Qualified immunity: A get out of court free card for abusive police

Police officers almost always avoid legal liability for abusing citizens because of the doctrine of qualified immunity. The doctrine has its roots in ugly chapters of American history – from enforcement of racial segregation at a lunch counter in Mississippi; to the National Guard killings of students at Kent State; to President Nixon's firing of a whistleblower; to Attorney General John Ashcroft's roundup of Middle Eastern men after 9/11.

"Qualified immunity is one of the most legally dubious and heavily criticized doctrines in the history of the Republic," says Jay Schweikert, a research fellow from the Cato Institute.

Justices from the right and left of the Supreme Court – from Clarence Thomas to Sonia Sotomayor – have strongly criticized the doctrine. But the support of the majority of the court appears solid, experts say.

Qualified immunity is a "get out of court free card" for police. Actually, it's better than that. It's a never come to court card. The case is thrown out before ever going to trial.

If an officer's conduct does not violate *clearly established law*, the officer is immune from lawsuits. The only conduct that does violate "clearly established law" is an action that "every reasonable" police officer would know was illegal the moment it occurred. That may require a prior Supreme Court decision involving almost identical facts.

This immunity creates a vicious circle: Because so many cases are thrown out before trial and before fact-finding, less new

"clearly established law" about police misconduct is created, so fewer officers are held accountable.

The court itself wrote that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."

Wayne C. Beyer, who has been lead counsel in more than 300 police misconduct cases, summarizes the criticisms of qualified immunity coming from groups as disparate as the liberal ACLU and the libertarian Cato Institute:

- Qualified immunity is judge-made, without any statutory basis.
- The defense deprives citizens of civil rights, which is what the Ku Klux Klan Act of 1871 – now codified as Section 1983 – provided.
- Because misconduct goes unpunished, the public's confidence in law enforcement is eroded.
- The threat of liability doesn't deter police misconduct because officers are usually indemnified by their cities. In other words the city pays the bill, not the officer. Chicago has paid hundreds of millions of dollars for the brutality of their police officers.

The Supreme Court's explanation for providing this extra legal protection for officers and other public officials is "to protect public officials from undue interference with their duties and from potentially disabling threats of liability."

An officer on the street who hesitates too long while considering whether or not an action is unconstitutional could end up getting shot.

The Ku Klux Klan Act of 1871

Congress passed the Civil Rights Act of 1871 – the Ku Klux Klan Act – to protect the newly freed Black citizens from the violent attacks of the KKK and other armed bands immediately

after the Civil War – attacks that law enforcement officers in the South ignored or abetted.

The law is now codified as Section 1983 and is the legal basis of most civil lawsuits that abused citizens file against police officers. It authorizes suits against any person "who under color of any statute, ordinance, regulation, custom or usage" subjects "any citizens … to the deprivation of any rights, privileges or immunities secured by the Constitution and laws."

Congressmen were explicit about their purpose in speeches on the floor of Congress.

Rep. David P. Lowe of Kansas said, "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited on unoffending American citizens, the local administrations have been found unwilling or inadequate to apply the proper corrective. Combinations, darker than the night (which) hides them, conspiracies, wicked as the worst felons could devise, have gone unwhipped of justice."

Rep. John Beatty, R-Ohio, said, "Men were murdered, houses were burned, women were outraged, men were scourged and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons."

Congress' high intentions were ignored for 90 years. Then, in 1961, the Supreme Court quoted the congressmen's speeches in Monroe v. Pape which for the first time applied Section 1983 to police officers for brutality.

The case resulted from an abusive and illegal raid by 13 Chicago police officers on a Black family who were manhandled and forced to stand naked while their home was ransacked.

Here’s what happened that evening in 1958, according to Monroe’s legal complaint:

At 5:45 a.m. while investigating a murder case, 12 Chicago officers along with Deputy Chief of Detectives Frank Pape broke through two doors into the Monroe family home without bothering to get a search warrant. Pape was a legendary Chicago cop known for battling hoodlums and bragging that the only time he fired his gun was to kill. At gunpoint Pape and the other officers forced the Monroes and their six children out of bed and into the middle of the living room where they stood naked. Pape struck Monroe several times with a flashlight and called him “n——” and “black boy.” Officers pushed Mrs. Monroe and several of the children while dumping out the contents of drawers and closets and ripping open mattresses. After finding nothing incriminating the officers took Monroe to the police station and held him for 10 hours, refusing to let him call his lawyer. Pape was vocal in Chicago for his complaints that the Supreme Court tied the hands of the police.

Justice William O. Douglas wrote the court’s opinion holding that Section 1983 was intended to protect civilians from law enforcement officers who violate the law while acting under color of law. Separately, the court ruled that Monroe could not sue the city of Chicago.

Frank Pape’s illegal raid on the Monroes’ home revolutionized civil rights lawsuits against police – which went from a dribble to a torrent of lawsuits that now fill volumes of law books.

Qualified Immunity emerges from ‘white Only’ Mississippi coffee shop

Qualified immunity ‘WHITE ONLY’ MISSISSIPPI COFFEE SHOP

On Sept. 13, 1961, a group of 15 ministers, including three

Black priests, arrived at the Jackson, Mississippi, Trailways bus terminal planning to travel to Chattanooga. They called themselves “the Prayer Pilgrimage” and were among hundreds of Freedom Riders in Mississippi that summer who challenged segregation in the South.

Around noon they tried to get lunch in a small coffee shop in the bus terminal with a sign that said: “White Waiting Room Only – By Order of the Police Department.” Two police officers stopped them. The priests prayed for the people of Mississippi and the police arrested them when the prayer was over.

A policeman – who found out that the Rev. Robert L. Pierson was the son-in-law of then Gov. Nelson Rockefeller – remarked, “His father-in-law may be a big shot up there, but I don’t guess that makes any difference down here.”

The Rev. Robert L. Pierson was one of those arrested for walking into a White Only coffee shop in a Trailways Bus Terminal in Jackson, Miss. Police noted he was the son-in-law of Gov. Nelson Rockefeller and one officer said being related to a “big shot” might matter in the North “but I don’t guess that makes any difference down here.”

At the station house the officers feverishly ran background checks on each of the ministers to try to link them to Castro's Cuba. During later court proceedings the state's lawyers asked the priests on the witness stand to explain why their views on racial justice were the same as the Communist Party's views.

The ministers were charged with disturbing the peace, even though they were quiet and prayerful, by all accounts.

The police justified the peace disturbance charge on their claim that a crowd of about 20 segregationists had gathered and was threatening the ministers. The ministers said there was no crowd.

Chief Justice Earl Warren wrote in a 1967 opinion that if the police were actually enforcing a peace disturbance law that they had every reason to believe was constitutional, then they were acting in "good faith."

He wrote that common law – judge made law – gave law officers immunity from lawsuits when they acted in good faith and had probable cause.

"We agree that a police officer is not charged with predicting the future course of constitutional law," Warren wrote.

This was the birth of qualified immunity – giving Jackson police immunity based on what was apparently a false claim about a segregationist crowd that didn't exist.

Legal experts say that Warren was simply wrong in saying that the common law in 1871 provided good faith immunity for state officials. That weak legal basis is one reason Justice Thomas opposes qualified immunity. He is an originalist who stresses interpreting legal doctrines consistent with the times in which they are written.

Protecting officials in tumultuous times

Three disparate cases from tumultuous times solidified the doctrine of qualified immunity.

– **Kent State killings:** The Supreme Court rejected absolute immunity for Gov. James Rhodes and National Guard Commanders in the killing of four students during protests at Kent State in May 1971, after the Nixon invasion of Cambodia. But the court claimed the officials deserved qualified immunity that protected the latitude of their decision-making. The court said: "In common with police officers … officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act. When a condition of civil disorder in fact exists, there is obvious need for prompt action and decisions must be made in reliance on factual information supplied by others."

A $46 million lawsuit against state officials ended in a $675,000 settlement and statement of regret from Ohio officials. The families of the dead students received $15,000 each.

– **Nixon whistleblower**: The Supreme Court protected two senior White House aides from paying damages for their involvement in the firing of a famous whistleblower, Ernest Fitzgerald. Fitzgerald angered Richard Nixon by

testifying in 1968 that Lockheed's C-5A transport program might cost $2 billion more than its original $3 billion price tag. The White House taping system left no doubt about Nixon's reaction. "I said get rid of that son of a bitch," he said. The Supreme Court ruled White House aides had qualified immunity from a suit by Fitzgerald, who was laid off from his job. The president could expect loyalty, the court said.

The court worried about “social costs (that) include the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible (public officials) in the unflinching discharge of their duties.”

– **Ashcroft roundup of Middle Eastern men**: Attorney General John Ashcroft used the material witness law to roundup Middle Eastern men after 9/11, even though there was no evidence that they were involved in a crime nor any intention to call them as witnesses.

One of those detained was Abdullah al-Kidd. Al-Kidd was born in Wichita, Kansas, and was a football star at the University of Idaho where he converted to Islam. The FBI was suspicious of an acquaintance of his who had worked with an Islamic charity.

Al-Kidd was arrested at Dulles Airport and detained for 16 days, during which time he was repeatedly strip-searched and transported between jails in handcuffs and leg irons, yet he was never charged with a crime. Nor did agents ever question him as a material witness.

Ashcroft admitted shortly after the Sept. 11, 2001, terrorist attacks that using the “material witness” law was a tactic to take “suspected terrorists off the street.” But Justice Antonin Scalia said the court generally does not allow lower courts to inquire into the “subjective” purpose for seeking an arrest warrant. Lacking such a precedent, there was no established law and Ashcroft was entitled to immunity.

Scalia wrote: “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the

law. Ashcroft deserves neither label.”

Supporters of qualified immunity say officials need legal protections to make tough decisions in perilous times. Critics ask: Should officials who made bad decisions be protected from the consequences?

Officers almost always win in the supreme court

For 16 years, from 2006 to 2020 no suspect or prisoner had won a qualified immunity case in the Supreme Court. Here’s what it took for Trent Taylor to win against the state of Texas last year:

After a suicide attempt, Taylor was transferred to the Montford Psychiatric Facility Unit in Lubbbock Texas. Prison officials stripped Taylor naked and placed him in a cell where almost every surface – including the floor, ceiling, windows and walls – was covered in “massive amounts” of human feces belonging to previous occupants. Taylor was unable to eat because he feared that any food in the cell would become contaminated, and feces “packed inside the water faucet” prevented him from drinking water for days. The prison officials laughed at Taylor’s predicament and said he was, “Going to have a long weekend.”

Four days later, they moved Taylor to a different seclusion cell named “the cold room” by other inmates because it was so frigid. The cell had no toilet, water fountain or furniture, but had a drain on the floor – which was clogged – leaving a standing pool of raw sewage in the cell. There was no bed. Taylor had to sleep on the floor, naked and soaked in sewage, with only a “suicide blanket.” Taylor was locked in this cell for three days and never allowed to use a restroom. He attempted to avoid urinating on himself and developed a distended bladder requiring catheterization.

The Supreme Court said, “No reasonable correctional officer could have concluded that, under extreme circumstances of this case, it was constitutionally permissible to house Tayor in such deplorably unsanitary conditions for such an extended period of time.”

But this past fall the Supreme Court dispelled hope that the Taylor decision meant it was reconsidering qualified immunity. It ruled in favor of officers in two cases, emphasizing that “clearly established law” requires prior cases with very similar facts.

In one of the cases a woman called police to her house because her husband was drunk. The husband went to the garage, picked up a hammer and approached police refusing to put it down. The police shot and killed him. The 10th U.S. Circuit Court of Appeals denied the officers qualified immunity citing its precedents that an officer can’t claim immunity if his own recklessness leads to a shooting death. But the Supreme Court said that the case was not similar enough.

An example of an excessive force case where an officer was able to avoid accountability using qualified immunity is Dukes v. Deaton.

During a home search for marijuana, an officer threw a flashbang explosive device into Ms. Dukes’ bedroom which resulted in her being badly burned. While the use of the flashbang device constituted excessive force under the Fourth Amendment, and the officer did not inspect the room beforehand like he was supposed to, he was found not responsible under qualified immunity. Not every reasonable police officer would have known throwing the flashbang would be considered excessive force, the court said.

A 2009 decision by the Supreme Court made qualified immunity an even more potent defense for abusive officers. The court decided in Pearson v. Callahan that courts could skip past the

initial question of whether or not a police action violated the Constitution. It allowed the courts to jump instead to whether or not the law violation, if proved, was clearly established law. If not, then the case was tossed out before the legality of the officer's actions was determined.

The Catch-22 is that the change resulted in fewer court determinations of what was illegal and therefore less clearly established law and therefore more cases being tossed out on qualified immunity.

A Reuters investigation in 2020 found that an increasing number of cases are being thrown out without the court considering the lawfulness of the police use of excessive force.

Reuters noted that in 2009 the 11th U.S. Circuit Court of Appeals threw out a case in which a man who was found disoriented along the side of the road died after police hogtied him. The court did not evaluate the constitutionality of this frowned on police tactic but instead immediately granted qualified immunity.

Four years later, police in Phenix City, Alabama, found Khari Illidge wandering naked along a road, apparently after using drugs. An officer stunned him 14 times while he was handcuffing him. He fully hogtied him by attaching the handcuffs to leg irons holding his ankles. A 385 pound officer lay on Illidge until he went limp. He died of cardiac arrest.

When the same Court of Appeals took up the case, there was no clearly established law because it hadn't considered the constitutionality of hogtying in the first case.

Schweikert from Cato sums things up by explaining that even if an officer is convicted of murder – as was Derek Chauvin – the officer can still avoid liability under qualified immunity. "There's a ton of police misconduct that does fail to meet constitutional standards, but which nevertheless gets excused

under the doctrine of qualified immunity.”