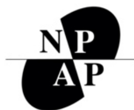

National Police Accountability Project

A Project of the National Lawyers Guild

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June 9, 2020

Dear Speaker Pelosi, Leader McCarthy, Majority Leader McConnell, and Minority Leader Schumer:

On behalf of the National Police Accountability Project ("NPAP"), we write to voice our strong support for ending qualified immunity, as proposed in the End Qualified Immunity Act sponsored by Congressmembers Justin Amash and Ayanna Pressley and the Justice in Policing Act sponsored by Senators Cory Booker and Kamala Harris and Chairs Karen Bass and Jerry Nadler. As recent days have made painfully clear, police officers all too often abuse their position of power and trust in the community. Qualified immunity hobbles one of the most effective tools for police accountability and prevents those whose rights are violated from seeking justice while simultaneously imposing enormous costs on courts and litigants. We urge you to take immediate action to end this abusive and harmful doctrine.

NPAP is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. With over five hundred attorney members representing victims of police misconduct nationwide, we have seen firsthand how qualified immunity lets officers evade accountability for appalling misconduct. This letter explains some of the real damage wrought by this doctrine.

Qualified immunity is a judge-made barrier between victims of official misconduct and the remedy Congress provided them—private lawsuits under 42 U.S.C. § 1983. Section 1983 serves two critical public functions: "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[1] Thus, Congress has repeatedly recognized that successful, private § 1983 suits benefit the public as a whole.[2] But, in devising qualified immunity, the Supreme Court has hampered such suits by inventing a loophole found nowhere in the text of the statute.

Under qualified immunity, it is not enough for the plaintiff to show that her constitutional rights were violated—to win, she must also prove that the violation was of "clearly established" law.[3] And the Supreme Court has held that to meet that bar, there generally must be a prior court case with nearly identical facts from either the Supreme Court or the court of appeals in which the case arises. This means that, unless the police happen to commit the precise same constitutional violation twice, those that suffer those violations often have no ability to seek accountability and justice for those violations. And police can be immune from suit for even the most egregious and shocking misconduct.

For example, just last year, the Ninth Circuit dismissed a suit alleging that Fresno police officers stole over $225,000 in cash and rare coins during the search of a person's home. While the court noted that the act was "morally wrong," it protected the officers from suit—and prevented the victim from recovering what had been stolen—simply because there was no prior case where officers had stolen property in precisely the same circumstances.[4]

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[1] *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).
[2] *City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986).
[3] *Pierson v. Ray,* 386 U.S. 547, 555-57 (1967); *see also Pearson v. Callahan,* 555 U.S. 223, 231 (2009).
[4] *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019).

Nowhere is the impact of qualified immunity more obvious—or more horrific—than in cases of police brutality. For instance, in 2008, St. Louis police were called to subdue an actively delusional Black man, Samuel De Boise, who had run naked onto his lawn. Rejecting safer alternatives—and even though the naked man obviously was not carrying any weapon—the officers fired a taser at De Boise repeatedly until he died. The Eighth Circuit threw out his family's lawsuit on the basis of qualified immunity, finding prior cases prohibiting repeated tasing not sufficiently similar.[5]

Likewise, in 2010, Tucson police encountered a woman named Amy Hughes having a mental health episode and hitting a tree with a knife. Without warning, and though his companion officers believed they could diffuse the situation without firing, an officer shot her four times through a chain-link fence, and then handcuffed her. The Supreme Court held that officer was entitled to qualified immunity, in part because the most similar prior case involved an officer who shot someone from the top of a hill, not from behind a fence.[6]

And consider the case of Treneshia Dukes. Dukes was asleep in her boyfriend's apartment when police officers began a military-style assault on the home based on a tip that her boyfriend was seen with a "small quantity of a green leafy substance." Without providing any warning, a police officer threw a flashbang grenade through the bedroom window, hitting Dukes and causing severe burns to her arms and legs. The Eleventh Circuit concluded that throwing an explosive device into an occupied bedroom was not a clearly established constitutional violation, and her case was dismissed. [7]

These cases are not isolated incidents, but rather the inevitable result of qualified immunity: police escape accountability for shooting, maiming, and otherwise injuring innocent people, and victims are denied any measure of justice for that brutality. And, critically, police do not face the powerful incentive of a looming § 1983 suit to avoid committing similar constitutional violations in the future.

Qualified immunity also chills development of constitutional law, meaning that violations that are not "clearly established" today will also not be "clearly established" tomorrow. The Supreme Court has directed that courts need not first determine whether a constitutional violation occurred before dismissing under qualified immunity.[8] In practice, this means that courts can avoid for years providing warnings about what the Constitution requires, instead holding in case after case merely that a violation was not previously established.

Consider the question of whether there is a constitutional right to record the police. In 2007, Brian Kelly was arrested for videotaping a police officer during a traffic stop. Although courts around the country had held that the First Amendment protects such recording, the Third Circuit had not yet, and it dismissed Kelly's suit on qualified immunity grounds—without addressing whether Kelly's rights had been violated.[9] With the constitutional question left open, the issue continued to arise.[10] In 2012, Philadelphia police pinned Amanda Geraci against a wall to prevent her from filming police at a protest. A year later, Philadelphia police arrested Richard Fields and seized his iPhone for photographing a raid on a house party. In the ensuing lawsuits, the Philadelphia Police Department *conceded* there was a First Amendment right to record police—a right codified in the department's official policies. Still, the Third Circuit dismissed the suits against the officers because, under its previous decision, the right was not "clearly established."[11] Although the Third Circuit ultimately ruled that the Constitution *does* protect the right to videotape the police, the earlier qualified immunity decisions held the question open for nearly a decade.[12] Those wrongly arrested for

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[5] *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 898 (8th Cir. 2014).
[6] *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018).
[7] *Dukes v. Deaton*, 852 F.3d 1035 (11th Cir. 2017).
[8] *Pearson v. Callahan*, 555 U.S. 223 (2009).
[9] *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010).
[10] *See, e.g.*, *True Blue Auctions v. Foster*, 528 F. App'x 190 (3d Cir. 2013).
[11] *Fields v. City of Philadelphia*, 862 F.3d 353, 361–62 (3d Cir. 2017).
[12] *Id.* at 359–60.

recording the police during that period have no legal redress even though, as the Third Circuit recognized, their constitutional rights were violated.

Qualified immunity also makes litigation of ultimately successful § 1983 cases slower and more expensive, for both the litigants and the courts. While the normal rule in federal court only allows appeals at the end of the case, the Supreme Court permits defendants to file interlocutory appeals of denials of qualified immunity.[13] This means defendants who violated clearly established rights can delay a trial for months if not years, clogging up courts' dockets, and running up costs on both sides. Defendants can even file multiple interlocutory appeals in the same case. That means even those victims of police misconduct who ultimately prevail have to wait much longer to obtain a measure of justice.

In our collective experience as attorneys who litigate police accountability cases, we know all too well that the examples provided in this letter are just the tip of the iceberg. Indeed, for every case dismissed on the basis of qualified immunity, many more are never filed. We know from experience many cases are never brought because the lack of a similar prior case dooms the suit from the start—even when constitutional rights have been violated and the victim has suffered egregious injuries or other harms.

Civil rights suits under § 1983 provide one of the most powerful tools to rein in police misconduct. But qualified immunity often stops these lawsuits in their tracks. The wrongdoing is not exposed, the victim is not compensated, and—perhaps most critically—the officers are not deterred from committing the same constitutional violations time and again. Ending qualified immunity is therefore a crucial step for police accountability, and we urge you in the strongest possible terms to support the bills proposed to achieve that goal.

Sincerely,

Michael Avery
Rachel Pickens
Anna Benvenutti Hoffmann

The National Police Accountability Project

[13] *Mitchell v. Forsyth*, 472 U.S. 511 (1985).