



June 23, 2020

Support the Reforming Qualified Immunity Act, S. 4036

On behalf of FreedomWorks' activist community, I urge you to contact your senators and ask them to co-sponsor the Reforming Qualified Immunity Act, S. 4036. Introduced by Sen. Mike Braun (R-Ind.), the Reforming Qualified Immunity Act would restore the original intent of 42 U.S.C. 1983 and clarifies the judicial doctrine of qualified immunity created by the Supreme Court.

Federal law, in [42 U.S.C. 1983](#), provides a private right of action for individuals whose rights are deprived by any individual acting in his or her official state and local government capacity, including law enforcement. This law was part of the Enforcement Act of 1871, which was passed to combat the Ku Klux Klan and white supremacy after the Civil War.

However, in 1967, the Supreme Court created the doctrine of "qualified immunity" for public officials out of thin air, and in conflict with existing statute, essentially insulating government officials from civil lawsuits unless constitutional protections were clearly established. The Supreme Court gave the modern view of qualified immunity in *Harlow v. Fitzgerald* (1982). As Justice Lewis Powell wrote in his opinion for the Court, "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."

In *Saucier v. Katz* (2001), the Court clarified the test for qualified immunity. Justice Anthony Kennedy wrote, "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals." Subsequent case law has attempted to define this standard, but all we know is that an exact match of the case is not required, but that it must be "particularized."

The threshold of "clearly established" statutory or constitutional rights is a difficult one for a victim of some action by a federal, state, or local government official to meet. The victim has to

identify case law establishing that statutory or constitutional right. If he or she can't find such a case, the government official, including a police officer, has qualified immunity from any civil action.

Qualified immunity is an example of the Supreme Court legislating from the bench, contrary to the law. In *Ziglar v. Abbasi* (2017), Justice Clarence Thomas expressed skepticism toward the Court's continued approach to qualified immunity, [writing](#), "In an appropriate case, we should reconsider our qualified immunity jurisprudence."

Separately, Judge Don Willett, a conservative judge on the U.S. Court of Appeals for the 5th Circuit, [wrote in August 2019 in his dissent in *Cole v. Carson*](#), "This much is certain: Qualified immunity, whatever its success at achieving its intended policy goals, thwarts the righting of many constitutional wrongs."

Some have expressed concern that law enforcement could be hit hard by the financial impact of these cases. There is little evidence to support such claims. Law enforcement are almost always indemnified in these civil cases. A [2014 study on police indemnification](#) notes, "Between 2006 and 2011, in forty-four of the seventy largest law enforcement agencies across the country, officers paid just .02% of the dollars awarded to plaintiffs in police misconduct suits."

Others have also claimed that few cases are dismissed on qualified immunity, citing [a 2017 study](#) on the issue. The author of this study noted, "Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways."

The author also explained, "One also should not conclude based on my findings that qualified immunity is more benign than has been assumed. My findings do show that Section 1983 claims against the police are infrequently dismissed on qualified immunity grounds. But qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith. The fact that few cases are dismissed on qualified immunity grounds does not fundamentally undermine these critiques."

The Reforming Qualified Immunity Act would restore 42 U.S.C. 1983 to its original intent and would allow government officials, including law enforcement, to claim qualified immunity under specific instances.

- A government official may claim qualified immunity when conduct alleged to cause "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" had been authorized by federal law or regulation or by a state law or regulation.
- A government official may claim qualified immunity if a court determined that the conduct was consistent with the Constitution and federal law.

The court-created doctrine of qualified immunity must be addressed. It creates conflict with statute and can prevent individuals whose rights have been deprived, even instances where a government official is prosecuted and convicted of a crime, from getting any restitution for the deprivation of those rights. For these reasons, I urge you to contact your senators and ask them to cosponsor the Reforming Qualified Immunity Act, S. 4036.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Brandon', with a stylized flourish at the end.

Adam Brandon
President, FreedomWorks