

Distribution: Attached separately

Subject: Proposed legislative action to eliminate qualified immunity for Vermont law enforcement officers

Senators, **Hinsdale, Balint, Baruth, and Sears** are sponsoring a bill (**S.254**) to eliminate "qualified immunity" for Vermont police officers. Their argument, with the support of activist groups **ACLU** and **NAACP** and as reported by the **Burlington Free Press**, is that they want to remove any systemic roadblocks that could hamper the ability of people of color to secure their "rights" as they are "disproportionally" subject to police and legal system inequalities.

ARUGUMENT:

Qualified immunity, established by the **SCOTUS** in 1967, protects state and local officials, including police officers, from personal liability unless they are determined to have violated what the court defines as an individual's "clearly established statutory or constitutional rights." The doctrine can be used only in civil cases, not criminal, and allows victims to sue officials for damages only under those circumstances. ^{*(1.7)} States do not have the power to abolish the federal doctrine of "qualified immunity", but they can ban its application in state civil lawsuits against public officials.

To me this bill should be a non-starter, disqualified by its racist tones for emphasizing one specific faction of the Vermont population and not the state's population. This legislation is pandering to a certain group which should set off alarm bells. If the tables were reversed, there would be a raucous outcry.

Be reminded that there is only one **U.S.** and one **Vermont** Constitution. Lawmakers enact one set of laws, not two or more to cover various factions of the population. All Americans have the same legal remedies through the court system(s). I question the bill's motive and what appears to be prejudicial posturing with intent to tip the scale in a specific direction. What the sponsors are suggesting is exactly what they say they are trying to stop.

As of October 7, 2021, "in state after state, **qualified immunity** bills withered, were withdrawn, or were altered beyond recognition. **At least 35 state qualified-immunity bills have died in the past 18 months**, according to an analysis by The Washington Post of legislative records and data from the *National Conference of State Legislatures*. Among at least four bills that are still alive, three initially called for a complete ban on qualified immunity. One of these, in Michigan, has since been amended to allow use of the legal defense in many instances. Among the seven qualified-immunity bills that have become law since last year, only Colorado has completely barred the legal defense for officers. Iowa actually strengthened qualified-immunity rights of its officers, and Arkansas did so for its college and university police officers". ^{*(1.6)}

Why aren't these legislators (sponsors) saying they are committed to reviewing why 35 states killed their qualified immunity bills. Why did they say in the **VTDigger** article of 12/15/21 that they are modeling the Vermont bill after Colorado's, the only one that eliminated qualified

immunity totally for police in their state? My guess is they have a predetermined objective and have little interest in differing opinions. *(1-8)

Many groups i.e., **Antifa** and **BLM**, also want to eliminate qualified immunity. Why wouldn't they? After causing hundreds of billions of dollars in damage to property in 2020 and 2021, injuring thousands of police officers and citizens, they will do anything they can to neutralize any organization that gets in the way of their violent civil disobedience proclamation.

A recent article in **VTDigger** (12/15/21) quotes Diane Goldstein, who is the executive director of the **Law Enforcement Action Project**, saying at a news conference that "ending qualified immunity will not bring open season upon law enforcement." "It will simply allow judges to hear the facts of the most egregious cases, which are currently causing the public perception that police are, in fact, above the law". *(1-8)

That is an odd assessment by Ms. Goldstein as that is exactly what "qualified immunity" does. It requires a court to make a judgement that a police officer did or did not break the law. If the officer did, then qualified immunity does not apply, and the officer/agency may face court action. Note her key words, "public perception", obviously meaning, not fact, not readily understood by the public, etc. **That is the crux of this issue.** The public, wrongfully so, believes police have "guaranteed immunity". That is a patently false impression or fact and is causing angst in the public's mind needlessly!

I know of no in depth empirical, fact checked data, (i.e., **actual case files**) in Vermont that supports this radical legislative gambit. The vague data that I have seen, i.e., the UVM study on VT policing, or from sectarian polling that fits the agenda of the groups pushing for this legislation, does not begin to meet the high bar required to attain such a monumental legislative change. *Qualified immunity* is a critical legal path that affords protection for both police and those challenging a police action. The Supreme Court has made many rulings on the subject. In 1998 **SCOTUS** made the process much more straightforward.

According to Steffen Gillom, president of the Windham County Chapter of the *National Association for the Advancement of Colored People*, his mission, and the mission of the Rutland Area **NAACP** (director Mia Schultz), and a coalition of advocates led by the **ACLU** of Vermont, "is to end qualified immunity for law enforcement officers". They claim, that would allow people who have had their civil rights violated to get justice more easily in civil court". **ACLU** calls it a nationwide effort to address police abuse of power and end systemic racism. *(1.2)

Changes in policing/prosecution in many jurisdictions have created epicenters of record high crime in America today. At least 12 (*Progressive led*) major U.S. cities have broken annual homicide records in 2021. Residents overwhelmingly are asking to have policing and prosecutorial practices be restored to past levels. Progressive activists/legislators have continued their quest to dismantle policing in this country and have now made it a "**regressive**" movement.

Ultimately it rewards criminal activity and leaves the citizenry to fend for themselves, often at the hands of repeat offenders.

According to the ACLU, Recent polling in Vermont “indicates” that three out of every four Vermonters across the state favor ending qualified immunity for police officers. **I would ask, how many people polled can even define the legal definition or the limitations of *qualified immunity*.** My guess, very few if any. It is a federal doctrine that protects both a plaintiff and a defendant in the court process. I’m sure that those polled overwhelmingly believe (or were swayed) that a police officer has unrestricted indemnity protection against all civil judgements. **Nothing is further from the truth.** **It must be remembered that there is no protection if an officer is found to have violated any individual’s constitutional guarantees or statutory laws.** Every officer is sworn by oath to uphold the constitution and the laws/ordinances of the jurisdiction he works for. It is not a decision that can be made by the leadership in a policing organization. Only the court can make that decision. ***(1.1)**

Only **18% of Americans support dismantling/defunding of police.** The biggest turnaround from 2020 polling is among **black adults and Democrats** who want to see increased funding and staffing of more police officers. **(USA poll Mar. 2021).**

Qualified immunity doesn’t just relate to police but also to most public officials. **School employees, teachers/administrators have Qualified Immunity.** **Prosecutors have “absolute immunity.** **Legislators also have immunity** protections. I am not sure how one can, with egalitarianism, be selective on who can or cannot fall under the purview of these **legal remedies** just to make it fit their parochial political ideology. This bill is pressing to remove a legal avenue for “plaintiffs” and “defendants” to use within the court system for relief of actions precipitated by a law enforcement officer. This bill also seems to run counter to multiple U.S. Supreme Court rulings. It should also be noted that **“qualified immunity”** is not the same as **“guaranteed immunity”** or **“indemnity”**. **These legislators might want to be cautiously tempered in their zest to “snipe” one entity (police) as I am sure that this may be just the tip of the iceberg, i.e., teachers, legislators, et al.**

It is difficult to believe this legislation is not intended to be retributive toward policing. **If that is the case, this bill is dangerous and will, in the end, denigrate policing to a less than effective entity.** In the past year, police organizations nationwide have lost over 100K officers. Vermont is unable to interest, acquire or train new recruits as witnessed by a recent ***Vermont State Police*** interview on local TV channel 3.

In 1967 the Supreme Court feared that police would not seek to arrest suspects, or do their jobs as diligently, if they feared being held liable. “A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does”, Chief Justice Earl Warren wrote. ***(1.1)**

In 1998, [§Harlow v. Fitzgerald](#), the Supreme Court, in an **8-1** decision, said that public officials have immunity **unless the official knew or should have known** that their actions violated the plaintiff's constitutional rights. It replaced the previous "good faith" test with something more "objective." **This test is now the analysis courts use when determining if qualified immunity protects an officer (or any public official) from a lawsuit.** *(1.1)

Courts employ a two-part test to determine whether **qualified immunity** applies. If the answer to both questions is yes, then the public official does not get immunity. *(1.1)

- Did the officer violate a Constitutional right?
- Did the officer know that their actions violated a "clearly established right"?

One can only assume that the sponsors of this bill, along with **ACLU, NAACP**, and others, are attempting to "dissuade" police officers from performing their sworn duties through intimidation and trepidation. This is **exactly what the Supreme court was worried about**. We rightfully expect all police officers to be professional and color blind as they execute their professional responsibilities. Anything less requires strong disciplinary action or immediate termination.

Vermont isn't exempt from acute liberal governance, particularly in Burlington where support from the mayor and city council have partially defunded and reduced staffing the city police. They have seen crime rise significantly, particularly illicit use of guns and drug dealing. The county prosecutor is "going easy on criminals", even refusing to press charges in a number of high-profile cases. The Governor stepped in and demanded action by the **AG** and pressed for reassignment of cases. It seems to be the same Progressive thinking that is the genesis of this very bill being discussed in this memo. Make it easier for criminal activity and harder for effective policing. *(1.4)

Before this bill sees any action, or the light of day, the sponsors need to be very detailed **publicly** on **all the veritable statistics** justifying their accusations of malfeasance and **not be based on emotionally charged surveys or polls; just hard factual data**. Data must show, who specifically, when, where, how, they were damaged by *qualified immunity*? How did the court base it's decision that supported the police officer(s)? This must include multiple cases to show a historical trend and include any cases that were overturned on appeal. Anything less would show this is simply a political ploy with no reputable justification for blocking qualified immunity in VT.

This bill begs more questions than it answers. **Vermont, for decades, has repeatedly been one of the three safest states in the nation.** Tampering with qualified immunity will dissuade more qualified people from joining or remaining in law enforcement in Vermont. Having more police officers leave the profession, for what seems to be a manufactured reason, will further erode the safety of our citizenry as is happening in many Progressive jurisdictions across the country!

In a nationwide study *(1.5) of the arrest of police officers, it must be noted that in a six-year study, 2005-2011, an average of 924 officers were arrested annually out of an average total of 696,644 sworn officers. That equates to about .001% of all officers who have arrest powers per year in

the U.S and .0003% of the U.S. population. These arrests span a potpourri of crimes, i.e., violation of civil rights, obstruction of justice, misconduct, simple assault, domestic violence, profit motivated, alcohol (DUI, etc.), weapons charges, sexual misconduct, etc. This was a very detailed report with 669 pages of data analyzed. It covered **2520** state and local agencies. **I make note of this study only to establish a historical reference that police officers overall have a stellar record of supporting/adhering to rigid expectations and standards. Those who violate others civil rights do pay a heavy price for their actions, rightfully so.**

SUMMARY:

I view that this bill is entirely politically contrived and that it will incur long term damage to Vermont policing if enacted, which is what I believe these progressive legislators and activist groups really want. There is little to no evidence that "qualified immunity" is even a minor point of consternation within the Vermont law enforcement community or in our court systems. Rather than trying to further "damage" policing in Vermont through progressive legislation, we would all be better served to support those that respond to some of the worst tragedies any of us could imagine, make split second decisions, often work alone at night and in rural settings, then get up do it all over again the next day. It should not be profoundly influenced by what several activist groups (NAACP / ACLU) want as noted in their fund-raising web sites in support of a self-serving agenda to further advance their true ideologue for less policing. *(1.9), *(1.10)

The lady of justice is blindfolded for a reason. The blindfold represents impartiality, the ideal that justice should be applied without regard to wealth, power, or other status.

Respectfully,

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