Newsday

What does qualified immunity for police officers mean?

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An obscure judicial doctrine that makes it harder to sue police for misconduct looms as a key battle as Congress considers police reform after the outcry over a Minneapolis police officer killing of George Floyd by kneeling on his neck.

The doctrine, called qualified immunity, shields police from being sued for money damages in federal court for constitutional violations such as excessive force unless the officers broke any "clearly established" law — a high bar for plaintiffs to overcome.

Democratic and Republican leaders already have taken sides for and against amending the law to void the legal doctrine, though that change is backed by some Republican lawmakers and an unusual mix of liberals, libertarians and conservatives.

House Democrats have made ending qualified immunity for police and correctional officers a priority in the sweeping Justice in Policing Act, saying it allows police to act with impunity by blocking the ability to sue officers for unconstitutional abuse, injury or death.

"There must be accountability, and that is why it is so crucial that we eliminate qualified immunity, which has allowed police to use their badge as a shield from accountability," said Rep. Ayanna Pressley (D-Mass.), a co-sponsor of bills to end that doctrine.

But President Donald Trump and Senate Majority Leader Mitch McConnell (R-Ky.) have drawn the line against amending the underlying law on qualified immunity, calling it a "non-starter." Police groups oppose stripping away that protection.

"It's a very important issue. It could be considered a poison pill for the vast majority of my conference," said Sen. Tim Scott (R-S.C.), who led the team that crafted the Senate Republicans' bill, which does not mention that legal doctrine.

Congress' struggle to respond to the widespread, multiracial and popular protests demanding that Washington do something about police killings of African Americans will play out in the week ahead as the House Democrats and Senate Republicans move their bills to the floor.

What is qualified immunity?

Congress granted citizens the right to sue state public officials for damages for violations of their constitutional rights in the Civil Rights Act of 1871, also called the Ku Klux Klan Act, to enforce Reconstruction and protect freed slaves from white officials' oppression.

That law, codified as 42 U.S.C. 1983 and often referred to as Section 1983, now allows lawsuits against all state and local public officials, including police, sheriffs and other law enforcement officers. The law does not mention or refer to qualified immunity.

In a 1967 ruling, though, the Supreme Court said police and other public officials would be immune from lawsuits, but that immunity was qualified — it would only protect the officials if they acted in "subjective good faith" in their acts or conduct identified by the plaintiffs.

In 1982, the high court raised the bar for plaintiffs with an "objective" test: Plaintiffs could overcome officials' qualified immunity only by showing their conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."

The court said in another ruling that lawsuits should be permitted only to officials who are incompetent or knowingly break the law. And a 2009 decision has led lower court judges to quite literally parse whether a police officer knowingly violated a "clearly established" law.

A Doctrine Under Attack

Qualified immunity faces a growing chorus of critics, who blame the courts' interpretation of what it takes to show police violated a "clearly established" law to succeed.

"Police officers can usually defend themselves against civil charges so long as they can argue that even if they violated the Constitution, there isn't another case with basically the same facts that already existed in the jurisdiction they're in," said Chris Kemmitt, senior counsel at the NAACP Legal Defense Fund.

Increasingly, appellate courts appear to have protected police in excessive force cases, a Reuters analysis last month found, with the courts shifting from approving police immunity in 44% of those cases in 2005-07 to 57% of them in 2017-2019.

An unusual "cross-ideological" dozen-member collaboration that includes the NAACP Legal Defense Fund, the libertarian Cato Institute, and the gun rights Second Amendment Foundation have filed briefs in support of appeals to the Supreme Court.

Those briefs back challenges in cases in which immunity was granted to inept cop accidents, apparent police illegality and simply brutality, including:

- An appellate court panel protected a Georgia deputy who aimed at an unthreatening dog but shot a 10-year-old child instead because no prior case matched those "unique" facts, though one judge protested that no "competent" officer would shoot at a dog surrounded by kids.
- An appeals court ruled that officers might have been "morally wrong" but didn't have "clear notice" that theft violates the 4th Amendment in blocking a California homeowner's suit against police for allegedly stealing $225,000 in cash and rare coins while executing a search warrant.
- An appellate court dismissed a homeless man's suit against police in Tennessee who sicced a dog on him after he surrendered while sitting with his hands in the air because raising his hands wasn't enough to put them on notice that releasing the dog on him was unlawful.

But the Supreme Court continues to stand by its legal doctrine, refusing on Monday to hear eight challenges to qualified immunity. That leaves the question up to Congress.

Proposed limits

The House Democrats' Justice in Policing Act effectively voids the Supreme Court's qualified immunity doctrine for police and correctional officers, removing defenses for acting in good faith and the "clearly established" law standard.

The legislation, which also includes a wide range of measures from ending chokeholds and no-knock warrants to toughening federal and state probes of police misconduct, is co-sponsored by 225 Democrats, enough to pass it in the House.

The national Fraternal Order of Police did not comment on qualified immunity in its statement pledging to work with Congress to improve policing.

Sen. Lindsey Graham (R-S.C.) and Rep. Tom McClintock (R-Calif.) said they're open to discussing a limit on qualified immunity, and Sen. Mike Braun (R-Ind.) said he will introduce a bill to limit it but still protect police from "frivolous lawsuits."

The battle in Congress likely will be fought on political, not ideological, lines.

Potential effects of removal

Advocates and legal scholars offer conflicting views of what will happen if police lose qualified immunity.

Sherrilyn Ifill, president of the NAACP Legal Defense Fund, told Congress it would end the kind of police impunity that allowed former Minneapolis police officer Derek Chauvin to look with no fear at cameras recording him kneeling on the neck of George Floyd.

Police groups and unions, and many Republicans, say it would have a chilling effect on police work, make them hesitant to act when they should be decisive in dicey situations, or lead to retirements and a smaller pool of applicants for police jobs.

“Qualified immunity is a foundational protection for the policing profession and any modification to this legal standard will have a devastating impact on the police’s ability to fulfill its public safety mission,” the International Association of Chiefs of Police said in a statement.

Both sides say it could lead to more federal civil rights lawsuits and more payouts by cities, counties and states for judgments and settlements as they indemnify their law enforcement officers.

New York City paid $94.6 million for Section 1983 civil rights claims last year, the city comptroller reported, and $100.2 million the year before. The city paid another $95.2 million for police misconduct lawsuits under state law last year, and $117.8 in 2018.

Yet in high-profile cases, local governments have sought a negotiated settlement to avoid the cost and time of a federal civil rights trial, such as New York City’s $5.9 million payout to the estate of Eric Garner, who died after a police chokehold on Staten Island.

And some scholars argue the pressure of higher payments may lead cities and counties to provide better training of officers and more oversight of their police departments.

Joanna Schwartz, a UCLA law professor who has done extensive research into Section 1983 lawsuits, predicted in a March law review paper a much less earth-shattering result: more clarity of the law, more lawsuits but no increase in the rate of success for those cases.

“Doomsday scenarios imagined by some commentators — of courthouses flooded with frivolous claims — would not come to pass,” she wrote. “And constitutional litigation would often still fail to hold government officials accountable when they exercise power irresponsibly.”

Daniel Epps, a Washington University law professor, wrote in a recent New York Times Op-Ed that courts will still narrowly interpret constitutional rights against police misconduct and police won’t be swayed by lawsuits that they won’t have to pay for if they lose.

But he said eliminating qualified immunity would be a positive symbolic step.

“Qualified immunity routinely requires courts to say that there will be no penalty for a police officer who has violated the Constitution. That sends the message — to officers and the public — that the police are above the law,” he wrote. “That is the wrong message.”