

116<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 4036

To amend the Revised Statutes to reform the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JUNE 23, 2020

Mr. BRAUN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend the Revised Statutes to reform the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Reforming Qualified  
5 Immunity Act”.

6       **SEC. 2. FINDINGS.**

7       The Congress finds the following:

8               (1) Congress passed the Act of April 20, 1871  
9       (commonly known as the “Ku Klux Klan Act”; 17  
10       Stat. 13, chapter 22), to combat rampant violations

1 of civil and constitutionally secured rights across the  
2 nation, particularly in the post-Civil War South.

3 (2) Included in that Act was a provision, now  
4 codified at section 1979 of the Revised Statutes (in  
5 this section referred to as “section 1983”), which  
6 provides a cause of action for individuals to file law-  
7 suits against State and local officials who violate  
8 their legal and constitutionally secured rights.

9 (3) Section 1983 has never included a defense  
10 or immunity for government officials who act in  
11 good faith when violating rights, nor has it ever had  
12 a defense or immunity based on whether the right  
13 was “clearly established” at the time of the viola-  
14 tion.

15 (4) From the law’s beginning in 1871, through  
16 the 1960s, government actors were not afforded  
17 qualified immunity for violating rights.

18 (5) The Supreme Court of the United States in  
19 *Pierson v. Ray*, 386 U.S. 547 (1967), found that  
20 government actors had a good-faith defense for mak-  
21 ing arrests under unconstitutional statutes based on  
22 a common-law defense for the tort of false arrest.

23 (6) The Supreme Court of the United States  
24 later extended the good-faith defense beyond false

1       arrests, turning it into a general good-faith defense  
2       for government officials.

3           (7) Finally, in *Harlow v. Fitzgerald*, 457 U.S.  
4       800 (1982), the Supreme Court of the United States  
5       found the subjective search for good faith in the gov-  
6       ernment actor unnecessary, and replaced it with an  
7       “objective reasonableness” standard that requires  
8       that the right be “clearly established” at the time of  
9       the violation for the defendant to be liable.

10          (8) This doctrine of qualified immunity has se-  
11       verely limited the ability of many plaintiffs to re-  
12       cover damages under section 1983 when their rights  
13       have been violated by State and local officials.

14          (9) As a result, the intent of Congress in pass-  
15       ing section 1983 has been frustrated, and the rights  
16       secured by the Constitution of the United States  
17       have not been appropriately protected.

18       **SEC. 3. SENSE OF THE CONGRESS.**

19       It is the sense of the Congress that Congress must  
20       correct the erroneous interpretation of section 1979 of the  
21       Revised Statutes and reform the court-created doctrine of  
22       qualified immunity.

23       **SEC. 4. REFORM OF QUALIFIED IMMUNITY.**

24       Section 1979 of the Revised Statutes (42 U.S.C.  
25       1983) is amended—

1 (1) by inserting “(a)” before “Every person”;

2 and

3 (2) by adding at the end the following:

4 “(b)(1) Except as provided in paragraph (2), it shall  
5 not be a defense to any action brought under this section  
6 that, at the time of the deprivation—

7 “(A) the defendant was acting in good faith;

8 “(B) the defendant believed, reasonably or oth-  
9 erwise, that his or her conduct was lawful;

10 “(C) the rights, privileges, or immunities se-  
11 cured by the Constitution and laws were not clearly  
12 established; or

13 “(D) the state of the law was such that the de-  
14 fendant could not reasonably have been expected to  
15 know whether his or her conduct was lawful.

16 “(2) A defendant sued in his or her individual capac-  
17 ity under this section shall not be liable if the defendant  
18 establishes that, at the time the deprivation occurred—

19 “(A)(i) the conduct alleged to be unlawful was  
20 specifically authorized or required by a Federal stat-  
21 ute or regulation, or by a statute passed by the pri-  
22 mary legislative body of the State, Territory, or Dis-  
23 trict of Columbia in which the conduct was com-  
24 mitted;

1           “(ii) no court of competent jurisdiction had  
2 issued a final decision on the merits holding, without  
3 reversal, vacatur, or preemption, that the provision  
4 or provisions of the statute or regulation authorizing  
5 or requiring such conduct were inconsistent with the  
6 Constitution or Federal laws; and

7           “(iii) the defendant reasonably believed that his  
8 or her conduct was in conformance with the Con-  
9 stitution of the United States and Federal laws; or

10           “(B)(i) a court of competent jurisdiction had  
11 issued a final decision on the merits holding, without  
12 reversal, vacatur, or preemption, that the specific  
13 conduct alleged to be unlawful was consistent with  
14 the Constitution of the United States and Federal  
15 laws; and

16           “(ii) the defendant reasonably believed that his  
17 or her conduct was in conformance with the Con-  
18 stitution of the United States and Federal laws.

19           “(c)(1) In a covered action, a municipality or other  
20 unit of local government shall be liable for a violation of  
21 subsection (a) by an agent or employee of the municipality  
22 or other unit of local government acting within the scope  
23 of his or her employment.

24           “(2) It shall not be a defense to a covered action de-  
25 scribed in paragraph (1) that—

1           “(A) the agent or employee was acting in good  
2 faith, or that the agent or employee believed, reason-  
3 ably or otherwise, that his or her conduct was lawful  
4 at the time when it was committed; or

5           “(B) the rights, privileges, or immunities se-  
6 cured by the Constitution and laws were not clearly  
7 established at the time of their deprivation by the  
8 agent or employee, or that at this time, the state of  
9 the law was otherwise such that the agent or em-  
10 ployee could not reasonably have been expected to  
11 know whether his or her conduct was lawful.

12           “(d) In this section—

13           “(1) the term ‘court of competent jurisdiction’  
14 means—

15           “(A) the Supreme Court of the United  
16 States;

17           “(B) a district court or court of appeals of  
18 the United States that has jurisdiction over the  
19 territory in which the deprivation occurred; or

20           “(C) a court of general jurisdiction of a  
21 State, Territory, or District that has jurisdic-  
22 tion over the territory in which the deprivation  
23 occurred;

24           “(2) the term ‘covered action’ means an action  
25 under subsection (a) against—

1           “(A) an agent or employee of a munici-  
2           pality or other unit of local government acting  
3           in his or her official capacity; or

4           “(B) a municipality or other unit of local  
5           government; and

6           “(3) the term ‘defendant’ does not include—

7           “(A) a municipality or other unit of local  
8           government; or

9           “(B) an individual employed by a munici-  
10          pality or other unit of local government acting  
11          in his or her official capacity.”.

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