



Statement of Bruce Stern, President

Oversight Hearing on “Police Practices and Law Enforcement Accountability”

House Committee on the Judiciary

June 10, 2020

The American Association for Justice (AAJ) thanks the Chairman for holding this hearing and submits this statement for inclusion in the record. The horrific actions against Black people over the last few weeks have brought to light a tragic American failure long in need of reform: police accountability and systemic racism. The continued tragic, unjust, and senseless deaths require us to do more to fight police brutality, systematic racism, and violations of the U.S. Constitution. This is a time for action, and AAJ and its members are committed to helping families seek justice in the courts. AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured or killed, or whose rights have been violated. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. Ben Crump, who is testifying today, and AAJ members across the country, represent the families of those killed or injured by police violence and people whose civil rights have been violated by the government.

AAJ applauds Rep. Bass (D-CA), Chairman Nadler (D-NY) and the Congressional Black Caucus for taking swift action in response to the appalling death of George Floyd by the knee of a police officer. AAJ supports quick and bold action on many of the issues addressed in the Justice in Policing Act as a comprehensive approach for addressing police brutality and systemic racism within law enforcement. We thank the sponsors for addressing qualified immunity, a judicially developed doctrine that prevents families of victims killed or injured by police violence from holding officers accountable. AAJ also strongly supports the inclusion of provisions relating to data collection and retention, as well as transparency in policing and restoring public trust.

End Qualified Immunity: The judicially created doctrine of qualified immunity strips individuals, including victims of police violence and misconduct, of their ability to enforce their constitutional rights. The Civil Rights Act of 1871, codified as 42 U.S.C. §1983, provides if any person, acting under the color of state law, unlawfully deprives another of his or her federally guaranteed rights, that person “shall be liable to the party injured.” Judicial interpretation has grossly distorted the purpose of §1983 and rendered ineffectual an important mechanism of its enforcement power; the doctrine recognizes that a person’s constitutional rights can be violated by public officials but fails to provide any opportunity for accountability under the law. It does so by promulgating a nonsensical, judge-made rule not found in the statute, which creates a standard many victims and survivors can never meet. Section 1983 must be amended so that the doctrine of

qualified immunity no longer provides a defense or immunity to state actors—including law enforcement officers—who violate constitutional rights.

As part of the qualified immunity analysis, a court determines whether the police officer violated a “clearly established” statutory or constitutional right. The Supreme Court has held that to meet that standard there generally must be a prior court case with nearly identical facts from either the Supreme Court or a Court of Appeal from which the case arises. Effectively, unless the police happen to commit the precise same constitutional violation twice, qualified immunity is a complete bar to holding an officer accountable for deprivation of constitutional rights. And even if the victim can show violations of a clearly established right, the government official is entitled to qualified immunity if he or she made a reasonable mistake as to what the law requires.

Qualified immunity protects a government official from having to go through a trial at all. Accordingly, courts resolve qualified immunity issues as early in a case as possible, often before discovery when critical information becomes more available. This can further foreclose disclosure by the police of key information regarding the events that led up to a senseless, tragic death or other significant injury.

Section 1983 fundamentally protects constitutional rights. Because qualified immunity is a judicially created doctrine, Congress must be careful in the language it uses to address it so as not to legitimize a doctrine not found in the existing statute. To this end, AAJ also recommends amending §1983 so that the usual legal rules embodied in the doctrine of respondeat superior apply and that employers of law enforcement officers can be held accountable for the actions of their employees. The combination of qualified immunity and the fact that municipalities cannot be held accountability for an officer’s actions leads to recurring, uncontrolled police violence, misconduct, and abuse.

Additional consideration should also be given to whether a federal statute of limitation could preserve individual access to justice. Also worthy of consideration is whether the victim and his or her family can ever be given a meaningful chance at achieving a measure of justice if the jury deciding their case is not from the surrounding community, as is the circumstance for most federal court trials which occur outside of the community in which the incident occurs.

Public Access to Information: Nothing has done more in recent years to bring broader public awareness to the crisis of police violence and misconduct than personal cell phone video. Official police video, if collected and retained on a consistent basis, could augment and enhance information gathered by the public, and the Justice for Policing Act contains key provisions regarding the use and retention of body camera and dashboard camera videos, which often play key evidentiary roles in both criminal and civil proceedings.

Collection: The establishment of a rebuttable evidentiary presumption for failing to capture or destroying body camera video is an essential provision of the bill.

Retention: All electronic communications—including body camera and dashboard camera video—must be preserved with appropriate privacy considerations in place for members of the public, especially minor children. Third-party vendors retained by law enforcement

for maintaining body camera and other video footage must have both the capacity and security to do so.

In addition, federal data collection on law enforcement practices is another central and critical component to transparency and creating some level of public trust. Data collection and retention on traffic stops, body searches, and deadly force are required under the bill and must be available to the public and for attorneys to document patterns and practices of misconduct.

Finally, a provision could be added to the bill requiring law enforcement to self-identify. As the public is aware from recent protests, it is often difficult to tell what specific law enforcement agency has provided which officers. The public should not be left guessing which law enforcement agency or particular officer is involved in policing particular events or venues. Officers should be prohibited from covering up identifying information, such as their names, on their badges.

Police Misconduct Registry: In the case of Derek Chauvin, the former Minneapolis police officer charged with second-degree murder for the death of George Floyd, 18 prior complaints had been filed against him. Shouldn't this information be available and before 18 complaints or reports of misconduct are filed? And if Mr. Chauvin had been terminated earlier by the Minneapolis Police Department, shouldn't the St. Paul Police Department located just across the Mississippi River know about Mr. Chauvin's record when making a hiring decision? A national registry allows for informed decision-making. Transparency will enable law enforcement agencies to terminate individuals with a history of racist or abusive behavior more expeditiously and ensure that they do not become a problem for another law enforcement agency.

AAJ is grateful to Chairman Nadler and members of the Judiciary Committee for quickly providing a national forum in which to discuss these critical issues which are long overdue for congressional reform. Congress must heed the calls of the American public for police accountability and enact tangible measures to end systemic racism in all facets of American life. The lives lost due to police violence and misconduct during our nation's history and the leadership of individuals and organizations who have long fought for civil rights, justice and equality must result in action. The time has come for Congress to enact reforms to finally move this country closer to fulfilling America's promise for everyone.