



**Illinois Criminal Justice Information Authority**

**Minutes**

**ILLINOIS TASK FORCE ON CONSTITUTIONAL RIGHTS AND REMEDIES**

20 ILCS 5165/4-5 P.A. 101-652  
P.A. 101-24

Thursday, October 21, 2021  
3:00pm—5pm

Location

Via WebEx Video Conference/Teleconference

**Call to Order and Roll Call**

At 3:06 pm, Chairman Justin Slaughter called the meeting to order and asked ICJIA General Counsel, Karen Sheley to call the roll. Quorum was achieved.

**Attendees**

<b>Task Force Member Attendance</b>	<b>Present</b>	<b>Telephone</b>	<b>Absent</b>
Professor Craig Futterman, U of Chicago	X		
Joel D’Alba, Shareholder Asher, Gittler & D’Alba	X		
Professor Carolyn Shapiro, Kent Law School	X		
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		
Khadine Bennet (designee), ACLU	X		
Senator Elgie Sims, State Senator 17 <sup>th</sup> District	X		
Representative Justine Slaughter, State Rep. 27 <sup>th</sup> 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		

**Also present were:**

Karen Sheley, Crystal D. Johnson – ICJIA Office of General Counsel  
Charise Williams—Deputy Director ICJIA

**Item 1: Old Business**

Chairman Slaughter reminded members that required trainings need to be completed by October 30, 2021.

General Counsel Sheley let task members know that they could review the training on paper and to let ICJIA know if the members have already completed.

Chairman Slaughter referred the Task Force members to the meeting minutes for September 23, 2021 sent to members on October 19, 2021.

Jim Kaischuk asked for changes—noting that it should read “Senator Sims” and that the reference should be Mitch Davis.

Representative Ugaste noted that his conflict was with the October 7 meeting.

Chairman Slaughter moved to approve the minutes for the September 23, 2021 meeting be approved as amended. Chris Conrad seconded the motion. The minutes were approved by roll call vote with the following votes taken.

<b>Task Force Member Attendance</b>	<b>Yes</b>	<b>No</b>	<b>Absent</b>
Professor Craig Futterman, U of Chicago	X		
Joel D’Alba, Shareholder Asher, Gittler & D’Alba	X		
Professor Carolyn Shapiro, Kent Law School	X		
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
Khadine Bennet (designee), ACLU	X		
Senator Elgie Sims, State Senator 17 <sup>th</sup> District	X		

Representative Justine Slaughter, State Rep. 27 <sup>th</sup> 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 2: New Business**

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Chairman Slaughter opened the discussion, noting three relevant questions:

- When people's rights are violated, what will the state do?
- How do we hold the officer or police department accountable?
- How do we inform the public on how qualified immunity works?

Chairman Slaughter invited people who submitted materials to discuss.

Representative Ugaste agreed that the questions identified are important, but asked that this task force take into consideration other actions taken by the state. He asked that the task force consider how the task force's recommendations will impact how officers will make split-second decisions and the impact on public safety.

Rep Slaughter noted that we should consider the impact on practitioners on the ground. He then called for people who submitted materials to respond.

Mr. Conrad noted that they requested data from ICJIA regarding cases in Illinois.

Rep. Slaughter responded that ICJIA is working on the research.

General Counsel Sheley agreed that the work was in progress.

Professor Futterman noted that he is also reviewing cases and that he should have that material to the task force by mid-next week.

Professor Shapiro noted that early that week the Supreme Court ruled on two qualified immunity cases in which they reversed denials of qualified immunity on the basis that the cases did not have nearly identical cases. The Supreme Court had signaled that it may loosen that standard, but it did not. I can't tell based on the facts in the opinions whether there was a constitutional violation. The Supreme Court did not address that issue.

General Counsel Cummings: I disagree with the characterizations of the case. The 9<sup>th</sup> Circuit case had very different facts. In the case at issue, the person had a chainsaw and was threatening his family. The police responded and got the offender to drop the chainsaw, but he also had a

knife. In contrast, the case the 9<sup>th</sup> circuit relied on was one where someone had a knife and officers put pressure on his back. This case was not close. It was a case where qualified immunity should never have been denied.

Professor Shapiro offered to submit the opinion. She noted that in both cases, the court made it clear that they will summarily reverse, which they do not often do in other areas of law. Additionally, the court reaffirmed clearly established law requires cases that are close in fact. She noted that she does not disagree with Ms. Cummings description of the facts.

Mr. Conrad noted that we continue to discuss cases outside of Illinois. In his training, he learned that, Illinois was light years ahead of other states in terms of training and accountability. He noted that Professor Schwartz had said that training and accountability are the best ways to prevent these events from occurring. Illinois, now with the SAFE-T act, is ahead of other states and we have not yet given the SAFE-T Act time to have an impact.

Rep Slaughter agreed that we are looking for an Illinois solution. He acknowledged the changes in the SAFE-T Act. He thanked Mr. Conrad for the comments.

Khadine Bennet noted that it is possible to reform, but also have a reform that includes removing qualified immunity for law enforcement. Other states have been able to do both at the same time. A concern about waiting is that many pieces of the SAFE-T Act have been delayed at the request of law enforcement. This is an opportunity to continue to build trust between law enforcement and the community. She noted that she wanted to share the testimony of Dave Franco, formerly a Chicago Police Department member and now of LEAP. His testimony was in support of reforming qualified immunity. Many concerns that have been shared could be addressed there.

Mr. Kaitschuk noted that delayed implementation was related to the delayed effective date. The trailer bill did extend training and certification requirements as it related to issues of the Training Board to get up and running. Regarding Representative Tarver's bill, it goes farther than qualified immunity and discusses a variety of issues including the ability to walk away from a scene.

Judge Crowder asked the ACLU for the recommendations and the proposed bill that was discussed.

Khadine Bennet explained that the LEAP testimony was in reference to the Bad Apples in Law Enforcement Act. The bill would allow people to access civil court when they had their civil rights violated. She noted that she shared in the materials and an explainer of the bill.

General Counsel Cummings noted she submitted materials from Larry James, National Fraternal Order of Police, and further noted that the number of cases that are dismissed based on qualified immunity are rare. There aren't an overwhelming number of cases that are dismissed on qualified immunity, it is pretty balanced.

Chairman Slaughter noted that many people are questioning what qualified immunity is. He asked for the task force to dig into what it is.

Professor Shapiro stated that the focus on qualified immunity is a little off from what the General Assembly can do. Qualified Immunity is a doctrine interpreting a federal law. The Illinois legislature cannot do a lot about how cases are addressed in federal court. What we can do is think about what kind of compensation is appropriate for people whose rights are violated. Regardless of how many people's cases are thrown out on qualified immunity, there are undoubtedly people whose rights were violated and could not get a remedy. What that regime looks like doesn't need to look like the federal system. Instead, there could be guaranteed indemnification, or Illinois could allow respondeat superior, which is not allowed in federal court. There could be some kind of no fault system or limited fault system that is something closer to workers' compensation. We've nearly only talked about this in the law enforcement, but it can be any government official. This could apply to others as well—it was noted that it could be seen as punitive toward law enforcement—there are good reasons to have the system apply to all government employees.

Professor Futterman explained how qualified immunity applies to all public employees, including police officers. Under qualified immunity, even if there is a constitutional violation, unless that right is clearly established by another case, usually in the same circuit, with very similar facts, the victim has no opportunity to get any relief, even though there is a constitutional violation. Officials can raise qualified immunity many times—at the beginning of the case or before trial. This can inject years of delay, which impacts your ability to have your day in court and the cost of it. He further described the state constitutional system. Considering the state constitutional system, which created the rights most fundamental to Illinois which states that for every right there shall be a remedy. The General Assembly has the power to create a separate cause of action under the Illinois Constitution, without creating a defense of qualified immunity.

D'Alba stated that it's important to know the context of how the body of law arises. The doctrine is designed to protect officials based on what they have been trained and what they know. He gave an example of an HR representative who was sued for failing to provide a hearing. That person would have a qualified immunity defense. It's designed to protect public officials when someone is injured, but the law was not clear. He noted the need to train police officers. He noted that the consent decree over the Chicago Police Department requires training; prior there was little training. He then described a recent opinion by Judge Lefkow provided to the task force. In the case, the court decided there was qualified immunity, noting that the court spent hours analyzing facts that the officers had seconds to analyze. He noted that everyone was asked to take a training about the Fourth Amendment. The best way to address this is through training. Regarding Professor Futterman's statement on state law, if a case is brought in state court and alleges issues under the Illinois Constitution, which could also have been alleged under the federal constitution, as a matter of federal procedure, the case can be removed to the federal court. So what is the point of creating a qualified immunity exception when it would be heard in federal court? He also noted that in Illinois, unlike other states, the tort immunity act bars cities from paying punitive damages.

Peter Hanna stepped in for Khadine Bennet. There was a discussion of the bylaws.

Rep Ugaste raised questions about the second designee.

Rep Slaughter recognized Peter Hanna as the designee of the ACLU.

Peter Hanna noted that in *Graham v. Conner* the court allows discretion under the Fourth Amendment to make split second decisions. He contrasted that doctrine from qualified immunity which addresses the question of whether there is clearly established law. He then raised concerns about the qualified immunity doctrine. That doctrine turns on clearly established law. He provided examples where qualified immunity was granted: an officer shot a family dog and hit a 10 year old boy and officers stole \$225,000 during the execution of a warrant. He noted that the doctrine also prevents the litigation of whether there was a constitutional violation because courts can easily determine that there is no clearly established law because there is not another case with the same facts. Perverse aspect of the doctrine is that the more inventive you are in violating constitutional rights, the less likely another court has addressed it. He presented additional cases where the court did not reach the question of whether there was a constitutional violation. He encouraged ending qualified immunity to expand accountability.

Professor Shapiro noted that the task force recommendations do not have to revolve around liability to police officers. We would have to be recommending a new approach to compensating victims. We would not necessarily have to make police officers individually liable. There are ways to remediate that, including indemnification. In Colorado, they allowed indemnification with limited exceptions for a limited amount.

Mr. Conrad noted that we had not yet fully discussed indemnity. It often exists, so the costs are placed on the taxpayers. He also noted the new accountability measures in the SAFE-T Act, including anonymous complaints, duty to intervene, body camera mandates, etc. He responded to concerns raised by Mr. Hanna, noting officers do not attempt to creatively violate civil rights and they did he would have found a way to get them out of law enforcement.

Mr. D'Alba suggested a workers' compensation approach for police misconduct lawsuits, noting that the judgements would be lower. He also identified a study regarding insurance companies that were able to corral police officer misconduct. The insurance companies sent teams of investigators to watch what was going on. This could be incorporated into a system like workers' compensation. He also noted that he wrote a letter to the Chairmen suggesting additional deliberations.

General Counsel O'Malley responded to a method of compensation in the state setting. She noted that there is a method—it is civil litigation under state court, allegations of battery, malicious prosecution, false imprisonment, etc.

Deputy Davis reiterated the request for data to define an Illinois solution to an Illinois problem. Regarding a workers' comp regime, I struggle because of detailed injury schedules. That type of schedule would prove difficult with constitutional cases.

Mr. Hanna raised that it is not a quantitative issue. Professor Schwartz reviewed 1200 cases across the country. But he noted there are cases that are not brought in the first place.

Judge Crowder noted that in her experience presiding over cases for the 20 years she was a judge, many cases in state court were brought, not on a contingency basis, but they were paying

by the hour which foreclosed a lot of people from raising their rights. If there are a lot of cases in state court without horrible outcomes, then perhaps we could clarify the law on immunity and the municipality could protect the officer. I don't think it could be a workers' comp situation because of how it evaluated based on injury, but we could have a claim in the court of claims. It doesn't matter if there are not a 100,000 claims that could be made, or 1000, the question is whether there should be a remedy for a violation of a constitutional right.

Mr. Conrad noted that qualified immunity didn't protect against the large amounts settled in Chicago. We suggested an alternate court with reasonable parameters.

Rep Ugaste asked about attorneys' fees, and if bar associations could help. He noted that we want to make sure everyone can have access to the courts. There are provisions in law, federal and state, that allow people to pursue their cases if their constitutional rights are violated. There are already existing ways to receive compensation—we need to understand if they are currently working.

Chairman Slaughter commended the impressive discussion.

### **Public Comment**

Chairman Slaughter called for public comment.

Don Zoufal noted the call for a statute that would allow a cause of action under the state constitution. The state constitution is broader than the federal constitution. That statute would greatly expand liability for municipalities because everyone has said that the liability should be indemnified.

Professor Shapiro if that was a concern, you could ground a state law cause of action in constitutional rights.

Mr. Hanna noted that the differences are not vast between the state and federal constitution.

Mr. Zoufal noted that there is no caselaw under the Illinois constitution and courts may further develop it.

Mr. Hanna noted that the Illinois Supreme Court typically follows the U.S. constitution.

Chairman Slaughter reminded the task force of the next meeting on October 25. He thanked everyone for the participation on the task force.

### **Adjournment**

Chairman Slaughter moved to adjourn the meeting. The motion was seconded by Judge Crowder. The meeting was adjourned at approximately 5 p.m.