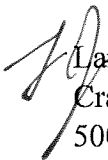




MEMORANDUM

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DATE: October 11, 2021

RE: FOP: Illinois Qualified Immunity Task Force

FILE NO: 10093-27992

Ms. Johnson-

Pursuant to the request of the Chair, the following is my written testimony in addition to that which was given on Thursday, October 7, 2021. I believe that we all can agree that our goal is to improve the quality of policing and the quality of the relationship between the law enforcement community and the community as a whole. I have seen no case to suggest that eliminating qualified immunity does anything toward that goal.

Thank you for your consideration and please call if there are questions.

I. Qualified Immunity Litigation

a. What do the statistics suggest?

- According to a recent study (Reuters) of more than 200 lower court decisions involving excessive force where qualified immunity was raised as a defense, the court denied officers qualified immunity 43% of the time. These numbers suggest that law enforcement officers are not granted qualified as is often reported

b. What do recent Supreme Court cases suggest?

- In 2020, the Supreme Court summarily declined to hear at least nine (9) separate cases wherein qualified immunity was squarely at issue. *Brennan v. Dawson*, No. 18-913; *Baxter v. Bracey*, No. 18-1287; *Anderson v. City of Minneapolis*, No. 19-656; *Zadeh v. Robinson*, No. 19-676; *Corbitt v. Vickers*, No. 19-679; *Hunter v. Cole*, No. 19-753; *West v. Winfield*, No. 19-899; *Mason v. Faul*, No. 19-7790; *Cooper v. Flaig*, No. 19-1001.
- In 2021, the Supreme Court reversed and remanded two cases where the officers were granted qualified immunity. Both cases involved prison officials and egregious facts.
 - o ***Taylor v. Riojas*** - the Court held that the Fifth Circuit erred in granting the prison officers qualified immunity because any reasonable officer should have realized that the inmate's conditions of confinement, including a cell covered nearly floor to ceiling in feces, offended the Constitution. "[N]o reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions." Reversed and remanded.
 - o ***McCoy v. Alamu*** – the Court declined to hear the case but did remand it in light of the decision in *Taylor v. Riojas*. In this case, the prison official assaulted an inmate with pepper spray after a different inmate had thrown a liquid on the prison official.
 - o Judges can follow if they so find.

II. Qualified Immunity Legislation

- ***Colorado***
 - o The first state to specifically negate the availability of qualified immunity as a defense through legislation.
 - o **State law only.** The law permits individuals to bring claims in state court against law enforcement officers who violate their state constitutional rights under Colorado law. And in these cases, qualified immunity is unavailable as a defense.
 - o **Indemnification provision.** The new law requires that the respective political subdivision of the state indemnify its employee's, except if the employer determines the officer did not act upon a good faith and reasonable belief that the action was lawful, then the peace officer can be personally liable for the lesser of 5 percent of the judgment or \$25,000.
- ***Connecticut***

- Did not eliminate qualified immunity. Qualified immunity is only available when the police officer had an objectively good faith belief that such officer's conduct did not violate the law.
 - **State law only.** Again, this applies to cases involving alleged state law deprivations.
 - **Statute of limitations.** Connecticut residents have a one-year statute of limitation in which to bring claims arising out of a police officer deprivation of a person's equal protection, privileges, and immunities provided under State law.
 - **Indemnification provision.** In addition, each respective municipality or police department shall indemnify a police officer for financial loss and expense in a suit initiated against an officer, except when it may attempt to recover such costs against the police officer if the act was malicious, wanton, or willful.
- *New Mexico*
- Eliminated qualified immunity for all public officials—not just police officers.
 - **State law only.** Again, this applies to cases involving state law deprivations.
 - **Statute of limitations.** New Mexicans have a three-year statute of limitations to bring a claim under this new law.
- *New York*
- New York City Council voted to end qualified immunity for NYPD. It creates a new local civil right protecting New Yorkers against unreasonable search and seizures and against excessive force and ban the use of qualified immunity as a defense.

Again, these all represent state legislature efforts to eliminate/curtail qualified immunity as it applies to state law actions only. These do not impact individual claims regarding federal law and constitutional rights violations brought in federal court (which is where the vast majority of these actions are venued).

III. Justifications for Qualified Immunity

In addition to those justifications included on our July 21, 2020 Qualified Immunity Memorandum the following are noteworthy:

- 1) **Qualified immunity is a defense available to mayors, governors, medical board inspectors, prison guards, and teachers, among others. To eliminate the defense only for law enforcement officers seems punitive.**

Many states have enacted indemnification laws, indemnifying their public officers—why is that?

- 2) **States want to attract talented individuals to work for the government. This is true in all state departments, not just police departments.**

- The U.S. Supreme Court has noted this policy consideration. In *Filarsky v. Delia*, the Court considered whether to extend qualified immunity to a private defendant acting on behalf of the government. In holding that qualified immunity should be available to the private defendant, the Court reasoned, without qualified immunity, “the most talented candidates will decline public engagements” in favor of “other work—that does not expose them to liability for government actions.” *Filarsky v. Delia*, 566 U.S. 377 (2012).
- The fear of defending a civil suit, compounded with the risk of personal liability, will dissuade people from becoming government officials.
- Why? Because attaching personal liability will only deter *willful misconduct*. Most constitutional violations occurring in each jurisdiction (i.e. what officers are being sued for) are not the result of willful behavior on behalf of the officer. And remember, qualified immunity does not apply to those who knowingly violate the law! We note that an officer who acts outside the law is not afforded a defense at all.

- 3) **Legitimate claims for injuries inflicted by government officials should be compensated. In the absence of indemnification, plaintiffs will often be left with very limited remedies because most individual defendants will not have the personal means to satisfy a substantial judgment.**

IV. What is qualified immunity?

- Qualified immunity applies only in civil lawsuits where a state actor (i.e. police officer or government official) is sued in his or her individual capacity for performing a discretionary function and the plaintiff seeks monetary damages directly from the state actor.
- Qualified immunity is an affirmative defense available to state actors, and, if granted, provides them protection from personal, civil liability.
- As the Supreme Court said in a recent opinion: “[T]he doctrine of qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011).

- If the plaintiff can show that the police officer or government official violated a clearly established statutory or constitutional right that a reasonable police officer (or government official) would have known, qualified immunity is *not* available and as stated earlier if the acts are egregious. A judge may deny qualified immunity.

V. What qualified is not.

- Qualified immunity does not protect those that “knowingly violate the law.” In cases where it is obviously, or sufficiently clear, that the officer or government official conduct was unlawful, qualified immunity is unavailable and the case will proceed to trial.
- Qualified immunity does not prohibit suits against the city, municipality, or other government entity itself.
- Qualified immunity does not protect a police officer or government official from criminal charges.
- Qualified immunity does not protect a police officer or government official from internal investigations and/or termination.
- Qualified immunity does not apply to claims for noneconomic relief such as injunctive relief.
- Qualified immunity does not apply to failure to perform ministerial tasks—it only applies to those discretionary functions a police officer or government official may perform.

VI. Defenses of qualified immunity as a necessary protection for police officers and government officials.

- **Police officers need protection in order to perform discretionary functions.** Every single factual scenario an officer encounters is different and unknown. It is extremely difficult for an officer to determine how a legal doctrine will apply to a split-second factual scenario that the officer confronts. Thus, unless there is existing precedent that squarely governs the facts before the officer, the reasonable officer needs to be afforded a certain degree of discretion to make split-second decisions in situations that could put lives, including their own, at risk. Officers must rely on training and should not be punished for doing so.

- **Creating personal financial liability would deter applicants.** If qualified immunity is abolished, qualified applicants will be deterred from becoming a police officer or other public office, coupled with an exodus of experienced officers. It takes one case.
- **Qualified immunity only protects the *individual* officers—not the government itself.** Qualified immunity does not protect a city from suit for its policies and practices or failure to train. If an individual has a viable claim that the city has a practice of misconduct or failed to train its officers, that claim can go forward irrespective of an individual officers' qualified immunity.
- **The courts have been balanced in denying or granting qualified immunity.**
 - A recent study of more than 200 lower court decisions where qualified immunity was raised as a defense, the court *denied* officers qualified immunity 43% of the time.
 - Despite acknowledgment from strong justices on both sides (Thomas and Sotomayor) of a desire to revisit qualified immunity, the Supreme Court appears content with its current jurisprudence.
 - Only 5 cases have made it to the Supreme Court since 2015. In all 5 cases, officers were granted qualified immunity, including 9-0 and 8-1 decisions.
 - The Supreme Court recently (June 2020) declined to hear 9 cases where qualified immunity was before it.
- **For those government entities that purchase insurance; without qualified immunity, premiums will become much more costly for government entities to maintain.** Those individuals that are injured by clearly improper government action will not be properly compensated. Officers do not have assets to pay for any substantial judgment.
- **Qualified immunity avoids expending substantial litigation costs and resources.** Qualified immunity prevents a plaintiff from being able to make a frivolous allegation against an officer or government official with a hope of finding some evidence during time-consuming discovery. Absent qualified immunity, every time a police officer or government official is sued, they would be subject to extensive personal litigation costs.
- **Departments will not defend officers in egregious cases and courts will not entertain the defense.** The city will not defend officers involved in obvious misconduct and the courts do not have to conduct a qualified immunity analysis. Qualified immunity protects the actions of a reasonable police officer, not those whose



actions fall outside the scope of his/her employment nor those who knowingly violate the law.
