

CIVIL RIGHTS COMMISSION

September 3, 2020

Via Go to Meeting

1. CALL TO ORDER

The first meeting of the Civil Rights Commission called to order at 2:06 pm by Richard Bosson, Chair of the Civil Rights Commission. The meeting was held via Go to Meeting due to the current restrictions.

2. ROLL CALL

Roll call indicated the presence of a quorum as follows:

Commission Members Present:

Richard Bosson, Chair
Mark Baker, Vice Chair
Denise Torres
Zackeree Kelin
Kim Stewart
Judge Stan Whitaker
Gerald Byers
Victor J. Rodriguez

Members Excused:

Senator Steve Neville

Others Present:

Prof. Joanna Schwartz, University of California
Prof. Alexander Reinert, Benjamin Cardozo School of Law
Prof. James Pfander, Northwestern Pritzker School of Law
Raul Burciaga, Legislative Council Service
Secretary Ken Ortiz, General Services Department
Alexandra Smith, Counsel to the Commission
Abby Bannon-Schneebeck, Law Student Intern
Jacques Chouinard, Law Student Intern

3. APPROVAL OF MINUTES

With all members in agreement the minutes were passed unanimously by voice vote.

4. APPROVAL OF AGENDA

With all members in agreement the agenda was passed unanimously by voice vote.

Mr. Burciaga explained that the Commission website is on nmlegis.gov that redirects the link back to the GSD site created with documents agendas, recordings, member bios and a link for public comments. The comments will go to Alex Smith, the law students and the members for consideration.

Mr. Burciaga thanked Secretary Ortiz for his assistance with the website.

Chair Bosson explained the legislation that created the Civil Rights Commission. Mr. Burciaga explained HB 5 is posted on the website.

5. DISCUSSION OF QUALIFIED IMMUNITY

Chair Bosson reviewed the section in HB5 regarding qualified immunity. It is a controversial subject.

Mr. Baker introduced the nationally recognized scholars that were invited to speak today. They have all published articles in the country's top law journals. They are volunteering their time today. Professor Schwartz from UCLA has taught there since 2006. She is recognized as an expert on the qualified immunity doctrine. Professor Reinert from the Cardozo School of Law. He served as a law clerk in the US Supreme Court to Justice Breyer. He was involved in a key case in 2009. Professor Pfander from Northwestern Pritzker School of Law focuses on the role of the Federal law of Article 3 of the United States Constitution. He has written six books on legal issues.

Professor Schwartz thanked Mr. Baker for the introduction. Ms. Schwartz stated that she and the other speakers will give an overview of the doctrine of qualified immunity and the effects of restricting it. She understands they are aware of the Federal Civil Rights Actions that are in Section 1983 and claims that can be brought against government officials for violations of those rights. This was brought forth during the Civil Rights era. In 1967 the US Supreme Court created the doctrine of qualified immunity. The court did not see it based in the law but saw it as related to good faith defense.

The doctrine has shifted in dramatic ways since 1967. There is little connection to what it began as. In 1982, the Supreme Court stated that courts considering qualified immunity no longer had to look at an officer's good faith intent. The courts were asking what clearly established law there is. There are different definitions. In recent years the Roberts court has issued several decisions stating the law is clearly established when the plaintiff can come forward with a prior court decision from that circuit or US Supreme Court with identical conduct. Every year there are decisions and lower courts dismissing claims against law enforcement officers who engage in egregious behaviors.

Professor Schwartz discussed a decision where a citizen was killed by Dallas Police who called 911 asking for help. He was zip tied and held for over fourteen minutes until he died. They dismissed the case due to it not being clearly established that it was unconstitutional to restrain him for that amount of time. The reason these cases were dismissed is because there weren't other cases with that same conduct holding it unconstitutional. The Supreme Court stated that when they created qualified immunity, the reason was was to shield officers from the threat of financial responsibility.

Professor Schwartz states there has been growing analysis to understand if these cases have merit or have justified concerns. In the research she has found they are often unsupported with regards to financial liability. She looked at 81 jurisdictions and over a six-year period, she found officers contributed to .4% of the successful lawsuits on cases brought against officers. Officers contributed .02% of the amounts but they were not made to contribute when the officers were disciplined, terminated or charged. The concerns about shielding them from the financial burden has been brought forth by legislators.

The Supreme Court meant qualified immunity to be raised before discovery to avoid the costs of discovery. It does little work from shielding officers in discovery. It is used less frequently to get the case dismissed. If you look at the data, it indicated there are other barriers in civil rights cases. The standard for proving excessive force is a standard to consider if they have those constitutional limitations or standards, and that ends up being the basis for dismissing many cases before you get to the qualified immunity analysis. There have been many items brought to Congress criticizing qualified immunity. If qualified immunity goes away, the question is what would happen without it. There have been concerns raised that focus on three issues: fear officers will be bankrupted, officers liable for reasonable mistakes, whether indemnified liability will impact the budgets of local governments. Professor Schwartz is unaware of any officer becoming bankrupt when found responsible. Reasonable mistakes are already covered. Good faith mistakes will still be covered by the constitution. She doesn't believe governments would be bankrupted. Even in the focus on law enforcement juries have been deferential to government. Lawyers will be selective in taking cases because they only recover costs if the cases are successful.

Professor Schwartz stated that there is a question as to whether eliminating qualified immunity will do anything at all. She assures them there would be important changes if it is eliminated. It would provide a remedy for people whose rights were violated. It would also result in the clarification of the law. It would end the flow of court decisions that sends a message to police. It would reduce the complexity and focus on the critical issue.

Professor Reinert stated they are hoping this is a conversation. As Professor Schwartz noted in her research of qualified immunity there are other barriers in civil rights cases. It can be introduced as a defense and it may play a role in cases. When it is effective it hurts someone who has had their civil rights violated. They are speaking on claims based on the Federal and State Constitutions. When those rights are violated, it leaves the costs on the victim and sometimes they are very significant. For the excessive force cases in prison the person has to prove the officer had malicious and sadistic intent. There are other claims in prison that are hard to prove due to additional barriers on those cases apart of qualified immunity. Federal and state laws have barriers.

When qualified immunity is appealed, it goes back to trial court and there is a longer delay. When qualified immunity is operative and limits recovery, it also stunts the development of constitutional law. That matters in a lot of ways because, for officers, they want to know the boundaries of the Constitution.

Professor Pfander states much of his work concentrates on the history of the time it was foundational. As he looked back in the early 19th century, it was a different world. In that world, the courts took the responsibility of adjudicating the claim. The responsibility for protecting rights of officers was better suited for another branch of government.

The responsibility was assigned to the legislative branch or executive branch which could provide out of their funds to indemnify officers in appropriate cases. That left them to clarify the law. The other lesson from the 19th century shouldn't be managed by the courts because they should be classic jury cases. They often find in favor of the officer. If they ruled out qualified immunity that would leave the courts to do what they do best and that is to determine these questions of law.

Chair Bosson stated he recently read where the courts had the opportunity to make some changes, how would they characterize their reasons on the resistance.

Professor Schwartz states they do now know for sure. There are two possibilities perhaps the general view is that at the moment they were making the decisions (via cert petitions) they calendared and then there are bills in congress to end qualified immunity. There were questions on getting votes. Or there may be concerns revisiting the law because of stare decisis which is a precedence on previous decisions the Court has made.

Professor Reinert stated Justice Thomas is open to revisiting qualified immunity and has been criticized heavily. There are also some liberal justices who have criticized it including Justice Ginsburg. The justification for creating the doctrine is lost. The current version has no connection to 1868 or 1871. The justification is one that sounds in decisions they are about balancing policies. Those are sovereign decisions. The Supreme Court is making that the same for every state. It is up to every state to change it.

Mr. Baker asked if they don't revisit those items and say it goes out would the legislature adjust it?

Professor Reinert explained in the event it happens, there's no evidence to suggest there would be a flood of cases but even if there were, the legislature is situated to respond in kind.

Mr. Baker asked what did Justice Thomas say when he showed openness to reopening qualified immunity?

Professor Reinart stated that Justice Thomas said he did not think qualified immunity had any basis in law when they originally created it. There maybe there was some connection to law but it has become federal judge-made common law and it is not rooted in statute and therefore could be argued that it is illegitimate.

Professor Schwartz agrees, he added his colorful language on judges using their free wheeling policy choices on the doctrine, that it was time to revisit it.

Judge Whitaker asked about the case studies and the outcomes. Was there a study on the impact on the plaintiffs who lost when qualified immunity was granted? What was the economic impact on the families?

Professor Schwartz explained the important observation when the case was dismissed leaves the cost on the victims. She is not aware of an effort on what the economic analysis is.

Judge Whitaker asked what the demographics on the cases were?

Professor Schwartz stated she is trying to look at them again to be able to look at race, gender, community and economic status. It would be important to see.

Ms. Torres asked if there are officers on the commission and they have had some reach out, they are worried that removing qualified immunity will have an effect on being able to keep officers for fear they would be financially responsible.

Professor Schwartz explained the concerns about financial liability should be as assuaged by the qualified immunity policies in each state. State and city policies that provide the officer's defense and settlement and it states it will be paid for by the government. The officers will not pay on their own behalf, which is another protection for the financial dynamics. Plaintiffs and lawyers do not seek to recover to satisfy their judgement. There is a strong shield already from personal liability.

There are challenges in hiring and retaining officers, the research focuses on hiring and retaining them. They relate to concerns about police and community relations and the lack of the trust with communities. There is a symbolic reason behind this, there is an argument to be raised. Qualified immunity contributes to the lack of trust between communities and police. Professor Schwartz does not believe eliminating it would be a significant problem.

Ms. Torres stated similarly the government entities will have to be financially responsible for the officers. How will they afford it?

Professor Schwartz states there are many other barriers to relief in these cases. It does not result in the dismissal of that many cases. In her research she found in many of the cases they would have dismissed the cases anyway. The place where qualified immunity would make a difference is where a person's rights have been violated and the entity hasn't already decided to settle the claim and the cases where there is strong evidence of it. It is hard to predict the future; the legislature can be nimble in a reconsideration.

Professor Pfander explained by transferring to the city or county for the constitutional violations should mean there would be fewer incidents. That would mean fewer losses to the plaintiffs groups. The signals sent would lessen the liability and improve the quality of policing.

Professor Reinert stated perhaps individual officers may change their behavior if they face accountability. There are effective ways to change the system. The more they know what the law

is the easier it is to prevent people from running afoul of the law. Being a police officer is a difficult job and it makes it harder when they do not know their boundaries.

Chair Bosson agrees, in many of his opinions he explained how they should have avoided situations. They will discuss the financial burden on the State in the next meeting. Assuming it will be expensive they could do away with qualified immunity to open it up to unlimited risk.

Has anyone else experienced it? Insurance people they are good at assessing risk and charging a premium for it.

Ms. Torres asked if they have ever experienced an insurance agency who refused to cover entities with the elimination of qualified immunity.

Professor Reinert stated in the federal system qualified immunity exists and in the state system it does not always exist. They do know that in New York State there is arguably to some degree overlap of state tort claims and what would be a state constitutional tort. It does not cover everything. That's a small corner of the claims but they still matter. He would think of it as a new tort that would bring in a huge swath of activity.

Professor Schwartz explained there are many states where the most expensive cases concern excess force. The dollars are spent on excessive force cases and there are already state tort causes of action. There is already the ability to sue law enforcement where qualified immunity is not available. Self-insured jurisdictions payouts in litigation amounted to less than 1% of budgets.

Ms. Torres mediates these cases often on the death cases filed in state court and covered under the cap; they can settle for multimillions of dollars because of the federal case could be filed. The parties release on the cases where the damages are less, she sees qualified immunity motions filed right before mediation. The cases take longer to mediate. This commission is tasked with making recommendations in a short period of time. Ms. Torres thanked them for trying to help the Commission understand this portion.

Mr. Kelin asked what the break down is for those self-insured jurisdictions and ones that purchase insurance. In terms of shifting the cost for excessive force and damages often times the public picks that up in terms of Medicaid or other insurance coverage. He is curious if there is data.

Professor Schwartz tried to break it down. Self-insurance and outside insurance is largely determined by the size of the department.

Mr. Baker asked how does the court filter out the cases?

Professor Reinert explained it depends on the damages and if there were good arguments. The standard to the officer's judgment is high whether the constitutional right violation occurred or not. Perhaps there is discovery, in the prison context there are limitations on the types of claims. If there is discrimination you have to show it was intentional.

Professor Schwartz explained the first step is to find a lawyer to take the case and if likely can they recover one third of what the plaintiff receives. She has interviewed attorneys who think about bringing these cases and the message she got was that they deny 90% of the cases. If a plaintiff cannot find a lawyer they may never bring a case. In her research a significant amount of those *pro se* cases were dismissed.

Ms. Torres asked how attorney's fees plays a part.

Professor Pfander explained there are many procedures in place to limit the risk of frivolous cases. That has a tendency to get those dismissed.

Professor Reinert stated the transition even in the Federal system where there is a shifting provision lawyers think of the value of the case. He worked for a small civil rights law firm who engaged significantly in sifting through cases before deciding which to take. It takes many resources. Having a fee shifting provision would help.

Mr. Kelin asked if they see qualified immunity used in those types of cases outside of law enforcement and what are some examples.

Professor Reinert explained in the first amendment context in government speech, courts will look for clearly established law. In the due process context, they will look to see if it was a clearly established that it was a protected liberty. In the equal protection context, it is overlapped because of the need to prove intentionality. He has studied ten years of circuit court decisions on qualified immunity cases that is not published yet. He segregated out law enforcement cases. It is about 3,000 cases across the country. Qualified immunity is a powerful issue when used.

Professor Reinert explained the prison cases can be wrongful placement in solitary confinement and outside taking property. Sometimes they can be public employment.

Judge Whitaker asked about the mechanism they use in the Federal system.

Professor Reinert explained 28 USC 19-15A was part of the federal Prison Litigation Reform Act. It is a statutory provision for prescreening.

Mr. Rodriguez thanked the Professors and asked, out of all the cases in Federal court how many involve law enforcement?

Professor Schwartz stated when Professor Reinert collected his data he looked at government actors. She does not have the number but it would be good to know.

Professor Reinert stated he can recall it around 40-50% in the study he conducted. The system only breaks it down in detail. There are claims that involve law enforcement and other claims. It is fair to say it is 40-50%.

Mr. Rodriguez stated even though the commission is tasked with all public officials it was law enforcement that brought it to light. Would it be fair to say these causes being settled before and still being insured. If they make it are they being dismissed?

Professor Schwartz can say yes in her study with five districts. Among the almost 1,200 cases, qualified immunity was raised in 35% of them. When you get to the totals how they ended, out of those .6% were dismissed, 27% were dismissed at summary judgement and 4% were granted qualified immunity at appeal. She feels it is a big deal to those whose cases are dismissed. Those denied relief for whom none of the other barriers have been functional. It dramatically increases the complexity, cost and time associated with litigating these cases. It is a doctrine to those who have had their civil rights violated. It will not result in changing police accountability.

Ms. Stewart's technology was not cooperating she will send her question via chat box.

Ms. Torres asked if Colorado had codified it. What have they learned?

Professor Schwartz stated it can be done but it is brand new.

Mr. Rodriguez stated that a lot of cases are being settled before qualified immunity is raised and the entities are already paying substantial monetary awards and are still insured.

Professor Reinert stated some are also being dismissed or not being brought. He and Professor Schwartz agree it seems to operate and there are other things to cause dismissal of the cases. Some will be settled and some the parties cannot agree. It is important to note the Supreme Court has changed the qualified immunity doctrine and tries to send more signals to use it more and more often. It takes time for the courts to use it. It is least successful in the lower court and pretty successful in the Court of Appeals and then really successful as a defense in the Supreme Court. As time goes on the lower courts may start to expect to have greater rates of dismissal.

Mr. Baker read aloud Ms. Stewart's question: "who stands to "win" if qualified immunity is abolished. Attorneys? You present the possibility that getting rid of qualified immunity is not likely to make an impact on much change. Am I clear?"

Professor Reinert stated they have cases where there are rights at issue and the public stands to win if they eliminate qualified immunity. From a fiscal aspect law enforcement or the public do not stand to lose that much. It will not change much there are cases involving egregious conduct that plays a role. They do not want to be misheard. The commission is not being tasked with solving everything. However, it will bring greater accountability in some cases for those whose rights are violated.

Chair Bosson asked if there is an anticipated argument that anything done to increase the liability will have an effect on law enforcement whether it is morale or recruitment. Is there any research that would justify that claim or contradict it?

Professor Schwartz stated there has been research that the threat of suit or being sued plays in officer's decisions on the street. These are studies by criminologist who concluded the prospect of civil liability has a deterrent effect in the abstract study environment but not an effect on field practices. Another study showed many police officers did not consider the threat of a lawsuit among their top ten thoughts when stopping a vehicle or engaging in personal interaction. The data that is there is that the threat of being sued is not a present threat for the majority of officers.

Chair Bosson thanked the speakers for their time.

Mr. Baker thanked them for volunteering their time. Professor Schwartz stated they are all happy to help.

6. OTHER BUSINESS

Ms. Smith asked if any members would like any of the speaker's articles. Judge Whitaker would appreciate that.

Chair Bosson stated that Professor Schwartz does abstract research.

Judge Whitaker stated that Colorado has taken on this task, and asked if they have researched that legislation.

Ms. Smith will send the bill that was enacted. Ms. Torres thanked them for the handouts it was a lot of information to digest.

Ms. Smith thanked the law students for their work on it.

Mr. Baker stated he would like for any of the commissioners to weigh in on speakers and flag anything.

7. NEXT MEETING

Chair Bosson explained the next meeting there will be the topic of fiscal impact with the state, counties, cities and public schools. There are many moving parts which may take more than one session. They will also have Ms. Maureen Sanders testify. They may need to keep it open to have an extra session, they will decide at the next meeting.

Mr. Kelin stated the budgets of the entities or jurisdictions was interesting, it should be readily available. Especially for cases related to the tort claim act.

Ms. Torres explained all the municipalities are gathering the information, they are all run differently. It will be presented.

Ms. Torres read aloud a public comment asking how many presentations the speakers today have done together. They will have to find out.

Mr. Rodriguez thanked the staff and Vice Chairman Baker for bringing the presentation in layman's terms to get an understanding on qualified immunity he looks forward to the next meeting.

Ms. Stewart stated will get her technology working next month.

8. ADJOURN

With all business concluded the meeting adjourned at 4:04 p.m.

Signed and approved:

/s/Justice Bosson, Chair