TESTIMONY OF TIFFANY R. WRIGHT
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity
March 31, 2022

Good morning, Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and members of the Subcommittee. My name is Tiffany R. Wright, and I co-direct the Civil Rights Clinic at Howard University School of Law. I previously served as a law clerk to Justice Sonia Sotomayor on the U.S. Supreme Court, Judge David S. Tatel on the U.S. Court of Appeals for the D.C. Circuit, and Judge Royce C. Lamberth on the U.S. District Court for the District of Columbia. In my current position, I regularly represent victims of law enforcement misconduct in cases involving qualified immunity.

Two years ago, I represented a man named Trent Taylor. Mr. Taylor was incarcerated in a Texas prison when jail officials alleged that he tried to take his own life. Mr. Taylor was transferred to a psychiatric prison facility ostensibly to receive mental health treatment. Instead, Mr. Taylor was stripped naked and placed in a cell covered in massive amounts of feces. He could not eat because he feared that the waste would contaminate his food. He could not drink water because even the water faucet was packed with feces. This treatment was intentional; guards largely ignored Mr. Taylor's pleas for help and said that he would have a "long weekend." After four days, guards moved Mr. Taylor to a new cell. The new cell, in addition to being covered with human waste, was extremely cold. Guards stated that they hoped Mr. Taylor would "f**king freeze." The cold cell had no furniture. The drain on the floor was clogged, leaving a standing puddle of human waste in which Mr. Taylor—still naked—was forced to sleep. Mr. Taylor endured these conditions for an additional two days.

The U.S. Court of Appeals for the Fifth Circuit granted qualified immunity to the jail guards who intentionally subjected Mr. Taylor to these inhumane conditions. Although every federal court of appeals—including the Fifth Circuit— has held that forced exposure to human waste violates the constitution,[1] the Fifth Circuit decided that because Mr. Taylor had been forced to live in those conditions for "only six days," the prior precedent did not qualify as "clearly established."[2] Thankfully, the Supreme

[1] See *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972); *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Hawkins v. Hall*, 644 F.2d 914, 918 (1st Cir. 1981); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Parrish v. Johnson*, 800 F.2d 600, 609 (6th Cir. 1986); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989); *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991); *Young v. Quinlan*, 960 F.2d 351, 365 (9th Cir. 1992); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013); *Brooks v. Warden*, 800 F.3d 1295, 1303 (11th Cir. 2015).

[2] *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019).

Court intervened. The Court held that this was an especially obvious case; that the constitutional violation was so apparent that no reasonable officer could have possibly thought otherwise.[3]

Taylor is extraordinary because it was just the third time in history that the Supreme Court has intervened to reverse a *grant* of qualified immunity.[4] It has done the opposite—reversed the *denial* of qualified immunity in favor of government officials—more than 30 times. But *Taylor* is not extraordinary because of its facts. Federal courts have granted qualified immunity in cases just as abhorrent as *Taylor*, including to officers who stole $276,380 in cash and rare coins after executing a search warrant;[5] a prison official who ignored or, in legal terms, exhibited deliberate indifference to significant evidence that an incarcerated woman was being sexually assaulted by guards under the official's supervision;[6] officers who unleashed dogs on a man who had surrendered with his hands raised in the air;[7] officers who tased a heavily pregnant woman in the thigh and neck for refusing to sign a speeding ticket;[8] and officers who threw a non-violent, non-threatening woman suspected of a misdemeanor to the ground with such force that it broke her shoulder and knocked her unconscious.[9] The people who suffered these abuses are the sorts of people I represent. They are generally working-class members of marginalized communities whose lives are torn apart by law enforcement misconduct.[10] In at least three ways, qualified immunity makes it nearly impossible for these victims to achieve any measure of justice or accountability.

First, many misconduct victims do not have the resources to retain legal representation. I have met with many families who tell stories of trying for months, and in some cases years, to find a lawyer willing to represent them. The lawyers are often solo or small-firm practitioners who work on a contingency basis and cannot risk spending significant time on a case that is ultimately blocked due to qualified immunity. Unless there is prior precedent that is materially identical to the case

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[3] *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

[4] The others were *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Groh v. Ramirez*, 540 U.S. 551 (2004).

[5] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

[6] *Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020).

[7] *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018).

[8] *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011).

[9] *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).

[10] *See, e.g.*, Francie Diep, *Police Are More Likely To Use Deadly Force In Poorer, More Highly Segregated Neighborhoods*, Pacific Standard (Jan. 24, 2019), https://tinyurl.com/5n6zae7n.

presented, securing legal representation can be nearly impossible. By contrast, the officers who commit these abuses almost always have experienced counsel paid for by their employers or unions. In my experience, state and local governments will provide legal representation even when the officer is no longer employed and even when there is significant evidence that the officer acted outside the law.

Second, qualified immunity impedes access to information. Qualified immunity is not just immunity from liability—it is immunity from having to engage with the legal process at all. When the defense is raised in the early stages of a case—*e.g.*, in a motion filed under Federal Rule of Civil Procedure 12(b)(6)—victims are denied any opportunity to gather information or ask questions about the alleged constitutional violation. I have worked on cases involving persons killed by police where families were denied access to the most basic information such as autopsy reports, on site photographs, or investigative records.

On this front, qualified immunity works in concert with other policies and local regulations that block public access to police misconduct records. I spent several months in 2020 and 2021 litigating against police unions in New York who sought to block access to police misconduct records following the repeal of a state law that had kept such records secret for decades.[11] Through that litigation, a troubling phenomenon became clear. In the aftermath of police violence, including the highly publicized killings of Eric Garner and Amadou Diallo, all negative information about the victims is immediately available. State law, however, kept nearly all information about the officers involved secret. So while the public discussed every aspect of the victims' background and debated whether the police were justified in killing them, there was no way for the families or the public to know that the officers involved had troubling histories of violent misconduct.[12]

The upshot is that a victim who suffers law enforcement abuse must contend with qualified immunity *and* other state laws that make it impossible to get answers and demand accountability. And the secrecy promoted by qualified immunity and other state and local regulations makes criminal prosecution unlikely. Recent experience demonstrates that it is often public demands for accountability—which is usually based on public evidence such as videos filmed by everyday citizens—that leads to prosecution.

Finally, qualified immunity upends the normal legal process. The inhumane treatment of Trent Taylor occurred in September 2013. It would be more than *seven*

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[11] *Uniformed Fire Officers Ass'n v. Blasio*, 846 F. App'x 25, 29 (2d Cir. 2021).

[12] *See, e.g.*, Stephanie Wyskstra, *The Fight For Transparency In Police Misconduct*, Vox (June 16, 2020), https://tinyurl.com/u8yuusku.

years before the Supreme Court issued a decision ending the prison officials' quest for qualified immunity. For six and a half of those years, Mr. Taylor fought alone against the State of Texas, which defended the guards' indefensible actions. Qualified immunity makes seeking accountability for officers like those who abused Trent Taylor a long and particularly arduous process. The doctrine permits appeals at every stage of litigation where qualified immunity is considered—e.g., following a motion to dismiss, summary judgment, and/or trial.[13] So even *if* a family or victim can find a lawyer to represent them, and even *if* they can manage to gather enough information to support their claims, they must contend with years of costly and time-consuming litigation.

All of this means that the harm of official misconduct falls unfairly on victims. For many, there is no legal recourse. I have had the unfortunate task of sitting with victims who have suffered grievous loses through no fault of their own and telling them that there is no justice under the law available to them. On the other side of the equation are officers who, even when their conduct is palpably unreasonable, enjoy near absolute immunity. Officers are almost never criminally prosecuted for their actions. Officers do not face the prospect of financial ruin; they are virtually always indemnified. State and local governments pay approximately 99.98% of the financial recoveries by plaintiffs in civil rights lawsuits—even when indemnification is prohibited by statute or policy and even when officers were disciplined, terminated, or criminally prosecuted for their unlawful conduct.[14] When I attend settlement negotiations on behalf of citizens who have suffered alleged constitutional violations, the people across the table are not officers terrified of losing their livelihood—they are insurance adjusters. Because even in the rare instances where qualified immunity fails, the cost is a matter of insurance loss, not officers' loss of financial stability.

Thank you for the opportunity to testify. I welcome any questions.

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[13] *See, e.g.*, Raffi Melkonian, *Suing Cops Takes Forever Because They Get Three Chances To Appeal*, USA Today (Nov. 23, 2021), https://tinyurl.com/mvyp3fy5.

[14] *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).