

# Qualified Immunity Defense

**Will it Change?**

**STEWART HARMAN**

# Interpreting Qualified Immunity

- ▶ “Qualified immunity shields [government] officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).
  - ▶ “A government official’s conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).
  - ▶ The primary question is “whether it would be clear to a reasonable government official that his conduct was unlawful under the circumstances presented.”

# Remember this from last year?

## Post Ferguson

- ▶ What has changed?
- ▶ Strongly held opinions on both sides of the issue
- ▶ High Court's position is clear
  - ▶ No indication it will change anytime soon
  - ▶ Case Law highlights
- ▶ Limits to any efforts to reform the doctrine

# Post Ferguson, George Floyd, Breonna Taylor & Jacob Blake

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# Qualified Immunity

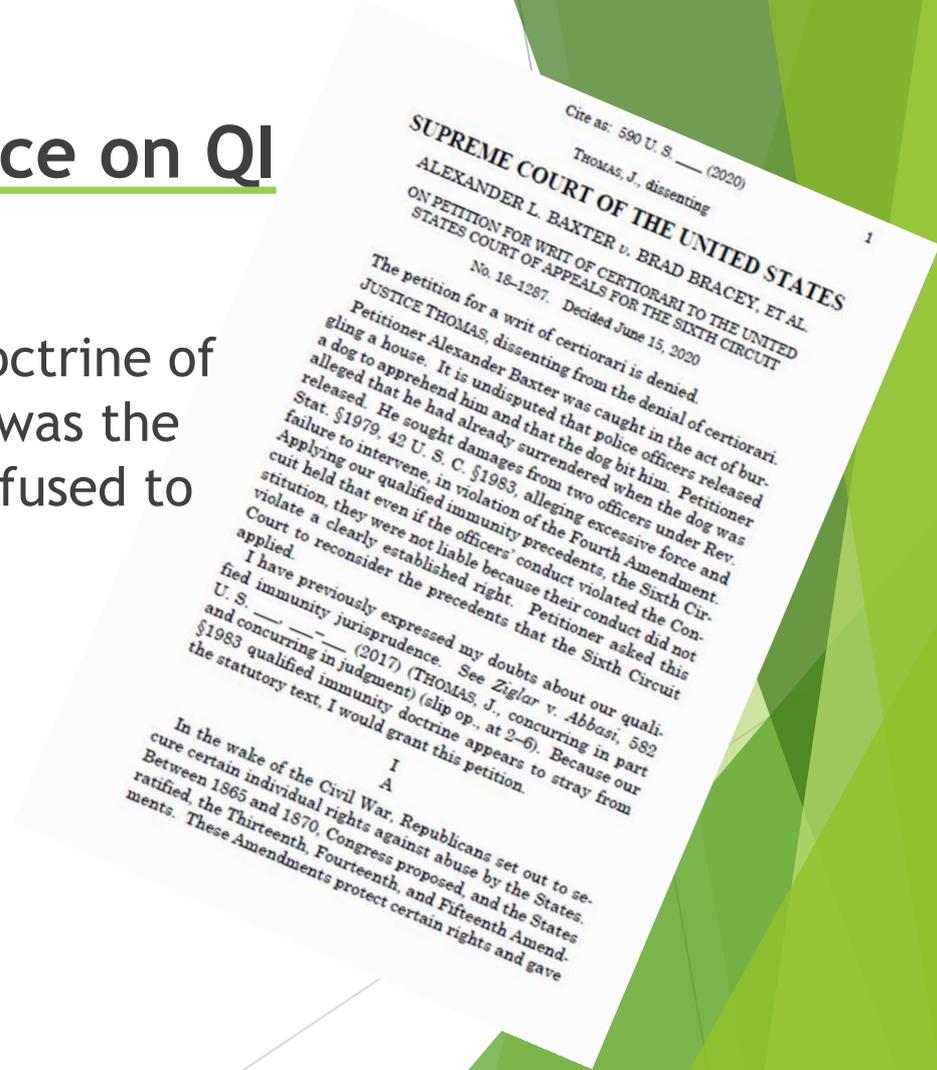
- ▶ As a reminder, under "qualified immunity," police and other officials are immune from federal civil lawsuits unless their actions violated clearly established legal precedents at the time. Some courts have required an extraordinarily precise match between the misconduct alleged in one case and in a prior one in order to find a violation of someone's constitutional rights.
- ▶ Despite ever increasing criticism over the past 6 months, the U.S. Supreme Court passed up at least seven cases this last June that would have allowed it to reconsider aspects of the doctrine.
- ▶ The court rarely explains why it is not taking cases and did the same in June, with the exception of Justice Clarence Thomas who recorded his dissent in connection with the decision to pass up one case stemming from a 2014 incident involving a police dog's bite of a homeless man, Alexander Baxter.

# *Baxter v. Bracey & Harris*

- ▶ Nashville police caught Baxter in the process of carrying out a burglary. He claimed he had already surrendered when the dog attacked.
- ▶ The 6th U.S. Circuit Court of Appeals at Cincinnati held that the police officers weren't liable because their conduct didn't violate a clearly established right. The court said Baxter had been hiding before police found him in the home, and the dog was well trained to only bite once. In those circumstances, Baxter's right to be free of excessive force wasn't clearly established, the appeals court said.
- ▶ The 6th Circuit Court held that while it was well established that a police dog couldn't be unleashed on a suspect who was lying down, there was no case addressing someone sitting down with their hands up, as Baxter said he was doing.

# U.S. Supreme Court Stance on QI

- ▶ Both Justice Thomas and Justice Sotomayor have criticized the doctrine of qualified immunity, but Thomas was the only dissenter when the court refused to hear *Baxter v. Bracey*.



# Justice Sotomayor's Position

- ▶ Justice Sotomayor repeatedly has warned that the court's "one-sided approach" to qualified immunity—more often protecting police—sends an "alarming signal" to law enforcement and the public.
- ▶ In the *Sigler v. Abassi* case in 2017, Justice Sotomayor wrote "We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force, but we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases."
- ▶ Sotomayor, a former prosecutor and the only former trial judge now on the Supreme Court, has been the court's most consistent critic of its qualified immunity rulings.
- ▶ In three recent qualified immunity dissents and one Fourth Amendment dissent, Sotomayor cautioned that the court's decisions were supporting a law enforcement culture that she said views qualified immunity as an "absolute shield" against liability for alleged abuses.

# Congressional Action

- ▶ Democratic and Republican lawmakers in Washington have been pulling together their own versions of police reform legislation. A Democratic plan unveiled in the House by Representative Justin Amash of Michigan is called the Ending Qualified Immunity Act and would roll back qualified immunity for law enforcement officers. 64 Representatives have joined as co-sponsors.
- ▶ Several Democratic members of the House of Representatives Judiciary Committee, which heard testimony in June on police practices, denounced the court's rejection of the cases.
- ▶ “The Supreme Court’s failure to reconsider this flawed legal rule makes it all the more important for Congress to act,” Chairman Jerrold Nadler and two other committee members said in a statement.
- ▶ Democratic Senators Markey, Warren and Sanders have proposed legislation in the Senate to end qualified immunity.
- ▶ Some Republican lawmakers have come out against abolishing qualified immunity, and the White House has signaled its opposition.”

# What Would it Mean for States?

- ▶ If qualified immunity applies, money damages aren't available against the government employee or official even if a constitutional violation has occurred.
- ▶ If qualified immunity doesn't apply, while the government employee or official technically is responsible for money damages, the governmental entity typically indemnifies and defends its employee. So qualified immunity protects states and local governments from having to pay money damages for actions not yet deemed unconstitutional by a court.
- ▶ According to the Supreme Court, qualified immunity protects all except the plainly incompetent or those who knowingly violate the law.

# What Would it Mean for States?

- ▶ The Supreme Court has offered multiple justifications for qualified immunity including that it encourages government officials to “unflinching[ly] discharge . . . their duties” without worrying about being sued for actions a court has not yet held violate the constitution.
- ▶ The Supreme Court has held that police and correctional officer use of force violates the Fourth Amendment when it is “excessive.” Police and correctional officers receive qualified immunity if it isn’t clearly established that their use of force was excessive. According to the Supreme Court, while qualified immunity “do[es] not require a case directly on point,” it does require that “existing precedent must have placed the statutory or constitutional question beyond debate.”

# Questions?

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