Qualified Immunity and Civil Rights in Mississippi

A Report of the
Mississippi Advisory Committee to the
U.S. Commission on Civil Rights

August 2021

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. They are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Acknowledgments

The Mississippi Advisory Committee (Committee) thanks each of the speakers who presented to the Committee during their December 15, 2020 and February 10 and 12, 2021 public meetings. The Committee is also grateful to members of the public who spoke during the selected periods of public comment, and those who shared their testimony in writing with the Committee.

Mississippi Advisory Committee to the
U.S. Commission on Civil Rights

The Mississippi Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the civil rights impact of qualified immunity for law enforcement in Mississippi as part of its responsibility to study and report on civil rights issues in the state of Mississippi. The contents of this report are primarily based on testimony the Committee heard during public hearings on December 15, 2020, and February 10 and 12, 2021, as well as related testimony submitted to the Committee in writing during the relevant period of public comment.

This report begins with a brief background of the issues to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing areas of related civil rights concerns. This report is intended to focus specifically on civil rights concerns regarding the qualified immunity of law enforcement officials in the state of Mississippi. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion.

Susan M. Glisson

Chair, Mississippi Advisory Committee

Mississippi Advisory Committee to the U.S. Commission on Civil Rights

Susan M. Glisson, Oxford, *Chair*

Lea Campbell, Ocean Springs

Macey Edmondson, Oxford

Christopher Green, Oxford

Caleb Herod, Abbeville

Nicholas Lott, Jackson

Kimberly Merchant, Greenville

Joseph Reilly Morse, Gulfport

Lisa Roy, Oxford

Ronald Rychlak, Oxford

TABLE OF CONTENTS

INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These committees advise the Commission of civil rights issues in their state that are within the Commission's jurisdiction.

On October 2, 2020, the Mississippi Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to study the impact of qualified immunity protections for law enforcement officials on civil rights and policing practices in Mississippi. The Committee sought to examine police accountability and the equal protection of civilians in the administration of justice. Following its recent study of prosecutorial discretion,[1] this examination is the next in a series addressing a broad range of present-day concerns regarding law enforcement and criminal justice including over-policing, excessive use of force, and persistent racial disparities at nearly every stage of the justice system. Several federal protections prohibit discrimination in the administration of justice, including:

The U.S. Constitution:

> **The Fourteenth (XIV) Amendment, Section I** prohibits any state from "abridg[ing] the privileges or immunities of citizens of the United States," "depriv[ing] any person of life, liberty or property without due process of law," or denying "to any person within its jurisdiction the equal protection of the laws."[2]

The Civil Rights Act of 1964:

> **Title II, Section 201(d)** pays special attention to discriminatory actions supported by the state, or actions carried out "under color of any law, statute, ordinance, or regulation," or "under color of any custom or usage required or enforced by officials of the State or political subdivision thereof."[3]

On December 15, 2020, the Committee convened a public hearing via web conference to receive testimony regarding the civil rights implications of the qualified immunity afforded to law enforcement in the state. The Committee heard additional testimony during web hearings held February 10 and 12, 2021, as well as through the submission of written testimony welcomed during this timeframe. The Committee heard from academics, attorneys, journalists, and advocates with perspectives on qualified immunity. The Committee also made several outreach efforts to the Mississippi Fraternal Order of Police, Mississippi Association of Chiefs

[1] Prosecutorial Discretion and Civil Rights in Mississippi, June 2020: https://www.usccr.gov/files/2020-06-16-Prosecutorial-Discretion-in-Mississippi.pdf.
[2] U.S. Const. amend. XIV.
[3] 42 U.S.C. § 2000a(d) (2018).

of Police, and Southern States Police Benevolent Association as well as to several individual prosecutors to invite their testimony. Invited speakers who were unavailable on the selected date were offered the opportunity to send an alternate speaker from their organization, to speak on an alternative date, and/or to submit written testimony. Unfortunately, despite these efforts the Committee was unable to gather direct testimony from any current law enforcement officials for this study. The Committee did, however, hear testimony from two attorneys who represent law enforcement officers in qualified immunity cases and from one retired detective.

The following report results from the testimony provided during these hearings, as well as testimony submitted to the Committee in writing during the related period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. The purposes of this report are: (i) to relay the civil rights concerns brought forth by the speakers relating to qualified immunity for law enforcement in Mississippi; and (ii) to provide specific recommendations to the Commission regarding actions that can be taken to understand and address these issues moving forward.

BACKGROUND

The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, gave Americans the right to sue public officials who violate their legal rights, as a remedy to hold them and the governments that employ them liable for damages.[4] The Act was intended to enforce the protections of the 14th Amendment to the U.S. Constitution, eliminating "extralegal violence" and protecting "the civil and political rights of four million freed slaves."[5] However, in 1967, in the case of *Pierson v. Ray*,[6] the Supreme Court ruled that officials acting in "good faith" can raise "qualified immunity" as a defense to civil claims, thereby shielding them from liability.[7] In 1982, the Supreme Court changed the qualified immunity standard in a case called *Harlow v. Fitzgerald*, holding that an officer's good faith was no long relevant—the critical question, instead, was whether an officer violated "clearly established" law.[8]

Qualified immunity is "a judicially created doctrine" that protects law enforcement officials from facing civil liability when accused of depriving a person of their "statutory or constitutional rights."[9] Qualified immunity was established by the courts to provide "breathing room" for law enforcement, who must often make spilt-second decisions under high pressure

[4] Amir H. Ali & Emily Clark: Qualified Immunity: Explained, The Appeal, June 20, 2019, https://theappeal.org/qualified-immunity-explained/.
[5] United States House of Representatives: History, Art & Archives, Historical Highlights: The Ku Klux Klan Act of 1871, https://history.house.gov/HistoricalHighlight/Detail/15032451486?ret=True.
[6] Pierson v. Ray, 386 U.S. 547 (1967).
[7] Evan Bernick, It's Time to Limit Qualified Immunity, Georgetown Law, September 17, 2018, https://www.law.georgetown.edu/public-policy-journal/blog/its-time-to-limit-qualified-immunity/.
[8] *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).
[9] Whitney K. Novak, Policing the Police: Qualified Immunity and Considerations for Congress, *Congressional Research Service, Legal Sidebar*, Updated June 25, 2020, https://crsreports.congress.gov/product/pdf/LSB/LSB10492.

circumstances, to make reasonable mistakes.[10] It protects law enforcement from facing civil liability *unless*: (1) the facts alleged by the plaintiff amount to a constitutional violation, *and* (2) the constitutional right was "clearly established" at the time of the alleged misconduct.[11] Qualified immunity does not protect law enforcement officials from facing criminal liability for their actions.

In practice, critics say that qualified immunity protection has given wide latitude for law enforcement to act with near impunity.[12] In order to demonstrate that a constitutional right has been "clearly established," a plaintiff must show that the Supreme Court or an appeals court within the same jurisdiction has previously ruled an official's action unconstitutional, under the same "specific context" and "particular conduct."[13] Without such a ruling, even when there appears to be a clear abuse of power, law enforcement officers are protected by qualified immunity and cannot be held liable in civil court.

For example:

- In 2018, the Sixth Circuit U.S. Court of Appeals ruled that police who unleashed their dog on a burglary suspect who was sitting on the floor, surrendered, with his hands in the air, were entitled to qualified immunity. In the closest prior case, the court had ruled in favor of a victim who had surrendered by lying down, rather than sitting.[14]

- In September of 2019, the U.S. Court of Appeals for the Ninth Circuit held that police accused of stealing $225,000 while executing a search warrant were entitled to qualified immunity because that court "never addressed whether the theft of property covered by the terms of a search warrant violates the Fourth Amendment."[15]

- In early September of 2020, a Mississippi federal court judge reluctantly ruled that a white police officer who falsely detained, interrogated, and illegally searched a Black

[10] Id.
[11] Id.
[12] Id. See also, Institute for Justice, Frequently Asked Questions About Ending Qualified Immunity, https://ij.org/frequently-asked-questions-about-ending-qualified-immunity/; American Civil Liberties Union: Baxter v. Bracey, Updated July 2, 2020, https://www.aclu.org/cases/baxter-v-bracey
[13] Amir H. Ali & Emily Clark: Qualified Immunity: Explained, The Appeal, June 20, 2019, https://theappeal.org/qualified-immunity-explained/.
[14] Baxter v. Bracey, 751 F. Appx. 869 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020); April Rodriguez, American Civil Liberties Union: Lower Courts Agree – It's Time to End Qualified Immunity, September 10, 2020, https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/; C.J. Ciaramella, Qualified Immunity: Police Sicced a Dog on a Surrendering Man. Will the Supreme Court Review the Doctrine that Gave them Immunity? April 8, 2019, https://reason.com/2019/04/08/police-sicced-a-dog-on-a-man-after-he-su/.
[15] Jessop v. City of Fresno, 936 F.3d 937, 941 (9th Cir. 2019), *cert denied sub nom. Jessop v. City of Fresno, California*, 140 S. Ct. 2793 (2020), *reh'g denied*, 141 S. Ct. 198 (2020); Institute for Justice, Frequently Asked Questions About Ending Qualified Immunity, https://ij.org/frequently-asked-questions-about-ending-qualified-immunity/;

man's car for more than two hours, despite clearing multiple background checks, would be protected from liability by qualified immunity.[16]

When a case is dismissed due to qualified immunity, the courts are not required to decide whether or not the underlying government conduct is in fact unconstitutional.[17] Therefore, the case does not establish any legal precedent moving forward and future opportunities to hold law enforcement officials accountable for the same or similar actions becomes increasingly narrow.

The Committee acknowledges the important role law enforcement plays in maintaining order and safety in society, often under dangerous and difficult circumstances. The Committee also acknowledges the vast authority extended to law enforcement officials to detain civilians, seize property, and even use deadly force. With this grave authority comes a responsibility for law enforcement to be tempered in their actions, and transparent and accountable for their decisions. Persistent racial disparities throughout the criminal justice system, including in law enforcement's use of force,[18] amplify the need for transparency and accountability if the promise of the Fourteenth Amendment is to be upheld. In this context, this report details the Committee's study of the impact of the qualified immunity protections afforded to law enforcement on the civil rights of the civilians they serve.

SUMMARY OF PANELISTS' TESTIMONY

The public meetings on December 15, 2020, and February 10 and 12, 2021, included testimony from academics, attorneys, journalists, and advocates with informed perspectives on qualified immunity. Speakers were selected to provide a diverse and balanced overview of qualified immunity for law enforcement officials as a civil rights issue.

A. Overview

The doctrine of qualified immunity was first articulated by the U.S. Supreme Court in 1967 in *Pierson v. Ray*. *Pierson* greatly limited the significance of the Court's 1961 holding in *Monroe v. Pape* that plaintiffs need not pursue state remedies before suing a law enforcement official for constitutional actions[19] under 42 U.S.C. section 1983, the section codifying the Civil Rights Act of 1871.[20] *Pierson* shielded law enforcement officials who act in "good faith" from section-

[16] Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020); April Rodriguez, American Civil Liberties Union: Lower Courts Agree – It's Time to End Qualified Immunity, September 10, 2020, https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/.
[17] *Pearson v. Callahan*, 555 U.S. 223 (2009); April Rodriguez, American Civil Liberties Union: Lower Courts Agree – It's Time to End Qualified Immunity, September 10, 2020, https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/.
[18] Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, B.U. L. Rev., 951 (2020). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2656.
[19] Monroe v. Pape, 365 U.S. 167 (1961), overruled by *Monell v Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978); Schwartz Testimony, Transcript I, p. 3, lines 4-8.
[20] Dortch Testimony, Transcript II, p. 7, lines 26-34 & p. 8, lines 16-18.

1983 liability based on unanticipated changes in law,[21] explaining that "a police officer is not charged with predicting the future course of constitutional law."[22] Panelist J. Chadwick Williams, Special Assistant Attorney General in the Civil Division of the Mississippi Attorney General's Office, pointed out that qualified immunity protections are extended to apply to all government employees to utilize as possible defense in a section 1983 suit;[23] law enforcement represent only a portion of state and local government employees that have qualified immunity available to them for defense and litigation.[24] Mr. Williams provided examples of employees eligible to move for qualified immunity, such as a professor in a First Amendment retaliation lawsuit suit filed by student or coworker[25] and a social worker accused of inadequately supervising a child in foster care.[26] Panelists testified that this judicially created doctrine is not found within legislation or legislative history of Section 1983.[27] Panelist Paloma Wu, Deputy Director of Impact Litigation at the Mississippi Center for Justice, testified that the doctrine is rooted in a history of racial discrimination and injustice in Mississippi,[28] and holds great power to determine who receives justice and who does not.[29]

1. Current Operation & Expansion

Qualified immunity provides a shield for federal claims against individual law enforcement officers, unless they violated a clearly established constitutional right.[30] The doctrine's primary benefit, as testified by attorney William Allen who represented the Mississippi Sheriffs' Association and Mississippi Association of Supervisors, is protection in situations where there is uncertainty by allowing officers to have "breathing room" to make reasonable, yet mistaken judgments where available jurisprudence does not let them know or provide guidelines on whether their conduct is or is not constitutional.[31] Mr. Williams also noted that qualified immunity is important because it can stay initial disclosures and discovery until resolving the motion for immunity, so that the case does not become bogged down by meetings, collecting documents, responding to discovery, and preparing and sitting for depositions.[32]

Mr. Allen described these protections in the form of assurance that officers will not be held individually liable for conduct that at the time appears to be lawful.[33] He explained the importance of this protection due to the personal danger officers face as an everyday part of

[21] Lane Testimony, Transcript II, p. 3, lines 2-3; Pierson v. Ray, 386 U.S. 547, 557 (1967).
[22] *Pierson v. Ray*, 386 U.S. 547, 557 (1967).
[23] Williams Testimony, Transcript III, p. 11, lines 22-23 & 27-28.
[24] Williams Testimony, Transcript III, p. 11, lines 25-27.
[25] Williams Testimony, Transcript III, p. 11, lines 29-30.
[26] Williams Testimony, Transcript III, p. 11, lines 20-32.
[27] Dortch Testimony, Transcript II, p. 7, lines 32-33 & p. 8, lines 2-7; Lane Testimony, Transcript II, p. 4, lines 28-30.
[28] Wu Testimony, Transcript II, p. 11, line 35-p. 12, line 2.
[29] Wu Testimony, Transcript II, p. 12, lines 12-13.
[30] Allen Testimony, Transcript III, p. 7, lines 4-6; Claxton Testimony, Transcript III, p. 2, line 39-p. 3, line 1.
[31] Allen Testimony, Transcript III, p. 7, lines 23-28 & 32-35.
[32] Williams Testimony, Transcript III, p. 13, lines 25-26 & 30-36.
[33] Allen Testimony, Transcript III, p. 8, lines 4-5.

the job,[34] coupled with the responsibility of making decisions on a rapid basis.[35] He and Mr. Williams noted that police are charged with protecting all individuals involved[36] and do not have the luxury of choosing who to help or which situations to engage in.[37]

When qualified immunity was first established by the Supreme Court in 1967, it was known as "a good faith defense to civil liability"—intended to protect police from being sued for damages resulting from a "good faith mistake."[38] However, with *Harlow v. Fitzgerald* (1982), the Supreme Court eliminated the subjective element of an officer acting in "good faith" and allowed qualified immunity protection so long as the officer did not violate "clearly established law."[39] Panelists testified that over the following years, the courts have developed an increasingly narrow definition of what constitutes "clearly established" law.[40] Currently, for an officer to be denied qualified immunity protection, a plaintiff must point to a prior court decision with nearly identical facts, whereby the officer's conduct was ruled unconstitutional, unless the alleged violation is so "obvious" that a prior court decision is not needed.[41] Professor Schwartz pointed out that the U.S. Supreme Court has only found an "obvious case" twice in the 50 years of the doctrine's existence.[42]

Further expanding qualified immunity protection, the doctrine was again altered in 2009 with *Pearson v. Callahan* (2009).[43] This ruling gave the lower courts the discretion to choose whether to first consider the question of the violation of a constitutional right, or to instead first address the questions of "clearly established" law.[44] If courts first rule on the question of "clearly established law," a case is resolved without ever addressing whether or not the underlying conduct was constitutional.[45] This limits the development of future case law and severely cripples the ability of plaintiffs to point to clearly established law in similar cases.[46]

Despite this expansion, Mr. Allen noted that it is important to also understand the limitations of qualified immunity. For example, the doctrine has no application to 1983 claims against the county, no application to federal claims for injunctive relief, no application to any criminal action against a law enforcement officer, and no application to state law claims in Mississippi.[47] Mr. Williams noted that the defense of qualified immunity cannot be utilized to simply dispose

[34] Allen Testimony, Transcript III, p. 6, lines 26-29.
[35] Allen Testimony, Transcript III, p. 8, lines 18-26.
[36] Allen Testimony, Transcript III, p. 6, lines 30-31.
[37] Williams Testimony, Transcript III, p. 13, lines 15-24.
[38] Schwartz Testimony, Transcript I, p. 4 lines 7-15.
[39] Harlow v. Fitzgerald, 457 U.S. 800 (1982); Schwartz Testimony, Transcript I, p. 3 lines 16-23; Dortch Testimony, Transcript II, p. 8, lines 30-36.
[40] Dortch Testimony, Transcript II, p. 8, line 33-p. 9, line 4; Schwartz Testimony, Transcript I, p. 3, lines 24-25.
[41] Schwartz Testimony, Transcript I, p. 3, lines 25-30.
[42] Ibid.
[43] *Pearson v. Callahan*, 555 U.S. 223 (2009).
[44] *Pearson v. Callahan*, 555 U.S. 223 (2009); Dortch Testimony, Transcript II, p. 9, lines 10-14; Januta Testimony, Transcript II, p. 20, lines 25-28.
[45] Williams Testimony, Transcript III, p. 14, lines 23-27.
[46] Dortch Testimony, Transcript II, p. 9 lines 10-19.
[47] Allen Testimony, Transcript III, p. 7, lines 6-11.

of a case,[48] and although qualified immunity provides liability protections for law enforcement officials, it does not guarantee indemnification for a civil rights judgement.[49] University of Mississippi Law Professor and Director of the MacArthur Justice Center, Cliff Johnson, explained that when the courts grant qualified immunity to law enforcement officers, the case does not "go away" entirely; however, plaintiffs are left with a *Monell* claim which is a claim against the municipality for maintaining a policy, practice, or custom of this wrong action,[50] which is extremely difficult to prove, and most lawyers in the state will not take on such a case.[51]

2. Debate

The current public debate around qualified immunity illustrates the tensions between the necessity to hold public officials accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties responsibly.[52] Panelist Marquez Claxton, a retired NYPD detective and the Director of Public Relations and Political Affairs for Black Law Enforcement Alliance, testified that there is a cultural notion that police work is purely selfless, brave, honorable, and noble but that these are not universal, absolute characteristics that should justify blanket qualified immunity in the face of misconduct or criminality.[53] Panelist Victor Fleitas, a Mississippi civil rights attorney, noted that there are an increasing number of judges and legal scholars that avoid holding law enforcement accountable for constitutional violations.[54] Professor Schwartz noted that this debate is symbolically significant as police unions and political leaders fear that eliminating the qualified immunity doctrine will lead to the end of policing, an idea that may be birthed from advocates arguing that the doctrine must end in order to ever have accountability in policing.[55]

3. Use of Qualified Immunity in Mississippi

Mississippi's qualified immunity data is extremely limited--civil rights court records do not readily indicate the type of case being filed (eg, excessive force, search and seizure, employment discrimination, etc.).[56] Records of cases that were awarded qualified immunity are not easily quantifiable and are only found in the federal court dockets.[57] Mr. Lane, who goes to court on a regular basis to argue qualified immunity cases, testified that the defense is being invoked at an "absurd rate."[58] Mr. Johnson attested that data from the Fifth Circuit Court

[48] Williams Testimony, Transcript III, p. 14, lines 30-32.
[49] Williams Testimony, Transcript III, p. 11, line 37-p. 12, line 29.
[50] Johnson Testimony, Transcript I, p. 9, lines 14-21.
[51] Johnson Testimony, Transcript I, p. 10, lines 7-10.
[52] Allen Testimony, Transcript III, p. 7, lines 15-18; Fleitas Testimony, Transcript I, p. 11, lines 26-29; Schwartz Testimony, Transcript I, p. 3, lines 9-15.
[53] Claxton Testimony, Transcript III, p. 3, lines 11-15.
[54] Fleitas Testimony, Transcript I, p. 11, lines 29-33.
[55] Schwartz Testimony, Transcript I, p. 23, lines 11-18.
[56] Johnson Testimony, Transcript I, p. 22, lines 23-27 & 31-32.
[57] Williams Testimony, Transcript III, p. 26, lines 21-23 & 28.
[58] Lane Testimony, Transcript II, p. 3, lines 9-10.

of Appeals showed 64% of law enforcement requests for qualified immunity in excessive force cases were granted from 2005 to 2019.[59] Mr. Allen reported that in cases he had personally worked on, he has seen a decrease in the motions for immunity granted over the past twenty years.[60]

Professor Johnson estimated that there are fewer than 10 lawyers in the state who regularly file section 1983 cases against law enforcement because there is a perceived social cost to litigating civil rights cases.[61] The additional burden of plaintiffs to point to "clearly established" law in order to challenge a defendants' move for qualified immunity discourages many lawyers from taking these cases.[62] Mr. Fleitas testified that a motion for qualified immunity adds uncertainty to case evaluation, costs, and labor[63] which may also serve as deterrents to lawyers who would take such cases.

B. Issues of Qualified Immunity

1. Accountability

Panelists testified that qualified immunity protects bad actors rather than good faith errors in judgement[64] because police are not held accountable for their actions.[65] Mr. Claxton noted that officers are afforded a great deal of latitude with compliance to rules, regulations, and the law.[66] He added that many police officers operate with a belief that if they are wearing a uniform or carrying a badge when they commit an infraction, they will be indemnified by the government that they represent.[67]

Several panelists testified that qualified immunity amounts to "liability insurance" that allows law enforcement officials to take greater risks with respect to the public's constitutional rights.[68] The doctrine shields police officers from accountability for the actual harm they cause and erases the cost of what it takes to repair the harm done to individuals that they are intended to help, according to Ms. Wu.[69] Mr. Fleitas testified that the doctrine creates the perception that officers can act with impunity.[70] Mr. Johnson stated that qualified immunity for law enforcement robs Mississippians of the protections that Congress afforded them in the Ku Klux Klan Act of 1871.[71] Mr. Lane noted that the remedies available to individuals treated

[59] Johnson Testimony, Transcript I, p. 8, lines 27-32.
[60] Allen Testimony, Transcript III, p. 22, lines 24-33.
[61] Johnson Testimony, Transcript I, p. 9 lines 18-19.
[62] Fleitas Testimony, Transcript I, p. 14, lines 3-4; Johnson Testimony, Transcript I, p. 9, lines 37-43; Johnson Testimony, Transcript I, p. 9, lines 28-34.
[63] Fleitas Testimony, Transcript I, p. 14, lines 12-13.
[64] Johnson Testimony, Transcript I, p. 10, lines 16-20.
[65] Dortch Testimony, Transcript II, p. 7, lines 1-2 & p. 8, lines 15-16.
[66] Claxton Testimony, Transcript III, p. 3, lines 9-10.
[67] Claxton Testimony, Transcript III, p. 4, lines 22-25; *See also,* Fleitas Testimony, Transcript I, p. 11, line 37.
[68] Wu Testimony, Transcript II, p. 14, lines 24-27; Dortch Testimony, Transcript II, p. 11, lines 25-27.
[69] Wu Testimony, Transcript II, p. 15, lines 21 – p. 16, line 19.
[70] Fleitas Testimony, Transcript I, p. 11, line 37.
[71] Johnson Testimony, Transcript I, p. 11, lines 5-6.

unconstitutionally differs significantly based on the law of each circuit.[72] Mississippi plaintiffs' remedies under the law of the Fifth Circuit Court of Appeals are particularly limited and onerous.[73] Mr. Fleitas mentioned that the motion for qualified immunity results in costs and delays in cases.[74] He described the example of *Blake v. Lambert* where qualified immunity allowed a school attendance officer to file an appeal in the middle of the case which stalled the entire case until the appeal could be heard and acted upon.[75] Professor Johnson added that qualified immunity is often granted in Mississippi federal courts, sometimes without conducting discovery.[76] He noted that the local rules of federal courts in the Northern and Southern districts of Mississippi have created an inefficient process for conducting discovery for immunity issues where the matter must first be taken up in court before then coming back and doing discovery again, often with the same people, where ultimately the immunity motion can be denied.[77]

Panelist Andrea Januta, an Investigative and Data Reporter for Reuters, testified that her analysis of 529 Appellate Court decisions revealed an increased tendency to grant qualified immunity in excessive force cases.[78] From 2005 to 2007, judges granted immunity in 44% of cases; in the three most recent years it has risen to 57%.[79] This increased tendency of the courts to grant immunity is even more pronounced in cases of unarmed civilians' encounters with police.[80] She noted that the rise in granting immunity stems from repeated Supreme Court decisions that advise judges to define "clearly established" law narrowly which then requires lower courts to accept precedent only in cases that have nearly identical circumstances.[81] Mr. Claxton testified that the Fifth Circuit Court of Appeals' qualified immunity decisions give too much leeway to police officers,[82] whom the judges of the court too often lionize rather than expecting more of them.[83]

Mr. Johnson explained that when a lawyer is defending a municipality, they have every incentive to minimize the extent to which there was misconduct and defend behaviors that one might otherwise condemn.[84] He explained that this creates perverse incentives that support bad behavior and make it difficult for municipalities to get rid of problematic officers.[85] He also

[72] Lane Testimony, Transcript II, p. 3, lines 22-23.
[73] Johnson Testimony, Transcript I, p. 8 line 25 – p. 9 line 2; Januta Testimony, Transcript II p. 21 lines 12-27.
[74] Fleitas Testimony, Transcript I, p. 11, line 38 & p. 12, line 28.
[75] *Blake v. Lambert*, 921 F.3d 215 (5th Cir. 2019); Fleitas Testimony, Transcript I, p. 12, lines 10-12, 29-p. 13, line 5.
[76] Johnson Testimony, Transcript I, p. 9, lines 6-11.
[77] Johnson Testimony, Transcript I, p. 8, line 37-p. 9, line 2.
[78] Januta Testimony, Transcript II, p. 19, lines 32-34.
[79] Januta Testimony, Transcript II, p. 19, lines 35-36.
[80] Januta Testimony, Transcript II, p. 19, lines 37-38.
[81] Januta Testimony, Transcript II, p. 20, lines 9-11.
[82] Claxton Testimony, Transcript III, p. 17, line 35-p. 18, line 2.
[83] Claxton Testimony, Transcript III, p. 18, lines 21-22.
[84] Johnson Testimony, Transcript I, p. 18, line 37 – p. 19 line 7.
[85] Johnson Testimony, Transcript I, p. 18, line 37 – p. 19 line 7.

noted concern facing many municipalities that if they are seen as not supportive of law enforcement it may cause difficulty for them hiring officers in the future.[86]

2. Application & Disparate Impact

Ms. Januta testified that excessive force case law is applied unevenly across different circuits.[87] She reported that plaintiffs fared worst in the Fifth Circuit Court of Appeals as judges followed precedents that favored police and thus, granted 64% of police requests for qualified immunity in excessive force cases.[88] In comparison, the Ninth Circuit Court of Appeals granted immunity to just 42% of requests.[89] Of the 435 federal District Court rulings in relevant excessive force cases from 2014 to 2018, judges in Texas (Fifth Circuit) granted immunity at nearly twice the rate (59%) as California judges (34%, Ninth Circuit).[90] The difference is so stark, that Ms. Januta asserted an unarmed plaintiff in Texas faces a more difficult time overcoming legal hurdles than an armed plaintiff in California.[91] She described the example of David Collie of Fort Worth, Texas who was shot and left permanently paralyzed by police who mistook him for a suspect in a crime that he had nothing to do with.[92] Mr. Collie's Fifth Circuit Court of Appeals case was dismissed,[93] while a Ninth Circuit Court of Appeals' judge denied immunity to the officers who shot and killed Benny Herrara of Los Angeles, California for an alleged assault and provided a $1 million settlement to his family.[94] Additionally, Ms. Januta reported that there were stark racial differences in who was bringing police excessive force cases; Black plaintiffs made up 22% of cases involving death or serious injury (more than twice their share of the combined population of California and Texas), while white plaintiffs made up 33% of cases.[95]

Ms. Wu testified that discriminatory outcomes are baked into qualified immunity standards which results in increased harm in Mississippi compared to other places.[96] For example, Mississippi has the largest proportion of Black residents in the country, and the state ranks first in the U.S. for people living in poverty.[97] Wu pointed out that with fewer cases moving forward, there are fewer cases interpreting what a constitutional violation is to begin with.[98] She also noted that while the Fifth Circuit Court of Appeals serves the most racially diverse population in the country, with over 50% people of color, Fifth Circuit judges are the least racially and ethnically diverse in the country.[99] Ms. Wu observed that white people make up 45% of the

[86] Johnson Testimony, Transcript I, p. 19, lines 24-28.
[87] Januta Testimony, Transcript II, p. 21, lines 10-11.
[88] Januta Testimony, Transcript II, p. 21, lines 12-14.
[89] Januta Testimony, Transcript II, p. 21, lines 15-16.
[90] Januta Testimony, Transcript II, p. 21, lines 21-23.
[91] Januta Testimony, Transcript II, p. 21, lines 24-26.
[92] Collie v. Barron, USDC No. 4:17-CV-211-A (5th Cir. 2018)
[93] Januta Testimony, Transcript II, p. 21, lines 29-32.
[94] Januta Testimony, Transcript II, p. 21, lines 33-38.
[95] Januta Testimony, Transcript II, p. 22, lines 6-14.
[96] Wu Testimony, Transcript II, p. 12, lines 17-20.
[97] Wu Testimony, Transcript II, p. 13, lines 18-22; Panel II presentations, slide 25.
[98] Wu Testimony, Transcript II, p. 13, lines 23-25.
[99] Wu Testimony, Transcript II, p. 13, lines 30-34.

Fifth Circuit Court of Appeals' population and comprise 85% of all sitting judges,[100] where one-third of the Fifth Circuit Court of Appeals' general population is Hispanic, but there are no active Hispanic judges.[101] This exposed a 40% gap between the proportion of people of color who live in the Fifth Circuit compared with the judges who serve on the Fifth Circuit Court of Appeals.[102]

Professor Johnson added that Black individuals, especially Black men, are disproportionately incarcerated[103] and killed by law enforcement nationally.[104] He noted that 60% of people who are incarcerated are Black, with Black individuals being 2.7 times more likely than white individuals to be incarcerated, and 1 in 3 Black men are likely to be incarcerated if born after 2001 (compared to 1 in 17 for white men and 1 in 6 for Latino men).[105] Compared to other wealthy countries, the United States reports substantially more police killings, approximately 1,000 people per year,[106] where Black men are twice as likely to be killed by law enforcement than white men.[107] Lastly, Professor Johnson reported that interactions with police disproportionately occur in Black communities with the incarceration rates of Black Mississippians supporting the notion that protections provided to law enforcement in the state disproportionately impact people of color, specifically Black Americans.[108]

Ms. Januta testified that Black individuals were more likely to be stopped, searched, arrested, and killed by police than their white counterparts, demonstrating a disproportionate burden on Black individuals of having to overcome this legal barrier.[109] Her analysis of 1,000 qualified immunity legal rulings involving police accused of excessive force summarized that (1) it is increasingly more difficult for plaintiffs to overcome the immunity defense in recent years; (2) immunity is applied unevenly around the country; (3) plaintiffs' chances of justice vary depending on where they live; and (4) the burden of overcoming the immunity defense disproportionately falls on Black plaintiffs.[110]

3. Impacts

Ms. Wu testified that qualified immunity artificially creates a "risk blindness" and a "rights blindness" in law enforcement culture.[111] She noted that since the 1980s and 1990s, large government programs and subsidies have militarized law enforcement by pushing military-grade equipment into small rural police departments.[112] This warfare-based equipment was

[100] Wu Testimony, Transcript II, p. 13, lines 35-37.
[101] Wu Testimony, Transcript II, p. 14, lines 1-2.
[102] Wu Testimony, Transcript II, p. 14, lines 6-8.
[103] Johnson Testimony, Transcript I, p. 7, lines 10-38.
[104] Johnson Testimony, Transcript I, p. 8, lines 7-11.
[105] Johnson Testimony, Transcript I, p. 7, lines 10-14.
[106] Johnson Testimony, Transcript I, p. 7, line 40-p. 8, line 3.
[107] Johnson Testimony, Transcript I, p. 8, lines 3-6 & 13-15.
[108] Johnson Testimony, Transcript I, p. 8, lines 20-25.
[109] Januta Testimony, Transcript II, p. 22, lines 15-18.
[110] Januta Testimony, Transcript II, p. 18, line 29-p. 19, line 2.
[111] Wu Testimony, Transcript II, p. 12, lines 21-29.
[112] Wu Testimony, Transcript II, p. 14, lines 24-28.

intended for overseas war against people who are not protected by the U.S. Bill of Rights, but law enforcement agencies within the country have increasingly applied this equipment to civil interactions within the United States against civilians who are protected by constitutional rights.[113] She testified that militarization of law enforcement has not shown to reduce the rates of violent crime or the number of officers who are assaulted or killed.[114]

Ms. Wu also testified that the protections of qualified immunity have created and sustained a toxic work culture and environment in police departments.[115] For example, she mentioned an incident where several officers of the Meridian Police Department were suspended for 10 days for not disciplining another officer's use of a racial slur.[116] Colorado civil rights attorney David Lane explained that teaching respect for citizens and the Constitution trickles down from the top law enforcement officials.[117]

Jarvis Dortch, Executive Director of the ACLU chapter of Mississippi, testified that qualified immunity is "judicial policymaking" which prevents any type of reform from coming forward through the Mississippi legislature or at local level.[118] Professor Johnson added that the courts have created expansive and unnecessary barriers to the protection of rights and to justice with the qualified immunity doctrine.[119]

4. Issues of "Clearly Established" Law Requirement

With the U.S. Supreme Court's ruling in *Pearson v. Callahan* (2009), judges may dismiss a case under qualified immunity without first rendering an opinion as to whether or not a constitutional violation occurred.[120] Panelists testified that when courts utilize this discretion, cases cannot set precedents moving forward[121] or provide rulings that could potentially discourage future violations.[122] This allows violative law enforcement behavior to continue to go unchecked.[123] Mississippi civil rights attorney Victor Fleitas testified that there is concern that the rate at which qualified immunity is awarded minimizes participation in the legal system of the individuals whose rights have been violated.[124] Judge Carlton Reeves of the Southern

[113] Wu Testimony, Transcript II, p. 16, lines 9-11.
[114] Wu Testimony, Transcript II, p. 15, lines 33-34.
[115] Wu Testimony, Transcript II, p. 14, lines 20-21.
[116] Wu Testimony, Transcript II, p. 14, lines 15-18.
[117] Lane Testimony, Transcript II, p. 24, lines 10-12.
[118] Dortch Testimony, Transcript II, p. 7, lines 12-17.
[119] Johnson Testimony, Transcript I, p. 11, lines 7-9.
[120] *Pearson v. Callahan*, 555 U.S. 223 (2009); Dortch Testimony, Transcript II, p. 9, lines 10-14; Januta Testimony, Transcript II, p. 20, lines 25-28 & p. 21, lines 5-6; Lane Testimony, Transcript II, p. 3, lines 33-35 & p. 4, lines 1-3 & 18-23; Schwartz Testimony, Transcript I, p. 22, lines 3-10.
[121] Lane Testimony, Transcript II, p. 4, lines 7-13; Johnson Testimony, Transcript I, p. 10, lines 21-22; Fleitas Testimony, Transcript I, p. 13m lines 17-18.
[122] Schwartz Testimony, Transcript I, p. 16, lines 19-25; Fleitas Testimony, Transcript I, p. 17, lines 13-20.
[123] Januta Testimony, Transcript II, p. 21, lines 7-9; Fleitas Testimony, Transcript I, p. 13 lines 16-17 & 19-21
[124] Fleitas Testimony, Transcript I, p. 13, lines 14-15.

District of Mississippi recently called for the scaling back of qualified immunity protections in the historical ruling of *Jamison v. McClendon* (2020).[125]

Panelists testified that law enforcement officers continue to be granted qualified immunity in cases that one might consider egregious constitutional violations only because there is not a prior court decision where virtually identical facts were found to be unconstitutional.[126] Mr. Lane explained that lawyers spend endless amounts of time making arguments and counterarguments about "clearly established" law.[127] For example, there is "clearly established" law that Department of Corrections guards cannot rape female prisoners, but there is not "clearly established" law that they cannot grope them.[128] Ms. Januta noted that District Judge James Browning of New Mexico wrote in his 2018 opinion that "a court can almost always manufacture a factual distinction between the case it's reviewing and an earlier case."[129]

To overcome a qualified immunity defense, the burden is on the plaintiff not only to show that force was excessive, but that specific police behavior was "clearly established" in precedent as illegal.[130] Panelists provided the following examples describing the types of police conduct that has been shielded from responsibility by qualified immunity:

- In *Cruz v. City of Laramie, Wyo.* (2001), officers were granted qualified immunity after pepper spraying, handcuffing, and hogtieing an individual, resulting in him dying from positional asphyxia. While the court did rule that the officers' conduct amounted to a constitutional violation, they also ruled that this violation had not been "clearly established."[131]

- In *Hope v. Pelzer* (2002), a prison guard was granted qualified immunity by the Eleventh Circuit Court of Appeals after leaving a prisoner tied up to a hitching post in the hot sun for several hours.[132] The Supreme Court later reversed the 11th circuit decision, ruling that qualified immunity can be denied if there is an obvious constitutional violation.[133]

- In *Mattos v. Agarano*, (2011), police were granted qualified immunity protections after tasing a pregnant woman who was pulled over while taking her 11-year-old son to school.[134]

---

[125] Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020); Dortch Testimony, Transcript II, p. 10, lines 6-12.
[126] Schwartz Testimony, Transcript I, p. 3, lines 31-36; Wu Testimony, Transcript II, p. 13, lines 2-9.
[127] Lane Testimony, Transcript II, p. 3, lines 14 & 16-18.
[128] Lane Testimony, Transcript II, p. 3, lines 15-16.
[129] *McGarry v. Bd. of Cty. Commissioners for Cty. of Lincoln*, 294 F. Supp. 3d 1170, 1201 (D.N.M. 2018); Januta Testimony, Transcript II, p. 20, lines 13-16.
[130] Januta Testimony, Transcript II, p. 19, lines 22-24.
[131] *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183 (10th Cir. 2001); Lane Testimony, Transcript II, p. 3, lines 24-31.
[132] Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001); Dortch Testimony, Transcript II, p. 11, lines 6 & 11-21.
[133] Hope v. Pelzer, 536 U.S. 730 (2002) (*rev'g Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001)).
[134] *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011); Schwartz Testimony, Transcript I, p. 3, lines 38-39.

- In *Estate of Stacks v. Prentiss County* (2013) jail guards were granted qualified immunity, as a result of U.S. Supreme Court and Fifth Circuit Court of Appeals precedents, after a 25-year-old took her own life despite her pleading for them not to leave her alone in a cell without suicide precautions.[135]

- In *Aldaba v. Pickens* (2016), police were granted qualified immunity after tasing and wresting an agitated and delirious pneumonia patient to the ground which resulted in his death by asphyxiation.[136]

- In *Dobbins v. Martin* (2017), a Texas police officer was granted qualified immunity after chasing, tasing, and jailing Clayton Dobbins who was deemed suspicious while riding his bike.[137]

- In *Jones v. Fransen* (2017), police officers were granted qualified immunity because of a difference between unleashing a police dog to bite a motionless suspect in a bushy ravine and unleashing a police dog to bite a complaint suspect in a canal in the woods.[138] (Contra, *Priester v. Riviera Beach*).[139]

- In *Callwood v. Jones* (2018), police were granted immunity after tasing and kneeling on Khari Illidge, which led to his death.[140]

- In *Kelsay v Ernst* (2019) (en banc), a police officer was granted qualified immunity after body slamming a woman to the ground, breaking her collarbone and knocking her unconscious, after she walked few feet away from him, because of a difference between subduing a woman from walking away from an officer and subduing a woman for refusing to end a phone call.[141] (Contra, *Brown v. City of Golden Valley*).[142]

---

[135] *Est. of Stacks v. Prentiss Cty., Miss.*, No. 1:12-CV-00032-GHD, 2013 WL 1124395 (N.D. Miss. Mar. 18, 2013), *on reconsideration*, No. 1:12-CV-00032-GHD, 2013 WL 6115838 (N.D. Miss. Nov. 20, 2013); Fleitas Testimony, Transcript I, p. 12, lines 19-27; Panel I Presentations, slide 42.
[136] *Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016); Januta Testimony, Transcript II, p. 19, lines 7-16, 18-21 & 25-27.
[137] *Dobbins v. Martin*, No. 3:16-CV-0388-N, 2017 WL 10121549 (N.D. Tex. May 4, 2017); Januta Testimony, Transcript II, p. 22, lines 22-24.
[138] *Jones v. Fransen*, 857 F.3d 843 (11th Cir. 2017); Januta Testimony, Transcript II, p. 20, lines 22-23.
[139] *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919 (11th Cir. 2000).
[140] *Callwood v. Jones*, 727 F. App'x 552 (11th Cir. 2018); Januta Testimony, Transcript II, p. 20, line 29-p 21, line 4.
[141] *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2760 (2020), *reh'g denied*, 141 S. Ct. 197 (2020); Januta Testimony, Transcript II, p. 20, lines 18-19; Schwartz Testimony, Transcript I, p. 4, lines 1-3.
[142] Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009).

- In *Corbitt v Vickers* (2019), police officers were granted qualified immunity because of a difference between shooting at a dog and instead hitting a child and shooting at a truck and instead hitting a passenger.[143] (Contra, *Vaughan v Cox*).[144]

- In *Jessop v. City of Fresno* (2019), police were granted immunity after stealing almost $250,000 in cash and rare coins when executing a warrant.[145]

- In *Baxter v. Bracey*, (2020), police were granted immunity after instructing a police dog to attack a man who had surrendered with his hands in the air.[146]

- In *J.H. v. Williamson County* (2020), officers were granted immunity after holding a 14-year-old in pre-trial solitary confinement for over month.[147]

- In *Jamison v. McClendon* (2020), a police officer was granted qualified immunity after pulling over an individual and subjecting him to a two-hour wait on the side of a dark highway even though he had violated no laws.[148]

- In *Howse v. Hodus,* (2020), an Ohio police officer was granted qualified immunity after slamming to the ground, handcuffing, and jailing Shase Howse who was fumbling with his keys on his own porch.[149]

- In *Stewart v. City of Euclid* (2020), an Ohio police officer was granted qualified immunity after shooting and killing Luke Stewart who was sleeping in his own car.[150]

- In *Taylor v. Riojas* (2020) psychiatric prison unit corrections officers were granted qualified immunity by the Fifth Circuit Court of Appeals after confining a prisoner in an unsanitary cell that impacted his physical health (although the court did rule that the prisoner's constitutional rights were violated).[151] The U.S. Supreme Court later reversed this decision, holding that because "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution[,]" the Fifth Circuit Court of Appeals "erred in granting the officers qualified immunity."[152]

---

[143] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110, 207 L. Ed. 2d 1051 (2020); Januta Testimony, Transcript II, p. 20, lines 19-21; Schwartz Testimony, Transcript I, p. 3, line 42-p. 4, line 1.
[144] *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003).
[145] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied sub nom. Jessop v. City of Fresno, California*, 140 S. Ct. 2793 (2020), *reh'g denied*, 141 S. Ct. 198 (2020); Schwartz Testimony, Transcript I, p. 4, lines 3-4; *See also* footnote 15.
[146] *Baxter v. Bracey*,140 S.Ct. 1862 (2020); Schwartz Testimony, Transcript I, p. 3, lines 40-41.
[147] *J.H. v. Williamson Cty., Tennessee*, 951 F.3d 709 (6th Cir.), *cert. denied sub nom. J. H. By Harris v. Williamson Cty., Tennessee*, 141 S. Ct. 849 (2020); Schwartz Testimony, Transcript I, p. 3, lines 39-40.
[148] Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020); Fleitas Testimony, Transcript I, p. 12, lines 4-16.
[149] Januta Testimony, Transcript II, p. 22, lines 25-26.
[150] *Stewart v. City of Euclid, Ohio*, 970 F.3d 667 (6th Cir. 2020), *cert. denied*, No. 20-951, 2021 WL 2044660 (U.S. May 24, 2021); Januta Testimony, Transcript II, p. 22, lines 26-28.
[151] *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019), *cert. granted, judgment vacated sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020); Dortch Testimony, Transcript II, p. 10, lines 26-31.
[152] *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020).

- In *McCoy v. Alamu* (2021), a state prison guard was granted qualified immunity by the Fifth Circuit Court of Appeals after pepper-spraying a prisoner in the face without provocation because there was no "clearly established" law against this, although the assault was found to be a violation of the Eighth Amendment.[153] The Supreme Court later reversed and told the lower court to reconsider its decision light of *Taylor v. Riojas*.[154]

Mr. Williams testified that there is a shift occurring from judges first examining the "clearly established" law to first examining whether officers violated constitutional rights.[155] He specifically mentioned that the judges of the Fifth Circuit Court of Appeals have their hands tied by the U.S. Supreme Court in regard to interpreting what is "clearly established law."[156]

The attorneys who represented law enforcement officials emphasized that qualified immunity hinges on law enforcement officers sufficiently and clearly knowing what conduct is acceptable for a reasonable officer[157] and that "clearly established" law is needed to ensure that officers have fair notice that their conduct may be considered unlawful or what is acceptable when going into unknown, and often, dangerous situations.[158]

C. Reforming Qualified Immunity

Many panelists explicitly stated their support for eliminating qualified immunity entirely.[159] Mr. Claxton explained that significant change in the culture of policing will not occur without incentivizing compliance or penalizing defiance and exposing law enforcement officials to individual, personal liability;[160] therefore, eliminating qualified immunity would be the most significant reform to the way police operate.[161] Professor Schwartz testified that although ending qualified immunity would not completely change police accountability it would (1) increase law enforcement officials' accountability as courts would stop sending the message that police officers can "shoot first and think later;" (2) increase clarity about the law as courts would explain whether someone's constitutional rights have been violated and lead to informing police officer policies and trainings; (3) decrease costs, complexity, and time; and

[153] *McCoy v. Alamu*, 950 F.3d 226 (5th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1364 (2021); Dortch Testimony, Transcript II, p. 9, line 36-p. 10, line 3.
[154] *McCoy v. Alamu*, 141 S. Ct. 1364 (2021).
[155] Williams Testimony, Transcript III, p. 17, lines 15-17.
[156] Williams Testimony, Transcript III, p. 17, lines 21-23.
[157] Allen Testimony, Transcript III, p. 8, lines 13-16.
[158] Williams Testimony, Transcript III, p. 15, lines 17-20.
[159] Schwartz Testimony, Transcript I, p. 3, lines 1-2; Fleitas Testimony, Transcript I, p. 14, lines 24-25; Lane Testimony, Transcript II, p. 6, 21-22; Claxton Testimony, Transcript III, p. 3, lines 20-22 & p.5 lines 23-32; Dortch Testimony, Transcript II, p. 7, lines 18-19 & p. 11, lines 22-23; Wu Testimony, Transcript II, p. 12, lines 30-33 & p. 15, lines 29-31.
[160] Claxton Testimony, Transcript III, p. 4, lines 18-20 & p. 18, line 37-p. 19, line 2, 15-16; *see also* Wu Testimony, Transcript II, p. 24, lines 30-32.
[161] Claxton Testimony, Transcript III, p. 3, lines 20-22 & 25-26; Johnson Testimony, Transcript I, p. 10, line 42-p. 11, line 1; Fleitas Testimony, Transcript I, p. 14, lines 25-29 & p. 20, lines 13-20.

(4) increase transparency of what actions violate people's constitutional rights.[162] She also testified that elimination would offer justice to the people whose constitutional rights have been violated and to those whose cases were dismissed only due to a lack of prior court decisions.[163]

Mr. Fleitas testified that doing nothing to address the current use of qualified immunity minimizes and potentially negates the promise of civil rights laws.[164] Mr. Lane pointed out that the State of Colorado recently eliminated qualified immunity for law enforcement with the passage of its Enhance Law Enforcement Integrity Act;[165] he suggested that every state and the federal government should establish legislation mimicking this Act.[166]

Others, however, cautioned against completely eliminating or significantly restricting qualified immunity. Mr. Allen, an attorney who represented the Mississippi Sheriffs' Association and Mississippi Association of Supervisors, asserted that previous and obvious instances where law enforcement officers were inappropriately granted qualified immunity should not serve as the basis for dismantling it,[167] and to do so would be throwing "the baby out with the bathwater."[168] Mr. Allen quoted Judge Willett of the Fifth Circuit Court of Appeals, who wrote that qualified immunity protects police officers when there are not "bright lines and sharp corners" regarding whether particular conduct violates constitutional rights.[169] Allen provided the example of *Holloway v. Purvis* (2017), in which the Fifth Circuit Court of Appeals upheld qualified immunity for police officers who arrested an individual on a mental writ of commitment (rather than an arrest warrant).[170] The individual was involved in a traffic accident, and reportedly walked away from officers down a busy highway in the middle of the night, "behaving erratically."[171] Officers became aware that the individual had a mental writ of commitment, and arrested him.[172] The individual later sued officers for false arrest, citing the lack of an arrest warrant.[173] The district court initially denied qualified immunity, finding that a warrantless arrest is clearly established as unconstitutional.[174] However, on appeal, the Fifth Circuit reversed the decision and granted the officers immunity, finding that while a writ of commitment is not identical to an arrest warrant, it was not clearly established that a person couldn't be arrested on this type of order.[175]

Proponents of qualified immunity have argued that eliminating the doctrine would lead to numerous frivolous lawsuits against law enforcement officers acting in good faith to perform

[162] Schwartz Testimony, Transcript I, p. 6, lines 8-21.
[163] Schwartz Testimony, Transcript I, p. 6, lines 6-8.
[164] Fleitas Testimony, Transcript I, p. 14, lines 38-41; *see also* Wu Testimony, Transcript II, p. 15, lines 29-31.
[165] Lane Testimony, Transcript II, p. 5, lines 9 & 13-16; see: Rev. Stat. Ann. § 13-21-131(1)(b) (West).
[166] Lane Testimony, Transcript II, p. 6, lines 20-21.
[167] Allen Testimony, Transcript III, p. 7, lines 1-2 & 23-25; p. 8, lines 31-40; p. 10, lines 16-26.
[168] Allen Testimony, Transcript III, p. 10 lines 5-14.
[169] Allen Testimony, Transcript III, p. 8, lines 7-10 (quoting *Reed v. Taylor*, 923 F.3d 411, 415 (5th Cir. 2019)).
[170] Holloway v. Purvis, 680 F. App'x 282 (5th Cir. 2017); Allen Testimony, Transcript III, p. 9, lines 1-33.
[171] Allen Testimony, Transcript III, p. 9 lines 1-15.
[172] Allen Testimony, Transcript III, p. 9 lines 1-15.
[173] Allen Testimony, Transcript III, p. 9 lines 16-22.
[174] *Holloway v. Lamar Cty.*, 180 F. Supp. 3d 467 (S.D. Miss. 2016), *rev'd in part, vacated in part sub nom. Holloway v. Purvis*, 680 F. App'x 282 (5th Cir. 2017); Allen Testimony, Transcript III, p. 9 lines 16-22.
[175] *Holloway v. Purvis*, 680 F. App'x 282 (5th Cir. 2017); Allen Testimony, Transcript III, p. 9 lines 23-35.

their duties.[176] The primary concern with changing or dismantling qualified immunity is that that without this protection law enforcement officers would be exposed to liability for split second decisions they must make in often very stressful and dangerous situations – even when they make those decisions in good faith.[177] Mr. Allen noted that some critics of qualified immunity feel the doctrine is unnecessary because the Fourth Amendment already presents a "reasonableness" standard whereby law enforcement officers who reasonably engage in search and seizure and use reasonable force in the course of their duties are protected.[178] However, he distinguished this protection from qualified immunity, arguing that the "reasonableness test" that is embedded in the Fourth Amendment protects police officers who make "factual mistakes," while the doctrine of qualified immunity provides protections from liability when they "reasonably midjudge legal standards."[179] Additionally, Mr. Allen testified that qualified immunity is used in many cases that do not involve the Fourth Amendment; for example qualified immunity cases may involve the Eighth Amendment or the First Amendment instead, and these Amendments do not include a "reasonableness test."[180]

In response to these and similar concerns, Professor Schwartz pointed out the legal system offers several layers of protection preventing officers from facing "frivolous" lawsuits. For example, she noted that lawyers have strong incentives to reject frivolous cases because civil rights cases are incredibly challenging, and attorneys are not paid unless they win: "[T]hese economic arrangements meant that they are going to look very carefully at a lawsuit before agreeing to file it and are not going to accept a frivolous case."[181] Judges also have the authority to dismiss cases they consider to be frivolous or without merit,[182] and juries often find against plaintiffs if they are unconvinced of their plaints.[183] Even when officers do face civil suits, they rarely, if ever, face direct personal liability. Schwartz pointed out that each state has an indemnification statute that requires local governments to provide law enforcement officers with a lawyer and pay any settlement in any civil action against them so long as they acted in "the course and scope of their employment."[184] She conducted a study of indemnification in eighty-one law enforcement agencies over a six year period across the U.S. and found that 99.98% of dollars were paid by local government, not the officers.[185] Furthermore, in the very few cases officers were required to contribute, the average was a couple of thousand dollars—not the entirety of the judgement.[186] Special Assistant Attorney General Williams countered that many officers still do worry about personal liability and testified that indemnification for

[176] Schwartz Testimony, Transcript I, p. 4 lines 11-21
[177] Allen Testimony, Transcript III, p. 7 line 23 – p. 8 line 30; p. 22, lines 13-16; Claxton Testimony, Transcript III, p. 22, lines 37-39.
[178] Allen Testimony, Transcript III, p. 8, lines 29-40; *see also*: Schwartz Testimony, Transcript I, p. 5, lines 3-19; Johnson Testimony, Transcript I, p. 10, lines 29-41; see generally, https://www.law.cornell.edu/wex/fourth_amendment, Section IV, "Reasonableness Requirement."
[179] Allen Testimony, Transcript III, p. 8, lines 29-40.
[180] Allen Testimony, Transcript III, p. 10 lines 9-14.
[181] Schwartz Testimony, Transcript I, p. 5, lines 24-28.
[182] Schwartz Testimony, Transcript I, p. 5, lines 29-42.
[183] Schwartz Testimony, Transcript I, p. 5 lines 30-31.
[184] Schwartz Testimony, Transcript I, p. 4, lines 23-30 & p. 16, lines 14-16.
[185] Schwartz Testimony, Transcript I, p. 4, line 35 – p. 5 line 2.
[186] Schwartz Testimony, Transcript I, p. 4, line 35 – p. 5 line 2; p. 18 lines 1-3.

a judgment in an officer's individual capacity is not guaranteed.[187] Still, Schwartz contended that together these protections would continue to shield officers who act in good faith, even without qualified immunity protection.[188]

Finally, proponents of qualified immunity have raised concern that without these protections law enforcement officials will begin policing in ways that reflect their fear of a lawsuit rather than their training.[189] Mr. Allen testified that when a police officer is sued, they change their policing to often be a little passive and much less aggressive, even when they are vindicated.[190] Other panelists countered that concerns regarding "passive policing" are not warranted, as law enforcement officials do not proactively consider their liability risk at the time that they are making split-second decisions.[191] Retired NYPD detective Mr. Claxton testified that law enforcement officers are not spending significant amounts of time panicked about the possibility that they may be held liable for their conduct.[192] Mr. Lane testified that that the State of Colorado has not reported a decrease in policing since recently eliminating qualified immunity.[193]

D. Panelist Observations & Recommendations (Selected)

Panelists offered a variety of observations and recommendations with respect to reforming the doctrine of qualified immunity.

- Mr. Williams noted that the scope of qualified immunity available in actions against federal officers under Bivens v. Six Unknown Named Agents, poses somewhat different issues in that the scope of actions against state and local officers under section 1983 are different than those against Federal law enforcement officers under Bivens. That is to say, the situations and circumstances state and local law enforcement officers find themselves in on a day-to-day basis are different than that of Federal law enforcement.[194]

- Several panelists agreed that at a minimum, courts should address the question of constitutional violations before ruling on qualified immunity or "clearly established"

[187] Williams Testimony, Transcript III, p. 11 line 37 – p. 12 lines 34; *see also:* Fleitas Testimony, Transcript I, p. 20 line 26 – p. 21 line 7.
[188] Schwartz Testimony, Transcript I, p. 5 line 38 – p. 6 line 5.
[189] Allen Testimony, Transcript III, p. 10, lines 29-30 & p. 20 lines 8-33; Claxton Testimony, Transcript III, p. 19, lines 8-13.
[190] Allen Testimony, Transcript III, p. 20, lines 8-33 & p. 22, lines 32-35.
[191] Johnson Testimony, Transcript I, p. 15, lines 34-37 & 41-p. 16, line 2; Schwartz Testimony, Transcript I, p. 16, lines 5-12.
[192] Claxton Testimony, Transcript III, p. 19, lines 6-8.
[193] Lane Testimony, Transcript II, p. 28, lines 1-4.
[194] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); Williams Testimony, Transcript III, p. 14, lines 10-12.

law questions, thereby avoiding constitutional stagnation.[195] Panelists noted that this would also provide clearer guidelines to law enforcement officials and overall improve policies and outcomes.[196]

- Some panelists suggested that qualified immunity reform efforts should be accompanied by other efforts to reduce law enforcement liability, such as demilitarizing police training and equipment[197] and shifting responsibilities like mental health crisis intervention and routine traffic control away from police to other civilian agencies.[198]

- A few state and local governments across the country have taken steps to address concerns regarding the qualified immunity of law enforcement. Examples discussed during the testimony include:

    - The Enhance Law Enforcement Integrity Act[199] in Colorado eliminated qualified immunity[200] and passed civil rights statutes that included mandating the use of body cameras for all Colorado law enforcement officers by July 1, 2023.[201] Mr. Lane testified that with the implementation of this new statute, if a state court judge decides there was a constitutional violation, whether or not it is "clearly established" in law, the case will proceed with no damage caps and no qualified immunity.[202] The new law exposes police officers to personal liability for 5% of the judgement or $25,000, whichever is less.[203]

    - In response to Governor Cuomo's mandate that required reform and threatened to withhold millions in state funding from New York City for failing to enact reform,[204] in April 2021, the New York City Council passed a bill eliminating qualified immunity for law enforcement in cases of unreasonable search and seizure and in cases of excessive force.[205]

---

[195] Fleitas Testimony, Transcript I, p. 14, lines 30-33; *see also*: Lane Testimony, Transcript II, p. 4, lines 34-35; Williams Testimony, Transcript III, p. 22, lines 7-11.
[196] Fleitas Testimony, Transcript I, p. 14, lines 34-38 & p. 17, lines 12-17; Allen Testimony, Transcript III, p. 16, lines 24-33, 35-40, p. 20, lines 31-33, p. 22, line 24, p. 23 line 15, 9-12, 18-19; Claxton Testimony, Transcript III, p. 23, lines 24-25 & 37.
[197] Wu Testimony, Transcript II, p. 16, lines 25-37 & p. 17, lines 15-17.
[198] Claxton Testimony, Transcript III, p. 3, lines 30-41; Wu Testimony, Transcript II, p. 16, lines 4-14 & p. 17, line 18 – p. 18, line 6 & lines 10-16; Dortch Testimony, Transcript II, p. 25, lines 7-11 & 19-21.
[199] 2020 Colo. Legis. Serv. Ch. 110 (S.B. 20-217) (West).
[200] Colo. Rev. Stat. Ann. § 13-21-131(1)(b) (West).
[201] Colo. Rev. Stat. Ann. § 24-31-902 (West); Lane Testimony, Transcript II, p. 5, lines 9, 13-16, 21-23.
[202] Lane Testimony, Transcript II, p. 5, lines 17-20.
[203] Colo. Rev. Stat. Ann. § 13-21-131(4)(a) (West). *This new legislation is currently being tested in the Brittany Gilliam civil lawsuit that may set a standard of expectations for civil cases against police officers along with testing the stability of qualified immunity*. *See:* Claxton Testimony, Transcript III, p. 4, line 39-p. 5, line 13; Lane Testimony, Transcript II, p. 5, lines 27-31 & p. 6, lines 13-16; Schwartz Testimony, Transcript I, p. 18, lines 20-25.
[204] Claxton Testimony, Transcript III, p. 5, lines 14-18.
[205] NYC Administrative Code 8-804.

COMMITTEE FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress. The Mississippi Advisory Committee submits the following findings and recommendations to the Commission for review:

A. Committee Findings

1. Qualified immunity is a judicially-created doctrine, existing outside of the legislative process, which shields many government officials, including law enforcement officers,[206] from facing personal civil liability for their conduct in the course of their official duties.
    a. Qualified immunity was initially limited to protecting police officers from liability for errors of knowledge or judgement made "in good faith."
    b. In 1982, with *Harlow v. Fitzgerald*, this protection was expanded to protect any law enforcement action that did not violate "clearly established law."
    c. With *Pearson v. Callihan* in 2009, courts were granted discretion to consider the question of "clearly established law" *before* ruling on whether or not the underlying law enforcement conduct was constitutional, stagnating the further development of civil rights case law. The judicial definition of "clearly established law" has become increasingly narrow since this time. The *Pearson* ruling has heightened the need for non-judicial parts of the criminal-justice system—both legislative and executive, and at the national, state, and local levels—to gather more data and articulate more precise rules to govern officers' conduct. If unclear law remains unclear despite litigation, as *Pearson* allows, other actors can and should step in to help clarify officers' duties.
2. There is continued tension between the competing priorities of affording law enforcement officers the space to do an often tense and dangerous job without constant fear of personal liability and protecting the public from abuses of unchecked law enforcement authority.
    a. Law enforcement advocates fear that limiting or removing qualified immunity protections will expose officers to frivolous lawsuits and result in an increase in "passive policing," putting the public at risk.

[206] This report focuses solely on the qualified immunity of law enforcement officials and the civil rights implications thereof.

b. Critics of qualified immunity find that qualified immunity has become so broadly applied, and placed such a burden on plaintiffs, that most lawyers will not even take these cases, allowing law enforcement to act with near impunity.
c. Critics also contend that qualified immunity creates a police culture less responsive to legal risk, decreasing caution with respect to decisions such as using military-grade weapons and failing to address inappropriate or abusive behavior.
d. In the Committee's hearings, both law enforcement advocates and critics of qualified immunity agreed that the public interest would be better served by better developed precedent on what kinds of conduct do and do not violate constitutional protections of persons in encounters with law enforcement. There was consensus among the witnesses that the public interest is not served by permitting courts to consider whether the conduct violates clearly established law before ruling on the underlying conduct of the case, as permitted under *Pearson v. Callahan.*

3. Mississippi's qualified immunity data is extremely limited and does not readily indicate the types of civil rights complaints being filed.
4. Available data indicate uneven application of excessive force case law across different circuits.
    a. The Fifth Circuit, where Mississippi cases go, upholds qualified immunity at perhaps the greatest rate in nation, and this rate is rising.
    b. The Fifth Circuit serves the most racially diverse population in the country; however, Fifth Circuit judges are the least racially and ethnically diverse in the country.
    c. Black and Hispanic individuals are disproportionately impacted by qualified immunity; they are more likely to be killed by police, disproportionately incarcerated, and have disproportionately high rates of police contact. Therefore, they also disproportionately face the burden of overcoming the qualified immunity defense when their rights are violated.
5. Law enforcement officials would continue to benefit from a wide range of protections for reasonable, good-faith conduct, even in the absence of qualified immunity.
    a. Lawyers have economic incentives not to file "frivolous" or unwarranted civil rights lawsuits—these cases are extremely difficult to prove, and lawyers are not paid unless they win.
    b. Judges often dismiss cases they find to be frivolous.
    c. Indemnification statutes in each state protect officers from personal liability when they are acting within the course and scope of their employment.
6. Precedents for eliminating or restricting qualified immunity exists; Colorado recently eliminated qualified immunity for law enforcement when there is a constitutional violation, regardless of whether or not the plaintiff can demonstrate "clearly established law." New York City also recently eliminated qualified immunity for law enforcement in cases of unreasonable search and seizure and excessive force.

B. Committee Recommendations

1. The **U.S. Commission on Civil Rights** should conduct a study of qualified immunity at the national level. Such a study should include:
    a. Exploration of why qualified immunity outcomes diverge so sharply between different Circuit Courts of Appeals.
    b. Review of any data regarding the impact of qualified immunity (or denial thereof) on the ability of police departments to hire and retain qualified officers, particularly in large metropolitan areas, including data from New York and Colorado where qualified immunity of law enforcement has been removed.
    c. Assessment of differences in officer recruitment, retention, and training efforts across the country and their relation to complaints regarding officer conduct and motions for qualified immunity.
2. The U.S. Commission on Civil Rights should issue the following recommendation to the **President and U.S. Congress:**
    a. Require all law enforcement agencies receiving federal funding to collect and report data regarding excessive force complaints, motions for qualified immunity, and the outcomes of the same.
    b. Adopt more detailed codes to govern officer conduct in light of such data.
    c. Modify the qualified immunity analysis to require the courts first determine the constitutionality of the underlying conduct in the individual case before determining whether it violates clearly established precedent.
    d. Establish a task force to study differences in the application of qualified immunity law across court districts and make recommendations for addressing these differences.
    e. Increase fungibility in law enforcement funding so that state and local governments may use funding to establish and support broader community based social services such as mental health crisis intervention to support and reduce risk to officers and the community.
3. The U.S. Commission on Civil Rights should issue the following recommendation to the **U.S. Department of Justice:**
    a. Require all law enforcement agencies receiving federal funding to collect and report data regarding excessive force complaints, motions for qualified immunity, and the outcomes of the same.
    b. Use this data to issue guidelines for federal, state, and local law enforcement agencies to address gaps in case law regarding officer conduct.
    c. Conduct a study of differences in the application of qualified immunity law across court districts and make recommendations for addressing these differences.
4. The U.S. Commission on Civil Rights should issue the following recommendation to the **Mississippi Governor and Legislature:**
    a. Require all state municipalities to report civil rights settlement data to the Office of the Attorney General.

b. Adopt more detailed codes to govern officer conduct in light of such data.
c. Direct law enforcement funding to be used for broader community based social services such as mental health crisis intervention to support and reduce risk to officers and the community.

5. The U.S. Commission on Civil Rights should issue the following recommendation **to the Mississippi Administrative Office of the courts:**
    a. Collect and report on more specific data regarding civil rights case filings so that data can be easily disaggregated by type (use of force, search and seizure, etc.)
6. The U.S. Commission on Civil Rights should issue the following recommendation **to the Mississippi Board of Supervisors and the Mississippi Municipal League:**
    a. Require municipalities to collect and report on data regarding civil rights case filings and settlements, disaggregated by case type (use of force, search and seizure, etc.)

APPENDIX

A. Meeting Materials, December 15, 2020, Web Hearing*
    i. Transcript
    ii. Agenda
    iii. Meeting Minutes
    iv. Panelist Presentation Slides
B. Meeting Materials, February 10, 2021, Web Hearing*
    i. Transcript
    ii. Agenda
    iii. Meeting Minutes
    iv. Panelist Presentation Slides
C. Meeting Materials, February 12, 2021, Web Hearing*
    i. Transcript
    ii. Agenda
    iii. Meeting Minutes
D. Written Testimony*
    i. Andrea Januta, Investigative and Data Reporter, Reuters

*Appendix materials available at: **https://bit.ly/3zQOdcD**

Mississippi Advisory Committee to the

United States Commission on Civil Rights

U. S. Commission on Civil Rights

Contact: Regional Programs Coordination Unit

U.S. Commission on Civil Rights

230 S. Dearborn, Suite 2120

Chicago IL, 60604

(312) 353-8311