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Legal Sidebar

Policing the Police: Qualified Immunity and Considerations for Congress

Updated February 21, 2023

Incidents involving the use of force by law enforcement, such as the 2020 death of George Floyd and the 2023 death of Tyre Nichols, have raised questions regarding how existing law regulates the conduct of police officers. While some of these issues are explored more broadly in other Legal Sidebars, one particular issue of recent judicial and legislative focus is the doctrine of qualified immunity.

Qualified immunity is a judicially created doctrine shielding from civil liability those public officials who perform discretionary functions. The doctrine plays a particularly prominent role in defense of civil rights lawsuits against federal law enforcement officials under the *Bivens* doctrine and against state and local police under 42 U.S.C. § 1983 (Section 1983). Commentators debate whether Congress should legislate to abrogate or otherwise modify the doctrine. Defenders of the doctrine have suggested that qualified immunity plays an important role in affording police officers some level of deference when making split-second decisions about whether to, for example, use force to subdue a fleeing or resisting suspect. Critics of the doctrine have questioned its legal origins and have argued that, in practice, it has provided too much deference to the police at the expense of accountability and the erosion of criminal suspects' constitutional rights. This Sidebar explores the legal basis for qualified immunity, how it has operated in practice, and current debate over the efficacy of the doctrine. The Sidebar concludes by discussing considerations for Congress regarding qualified immunity.

What Is Qualified Immunity?

Qualified immunity is a judicially created legal doctrine that protects government officials performing discretionary duties from civil liability in cases involving the deprivation of statutory or constitutional rights. Government officials are entitled to qualified immunity so long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The Supreme Court has observed that qualified immunity balances two important interests—"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." The immunity's broad protection is intended for "all but the plainly incompetent or those who knowingly violate the law" and to give government officials "breathing room" to make reasonable mistakes of fact and law. According to the Supreme Court, the "driving force" behind qualified immunity was to ensure that

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LSB10492

"insubstantial claims" against government officials were resolved at the outset of the lawsuit. Qualified immunity, when applied, provides immunity not only from civil damages but from having to defend against litigation altogether.

The Supreme Court has set forth a two-part analysis when determining whether an official is entitled to qualified immunity: (1) whether the facts alleged by the plaintiff amount to a constitutional violation, and (2) if so, whether the constitutional right was "clearly established" at the time of the misconduct. (Some circuit courts also include a third prong, which asks whether the conduct was "objectively reasonable" in light of clearly established law, but the Supreme Court has not expanded its two-part analysis to date.) Both conditions must be met for a suit against the official to proceed. Conversely, if either condition is absent, then the official is immune from suit. The Supreme Court grants courts the discretion to decide which prong to first address in light of the circumstances of the facts of the case at hand. Whether a right is clearly established depends on whether "the contours of a right are sufficiently clear" so that every "reasonable official would have understood that what he is doing violates that right." When conducting this analysis, courts look to see whether it is "beyond debate" that existing legal precedent establishes the illegality of the conduct."

Qualified immunity is available for local and state government officials such as law enforcement officers, teachers, or social workers in actions brought under Section 1983. While Section 1983 applies only to claims against officials acting under *state* law, the Supreme Court has also recognized an implied damages claim, known as a *Bivens* action, for constitutional misconduct by *federal* officials in limited circumstances. Federal officials who face liability under the *Bivens* doctrine, which was first recognized in the 1971 case *Bivens v. Six Unknown Federal Narcotics Agents*, may also claim qualified immunity.

Historical Development of Qualified Immunity

The Supreme Court developed qualified immunity as part of its interpretation of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act). The portion of that statute now codified in Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." As applied to the conduct of police officers, Section 1983 provides a legal remedy for individuals claiming that their constitutional rights, such as the right to be free from excessive force under the Fourth Amendment, were violated by state or local police acting pursuant to state or local law. According to the Supreme Court, Section 1983 is a "vital component ... for vindicating cherished constitutional guarantees," as the law has been viewed much like common law tort claims that deter wrongful actions.

While the modern qualified immunity test was first set forth in the Supreme Court's 1982 decision *Harlow v. Fitzgerald*, the concept of qualified immunity as a "good faith defense" has origins in common law. The Court first extended a "good faith defense" to police officers in a Section 1983 case in its 1967 decision *Pierson v. Ray*. There, the Court held that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," and therefore, common law defenses such as good faith were applicable to actions brought under Section 1983. The Court determined that although they were not expressly included in Section 1983, there was no evidence in the legislative record that Congress intended to abolish common law immunities.

Fifteen years later in *Harlow*, the Supreme Court distinguished qualified immunity from absolute immunity. Absolute immunity provides a complete immunity from civil liability and is usually extended to, for example, the President of the United States, legislators, judges, and prosecutors acting in their official duties. Absolute immunity, according to the Court, provides high-level officials a "greater protection than those with less complex discretionary responsibilities." For other government officials, however, the Court believed a qualified immunity was still necessary to balance "the importance of a

damages remedy to protect the rights of citizens" with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." Thus, the Court established the modern objective test, granting qualified immunity to those government officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In the years since *Harlow*, the Supreme Court has continued to refine and expand the reach of the doctrine. For example, one legal scholar examined eighteen qualified immunity cases that the Supreme Court heard from 2000 until 2016, all considering whether a particular constitutional right was clearly established. In sixteen of those cases, many of which involved allegations of police use of excessive force in violation of the Fourth Amendment, the Court found that the government officials were entitled to qualified immunity because they did not act in violation of clearly established law. In deciding what constitutes clearly established law, the Court has focused on the "generality at which the relevant legal rule is to be identified." Recently, the Court has emphasized that the clearly established right must be defined with specificity, such that even minor differences between the case at hand and the case in which the relevant legal right claimed to be violated was first established can immunize the defendant police officer. For example, in the 2019 case *City of Escondido, California v. Emmons*, the Court reviewed a claim of excessive force brought against a police officer. In holding that the officer was entitled to qualified immunity, the Court explained that the appropriate inquiry is not whether the officer violated the man's clearly established right to generally be free from excessive force but whether clearly established law "prohibited the officers from stopping and taking down a man in these circumstances."

The Debate over Qualified Immunity

As courts have expanded the protections of qualified immunity, criticism of the doctrine has also increased. Some scholars have argued that qualified immunity has no basis in the common law—the body of law from which the Court derived the doctrine. Justice Clarence Thomas has advocated for reconsidering the Court's qualified immunity jurisprudence on these grounds, arguing that the modern doctrine bears little resemblance to the common law immunity and instead represents a "freewheeling policy choice" that only Congress has the power to make.

Other criticisms of the doctrine focus more on its practical applications, with some arguing that qualified immunity no longer achieves its policy goals of protecting public officials from the expense and distraction of litigation and from the danger that the fear of being sued will prevent officials from performing their duties or from entering public service altogether. For example, former Supreme Court Justice Stephen Breyer has argued that indemnification by police departments of their employees may alleviate employees' concerns about facing liability upon accepting employment. According to one study, police officers are "virtually always indemnified," meaning even if they are found liable for their own individual conduct, the city or county covers any monetary damages.

There is also some concern that the level of specificity required has made it increasingly difficult for plaintiffs to show that the law was clearly established—which some scholars have argued may jeopardize the purpose of Section 1983 as a tool for allowing individuals to recover for constitutional violations. Justice Sonia Sotomayor, dissenting in several cases in which the Court found officers were entitled to qualified immunity, expressed her disfavor with the modern approach, fearing its application essentially provides an absolute shield for law enforcement officers and "renders the protections of the Fourth Amendment hollow." Some statistics may support this hypothesis: According to one recent study, appellate courts have shown an increasing tendency to grant qualified immunity, particularly in excessive force cases. From 2005 to 2007, for example, the study reported that 44 percent of courts favored police in excessive force cases. That number jumped to 57 percent in excessive force cases decided from 2017 to 2019.

The modern application of qualified immunity has its proponents. In its qualified immunity jurisprudence involving the police, a majority of the Supreme Court has emphasized the important role the doctrine plays in allowing law enforcement the flexibility to make judgment calls in rapidly evolving situations. According to one defender of the doctrine, members of law enforcement find it "comforting" to know the doctrine protects all but "the plainly incompetent or those who knowingly violate the law." Although a majority of jurisdictions may indemnify police officers, some do not—leaving officers at risk of personal financial liability. Other scholars have defended qualified immunity on stare decisis grounds (i.e., the doctrine that promotes maintaining long settled interpretations of the law—especially statutes—absent a special justification) while questioning both the historical and practical arguments lodged against the doctrine. There are also empirical questions on whether qualified immunity is actually a significant barrier to recovery under Section 1983. For example, according to one study, "qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end."

Considerations for Congress

As the debate over qualified immunity continues, some discussion addresses which branch of government should be responsible for any reforms of the doctrine. Because qualified immunity is judicially created, the Supreme Court may, as it has in the past, choose to revise the doctrine. Some scholars have expressed skepticism that the present Court will reverse course on its expansion of the doctrine, pointing out that the Court is generally reluctant to overturn its interpretation of statutes. Another group of scholars suggests that even if it does not completely repeal the doctrine, the Court may choose to revisit its prior precedent to "better align" qualified immunity with its earlier role.

There may also be a role for Congress in revising qualified immunity. Because qualified immunity is a product of statutory interpretation, Congress has wide authority to amend, expand, or even abolish the doctrine. Several bills introduced in the 116th and 117th Congresses proposed various approaches to reforming qualified immunity. For example, H.R. 7085—the Ending Qualified Immunity Act—introduced in the 116th Congress, would have amended Section 1983 by abolishing both the "good faith" defense and the defense that the law was not clearly established at the time of the alleged misconduct. A similar proposal—limited to cases brought against certain state and local police officers and federal investigative or law enforcement officers, was found in the Justice in Policing Act of 2020 and 2021.

Another proposal from the 116th Congress aimed at removing barriers to Section 1983 liability was the Reforming Qualified Immunity Act. Under current law, officials are entitled to qualified immunity unless "clearly established" law *prohibited* their conduct. This proposal would instead have placed the burden on Section 1983 defendants to affirmatively show with some particularity that the law *authorized* their conduct.

Questions could remain, however, as to whether eliminating qualified immunity in Section 1983 cases or in other circumstances properly calibrates the competing interests that persuaded the Supreme Court to recognize qualified immunity in the first place. There may also be questions about whether it is appropriate to eliminate qualified immunity for *state and local* law enforcement agents under Section 1983—as several proposals would have done—while leaving it in place for *federal* law enforcement agents in claims brought under *Bivens*. Eliminating qualified immunity entirely—as other legislation has proposed—may have effects beyond law enforcement, as the doctrine currently extends to all government employees.

As an alternative to eliminating qualified immunity, Congress could choose to provide for qualified immunity by statute but in more limited circumstances than current law. For example, Congress could limit the reach of the doctrine to only certain government actors (as the Justice in Policing Act would have done) or limit the doctrine's application in cases where certain rights are at stake, such as Fourth Amendment excessive force claims. Or, similar to the Reforming Qualified Immunity Act, Congress may

choose to impose a new statutory test to apply to state and local actors sued in their individual capacities. Congress could also abrogate recent Supreme Court jurisprudence requiring a high level of specificity for a finding of "clearly established" law.

Beyond the doctrine of qualified immunity, Congress could, as some have suggested, explore reforming or eliminating the separate immunity rules set forth in *Monell v. Department of Social Services*. In that case, the Supreme Court held that while a municipality is a "person" subject to suit under Section 1983, a local government cannot be sued "for an injury inflicted solely by its employees or agents." Some have suggested that the Reforming Qualified Immunity Act would revise the *Monell* rule by providing that "a municipality or other unit of local government shall be liable for a violation [of Section 1983] by an agent or employee of the municipality or other unit of local government acting within the scope of his or her employment." Additionally, the Constitutional Accountability Act, introduced in the 117th Congress, would have rendered federal, state, and local governments civilly liable for constitutional violations by law enforcement officers in their employment, "without regard to whether such employee or contractor would be immune from liability, and without regard to whether the employee or contractor was acting pursuant to a policy or custom" of the employer.

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