

NATIONAL REVIEW

Bill to Restrict Qualified Immunity Accidentally Makes the Case for It

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A few weeks back I [called on Congress](#) to reform the doctrine of qualified immunity, which makes it difficult to sue police officers who violate suspects' constitutional rights. While many would like to see the doctrine ended entirely, I would prefer to narrow it: Make it easier to punish clear abuses, but don't let courts make up new rules and apply them retroactively.

A [new bill](#), [helpfully described over at the Cato Institute's blog](#), unintentionally shows why a careful approach is needed. Not only does it retain a sliver of the qualified-immunity defense, but it also explicitly bans defenses that most people would find entirely reasonable.

The bill states that it will *not* be a defense to a lawsuit for a cop to argue that:

- (A) the defendant was acting in good faith;
- (B) the defendant believed, reasonably or otherwise, that his or her conduct was lawful;
- (C) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established; or
- (D) the state of the law was such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

Another part of the bill basically gives cops a safe harbor if what they did was explicitly authorized by a law or court decision. Even so, however, the text quoted above outright states that cops can be held liable *even if they did not know and could not have been expected to know that they were violating the Constitution* — which is to say that courts can make up the law as they go along and apply it retroactively.

That's what we get if we crack down on qualified immunity without thinking through the consequences.

