



Policing the Police: Qualified Immunity and Considerations for Congress

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In the wake of unrest arising from George Floyd’s death on May 25, 2020, after a Minneapolis police officer pressed a knee into his neck, broader questions have arisen with regard to how existing law regulates the conduct of local police officers. While these issues are explored more broadly in these [separate Sidebars](#), one particular issue of recent judicial and legislative focus has been the doctrine of qualified immunity. Qualified immunity is a judicially created doctrine shielding public officials who are performing discretionary functions from civil liability. 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 \(Section 1983\)](#). With regard to its role in civil lawsuits concerning violations of constitutional norms regulating the police, [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 its practice has provided [too much deference](#) to the police at the expense of accountability and the erosion of criminal suspects’ constitutional rights. With increasing focus on whether [Congress](#) should legislate to abrogate or otherwise modify the doctrine, 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 [shields](#) 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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“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 liability altogether.

Courts apply 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. [Recent Supreme Court precedent](#) provides flexibility in applying this standard, granting 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, for example, law enforcement officers, teachers, or social workers. Federal officials who face liability in cases brought under the [Bivens](#) doctrine—which allows for individuals to recover for the deprivation of constitutional rights against federal officials in [a few, limited circumstances](#)—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) and its codified cause of action at [Section 1983](#). That statute 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 actions which deter against wrongful actions. (While Section 1983 facially applies only to those acting under *state* law, the Court functionally expanded its application when it recognized an implied damages claim for Fourth Amendment violations by *federal* law enforcement officers in [Bivens v. Six Unknown Federal Narcotics Agents](#).)

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 Court—while again recognizing that the common law afforded government officials some level of immunity to “shield them from undue interference with their duties and from potentially disabling threats of liability”—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,” however; for other government officials, qualified immunity is still necessary, in the Court’s view, 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 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 brought by a man who alleged police used excessive force in arresting him. Following past incidents of domestic abuse by a husband against his wife, police in Escondido, California, responded to a domestic disturbance call at the residence of the couple. After failing to make contact with anyone inside the home, a man—who later turned out to be the wife’s father—eventually opened the door and passively **brushed past** the police. An officer took the man to the ground and handcuffed him, allegedly injuring him in the process. In holding 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.” In so holding, the Court rejected the lower court’s attempts to analogize this case to another that generally involved the use of excessive force in response to passive resistance by a criminal suspect. Instead, the Court, citing other **recent precedent**, stressed the need to “identify a case where an officer under similar circumstances was held to violate the Fourth Amendment.”

The Debate over Qualified Immunity

As courts have expanded the protections of qualified immunity over the years, criticism of the doctrine has also increased. At least three major criticisms of the doctrine have emerged. First, some scholars have argued that qualified immunity has **no basis in the common law**—the body of law from where the Court determined the doctrine originated. **In a recent concurrence**, Justice Thomas 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 the Court lacks the power to make and usurps the role of Congress.

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, **Justice Breyer has argued** that indemnification by police departments of their employees may alleviate employees’ concerns about facing liability upon accepting employment. And 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.

And there is 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 Sotomayor, in 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](#).” And 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](#), 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, however, is not without its proponents. Throughout 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.” And 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. And some studies, while perhaps also undermining the need for the doctrine, may also refute the concern that qualified immunity is 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, there is [discussion](#) over which branch of government should be responsible for reforming the doctrine. Because qualified immunity is judicially created, the Supreme Court may, [as it has](#) in the past, choose to revise the doctrine. As mentioned above, some justices—for varying reasons—believe the modern application of qualified immunity should be reexamined. And [some observers](#) suggest that the Court may be preparing to reconsider the doctrine. The Court is currently considering [multiple petitions for certiorari](#) in cases that involve challenges to qualified immunity. Other [scholars](#), however, express skepticism that the Roberts 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](#) suggest 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 originally intended role. The Court, however, recently [rejected](#) a number of petitions to review cases involving qualified immunity.

Even without action from the Court, there may be a potential 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. For example, H.R. 7085—the Ending Qualified Immunity Act—would amend 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, as defined in 28 U.S.C. § 2680(h)—is found in the [Justice in Policing Act of 2020](#). These proposals would effectively eliminate the judicially created doctrine applied in modern Section 1983 litigation and in any actions against federal law enforcement officers.

Another proposal aimed at removing barriers to Section 1983 liability is the [Reforming Qualified Immunity Act](#). Unlike current law, which grants officials qualified immunity if the constitutional right alleged to have been violated is not “clearly established,” this proposal would place the burden on Section 1983 defendants to affirmatively show with some particularity that the conduct at issue has been authorized by law. Specifically, the proposal would seek to remove the existing doctrine of qualified

immunity and instead provide that an individual defendant “shall not be liable” if the defendant reasonably believed that his or her conduct was lawful and either (1) the conduct at issue was “specifically authorized or required” by federal or state law, or (2) a federal or state court had issued a final decision holding that “the specific conduct alleged to be unlawful was consistent with the Constitution of the United States and Federal laws.”

Questions [could remain](#), however, as to whether eliminating the doctrine in Section 1983 cases or beyond properly calibrates the competing interests that drove the Supreme Court to recognize qualified immunity in the first place. There may also be questions about whether eliminating qualified immunity for *state* law enforcement agents (or some subset of state actors) under Section 1983—as several proposals would do—would create an anomaly where the doctrine would still exist for *federal* law enforcement agents under *Bivens*. And eliminating qualified immunity entirely—as other legislation proposes—would appear to have effects beyond state and local police officers, as the doctrine extends to all government employees who make discretionary decisions in their work.

As an alternative, Congress could instead choose to scale back qualified immunity to more limited circumstances. For example, Congress could limit the reach of the doctrine to only certain government actors (as the [Justice in Policing Act of 2020](#) does) 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.

And 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” under the theory of *respondeat superior* (the legal doctrine that an employer may be liable to suit for wrongful acts of its employees). 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,” in effect applying the doctrine of *respondeat superior* to such governmental entities.

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