

END QUALIFIED IMMUNITY

QUALIFIED IMMUNITY FRUSTRATES CONGRESSIONAL INTENT TO HOLD STATE ACTORS ACCOUNTABLE FOR THEIR BRUTALITY AND STOP STATE VIOLENCE AGAINST AFRICAN AMERICANS.

- The Fourteenth Amendment was added to the Constitution against the backdrop of a campaign of terror and violence against African Americans by white police officers. The authors of the Fourteenth Amendment detailed the need for universal guarantees of liberty and equality, and they laid out, often in gruesome detail, how white police officers were engaged in a campaign of unending violence against African Americans.
- The Fourteenth Amendment was designed to put an end to such police violence and killings. The Amendment's Framers recognized that African Americans could not take their place as equal citizens in our nation if police officers were free to brutalize them.
- The Reconstruction-era Congress wrote Section 1983 to enforce the Fourteenth Amendment's promise of liberty and equality. It holds police accountable for violating the constitutional rights of the public they swear to protect.

THE SUPREME COURT REWROTE SECTION 1983 TO GIVE POLICE OFFICERS SWEEPING IMMUNITY FROM SUIT, EVEN WHEN THEY ENGAGE IN BRUTAL CONDUCT.

- Rather than giving full effect to a law designed to enforce the Fourteenth Amendment, the Court has [gutted it](#) to protect police officers and legitimize violations of constitutional rights.
- As a result, instead of a system of remedies for police misconduct, we have a system that breeds police impunity. We cannot hope to rein in police abuses of power if courts give the police a free pass when they violate our rights.
- As a recent [Reuters report demonstrates](#), the qualified immunity doctrine gives police officers who kill special protection from being sued. This makes it nearly impossible for individuals to hold the police accountable, even when they take an innocent life.

WE MUST END THE QUALIFIED IMMUNITY DOCTRINE.

- We can only fix the qualified immunity doctrine by ending it. Ending the qualified immunity doctrine would ensure government accountability, encourage courts to play their historic role of redressing abuse of power, and create an incentive for governments to properly train their officers to avoid unnecessary use of force.
- In the long term, we must also ensure that all of the judges that the Senate confirms to federal judgeships are faithful to the text, history, and values of the whole Constitution, as well as the text and history of the laws Congress passes. The Supreme Court has enabled horrific police violence by ignoring our constitutional history and the text and history of

Section 1983. Ending police violence and the killing of African Americans was one of the critical purposes of the Fourteenth Amendment, and Congress passed Section 1983 to help people vindicate their rights under the Constitution by holding state and local officials accountable for their constitutional violations.

FREQUENTLY ASKED QUESTIONS

1. Does the Justice in Policing Act of 2020 end qualified immunity?

It does not end qualified immunity entirely, but it does end qualified immunity for local law enforcement and state corrections officers [as defined by 18 U.S.C. §1121(b)]. This means that plaintiffs who have suffered a deprivation of constitutional rights at the hands of the police or while imprisoned can seek justice in court.

However, by supporting qualified immunity for some actors while creating a carveout for law enforcement and corrections, the current text actually *inserts* qualified immunity into Section 1983, giving Congress's endorsement for the first time ever to a doctrine that does not exist in the text of the statute and was invented by the Supreme Court. This is an especially dangerous result at a time when the Court is being pressed to revisit its qualified immunity precedent, and when both conservative and progressive Justices have suggested that the doctrine lacks any basis in the statute. Further, it raises the question of why is it appropriate for certain groups to get away with depriving people of their constitutional rights, but not others. This is not how the Constitution is meant to work. The rights enshrined in our national charter become little more than words on paper if there is no way to hold those who violate them accountable.

2. Would ending qualified immunity for all state officials open the floodgates to lawsuits challenging civil rights officials for violating the constitutional right to religious freedom?

There's nothing stopping people from filing such claims now. Qualified immunity is not an absolute bar to filing suit but acts as a deterrent because many cases are not allowed to proceed because of it, particularly in the context of police brutality.

Moreover, just because someone can sue, that does not mean that suit will succeed. When it comes to religious freedom specifically, implementation of antidiscrimination laws does not violate the constitutional rights of religious adherents when one takes into account the text, history, and values of the whole Constitution. So, such claims should not succeed.

If someone's religious freedom rights have actually been violated, that person should be able to sue. The Constitution is not meant to be real and accessible for certain rights and not for others. The rights enshrined in our national charter become little more than words on paper if there is no way to hold those who violate them accountable.

3. What about when government officials follow the law, but that law is then found to be unconstitutional? With qualified immunity gone, could those officials be sued when they have followed the letter of the law as understood at the time? Do we want them to be liable if the law changes?

When individual government officers have followed the rules set by their employers, indemnification arrangements typically shift financial liability away from those individual officers to their employers. And it has long been the case that a form of strict liability applies to Section 1983 suits against state and local governments. While these suits are often difficult because there has to be a showing of a government policy or custom, there is no qualified immunity of any kind. Governments cannot raise a good faith defense or argue that their policy did not violate clearly established law. The same should be true when a government's employees violate people's rights by following an unconstitutional law.

A so-called good faith defense should not be added to Section 1983. In the hands of a conservative judiciary already inclined to apply legal doctrines to hold police immune, a good faith defense will likely introduce many of the same problems the policing reform or abolition movements are fighting now.

4. Can federal officials claim qualified immunity under Section 1983?

Federal officials cannot be sued under Section 1983. The statute was written to enforce the part of the Fourteenth Amendment that prohibits states from "abridg[ing] the privileges or immunities of citizens of the United States." Therefore, the text holds *state and local* government officials liable for depriving others of their constitutional rights, not federal officers. While the Supreme Court once allowed federal officers to be sued for certain violations directly under the Constitution in a manner similar to Section 1983, in recent decades the Court has greatly restricted that remedy. However, Section 242 of Title 18 makes it a crime for any person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or other laws. This would include federal officers. The Justice in Policing Act of 2020 would change the *mens rea* requirement from willful to "knowingly or with reckless disregard."

5. Is there anything else that must be done to end qualified immunity?

Yes! It is important that we remain vigilant when confirming judges to the federal judiciary. The qualified immunity doctrine exists in the first place because we have judges on the bench who are not faithful to the text, history, and values of the whole Constitution and the statutes written to enforce the rights enshrined therein. We need fair-minded constitutionalists who are mindful of the history behind the text and do not rewrite civil rights laws, subverting Congress's intent. Or else we will find ourselves repeating the very history that Congress passed legislation to avoid.