



June 15, 2020

The Honorable Lindsey Graham  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Committee:

My name is Jay Schweikert, and I am an attorney and a policy analyst with the Cato Institute's Project on Criminal Justice. I would like to thank the Committee on the Judiciary for convening this hearing on Police Use of Force and Community Relations, on June 16, 2020, and for providing the opportunity to express my views regarding this topic. In particular, I am writing to discuss the harmful effect that the judicial doctrine of qualified immunity has on accountability for members of law enforcement, police-citizen relations, and the criminal justice system in general. This statement is substantively identical to a statement I submitted to your colleagues on the House Judiciary Committee last week.

In the landmark Supreme Court case of *Marbury v. Madison*, Chief Justice John Marshall stated that: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."<sup>1</sup> Stated differently, the substance of constitutional rights means little if state actors can violate those rights with impunity. Accountability must therefore be a top priority for anyone interested in policing practices and criminal justice reform more generally.

Congress created a robust means for ensuring the accountability of state and local officials back in 1871, when it passed what would become our primary civil rights statute. That statute is presently codified at 42 U.S.C. § 1983, and thus is usually called "Section 1983" after its place in the U.S. Code. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, which itself was part of a series of "Enforcement Acts" designed to help secure the promise of liberty and equality enshrined in the then-recently enacted Fourteenth Amendment.<sup>2</sup>

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<sup>1</sup> 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>2</sup> See An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871).



As currently codified, the statute states as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>3</sup>

In other words, the statute states simply and clearly that any state actor who violates someone's constitutional rights "shall be liable to the party injured." The purpose behind creating such a cause of action is quite simple: individuals whose rights are violated deserve a remedy, and at a structural level, the potential for such a remedy ensures accountability among public officials.

But the Supreme Court has effectively gutted the effect of Section 1983 through the invention of a doctrine called "qualified immunity." This judicial doctrine shields state and local officials from liability, even when they act unlawfully, so long as their actions did not violate "clearly established law."<sup>4</sup> In practice, this is a huge hurdle for civil rights plaintiffs, because the Court has repeatedly insisted that "clearly established law must be 'particularized' to the facts of the case."<sup>5</sup> In other words, to overcome qualified immunity, civil rights plaintiffs generally must show not just a clear legal *rule*, but a prior case in the relevant jurisdiction with functionally identical *facts*.

Although the Supreme Court has always purported to say that an exact case on point is not strictly necessary,<sup>6</sup> it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate."<sup>7</sup> And in practice, lower courts routinely hold that even seemingly minor factual distinctions between a case and prior precedent will suffice to hold that the law is not "clearly established." To give just a couple concrete examples:

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<sup>3</sup> 42 U.S.C. § 1983.

<sup>4</sup> See *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017).

<sup>5</sup> *Id.* at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>6</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

<sup>7</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

- In *Baxter v. Bracey*,<sup>8</sup> the Sixth Circuit granted qualified immunity to two police officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. A prior case had already held that it was unlawful to use a police dog without warning against an unarmed suspect laying on the ground with his hands at his sides.<sup>9</sup> But despite the apparent factual similarity, the *Baxter* court found this prior case insufficient to overcome qualified immunity because “Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put [the defendant] on notice that a canine apprehension was unlawful in these circumstances.”<sup>10</sup> In other words, prior case law holding unlawful the use of police dogs against non-threatening suspects who surrendered by *laying on the ground* did not “clearly establish” that it was unlawful to deploy police dogs against non-threatening suspects who surrendered by *sitting on the ground with their hands up*.
- In *Latits v. Philips*,<sup>11</sup> the Sixth Circuit granted immunity to a police officer who rammed his vehicle into the car of a fleeing suspect, drove the suspect off the road, then jumped out of his vehicle, ran up to the suspect’s window, and shot him three times in the chest, killing him. The court acknowledged that several prior cases had clearly established that “shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat.”<sup>12</sup> Even though that statement would seem to govern this case exactly, the majority held that these prior cases were “distinguishable” because they “involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate flight*,” whereas here “Phillips shot Latits *after* Latits led three police officers on a car chase for several minutes.”<sup>13</sup> The lone dissenting judge in this case noted that “the degree of factual similarity that the majority’s approach requires is probably impossible for any plaintiff to meet.”<sup>14</sup>

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<sup>8</sup> 751 F. App’x 869 (6th Cir. 2018).

<sup>9</sup> See *Campbell v. City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012).

<sup>10</sup> *Baxter*, 751 F. App’x at 872 (emphasis added).

<sup>11</sup> 878 F.3d 541 (6th Cir. 2017).

<sup>12</sup> *Id.* at 552-53 (quoting *Hermiz v. City of Southfield*, 484 F. App’x 13, 17 (6th Cir. 2012)).

<sup>13</sup> *Id.* at 553.

<sup>14</sup> *Id.* at 558 (Clay, J., concurring in part and dissenting in part).



Thus, given how the “clearly established law” test works in practice, whether victims of official misconduct will get redress for their injuries turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply on the happenstance of whether the relevant case law happens to include prior cases with fact patterns that match their own.

Perhaps most disturbingly, the doctrine can actually have the perverse effect of making it *harder* to overcome qualified immunity when misconduct is *more* egregious—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases. In the words of Judge Don Willett, one of President Trump’s appointees to the Fifth Circuit, “[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly.”<sup>15</sup>

There is no shortage of cases illustrating this point, but the following two are representative:

- ***Corbitt v. Vickers***:<sup>16</sup> Police officers pursued a criminal suspect into an unrelated family’s backyard, at which time one adult and six minor children were outside. The officers demanded they all get on the ground, everyone immediately complied, and the police took the suspect into custody. But then the family’s pet dog walked into the scene, and without any provocation or threat, one of the deputy sheriffs started firing off shots at the dog. He repeatedly missed, but did strike a ten-year-old who was still lying on the ground nearby. The child suffered severe pain and mental trauma and has to receive ongoing care from an orthopedic surgeon. The Eleventh Circuit granted qualified immunity on the grounds that no prior case law involved the “unique facts of this case.”<sup>17</sup> One judge did dissent, reasonably explaining that “no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children.”<sup>18</sup>
- ***Kelsay v. Ernst***:<sup>19</sup> Melanie Kelsay was playing at a public pool with her friend, when some onlookers thought her friend might be assaulting her and called the

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<sup>15</sup> *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

<sup>16</sup> 929 F.3d 1304 (11th Cir. 2019).

<sup>17</sup> *Id.* at 1316.

<sup>18</sup> *Id.* at 1323 (Wilson, J., dissenting).

<sup>19</sup> 933 F.3d 975 (8th Cir. 2019) (en banc).

police. The police arrested her friend, even though she repeatedly told them he had not assaulted her. While talking with a deputy, Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander and tried to go check on her. Ernst grabbed her arm and told her to "get back here," but Kelsay again said she needed to go check on her daughter, and began walking toward her. Ernst then ran up behind her, grabbed her, and slammed her to the ground in a "blind body slam" maneuver, knocking her unconscious and breaking her collarbone. The Eighth Circuit granted Ernst qualified immunity on the grounds that no prior cases specifically held that "a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer."<sup>20</sup>

But qualified immunity does not merely harm the *victims* of police misconduct—it also hurts the law enforcement community itself, by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively. Policing is dangerous, difficult work, and it cannot be done safely and effectively without the trust and cooperation of communities. Unsurprisingly then, public perception of accountability is absolutely essential to police effectiveness.<sup>21</sup>

Yet in the wake of so many high-profile police shootings, public confidence in law enforcement has been plummeting. Indeed, by 2015, Gallup reported that public trust in police officers had reached a twenty-two-year low.<sup>22</sup> Although only a small proportion of officers are involved in fatal encounters in any given year,<sup>23</sup> that fraction still generates a huge number of fatalities in absolute terms. For example, between 2015 and 2017, police officers fatally shot nearly a thousand Americans each year,<sup>24</sup> with tens of thousands more wounded.<sup>25</sup> And the widespread prevalence of cell phones, combined with the

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<sup>20</sup> *Id.* at 980.

<sup>21</sup> See generally Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* (2008).

<sup>22</sup> Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015).

<sup>23</sup> Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015).

<sup>24</sup> Julie Tate et al., *Fatal Force*, Washington Post Database (last updated June 9, 2020).

<sup>25</sup> Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).



ability to share videos on YouTube and social media, means that footage of police shootings are being documented and shared like never before.<sup>26</sup>

Qualified immunity therefore exacerbates what is already a crisis of confidence in law enforcement. Even if it is only a small proportion of the law enforcement community that routinely violates the law, ordinary citizens cannot help but accurately observe that even those officers will rarely be held accountable. Even police officers share this assessment—in a 2017 survey of over 8,000 officers, 72% disagreed with the statement that “officers who consistently do a poor job are held accountable.”<sup>27</sup>

In the wake of George Floyd’s death at the hands of Minnesota police—and the ongoing national turmoil his death has provoked—this issue has grown especially urgent. The shocking violence committed by Derek Chauvin and the stunning indifference of the other officers on the scene are the product of a culture of near-zero accountability, in which police simply do not expect to be held to account for their misconduct. Journalists and commentators of all stripes—including the New York Times,<sup>28</sup> Fox News,<sup>29</sup> Slate,<sup>30</sup> and Reason<sup>31</sup>—have all noted the direct connection between George Floyd’s death and the doctrine of qualified immunity.

The antidote to this crisis is exactly the sort of robust accountability that Section 1983 is supposed to provide, but which qualified immunity severely undercuts. When judges routinely excuse egregious misconduct on technicalities, then *all* members of law enforcement suffer a reputational loss. Qualified immunity thus prevents responsible law enforcement officers from overcoming negative perceptions about policing, and instead

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<sup>26</sup> See generally Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, WASH. POST (Dec. 13, 2015)

<sup>27</sup> Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).

<sup>28</sup> Editorial, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. Times, May 29, 2020.

<sup>29</sup> Tyler Olson, *George Floyd case revives 'qualified immunity' debate, as Supreme Court could soon take up issue*, Fox News, May 29, 2020, available at <https://www.foxnews.com/politics/george-floyd-case-revives-debate-on-qualified-immunity-for-government-officials>.

<sup>30</sup> Mark Joseph Stern, *The Supreme Court Broke Police Accountability. Now It Has the Chance to Fix It.*, Slate, May 27, 2020, available at <https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html>.

<sup>31</sup> C.J. Ciaramella, *The Supreme Court Has a Chance To End Qualified Immunity and Prevent Cases Like George Floyd's*, Reason, May 29, 2020, available at <https://reason.com/2020/05/29/the-supreme-court-has-a-chance-to-end-qualified-immunity-and-prevent-cases-like-george-floyds/>.



protects only the minority of police who routinely break the law, thereby eroding relationships between police and their communities.

For these reasons, amongst many others, opposition to qualified immunity enjoys more cross-ideological and cross-professional support than nearly any other public policy issue today. A recent *amicus* brief challenging the doctrine included, in the words of Judge Willett, “perhaps the most diverse amici ever assembled”<sup>32</sup>—including (but not limited to) the ACLU, the Alliance Defending Freedom, Americans for Prosperity, the Law Enforcement Action Partnership, the NAACP, and the Second Amendment Foundation.<sup>33</sup>

The Supreme Court may have created the doctrine of qualified immunity, but Congress has the power to fix it. By clarifying that Section 1983 means what it says—that state actors who violate constitutional rights “shall be liable to the party injured”—Congress can reinvigorate the best means we have of ensuring accountability for members of law enforcement, and also help restore the public trust and confidence that police officers need to do their jobs safely and effectively.

Sincerely,

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<sup>32</sup> *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

<sup>33</sup> See Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public’s Trust in Law Enforcement, and Promoting the Rule of Law, *I.B. & Doe v. Woodard*, No. 18-1173 (U.S. Apr. 10, 2019).