



ILLINOIS
CRIMINAL JUSTICE
INFORMATION AUTHORITY

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Illinois Criminal Justice Information Authority

MEMORANDUM

Meeting Minutes

Task Force on Constitutional Rights and Remedies

October 7, 2021

12:00 p.m.

Conducted via WebEx

Minutes

Task Force Members Attendees: Craig Futterman, Joel D'Alba, Tamara Cummings, Larry Rogers, Khadine Bennett, Michael Wilder, James Kaitschuk, Christopher Conrad, Dana O'Malley, Elgie Sims, Justin Slaughter, Matt Davis, Ashley Wright, Barbara Crowder, Dan Ugaste, John Curran

Not Present: Carolyn Shapiro

Also Present: Karen Sheley, Crystal D. Johnson – ICJIA Office of General Counsel

Call to Order

- Meeting was called to order at approximately 12:10.
- Roll call completed with certification of number of members to constitute a quorum

Attendees

| Task Force Member Attendance | Present | Telephone | Absent |
|--|--------------------|------------------|---------------|
| Professor Craig Futterman, U of Chicago | X | | |
| Joel D'Alba, Shareholder Asher, Gittler & D'Alba | X | | |
| Professor Carolyn Shapiro, Kent Law School | X (joined late) | | |

| | | | |
|---|---|--|--|
| General Counsel Tamara Cummings, Illinois FOP | X | | |
| Commissioner Larry Rogers Jr., Board of Review Commissioner | X | | |
| President Michael Wilder, Black Men Lawyers Association | X | | |
| Director Jim Kaitschuk, Illinois Sheriffs' Assoc. | X | | |
| City Manager Christopher Conrad, Highland Park | X | | |
| General Counsel Dana O'Malley, Chicago Police Dept. | X | | |
| Director Khadine Bennett, ACLU | X | | |
| Senator Elgie Sims, State Senator 17 th District | X | | |
| Representative Justin Slaughter, State Rep. 27 th District | X | | |
| Deputy Director Matt Davis, Illinois State Police | X | | |
| Chief Ashley Wright, Illinois Attorney General | X | | |
| Judge Barbara Crowder, Retired Judge | X | | |
| Representative Dan Ugaste | X | | |
| Senator John Curran | X | | |

Item 1: New Business

- Chair Slaughter reminded the task force members of the requirements for training and that links were sent for mandatory trainings on October 5, 2021. He asked task force members to let Crystal Johnson know if they have difficulty signing in.
- Ethics training: <https://onenet.illinois.gov/page.aspx?item=117671>
- Harassment: <https://onenet.illinois.gov/page.aspx?item=119012>

Chair Slaughter referred members to the Bylaws sent to members on October 5, 2021.

- Moved-Chair Slaughter moved to adopt the bylaws.
- Second-Chair Sims seconded.
- The motion was opened for discussion.
 - Representative Ugaste questioned whether the meetings should be open or closed and he moved to strike the part in the bylaws which allowed for closed meetings, asking if task force is anticipating holding closed sessions.
 - Chair Slaughter stated that the question is out on the floor for the entire task force.
 - Representative Ugaste moved to strike the portion about closed meetings.
 - Second-Joel D'Alba seconded the motion.
 - General Counsel Sheley cited the Open Meetings Act and clarified that this portion was pulled from other task force bylaws, stating that the task force would only be able to hold a closed session if there is business that required it.

- City Manager Conrad clarified this is just citing the current rule for OMA, allowing the task force to conduct meetings by video conference. It would be up to the board to decide to have an open or closed meeting. \
- Chair Sims stated that permissive authority to hold these closed meetings is consistent with other task force rules and requirements and bylaws. He also referred members to earlier in Section C where it says that the task force shall ensure the public is able to observe and comment on the proceedings in the meetings by attending via call in number provided for by ICJIA. The intent is for public discourse and public input to occur. It is not an intent to have a closed meeting but that language is consistent with other task force bylaws
- Chair Slaughter stated there is a motion on the floor that has been properly seconded and that Crystal Johnson would take the roll on that motion.
- There was discussion about which motion was being voted on.
- Chair Slaughter advised to take up the first motion to adopt the bylaws as distributed.
- Crystal Johnson took a roll call vote and the motion was granted with the following vote.

| TASK FORCE MEMBER | Yes | No |
|---|-------------|-------------|
| Professor Craig Futterman, U of Chicago | X | |
| Joel D'Alba, Shareholder Asher, Gittler & D'Alba | X | |
| Professor Carolyn Shapiro, Kent Law School | Not present | Not present |
| General Counsel Tamara Cummings, Illinois FOP | X | |
| Commissioner Larry Rogers Jr., Board of Review Commissioner | X | |
| President Michael Wilder, Black Men Lawyers Association | X | |
| Director Jim Kaitschuk, Illinois Sheriffs' Assoc. | X | |
| City Manager Christopher Conrad, Highland Park | X | |
| General Counsel Dana O'Malley, Chicago Police Dept. | X | |
| Director Khadine Bennett, ACLU | X | |
| Senator Elgie Sims, State Senator 17 th District | X | |
| Representative Justin Slaughter, State Rep. 27 th District | X | |
| Deputy Director Matt Davis, Illinois State Police | X | |
| Chief Ashley Wright, Illinois Attorney General | X | |
| Judge Barbara Crowder, Retired Judge | X | |
| Representative Dan Ugaste | | X |
| Senator John Curran | X | |

- Chair Slaughter announced there is a motion that has been properly seconded to amend the bylaws to strike the language allowing for a closed meeting.
- Crystal Johnson took a roll call and the motion carried based on the following votes.

| TASK FORCE MEMBER | Yes | No |
|---|-------------|-------------|
| Professor Craig Futterman, U of Chicago | | X |
| Joel D’Alba, Shareholder Asher, Gittler & D’Alba | X | |
| Professor Carolyn Shapiro, Kent Law School | Not present | Not present |
| General Counsel Tamara Cummings, Illinois FOP | X | |
| Commissioner Larry Rogers Jr., Board of Review Commissioner | | X |
| President Michael Wilder, Black Men Lawyers Association | | X |
| Director Jim Kaitschuk, Illinois Sheriffs’ Assoc. | X | |
| City Manager Christopher Conrad, Highland Park | X | |
| General Counsel Dana O’Malley, Chicago Police Dept. | X | |
| Director Khadine Bennett, ACLU | | X |
| Senator Elgie Sims, State Senator 17 th District | | X |
| Representative Justin Slaughter, State Rep. 27 th District | | X |
| Deputy Director Matt Davis, Illinois State Police | X | |
| Chief Ashley Wright, Illinois Attorney General | | X |
| Judge Barbara Crowder, Retired Judge | No response | No response |
| Representative Dan Ugaste | X | |
| Senator John Curran | X | |

Chair Slaughter asked for task force participation, to send materials on recommendations, thoughts, perspectives, reports, resources, or articles for report to Crystal Johnson at ICJIA by October 13, 2021.

- Director Jim Kaitschuk asked for clarification on whether it should be materials or recommendations.
- Chair Slaughter said both may come together, but materials for framework is more the focus at this point.
- Chair Sims concurred it’s about having as much information available as possible to make informed decisions.
- Professor Futterman asked if 10/13/21 was a firm deadline and asked if there will be an opportunity to supplement information as more becomes available
- Chair Slaughter stated while task force would like all materials to be in by deadline, if there is important information, it should be taken into account.
- General Counsel Cummings asked if a date could be provided for task force members to receive materials.
- Crystal Johnson said ICJIA would try to send it by 10/14/21 if received by 10/13/21.
- City Manager Conrad requested that ICJIA provide information on how many lawsuits in Illinois have been dismissed for qualified immunity in recent years versus how many cases have been filed – it might help to understand the scope of the problem.
- General Counsel Sheley stated she would speak with Research and Analysis team to see if that is possible.

- Chair Slaughter introduces panel, each speaker to have five minutes.

Item 2: Presentations by invited panelists

Group 1 Schedule:

- Speaker 1: 12:15-12:20 Larry James has served as General Counsel of the National Fraternal Order of Police since 2001. He is also co-founder of the African-American Leadership Academy and a member of the Board of Trustees of Kenyon College.
 - Mr. James presented information on the number of civil rights cases and the number in which qualified immunity was the deciding factor.
 - Mr. James noted that in high profile cases with misconduct, officers can be terminated and criminally prosecuted. Qualified immunity does not interfere.
 - The courts and government entities are not abusing qualified immunity as it stands.
- Speaker 2: 12:20-12:25 John Murphey-Partner at Odelson, Sterk, Murphey, Frazier, McGrath, LTD. He represents both plaintiffs and defendants in Section 1983 litigation.
 - Qualified immunity provides a limited but important protection to police officers and other government workers.
 - Qualified immunity protects police officers who are required to make snap judgement decisions about probable cause and other Fourth Amendment decisions.
 - He further noted that qualified immunity addressed money damages and that ending it will fall on taxpayers.
- Speaker 3: 12:25-12:30 Lance LoRusso- is a civil litigator with a law enforcement background. Lance is honored to serve as General Counsel to the Georgia State Lodge of the Fraternal Order of Police
 - Mr. LoRusso recommended the use of force training, both in the classroom and scenario-based training. That training shows the kind of split-second discretionary decision-making officer are engaged in.
 - Officers who commit crimes cannot and do not get qualified immunity.
 - He noted the efficiency of the Prison Litigation Reform Act and identified it as a different viable structure to replicate in police suits that would allow for early dismissal of frivolous lawsuits.
- Q&A: 12:30-1:00
 - Mr. Conrad: How would changes to qualified immunity, or leaving it in place, impact public safety?
 - Mr. LoRusso answered that law enforcement will face more lawsuits that should be dismissed. The net effect will be to reduce the quality of applicants to the police department.
 - Mr. James responded that unions don't train, hire or fire and that it is important to look at the top level administration and ask them to better vet officers during the hiring process.

- Mr. Murphey noted that he represents a North Shore community. The number of applicants 3 years ago was 120; 3 months ago there were 23.
- Mr. Conrad noted that law enforcement is having trouble with recruitment. He also questioned whether the changes in state law to use of force also changed the calculus for Qualified Immunity.
- Mr. Lance answered that changing the standard for use of force would not change whether qualified immunity could apply to that standard.
- Mr. James recommended use of force training and speaking to officers.
- Mr. Murphey noted his appreciation for new training standards, but also noted that there will still be circumstances of uncertainty that require qualified immunity.
- Commissioner Rogers noted that qualified immunity is a defense in federal court causes of action where someone alleges their civil rights were violated. He noted that the panelists were talking about the perspective of police officers, but the actions occurred against individuals. He further noted that judges have stated in legal opinions that their hands are tied by qualified immunity.
- Mr. James noted that certain judges have raised these concerns, but the United States Supreme Court hasn't moved and has provided a roadmap for the doctrine.

Group 2 Schedule:

- Speaker 4: Professor Schwartz- Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure* and a variety of courses on police accountability and public interest lawyering.
 - With limited exceptions, qualified immunity shields government officials, even when they have violated the constitution, if they have not violated clearly established law.
 - Responding to concerns that officers will leave the force, she noted that officers are indemnified. Across the country 99.98% of dollars were paid to plaintiffs from local budgets, not police officers; these lawsuits are less than 1% of most city's budgets. Additionally, the Fourth Amendment protects split second decisions, qualified immunity does not change that.
 - Qualified Immunity prevents courts from reaching constitutional questions because they do not rule on the underlying constitutional claim.
- Speaker 5: 1:05-1:10 Professor Baude- a Professor of Law and the Faculty Director of the Constitutional Law Institute at the University of Chicago Law School, where he teaches federal courts, constitutional law, and elements of the law.
 - Professor Baude noted that while, he is a legal and judicial conservative on most issues, qualified immunity is an area where he agrees with Professor Schwartz.
 - He approaches the question from the perspective of constitutional law and tradition and finds the doctrine troubling.

- It does not derive from any sort of positive law and was a creation of the middle twentieth century and has evolved since that time.
 - It is proper for the state to be considering how citizens of Illinois can enforce civil and constitutional rights. While the Supreme Court has petitions asking it to reconsider that doctrine is that it has declined to take up the issue. Observers believe that this is based on the perception that legislators are considering the doctrine and it is subject to democratic deliberations. It would be circular to then say that if the Supreme Court is leaving this in place, we'll leave it in place.
 - Qualified immunity is inconsistent with, *Marbury v. Madison*, and the fundamental principles of the rule of law that when there is a violation of a constitutional right there should be a remedy.
- Speaker 6: 1:10-1:15 Professor Smith- An associate professor at Emory University School of Law. He is a scholar of the federal judiciary, constitutional law, and local government.
 - Professor Smith identified cases where qualified immunity was granted, including when officers stole \$250,000 during a search, another where officers shot gas canisters into a home where they thought a suspect was there—they were wrong, and a case that reached the United States Supreme Court involving a high speed chase.
 - The Illinois legislature does not have to be bound by the federal standard created by federal judges. It does not have to be an all or nothing approach.
- Q&A: 1:15-1:45
 - Professor Shapiro asked the panelists to speak more about the interaction between state law and qualified immunity in federal court. Some panelists raised a question of how a change in Illinois' use of force statute may affect the scope of qualified immunity. She did not believe it was accurate and asked for clarity.
 - Professor Baude agreed that federal courts do not consider the state use of force standard and focus on federal rules.
 - Professor Smith agreed and noted that under his view, state legislatures could broaden access to federal courts without interfering with the Supremacy Clause.
 - Mr. D'Alba asked what happened to the officers who stole the \$250,000 and if they were criminally charged, or fired.
 - Professor Smith he did not know, but was certain that they were not civilly liable.
 - Mr. D'Alba asked Professor Baude if there were other areas where concepts like qualified immunity were addressed legislatively.
 - Professor Baude noted there is a lot of precedent, including going back to the beginning of the 20th century, workers' compensation systems. There

are also cases where courts say something is not cognizable in common law, but legislatures come in create fair housing, employment, or the whole range of civil rights statutes.

- Professor Schwartz was asked about other options for reform. She suggested providing an affirmative defense where officers showed that the action was within their training.
- Commissioner Rogers commented on the impact of qualified immunity, potentially on 1000s of people and asked how often cases are dismissed.
- Professor Schwartz cited her article showing that approximately 4% of cases are dismissed on those grounds, but noted that qualified immunity also prevents some lawyers from bringing cases at all and that even in successful cases it extends the litigation.
- General Counsel Cummings asked how qualified immunity impacts whether people settle cases at different rates, or for different amounts.
- Professor Schwartz noted that she has some research on this she can share, but that she does not believe that qualified immunity will have a dramatic impact on settlement because of other barriers to bringing these cases. She further noted that officers are indemnified, often as a function of state law.
- Professor Futterman asked the panelists if they could respond to the issue of officer recruitment, given that Illinois has an indemnification statute.
- Professor Schwartz noted that indemnification rules are already in effect and not impacted by eliminating qualified immunity. She further noted that qualified immunity results in the dismissal of a relatively few number of cases, meaning that the financial impact on municipalities is overstated.
- Mr. James stated that qualified immunity is not available if there is a criminal act. He described his experience in litigation. He noted that while a few judges may oppose qualified immunity, it is a small number.
- Judge Crowder raised whether it would be better to have an affirmative defense, or a separate system like workman's compensation. The panelists responded.
- Mr. Conrad noted that qualified immunity reform would be a concern to municipalities. He questioned what it would do for long term insurance and operating costs.
- Professor Baude noted that retroactivity would limit liability in cases where there is newly established law.

- Joel D’Alba asked the most effective way to address police misconduct and how to deter it.
- Professor Schwartz endorsed views from the first panel—better discipline, training, supervision, and oversight. She noted the concerns raised in the DOJ report that there have not been appropriate internal affairs division investigations and that she does not believe criminal prosecution is the answer—we are left with civil court. While civil suits are not a perfect solution, they provide compensation to those harmed.
- Professor Smith noted the importance of procedural justice and the messages communicated to the general public.
- Mr. LoRusso disagreed with Professor Schwartz’ concerns about investigations and raised concerns about videos depicting uses of force that are lawful, but widely criticized.
- Mr. James, based on his review of lawsuits throughout his career, disagreed that qualified immunity was preventing the filing of suits.

Chair Slaughter thanks everyone – panelists and task force members – for robust discussion.

Item 3: Public Comment

Chair Slaughter invites public comment.

John Socal asks about legal doctrine of being sued retroactively if Supreme Court were to change interpretation of what constitutes a suit. Have any citation for authority?

Professor Baude responds, citing *Wyatt v. Cole* (1992). Fred Smith also cited *Can Unions Be Sued for Following the Law?* (response to paper by Professor Baude).

Chief Mitchell Davis asked about changes that could be made without eliminating qualified immunity and achieve desired results?

Professor Baude responded that one idea would be for officers prove an affirmative defense that they were not on notice.

Closing Remarks

Chair Slaughter thanked the experts and task force for a great discussion. He announced that the next meeting - 10/21/21. Chair Slaughter reminded the task force members to submit materials by 10/13/21. As Chair, he is honored to serve, impressed with discussion and believes the right approach is being taken in hearing multiple perspectives on the matter and having a collaborative spirit leading to the report.

Chair Sims thanked all participants for the robust discussion. He also responded to some questions raised, and affirmed the need for all parties to be heard. He addressed concerns raised about the SAFE-T Act and encouraged an honest dialogue. He further thanked everyone for their work.

ADJOURN

Chair Slaughter moved to adjourn. The motion was seconded by Joel D'Alba. The meeting was adjourned at 12:30 pm.