

QUALIFIED IMMUNITY

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In the context of several highly controversial cases from other parts of the country, the General Assembly will be considering several possible law enforcement “reforms.” One such “reform” is a possible change to – or elimination of – the doctrine of qualified immunity. Here are some important facts about it:

- ***What is qualified immunity?*** Under the common law doctrine of qualified immunity, government officials performing discretionary functions are immune from civil suits unless the plaintiff shows that the official violated clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
- ***Does qualified immunity balance competing interests?*** Yes. As the Supreme Court of the United States held, in *Ziglar v. Abassi*, 582 U.S. ___ #151358, slip opinion pp. 27-28 (2017) – a case in which terrorists associated with 9/11 sued various government officials for damages – “The qualified immunity rule seeks a proper balance between two competing interests. On one hand, damages suits may offer the only realistic avenue for vindication of constitutional guarantees. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. As one means to accommodate these two objectives, the Court has held that Government officials are entitled to qualified immunity with respect to discretionary functions performed in their official capacities. *The doctrine of qualified immunity gives officials breathing room to make reasonable but mistaken judgments about open legal questions.*”²
- ***Does qualified immunity apply to suits against law enforcement officials?*** Yes.
- ***What does it do, in practical terms?*** It protects public officials, including law enforcement officials, from frivolous lawsuits - - but not from lawsuits involving legitimate claims of extreme misconduct.
- ***Can frivolous lawsuits be dismissed without going to a jury?*** Under present law, the General Assembly has made it difficult for most frivolous lawsuits in state court to be dismissed without going to a jury. Because of their frequent interaction with citizens in contentious situations, law enforcement officials are more at risk of unjustified lawsuits than perhaps any other government officials. Qualified immunity is a critical tool for them in getting frivolous cases dismissed without jury trials.

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² Internal quotation marks and case citations deleted. Emphasis added.

- ***Does qualified immunity give law enforcement officials absolute immunity from suit?*** No. If the official should have known his conduct violated someone's clearly established legal rights, qualified immunity does not apply, and the official faces potential liability. Very recently, the Fourth Circuit Court of Appeals denied the defense of qualified immunity when five West Virginia law enforcement officials stopped a homeless man for jaywalking, tased him four times, hit him in the brachial plexus, placed him in a choke hold, kicked him, and fired at him twenty-two times, killing him. *Estate of Jones v. City of Martinsburg*, ___ F.3d ___ #182412 (4th Cir. 2020). There have been numerous other cases where qualified immunity was denied for extreme misconduct by government officials.
- ***If qualified immunity were eliminated, who would bear the cost?*** Since localities – counties, cities, and towns – provide coverage for local officials who are sued for the performance of official duties, elimination of qualified immunity for local police would result in more cases going to juries and more and higher damage awards. The possibility of more and larger damage awards would ultimately mean higher settlements; and that in turn would mean higher insurance premiums. *All those costs would have to be paid by taxpayers, not the officials being sued.* Some damage awards are in the millions of dollars. For some localities, even a single large damage award would result in an increase in taxes. For state officials such as sheriffs and deputies, coverage is provided by the Virginia Department of Risk Management - - funded by state taxpayers.
- ***Who would benefit from eliminating qualified immunity?*** Trial lawyers.
- ***Unknown new legal standards.*** Abolishing qualified immunity would require entirely new ways of gauging negligence. For example, if a law enforcement official is in a pursuit, the usual rules of negligence could mean absurd results – engaging in a pursuit at above the speed limit could be argued to be negligence *per se*, thus justifying an award of damages.
- ***Harm to public safety.*** Without qualified immunity, law enforcement officials would inevitably be less willing to place themselves in situations requiring the use of force - - which is, of course, where they are most needed. It could also cause a law enforcement official to “freeze” and worry about lawsuits when faced with a split-second decision about the use of lethal force, with the hesitation possibly resulting in injury or death to civilians or other law enforcement officials. As the Supreme Court of the United States said in the *Ziglar* case, “fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”
- ***Harm to staffing.*** Abolishing or severely restricting qualified immunity would – to a certainty – result in numerous new lawsuits. The significant amount of time law enforcement officials would have to spend as defendants in those lawsuits would take them away from their normal public safety duties, thus creating department-wide staffing issues.
- ***Could the General Assembly limit or eliminate qualified immunity in all cases?*** No. the General Assembly could limit the doctrine only for cases in state court. The General

Assembly has no power over how the doctrine is applied in federal courts, where many cases against government officials are tried.

- ***If qualified immunity were eliminated, would that hurt the ability to recruit highly qualified and devoted men and women to law enforcement jobs?*** Unquestionably, yes. No one wants a job where there's a significant risk of being sued, with even frivolous cases going to juries for unknown outcomes. Under the law of unintended consequences, the result of eliminating qualified immunity could very well be a *reduction* in the level of professionalism in law enforcement.
- ***Is there a better way to improve professionalism in law enforcement?*** In fairness, it must be recognized that the controversial situations fueling the present debate are from other states, not Virginia. By and large, officers and deputies in Virginia show a high degree of professionalism. However, if improvement is deemed to be needed, there are better ways to achieve it: improve salaries, improve training, and ensure fair enforcement of professional standards.