



**U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
*Subcommittee on the Constitution, Civil Rights, and Civil Liberties***

**Statement of William Johnson on behalf of the
National Association of Police Organizations
317 S. Patrick Street, Alexandria, Virginia 22314**

***“Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity”
March 31, 2022***

Chair Mr. Cohen, Vice Chair Ms. Ross, Ranking Member Mr. Johnson, and distinguished members of the Subcommittee, my name is Bill Johnson, and I serve as the Executive Director and General Counsel of the National Association of Police Organizations (NAPO). Thank you for the opportunity to speak today on behalf of NAPO on the critical issue of qualified immunity. NAPO is a coalition of police associations from across the nation, representing more than 241,000 sworn law enforcement officers, which was organized for the purpose of advancing the interests of America’s law enforcement officers through the legislative process, legal advocacy, and education.

Today’s witnesses have been asked to limit our remarks to five minutes, so I will do my best to highlight what rank-and-file officers see as the most significant points regarding the issue of qualified immunity. If the Subcommittee has areas it wishes to explore more thoroughly, I will be happy to answer those questions as permitted, or to supplement my remarks with a written follow-up, as may be deemed most helpful.

First of all, it is vitally important, in our view, to emphasize what qualified immunity is, and what it is not. Qualified immunity, when it applies at all, is limited in scope to a small subset of civil lawsuits. And, it has absolutely nothing to do with criminal charges. According to a recent study of more than one thousand Section 1983 suits filed in five different federal Districts, “[Q]ualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in [the] study, just thirty-six (3.7%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.” (Note 1)

To determine whether qualified immunity applies in any given situation, a court must ask whether it would have been known to a reasonable officer that the alleged conduct was unlawful in the situation she confronted, at the time of the incident itself. If a reasonable officer could *not* have known that the conduct was unlawful, then she is immune from further *civil* liability, and only as to that particular allegation.

Qualified immunity, is, therefore, an issue of fundamental fairness. It only has effect where plaintiffs’ attorneys allege liability on the part of an officer based upon the violation of a right that in fact was not known or defined at the time of the incident. Courts have noted repeatedly that the doctrine does not shield the inept or willfully blind, but does protect governmental officials, not just law enforcement

1. Schwartz, Joanna C., How Qualified Immunity Fails (January 10, 2017). 127 Yale Law Journal 2 (2017), UCLA School of Law, Public Law Research Paper No. 17-02, Available at SSRN: <https://ssrn.com/abstract=2897000>

officers, from attempts to impose after-the-fact liability for actions that no reasonable official could have known were unlawful at the time. It does *not* apply to cases where the civil right in question was in fact a recognized right.

As I mentioned earlier, qualified immunity also simply does not apply at all outside this small subset of particular civil cases. It has nothing to do with cases such as the prosecution of the Minnesota officers in the George Floyd case, nor any other prosecutions of officers. The officers involved in the death of Mr. Floyd were arrested, charged, and convicted. They are already incarcerated or pending sentencing. The same holds true in the prosecutions of police officers in the Daunte Wright, Botham Jean, Walter Scott, Rodney King, and Breonna Taylor cases. The doctrine does not, and cannot, affect such cases at all.

Secondly, the doctrine of qualified immunity itself is one repeatedly recognized by the United States Supreme Court as part of its constitutional jurisprudence. It has been consistently acknowledged by the Court in the police context since at least 1967. It was *not* “invented” by police unions or police departments, and it applies to governmental workers, appointees, and officials in general, not just law enforcement officers. It is important to note that officers do not award themselves qualified immunity, *courts* do. The same independent judiciary that the Constitution requires to supervise officers in matters such as warrant issuance and service, evidence collection, *Miranda* warnings, and the affording of due process to suspects, has also recognized that a functioning society requires that *reasonable* officers be provided this *qualified* immunity in *applicable, civil* cases. Without it, the orderly administration of justice would come to a halt amidst paralyzing fear of personal liability for unknowingly violating an unknown and unknowable right.

Qualified immunity thus does *not* make officers immune to state or federal criminal charges for a wrongful act. It does *not* protect officers from internal investigations or disciplinary actions, including termination. Qualified immunity only protects officers from *civil* liability for acts that no reasonable person could have known violated a constitutional right. To retroactively punish an officer for conduct that he or she had no way of knowing at the time would later be found to violate the Constitution would be wrong and detrimental to the profession and to public safety.

A third very important point is that the immunity is *qualified*. The immunity will be denied by the court if the right in question was recognized or clearly defined. Other persons in governmental service, such as legislators, judges, and prosecutors, enjoy *absolute* immunity for their workplace actions, decisions, and errors. As a matter of fairness, therefore, we note that law enforcement officers may have *qualified* immunity only, which is narrow and carefully structured in its application; as opposed to the *absolute* immunity that judges, prosecutors, and Members of Congress enjoy, all of whom make their own decisions over the course of weeks, months, or even years, in a courthouse or office, not in a split second on the street.

Another area that it falls to NAPO to emphasize, as the only rank-and-file entity present today, is the vital importance of qualified immunity to individual, front line officers. It is these men and women who perform the most difficult and dangerous roles in our society. The policy makers and administrators who define and assign the tasks that our members are to perform are generally not themselves at risk of personal liability for their decisions. Line officers as a rule do not have the financial resources or the institutional personnel at their disposal to defend themselves from unfounded allegations that agencies, municipalities, and higher-ranking officials do. The line officer, like other working persons of modest means, must thus

place her confidence in the court system and the integrity of judges, to correctly apply this constitutional standard.

Related to this point, we note that there have not been similar calls for “reform” or abrogation of qualified immunity for firefighters, EMTs, code enforcement officers, construction inspectors, or other public actors, all of whom also have duties that directly impact the health, safety, and very lives of citizens. It is worth at least asking whether law enforcement officers are being singled out because law enforcement in general has been inaccurately but frequently portrayed as brutal, racist, or even unnecessary.

The next to last point I wish to raise concerns the consequences of doing away with qualified immunity. In the aftermath of Colorado enacting its qualified immunity ban, experienced officers left the profession in droves because they feared the risk of civil litigation. According to a March 2021 study on the challenges facing law enforcement in that state, 51 percent of the law enforcement agencies facing a shortage of full-time sworn officers said the shortage was greater than that of the year before. Eighty-two percent of responding agencies said they have seen an increase in officers expressing an intent to leave their position or expressing concerns for remaining in it, specifically citing the change in qualified immunity, as well as growing anti-police sentiment and unclear expectations of law enforcement as the reasons. (Note 2) Not just in Colorado, but across the nation, officers have chosen to leave law enforcement over the past two years due to the continued attack on the profession and the threat of revoking long-held legal protections for officers acting in good faith. Law enforcement agencies across the country are understaffed, under-resourced and struggling to hire and retain good, qualified officers. To significantly alter or repeal the legal protection of qualified immunity would greatly increase the difficulty agencies are having in recruiting and retaining qualified officers.

Well-qualified officers are by definition able to choose another, less hazardous (physically, psychologically, financially) line of work. The public, however, needs and relies upon *experienced* officers. Police work, like many other professions, is not learned overnight. Particularly in specific areas of law enforcement such as sexual assault, homicide, crimes against children, and anti-terror, years and years of training and experience are required before an officer gets really good at his or her job. If, G-d forbid, one of us or a family member was a victim of such a crime, we would want officers and detectives with decades of experience handling the case. Doing away with qualified immunity cuts directly against this public policy good.

Morale would also plummet, given that individual officers would now be *personally* liable for the violation of a “right” that did not exist and was not knowable at the time of the incident. Who would want to be a law enforcement officer, then? Those who could not find any other line of work? Those who have “nothing to lose”? Certainly, less qualified candidates. Legitimate, proactive policing would be discouraged and chilled. It is the public, especially in neighborhoods most victimized by crime, who will suffer, and terribly so.

There are also significant federalism concerns that militate against doing away with qualified immunity.

2. Public Safety Colorado. 2020 *Colorado Law Enforcement: Challenges and Opportunities*. March 8, 2021. <https://static1.squarespace.com/static/5f8f921f55c6f5763679a1d9/t/6046295c0dce94272a5787cb/1615210847437/LE+Survey+FINAL.pdf>

As noted in a recent legal survey of qualified immunity protections across the United States, “[M]any of the reasons the U.S. Supreme Court has proffered for qualified immunity best sound in protecting the States’ sovereign interests in recruiting competent officers and providing incentives for those officers to faithfully enforce State law. . . .” (Note 3) Also, “[T]he States have embraced indemnification policies premised on the existence of federal qualified immunity.” (*Id.*) If the scope of immunity is changed, it would have a profound effect on state and local laws and budgets.

In summary, a knowing violation of a right *already* entails significant administrative, economic, and even criminal liability for officers and the agencies that employ them. Qualified immunity “reform” is, in our view, largely a solution in search of a problem. Since this type of reform would only serve to impose liability in cases *where no reasonable officer could have known that a right was being violated*, it cannot, by definition, improve policing, nor deter misconduct. The public policy tendency of such “reform” is to create an incentive for officers to do nothing, since they cannot, by definition, know if they might be personally liable in any given situation in which they do act. And that is a result that no citizen, and certainly no member of this House, *as a lawmaker*, should countenance.

I would be happy to answer any questions. Thank you.

3. Nielson, Aaron and Walker, Christopher J., Qualified Immunity and Federalism (February 26, 2020). Georgetown Law Journal, Vol. 109, pp. 229-303, 2020, Ohio State Public Law Working Paper No. 530, BYU Law Research Paper No. 20-02, Available at SSRN: <https://ssrn.com/abstract=3544897>