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CLIENT BULLETIN

THE CASE FOR QUALIFIED IMMUNITY

The national outcry to strip peace officers of partial immunity from civil liability ignores the reasons why this "qualified immunity" exists, what it does for government officials and the public on the rare occasions it applies, and the consequences of taking it away. Qualified immunity does not prevent peace officers from getting sued or fired nor does it keep plaintiffs from recovering damages against law enforcement agencies for civil rights violations. Peace officers deserve the limited protections of qualified immunity because no other public servants risk life and livelihood every single day.

What Is "Qualified Immunity"?

Lawsuits against peace officers are brought most often under Section 1983 of Title 42 of the United States Code, the Civil Rights Act of 1871. These cases, commonly called Section 1983 claims, usually are filed in federal court, although state courts can entertain similar suits. Every year, more Section 1983 cases are filed in the nation's courts than any other type of civil claim; many of the suits have nothing to do with the high-profile viral video police incidents that capture public attention.

Qualified immunity, in the words of the U.S. Supreme Court, protects peace officers and other government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known". It is a defense that a federal, state or local public official may raise to a Section 1983 lawsuit accusing the official of violating a plaintiff's rights in the course of duty. In practice, a successful qualified immunity defense means a lawsuit alleging a peace officer violated a person's civil rights under color of authority cannot proceed against that officer so long as he or she did not violate a "clearly established" right.

The politicians who want to take qualified immunity away from law enforcement enjoy a protection peace officers do not: *absolute* immunity from the consequences of their actions. Qualified immunity is a step down – it is not the blanket immunity it has been made out to be but is instead a partial defense available to officials charged with making discretionary decisions, such as a police officer deciding what force to use to make an arrest. While the doctrine of qualified immunity has been redefined by the Court over the years, its primary

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purpose remains to allow peace officers and other public officials to make reasonable but mistaken judgments on the job – that is, to allow them to do what they are trained to do under changing conditions -- without the constant fear and expense of getting sued.

Cases Are Rarely Thrown Out on Qualified Immunity

Opponents of qualified immunity argue the courts have raised the bar too high for plaintiffs by failing to define what is or is not a "clearly established right" in every instance. But daily law enforcement events like entering a home to make an arrest, using force to restrain a combative or uncooperative subject, or discharging a firearm at an attacker are dynamic situations in which the rights and duties of the players are not always "clearly established". Thus, it is wisely left to the courts, rather than to the court of public opinion, to decide, based on the facts of each case, whether a particular officer's actions knowingly violated a clearly established right.

Even so, lawsuits against peace officers are rarely dismissed based on qualified immunity. Studies published by the Yale and NYU law school journals in recent years have shown qualified immunity causes less than four percent of Section 1983 claims to be tossed. When a court does dismiss a claim against an individual officer based on qualified immunity, however, the lawsuit against the public employer can, and in nearly every case does, still proceed.

Beware the Law of Unintended Consequences

Those who want to do away with qualified immunity should beware the law of unintended consequences. Municipalities, not individual officers, bear the costs of federal civil rights litigation and routinely pay high-dollar judgments when a plaintiff wins or settles a case. Without qualified immunity, plaintiffs may be left with an unenforceable judgment against an officer who cannot afford to pay instead of recovering much greater damages against a city, county or state.

A new law in Colorado eliminates qualified immunity as a defense to state civil proceedings, providing instead that municipal employers are required to pay for damages awarded against officers for constitutional violations unless the employer decides the officer did not act on a good faith and reasonable belief his or her actions were lawful. In that case, the officer is *personally liable* for up to $25,000 of any judgment.

Of course, the real goal of the protesters and pundits who want to take qualified immunity away may be to discourage officers from enforcing the law at all. If so, the lawless chaos we see nightly in cities across the country will be the inevitable result. Recruiting for law enforcement jobs will continue to drop, more officers will retire, and no one will want such a thankless job.

Nearly 40 years ago, the Supreme Court described qualified immunity as "the best attainable accommodation of [the] competing values" of giving civilians a means of recovering damages for wrongs done by the police and

protecting those same officers and the taxpayer from frivolous, unnecessary and expensive litigation. I have represented scores of law enforcement officers who were sued, charged, investigated and fired over split-second decisions they've made in life-threatening situations. For what society asks of our cops, probation officers, parole agents, deputy sheriffs and prison guards, maintaining qualified immunity is the least our political leaders can do.