

# QUALIFIED IMMUNITY BEYOND POLICING

In 1967, the Supreme Court created from whole cloth the legal doctrine of qualified immunity, which shields state government officials from civil liability when they violate people’s constitutional rights in all but the rarest cases, creating a sweeping defense that does not exist in the text of our laws. Under the doctrine of qualified immunity, as it currently exists, government officials cannot be held personally liable unless they have violated a constitutional right that was “clearly established” at the time of the violation. In practice, it has become very difficult to meet this standard, because plaintiffs are often required to identify prior case law involving nearly identical fact patterns. Even in cases in which the defendant’s actions were obviously wrong, the plaintiff is often denied relief and the government official escapes accountability.

While many recent discussions around qualified immunity revolve around law enforcement, qualified immunity reaches further than the realm of policing and has thwarted justice for rights violations that take place in schools, detention facilities, child protective contexts, and more. The following is just a small sample of cases in which qualified immunity was granted in egregious circumstances that do not involve law enforcement.



QUALIFIED IMMUNITY  
IN SCHOOLS



QUALIFIED IMMUNITY  
IN HIRING



QUALIFIED IMMUNITY  
IN PRISONS

## QUALIFIED IMMUNITY IN SCHOOLS

An Arizona school nurse and administrative assistant subjected 13-year-old Savana Redding to a strip search of her bra and underpants because they believed she had pain relief pills.<sup>1</sup> Even though this was an egregious violation of Savana’s Fourth Amendment rights because the officials had no reason to believe that she was hiding dangerous drugs in her underpants, the Court ultimately granted qualified immunity to the school administrators because lower court opinions viewed strip searches of students suspected of carrying drugs on their person differently enough that the Court believed the law was not clearly established at the time.<sup>2</sup> But as the dissent notes, “the clarity of a well-established right should not depend on whether jurists have misread our precedents.”<sup>3</sup>

## QUALIFIED IMMUNITY IN HIRING

Tammy Fields was passed over for the position of local director for the Buchanan County Department of Social Services by a county administrative board.<sup>4</sup> Shortly after, Fields sued the members of the board, alleging that they conspired to prevent Fields from being hired because of her support of the Republican Party, in violation of the First Amendment.<sup>5</sup> The Fourth Circuit found that the defendants violated Fields’ First Amendment rights by discriminating against her because of her political affiliation, but granted qualified immunity because they could not “unequivocally say that defendants knew or should have known they were violating Fields’s constitutional rights when they refused to hire her.”<sup>6</sup> But long before the events in question, the Supreme Court had established that denying persons employment opportunities based on partisan affiliation was a violation of the First Amendment’s guarantee of freedom of speech and association.<sup>7</sup> And while the government may consider partisan affiliation for policymaking jobs, there was no colorable claim that Fields sought such a job. In fact, the job application form that Fields filled out stated explicitly that political affiliation shall not be taken into consideration in hiring.<sup>8</sup> The Fourth Circuit inexplicably gave the government leeway to discriminate against job applicants based on their political beliefs, despite the fact that the Supreme Court has previously held such discrimination trampled on precious rights of free speech and association.

## QUALIFIED IMMUNITY IN PRISONS

In *Allah v. Milling*, the Second Circuit granted qualified immunity to prison officials who had kept a pretrial detainee in solitary confinement—a state of isolation that, as Justice Anthony Kennedy noted, “exact[s] a terrible price”<sup>9</sup>—for more than a year simply because the detainee asked a question about commissary access.<sup>10</sup> While the Second Circuit held that the prison officials had violated the Constitution, the court granted qualified immunity, even though as the dissent observed, the prison official’s actions were no different from “loading [him] with chains and shackles and throwing him in a dungeon.”<sup>11</sup> Once again, because there wasn’t a case with a similar enough fact pattern to this outrageous violation of constitutional rights, justice was not delivered.

More recently, the Fifth Circuit granted qualified immunity to a correctional officer who had sprayed Texas prisoner Prince McCoy in the face with a chemical agent without reason.<sup>12</sup> McCoy filed a suit against the officer for violating the Eighth Amendment; the lawsuit alleged that after being sprayed, McCoy suffered from “burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other emotional distress.”<sup>13</sup> The Fifth Circuit ultimately granted qualified immunity to the correctional officer, finding that while the officer did violate McCoy’s Eighth Amendment rights, the use of pepper spray on a prisoner did not violate clearly established law.<sup>14</sup> But as the dissent pointed out, the majority opinion was unnecessarily strict when it comes to deciding what counts as clearly established law. While other courts have found that a prison guard punching an inmate or hitting an inmate with a baton “for no reason” are violations of clearly established law, the Fifth Circuit allowed prison guards to use pepper spray on prisoners for no good reason with impunity.<sup>15</sup> The dissent rightly asked, “[s]hould the result be different because [the defendant’s] weapon of choice was pepper spray?”<sup>16</sup> And the answer, as the dissent argued, should be no. To add to the dissent’s argument, anyone learning of this case might rightly ask, should you need an earlier case with the exact same facts to know that pepper spraying a person in the face for no reason is wrong, and be held accountable when you do it anyway? Again, the answer should be no.

These examples are not exhaustive, as there are hundreds, if not thousands of cases where qualified immunity is raised to prevent officials from being held accountable for their egregious constitutional violations. But these examples make clear that the only way to fix the qualified immunity doctrine is to end it completely. Indeed, if Congress were to pass legislation specifically eliminating this judge-made doctrine only for law enforcement, it would essentially write qualified immunity into law for other state government officials when it does not currently exist in the text of any federal statute. This is important, because currently qualified immunity exists only as a judge-made doctrine, and one of the powerful arguments made against it in courts is that it has no basis in statutory text. If Congress were to codify qualified immunity outside the scope of policing, allowing government officials to violate constitutional rights with impunity, it might make it extremely difficult to rein in qualified immunity in other contexts via litigation. Congress should step in to make clear that *all* government officials should be held accountable when they violate people’s constitutional rights. The doctrine of qualified immunity must be ended completely.

**“Congress should step in to make clear that all government officials should be held accountable when they violate people’s constitutional rights.”**

### ENDNOTES

- 1 *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).
- 2 *Id.* at 378-379.
- 3 *Id.* at 380 (Stevens, J., concurring in part and dissenting in part).
- 4 *Fields v. Prater*, 566 F.3d 381, 383-84 (4th Cir. 2009).
- 5 *Id.* at 384-85.
- 6 *Id.* at 390.
- 7 *Branti v. Finkel*, 445 U.S. 507, 518 (1980).
- 8 *Fields*, 566 F.3d at 388.
- 9 *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring).
- 10 *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017).

- 11 *Id.* at 57-58 (internal citation omitted).
- 12 *McCoy v. Alamu*, 950 F.3d 226, 228 (5th Cir. 2020).
- 13 *Id.* at 229.
- 14 *Id.* at 233-34.
- 15 *Id.* at 234-235 (Costa, C.J. dissenting).
- 16 *Id.* at 235.

