountable after they violate the constitution. But we also need reform on the front end that prevents police brutality before it happens. An important first step is to set clear national standards that require all police departments to adhere to common-sense limitations on use of force and best practices.

- President Biden has already committed to the creation of a national, model use-of-force standard as one of his racial equity priorities. **The ACLU is currently lobbying Congress to pass legislation that ensures this model standard truly conforms to the best practices in the field by embracing the principles set forth in the PEACE Act**, which would permit officers to use force only when necessary, proportional, and as a last resort, after less extreme alternatives are exhausted. That standard would not only apply to federal agents, it would provide incentives to state and local police departments to adopt the rule.
- **Ayanna Pressley's End Qualified Immunity Act would end qualified immunity** for state and local actors.

Qualified immunity fosters an environment where government agents, including police, may feel empowered to violate people's rights with the knowledge they will face few consequences. This erodes relationships with the community and diminishes the system's credibility. Under qualified immunity, lives can be taken with impunity. It's past time to heed the protesters' signs, and end this doctrine once and for all.