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Law, Order, and Qualified Immunity at the Supreme Court

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Outside of the lawyers who watch such things, few Americans know that later this week the Supreme Court will be discussing a number of cases regarding the use of police power by local government officials and qualified immunity. Qualified immunity and how it should function in society is an important issue deserving of a fair debate. Today, I offer this article as a brief in its defense.

Qualified immunity is a legal doctrine that protects public officials from civil liability and corresponding monetary damages unless the official violated clearly established law and all reasonable officials in the same circumstances would have known the specific action violated the law. Groups like the CATO institute have joined together asking the Court to do away with qualified immunity altogether, and such groups have submitted page after page of amicus briefs demanding an end to the doctrine, urging that government officials—including but not limited to police officers—should face legal exposure for their actions performed in the line of duty.

On the other side of the debate, defenders of the qualified immunity doctrine argue that it is a common sense recognition that law enforcement officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Police officers do not make the split-second decisions at issue with the benefit of video footage of the incident in slow motion, nor hours or often even minutes to plot the best possible course of action after a thorough review of all possible evidence. Officers usually make the decisions at issue in a flash, often in situations that involve a real and palpable threat of possible violence to themselves or others. If—in addition to the existing inherent threat of serious physical harm—we tack on an unavoidably higher likelihood of civil liability and corresponding monetary ruin, who can we expect to be willing to even take the job?

Advocates seeking to end qualified immunity point to a parade of cases with bad facts, arguing that they illustrate why it must be discarded. Bad facts make bad law, and cases with bad facts

should not tempt us to allow the exceptions to make the rule. For every bad case, there are scores of cases and never-litigated examples illustrating why the doctrine should be retained. Consider Mullenix v. Luna. DPS trooper Mullenix fired from the cemetery road overpass over I-27 at a car driven by Israel Leija, Jr. racing north fleeing police at speeds of up to 110 mph. Leija had told the Tulia Police Department dispatch that he had a gun and that he was going to shoot at the police officers chasing him. Mullenix hoped to hit the engine block to disable the vehicle and end the chase, allowing officers to detain Leija and neutralize the deadly threat to both fellow drivers and police officers alike. Tragically for everyone involved, Mullenix missed the engine block and struck Leija instead. In the ensuing lawsuit, the district court denied Mullenix's motion to dismiss the suit on qualified immunity grounds, and he was forced to appeal the case to the Supreme Court. The Court determined by an 8-1 vote that Mullenix should be afforded qualified immunity for his actions—three years after the fact. Only Justice Sotomayor dissented.

Supreme Court watchers and advocates are all abuzz about which earlier Court decisions are "super precedents" that cannot be later reversed. Since 2004, the United States Supreme Court has reversed lower courts who denied qualified immunity 18 times. See Amicus briefs of California State Association of Counties & League of California Cities filed in the case of Browder v. Nehad at p. 16. Law enforcement agencies have trained, set budgets, and crafted policies in reliance on that settled law—so settled that the oft-embattled Justices Scalia and Ginsburg found themselves on the same side. A reversal of the mechanics and protection of qualified immunity—arguably a "super precedent" if there ever was one—will undoubtedly come at great public cost.

A large part of my practice involves defending law enforcement officers like those discussed above who have been accused of using excessive force allegedly in violation of the Fourth Amendment, including cases involving the use of lethal force. Not once during that time have I, nor any other attorney at my firm who has done the same work over the course of many decades, met an officer who ever went to work hoping that day was the day they would "get" to use force on the job, much less deadly force. Any narrative suggesting otherwise is false, or at the very least an exception so extraordinarily uncommon as to be a worthless outlier in the debate over whether police officers' split-second decisions should be afforded qualified immunity.

Consider the case of a police officer my law firm defended in the Western District of Texas to illustrate the importance of qualified immunity. In that case, the officer responded to a call about the suspicious actions of a customer in a store in a rural county of Texas. The officer arrived and began talking to the customer. Several minutes into the conversation, the man, Jessie James Tabor, began rambling incoherently. The officer took him into custody in his car for protection. Unbeknownst to the officer, Jessie James was on meth and kicked out the back window of the police car. When the officer opened the door asking that he calm down, the handcuffed Tabor fought his way out of the car and attacked the officer, praying at the top of his lungs to "shoot him in the head, Lord."

The officer—alone in the parking lot with no other officers on duty within a 20-minute drive other than the rookie officer who was training under him—engaged the man for over 15 minutes keeping him at bay, corralling him, and issuing over 100 commands for him to stop. Finally, the officers tased Tabor and he was subdued. Jessie James Tabor sued. The entire event was captured on video. Despite the video evidence, the trial judge denied the motion to dismiss the case based on qualified immunity and a three-day trial ensued.

At the end of evidence, the jury deliberated for less than 30 minutes before deciding that the actions of the officer did not violate the Fourth Amendment. Members of the jury said afterward that the officer's conduct was exemplary. While the verdict exonerated the officer on paper, it came two and a half years after the event itself. The required—and arguably unjustified—expense of time, stress, and attorney fees is certainly relevant to the greater debate about whether to discard the protections afforded by qualified immunity, especially in regards to what kinds of lawsuits we want to encourage, what effects discarding the doctrine would have on the already cash-strapped municipalities who often bear the brunt of those lawsuits, and the effects on our individual police officers themselves. The officer in question had previously been named officer of the year in his small department. That officer left law enforcement altogether because of the lawsuit, exoneration or not. When good police officers leave law enforcement, the societal cost is by no means small, no matter whether the loss is measured monetarily or intangibly.

Consider the case of the long tenured officer called by a local family to come to their aid because one family member was running around the front yard without clothes and acting in a manner that made them afraid of him and what he might do. Upon the arrival of that officer, the unarmed naked man attacked and took the officer's baton during the struggle. During the first interview about the case with one of my law partners, the officer told him with a shaking voice—tears in his eyes and no joy—that the moment the man took his baton he knew "it was him or me." The naked man, now armed with the baton, ran back toward the same house where his family had originally called from seeking those same police officers' protection. Backup officers pleaded with the man to drop the baton—a weapon inherently dangerous enough to be illegal for civilians to carry in many states—and to stop running toward the house, toward the frightened family. He refused. Fearing for the safety of the frightened family, three of the four officers fired their side arms to stop him. They did, and the family was protected. The family sued for the officer's actions. Three of those four officers left law enforcement because of the lawsuit, the fear that they might be sued again, and the fear that they might in the future be tempted to refrain from acting—to avoid a lawsuit—with potentially deadly consequences for the very persons who sought their help.

In addition to the cases above, statistics amplify reasons for qualified immunity. According to one of the amicus briefs written in part by a former law partner filed in the Hunter v. Cole, there have been 510 law enforcement officers feloniously killed in the line of duty in the past 12 years at the time of filing. See Amicus Brief of the International Assoc. of Chiefs of Police, et. al. in the pending Hunter v. Cole case at p. 15. Given this, "[m]ore officers may choose to take an overly cautious path that could result in lost lives if the courts will not guard them from liability for reasonable actions to protect the public". Id at 15. In addition to those physical risks, litigation can also be so stressful as to be life-changing, and rarely in a positive way. "A lawsuit is, after all, a public outcry alleging that the officer acted improperly, and this is a heavy professional burden to bear". Id at p. 22 citing Kevin Gilmartin, Emotional Survival for Law Enforcement (2002).

Judges review issues in lawsuits from the peace of their chambers with no immediate time constraints, no adrenaline, and no imminent threats of possible physical harm. Such decisions are by no means easy, and the judges making them often must effectively pick a winner and a loser in civil, criminal, or family law cases that involve extremely serious consequences, which is no small emotional burden to bear for the decisionmaker. When a trial court makes a ruling, parties can seek appellate review. On appeal, the trial court's decision is often reviewed under

an abuse of discretion standard, where the original courts' decision legally must be affirmed unless the trial judge abused his or her discretion. From a bird's eye view, formally and systematically trusting the original judge's difficult decision that he or she made in the official course and scope of the job bears a striking resemblance to qualified immunity. We must ask ourselves, why are we so willing to debate and consider stripping police and certain other officials of their long-enshrined legal right to being afforded the benefit of the doubt for decisions made on the job, while on the other hand we so unquestionably afford other officials the same level of trust as a matter of course?