



Before the court: A united front takes aim at qualified immunity

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The diverse opponents of qualified immunity have thrown their weight behind at least five appeals now awaiting the Supreme Court's attention, each considered a potential means of removing or softening the doctrine.

One of them is the case of Alexander Baxter, a homeless man arrested in Nashville, Tennessee, during a Jan. 8, 2014, home break-in. By Baxter's account, he had already put up his hands in surrender when police released a service dog that then rushed Baxter and bit him, resulting in an injury that required hospital treatment. The officers said they did not see his hands raised before they released the dog.

While serving the 12-year prison sentence arising from his conviction for attempted theft on the night of the alleged attack, Baxter – originally representing himself – sued the cops in federal court, alleging that they used excessive force by setting the dog on him.

A federal district court judge hearing Baxter's case allowed it to move forward. But in a Nov. 8, 2018, ruling, the 6th U.S. Circuit Court of Appeals in Cincinnati, Ohio, granted the officers immunity. Baxter then petitioned the Supreme Court to overturn the lower court. "I felt like the officers were wrongly getting away with spilling my blood," Baxter told Reuters in a handwritten letter sent from prison in Tennessee.

Now, the liberal American Civil Liberties Union and the libertarian Cato Institute are providing legal support for Baxter. The Alliance Defending Freedom, a conservative Christian advocacy group, the NAACP Legal Defense & Educational Fund, a civil rights group, and a diverse collection of legal scholars are also backing some of the cases awaiting the high court's attention.

In the Baxter petition, one of 11 qualified immunity appeals the Supreme Court plans to discuss on May 15, the ACLU has explicitly asked the justices to consider whether qualified immunity should be "narrowed or abolished." Cato, meanwhile, has filed friend-of-the-court briefs for Baxter's case and others like it as part of a campaign to end qualified immunity.

If the justices were to take up Baxter's case or another like it, the ACLU, Cato and other foes of qualified immunity are ready with arguments that the doctrine is improperly and inconsistently applied; that it has no basis in civil rights law; and that its purported benefits – to avoid second-

guessing officers or saddling them with distracting lawsuits – do not justify trampling civil rights.

The critics do not universally agree on what could replace the doctrine, or, if the justices refuse to abolish it, how it can be improved. Some suggest removing protections for officers that have been built up over years to avoid disclosing evidence, for instance, or assessing whether they acted in good faith. Others call for a rethink of the two-question test for deciding requests for qualified immunity.

“I don’t know we know the right answer yet,” said Emma Andersson, the lead ACLU lawyer on the Baxter appeal.