

ENDING QUALIFIED IMMUNITY IS BAD PUBLIC POLICY

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In the wake of the killing of George Floyd at the knee of a Minneapolis police officer, some on the political left and right have called for expanding the personal civil liability of police officers by ending the protections of the “qualified immunity” doctrine. This situation is a tragedy, and society should continue to root out and rectify injustice wherever it may be found, but ending qualified immunity is a very bad idea that will have severe unintended consequences for our communities. Such a departure from existing law would unnecessarily expose workers in law enforcement, public safety, and other government agencies to civil liability.

Section 1983 of Title 42 of the United States Code creates a private civil remedy against a government actor for violating someone’s constitutional rights. This could include any government worker, but this piece will focus specifically on police officers. Section 1983 is an overall good law that provides citizens redress against bad police officers.

But what happens when there is not a so-called bad actor? Officers are often called to make tough, discretionary decisions in situations that are rapidly evolving and uncertain. And constitutional law is not always clear. A split-second decision made by a police officer can be debated for over a decade by lawyers and judges. Well, cops do not have that kind of time when they are out working to keep our communities safe.

Enter the doctrine of qualified immunity. If a police officer makes a discretionary decision on the job, then the officer will generally be shielded from civil liability unless the officer violated clearly established constitutional rights. In lay terms,

the qualified immunity doctrine protects police officers from civil liability when they act reasonably and in good faith. Qualified immunity gives some peace of mind to police officers who, along with their families, sacrifice much so that the rest of us can sleep well at night.

When discussing qualified immunity, it is just as important to say what it does not do. Qualified immunity DOES NOT protect police officers from internal investigations or departmental discipline. It DOES NOT provide immunity from criminal prosecution at either the state or federal level. Officers can still be held accountable for their poor decisions and rightfully so.

Should bad officers be taken to task? Unequivocally, yes. But to be clear—in our journey to hold bad actors accountable and provide victims with an appropriate remedy, we should not paint ALL officers, the VAST MAJORITY of whom are GOOD COPS, with the same broad brush.

With a lay understanding of the doctrine, here is what has been happening. On May 31, 2020, Congressman Justin Amash (L-MI) released a letter¹ imploring his colleagues to join in support of his bill—the Ending Qualified Immunity Act. Amash notes that his bill would “explicitly not[e] in the statute that the elements of qualified immunity outlined by the Supreme Court are not a defense to liability.”

This bill, H.R. 7805², was introduced on June 4, 2020 by Congresswoman Ayanna Pressley (D-MA) and Justin Amash (L-MI), who were joined by 16 representatives from the Democratic party as original cosponsors.

To summarize, the bill provides that it does not matter if a police officer was acting in good faith. It does not matter if the police officer reasonably believed that his or her conduct was lawful. And it certainly does not matter that the police officer “could not reasonably have been expected to know whether his or her conduct was lawful.” Whether intentional or not, this is an inartful and opportunistic attack on good members of the law enforcement community. In addition to being poorly conceived, ending qualified immunity may have serious unintended consequences for our communities.

At the federal level, this bill has not gained much traction. But there is still a vocal faction of lawmakers, social justice groups, libertarian organizations, and citizens that support ending qualified immunity. These groups are pushing for change at the state level, as well as the federal level. For example, in response to current events, Colorado enacted the Law Enforcement Integrity and Accountability Act.³ One relevant portion of this law mirrors the federal Section 1983—it allows an individual to sue a Colorado police officer for violations of rights guaranteed under Colorado’s constitution; however, the law specifically states that “qualified immunity is not a defense to liability.”⁴

In addition to the legislative branches of federal and state government, the judicial branch may, at some point, also reconsider the protections of qualified immunity. It only takes the votes of four of the nine Supreme Court justices to decide to hear a particular case. Recently, there were at least seven different qualified immunity cases from various federal appeals courts

in front of the Supreme Court for its consideration. But the Court did not have the votes to take on the cases—at least not that time. In the future, if the Court does take up similar cases, it could potentially restrict qualified immunity or eliminate it altogether.

The law enforcement community should be open to a reasonable discussion of qualified immunity, its application, and its limitations in a free society. However, ending qualified immunity altogether is—simply put—a bad idea. Given the multi-faceted nature of our legal system, law enforcement stakeholders should keep an eye on all branches of government, as police reforms may be proposed by legislators, courts, or even elected and appointed executives.

Without qualified immunity, it is only a matter of time before officers realize that the safest thing to do is nothing. Officers will be incentivized to avoid situations that could implicate constitutional rights, which is pretty much any enforcement activity. Communities should take reasonable steps to encourage their officers to be active, engaged, and proactive to protect public health, safety, welfare, property values, and more. These goals are not mutually exclusive with a push for better and more effective training.

This comes at a time when departments in many areas are having difficulty recruiting and retaining talent. If signed into law, this bill, and others like it, would ask officers to remain in or enter a profession where they can be held personally liable for very difficult decisions made under unimaginable circumstances. This is a recipe for avoidance or exodus from the police profession. To add fuel to the fire, defined benefit pensions—tools that incentivized police officers to remain on the job long term—are gradually being eliminated in many departments. Add in the constant

negative media attention, and it is hard for a person to choose law enforcement as a long-term career.

Lastly, there are increased costs associated with eliminating qualified immunity, such as litigation expenses, which will be passed on to the taxpayers. The vast majority of civil cases are resolved without a trial, but it still costs money to defend

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even the most frivolous of lawsuits. Either through insurance policy language or due to the requirements of collective bargaining agreements, municipalities often cover the costs of defense and settlement when their police officers get sued. Plus, if qualified immunity is eliminated, police unions will likely bargain for expanded lawsuit coverage for their member units, even up to indemnifying individual officers in the event of a civil suit. The already underfunded municipalities will pass these costs onto the taxpayers.

Departments should continue to punish bad officers within their ranks. Departments should continue to use current events to update their policies, practices, and training. Police should be engaged with their respective communities and have productive dialogue concerning societal issues. And, as a society, we should continue to seek justice for victims. But we should not pursue these important goals at the expense of the majority of good officers.

That is why we need to come together in opposition to the Ending Qualified

Immunity Act and similar rhetoric. The George Floyd killing is a tragedy, and those responsible should be held accountable to the fullest extent of our systems of civil and criminal justice. However, we should not allow this tragedy to be used as an excuse for bad public policy.

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Instead of punishing bad actors, it removes the protection from good officers along with the bad ones. Eliminating qualified immunity will lead to a decrease in proactive policing and negatively impact your community and police department.

Play an active role in crafting this narrative and show your support for the good officers in this state and throughout the country. Although justice for victims should be aggressively pursued, the Ending Qualified Immunity Act is a swing and a miss. Join the conversation and promote positive measures to enhance law enforcement training, police-community relations, and police accountability. But do not punish good officers to get there. 🍌

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1 Justin Amash [@justinamash], Twitter (May 31, 2020, 9:30 PM), <https://twitter.com/justinamash/status/1267267244029083648?s=20>
2 Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020) (available at <https://www.congress.gov/bill/116th-congress/house-bill/7085/text>)
3 Law Enforcement Integrity and Accountability Act, S.B. 20-217 (Colorado 2020) (available at https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf).
4 Colo. Rev. Stat. § 13-21-131(2)(b).