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## MEMORANDUM

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TO: President Yoes, National FOP  
FROM: Larry James, General Counsel  
DATE: July 21, 2020  
RE: Qualified Immunity – What It Is And What It Is Not  
FILE: 10093-27992

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### QUALIFIED IMMUNITY

#### **I. What is qualified immunity?**

- Qualified immunity applies *only in civil lawsuits* where a state actor (i.e. police officer or government official) is sued in his or her individual capacity for *performing a discretionary function* and the plaintiff seeks *monetary damages directly from the state actor*.
- Qualified immunity is an affirmative defense available to state actors, and, if granted, provides them *protection from personal, civil liability*.
- As the Supreme Court said in a recent opinion: “[T]he doctrine of qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011).
- If the plaintiff can show that the police officer or government official violated a clearly established statutory or constitutional right that a reasonable police officer (or government official) would have known, qualified immunity is *not* available.

#### **II. What qualified is not.**

- Qualified immunity does not protect those that “knowingly violate the law.” In cases where it is obviously, or sufficiently clear, that the officer or government official conduct was unlawful, qualified immunity is unavailable and the case will proceed to trial.
- Qualified immunity does not prohibit suits against the city, municipality, or other government entity itself.

- Qualified immunity does not protect a police officer or government official from criminal charges.
- Qualified immunity does not protect a police officer or government official from internal investigations and/or termination.
- Qualified immunity does not apply to claims for noneconomic relief such as injunctive relief.
- Qualified immunity does not apply to failure to perform ministerial tasks—it only applies to those discretionary functions a police officer or government official may perform.

### III. **Defenses of qualified immunity as a necessary protection for police officers and government officials.**

- **Police officers need protection in order to perform discretionary functions.** Every single factual scenario an officer encounters is different and unknown. It is extremely difficult for an officer to determine how a legal doctrine will apply to a split-second factual scenario that the officer confronts. Thus, unless there is existing precedent that squarely governs the facts before the officer, the reasonable officer needs to be afforded a certain degree of discretion to make split-second decisions in situations that could put lives, including their own, at risk. Officers must rely on training and should not be punished for doing so.
- **Creating personal financial liability would deter applicants.** If qualified immunity is abolished, qualified applicants will be deterred from becoming a police officer or other public office, coupled with an exodus of experienced officers.
- **Qualified immunity only protects the *individual* officers—not the government itself.** Qualified immunity does not protect a city from suit for its policies and practices or failure to train. If an individual has a viable claim that the city has a practice of misconduct or failed to train its officers, that claim can go forward irrespective of an individual officers' qualified immunity.
- **The courts have been balanced in denying or granting qualified immunity.**
  - A recent study of more than 200 lower court decisions where qualified immunity was raised as a defense, the court *denied* officers qualified immunity 43% of the time.

- Despite acknowledgment from strong justices on both sides (Thomas and Sotomayor) of a desire to revisit qualified immunity, the Supreme Court appears content with its current jurisprudence.
  - Only 5 cases have made it to the Supreme Court since 2015. In all 5 cases, officers were granted qualified immunity, including 9-0 and 8-1 decisions.
  - The Supreme Court recently (June 2020) declined to hear 8 cases where qualified immunity was before it.
- **For those government entities that purchase insurance; without qualified immunity, premiums will become much more costly for government entities to maintain.** Those individuals that are injured by clearly improper government action will not be properly compensated. Officers do not have assets to pay for any substantial judgment.
- **Qualified immunity avoids expending substantial litigation costs and resources.** Qualified immunity prevents a plaintiff from being able to make a frivolous allegation against an officer or government official with a hope of finding some evidence during time-consuming discovery. Absent qualified immunity, every time a police officer or government official is sued, they would be subject to extensive personal litigation costs.
- **Departments will not defend officers in egregious cases and courts will not entertain the defense.** The city will not defend officers involved in obvious misconduct and the courts do not have to conduct a qualified immunity analysis. Qualified immunity protects the actions of a reasonable police officer, not those whose actions fall outside the scope of his/her employment nor those who knowingly violate the law.

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Lastly, the Supreme Court has offered its justifications for the doctrine. These justifications include avoiding “the expenses of litigation” by allowing courts to dismiss suits against officers at early stages in the litigation. Second, requiring officials to respond to such litigation can divert official energy from pressing public issues. Third, the Court worries that the threat of litigation would deter able citizens from acceptance of public office. And the courts are concerned that the threat of lawsuits could chill lawful law enforcement conduct. The doctrine of qualified immunity gives government officials breathing room to make reasonable but mistaken judgments.