July 2, 2020

The Honorable Nancy Pelosi, Speaker of the House  
1236 Longworth H.O.B., Washington, DC 20515

The Honorable Kevin McCarthy, Republican Leader  
2468 Rayburn House Office Building, Washington, DC 20515

The Honorable Mitch McConnell, Majority Leader  
317 Russell Senate, Office Building, Washington, DC 20510

The Honorable Charles Schumer, Minority Leader  
322 Hart Senate, Office Building, Washington, D.C. 20510

Re: Holding Police Accountable for Civil Rights Violations

Dear House and Senate Leadership:

This is an unprecedented moment in the history of our country, and decisive action must be taken to restore faith in government and the police. The undersigned, more than 300 law professors, call upon Congress to pass a pair of legislative reforms that will abolish qualified immunity and create vicarious liability for local government entities whose officers violate constitutional rights. These reforms will not cure all our nation’s problems with police violence, but they are among the most important and impactful things that Congress can do today to improve accountability.

Section 1983, enacted originally in 1871 as the Ku Klux Klan Act, was intended to provide a civil remedy under federal law for persons whose constitutional rights have been violated by state actors. In theory, the law provides a vehicle for such persons to seek redress from both the officers as well as the local governments that employ them. But the operative words are “in theory,” because the Supreme Court has drained the life from this statute in two significant ways.

First, the Court has created a defense of “qualified immunity.” This defense makes recovery against an officer very difficult, even when the officer has violated a person’s constitutional rights. The Court requires a showing that the right violated is one that was “clearly established,” such that every reasonable officer would understand that the conduct amounted to a constitutional violation. Most courts require a plaintiff to produce a case in which the Supreme Court or Court of Appeals has held unconstitutional conduct involving virtually identical facts. The requirement places an overwhelming burden on plaintiffs. It often results in “one free pass,” where the officer who has violated a person’s constitutional rights is absolved of liability because there was no case on point. Furthermore, the Court has compounded the injury of “one free pass” with the insult of a “continuing free pass” by allowing courts to grant qualified immunity without ruling on the merits of plaintiffs’ claims, thus insuring that no law becomes clearly established.

Second, the Supreme Court has created similarly insurmountable limits for a plaintiff who wants to sue the local government employer for an officer’s unconstitutional conduct. Although the entity is not able to raise qualified immunity, the Supreme Court held in a 1978 case, Monell v. Department of Social Services, that to recover from a local government under Section 1983, the plaintiff must show that the wrongdoing was caused by an official policy or custom. In most cases, a plaintiff would have to demonstrate a pattern of very similar constitutional violations and show that policymakers had knowledge of such incidents and failed to address the problem.
The defense of qualified immunity for the individual officers, combined with the heavy burden of proving an official policy or custom in order to recover from the government employer, results in no redress for persons whose constitutional rights have been violated. Congress should amend Section 1983, providing both that individual defendants have no qualified immunity and that local government entities shall be held liable for the unconstitutional acts of their officers.

Those who support qualified immunity argue that eliminating the defense will threaten to bankrupt officers for making reasonable mistakes while doing their jobs. But the Supreme Court’s Fourth Amendment doctrine already recognizes that officers often must take decisive action under quickly changing circumstances, and already protects officers from liability when they make reasonable mistakes. Moreover, even if an officer is found liable, he is almost certain not to face bankruptcy. Local government employers almost always agree to pay settlements and judgments against their officers through indemnification agreements. But, where the conduct is really egregious and/or in violation of the agency’s policy, the employer might refuse indemnification or an insurer may deny coverage, leaving the plaintiff whose rights have been violated without a remedy.

This “loophole” would be plugged by amending Section 1983 to make local governments vicariously liable for an employee’s constitutional violations. Replacing Monell with respondeat superior liability would mean that when an officer commits a truly egregious violation—and most likely would be denied indemnification—plaintiffs are still able to recover from the local government entity that gave that officer his badge and gun.

Several bills that have been introduced in Congress seek to abolish qualified immunity. We the undersigned endorse these proposals, as well as the proposal by Senator Braun (R-IN) to replace Monell with respondeat superior liability.

CC:

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