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CONTENTS

MARCH / APRIL 2021

ROBOCALL ME MAYBE-FEDERAL RESTRICTIONS ON MUNICIPAL AUTOMATED MESSAGING
By: David S. Johnson, Assistant City Attorney, City of Arlington, Texas
While emergency alerts and COVID updates may generally be communicated without the recipient's prior consent, most municipal robocalls and texts, even where well-intentioned, require advance authorization.
PAGE 6

THE MUNICIPALITY AS SHAREHOLDER: SECURITIES LITIGATION IN THE AGE OF FISCAL AND SOCIAL RESPONSIBILITY
By: Joshua Grabar, Principal, Grabar Law Office, Philadelphia, Pennsylvania
Municipalities increasingly take action as shareholders, seeking recourse for corporate fraud and mismanagement and exerting pressure for social and environmental reforms.
PAGE 12

DEPARTMENTS

PAGE12, 6, ILLUSTRATIONS BY TRUJILLODESIGN

18 AFFIRMATIVE LITIGATION
Public Sector Entities and Affirmative Litigation
By: Edward Truant, Founder, Slingshot Capital, Inc., Toronto, Ontario and Grant Farrar, Founder, Arran Capital, Inc. Evanston, Illinois
An additional mechanism to fund municipalities seeking recourse on behalf of their constituents.

22 PRACTICE TIPS
Mandatory Employee Vaccinations: Complexities Abound
By: Karen Day White, Executive Counsel, Louisiana Municipal Association, Baton Rouge, Louisiana
Covid vaccines are increasingly available. Easy answers are not.

24 SUPREME COURT
Legislators Rein in Qualified Immunity: High Court Review Ahead?
By: Lisa Soronen, Executive Director, SLLC Washington D.C.
Legislatures seek to limit QI.

28 AMICUS
About Face? Reviewing a Prior Administration's Pending Cases
By: Amanda Karras, IMLA Deputy General Counsel and Director of Legal Advocacy
A tradition of Solicitor General fidelity to prior pleadings.

32 PREEMPTION
Pandemic Proof? Cannabis Retailers Thrive in Ontario
By: Monica Ciriello, Ontario 2015, Hamilton, Ontario
A province overrides local regulatory efforts. Uncontrolled proliferation follows.

34 DIVERSITY
Diversity, Equity, and Inclusion, Oh Yes!
By: Deanna Shahnami, IMLA Associate Counsel
The law department as an investment portfolio.

36 INSIDE CANADA
Examining Racism, Bias, and Procedural Fairness
By: Monica Ciriello, Ontario 2015, Hamilton, Ontario
Recent cases of interest.

38 LISTSERV
Virtual Realities: Avoiding Mishaps While the Camera is On
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Do's and dont's in a Zoom world.

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SUPREME COURT

BY: LISA SORONEN,
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Legislators Rein In Qualified Immunity: High Court Review Ahead?

Lawyers who defend police officers and other government employees in civil rights cases held their breath every Monday during most of May and June 2020. Over a series of conferences, the U.S. Supreme Court was considering whether to take nine petitions[1] involving qualified immunity. That wouldn't have been unusual or alarming except for the fact that in a number of the petitions a party and/or an *amici* asked the Court to modify or overrule the doctrine. When multiple petitions piled up over months, speculation grew that the Court would agree to hear a number of the cases at the same time and somehow alter if not abolish the doctrine.

On June 15, 2020, government lawyers could rest a little easier. The Court refused to hear any of the petitions. Only Justice Thomas filed a dissenting opinion in one of the cases.[2] He reiterated his observation that qualified immunity is not mentioned in the text of 42 U.S.C. § 1983.

It is impossible to know whether qualified immunity is safe from the Supreme Court tinkering with it in the near future. We don't know why the Court didn't grant any of these petitions. At least two theories are plausible. First, the Justices may have known/suspected that Justice Ginsburg's death was imminent. If so, they may have wanted to spare the new Justice the challenge of immediately having to decide a question as big as what to do with qualified immunity. Second, while some of the Court's more liberal Justices may be open to eliminating or modifying the doctrine, they may have doubted that enough conservative colleagues would join them, making a grant pointless. Adding to the uncertainty, the Court now may want to wait and see what Congress does with legislation modifying qualified immunity proposed after George Floyd's death.

Since at least 2017 there has been a significant, ongoing, and (somewhat) organized attack on qualified immunity. The attack has happened on three fronts: at the U.S. Supreme Court and the lower courts, before Congress, and before state legislatures. The attack on the latter two fronts has been primarily due to George Floyd's death. This article explains how the Supreme Court ended up with nine petitions asking it to do something dramatic with the doctrine and summarizes what is going on in Congress and state legislatures related to qualified immunity.

Lower Courts and the Supreme Court

It all started with an academic article asking a simple yet bold question: is qualified immunity unlawful.[3] According to William Baude, the Supreme Court has articulated three legal justifications for qualified immunity; but all are flawed.[4] The most well-known is that qualified immunity "derives from a putative common-law rule that existed when Section 1983 was adopted" in 1871.[5] But Baude claims "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted."[6]

In *Ziglar v. Abbasi*, 582 U.S. ___ (2017), Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. In a concurring opinion, Justice Thomas cited to Baude's article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871.[7]

Baude's moment in the sun wasn't over yet. In *Kisela v. Hughes*, 584 U.S. ___, *6 (2018) (per curiam), a majority of the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer in an excessive force case. Justices Sotomayor and Ginsburg criticized the majority opinion citing to Baude's article for the proposition that the Supreme Court "routinely display[ing] an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'"[8]

So now Justices on the right and on the left had criticized qualified immunity in a short span of time—albeit for different reasons. But that isn't a movement—it might just be bad luck.

The attack on qualified immunity became clearer and more organized in March of 2018 when the Cato Institute held a forum on qualified immunity (featuring Baude as one of the speakers). Cato announced that it was beginning an "*amicus* campaign" in lower courts to alert them to the "variety of problems" with the doctrine.[9]

Since then, Cato has attacked qualified immunity on a number of fronts. As promised, it regularly files a prepackaged *amicus* brief in the lower courts criticizing the doctrine. The brief, relying heavily on Baude, argues qualified immunity is "untethered from any statutory or historical justification" and is "amorphous" and "unworkable."[10] Cato asks the lower court to deny qualified immunity and "take note of the legal infirmities with qualified immunity generally."[11] Cato has also filed numerous *certiorari* petitions asking the Supreme Court to modify or overrule the doctrine.[12]

Cato also maintains a website called Unlawful Shield[13] where it, among other things, criticizes the work of others who defend qualified immunity, reports on lawsuits that illustrate the problems it perceives with the doctrine, and summarizes legal and academic developments related to qualified immunity. In September 2020 Cato issued a lengthy report describing qualified immunity as a "legal, practical, and moral failure."[14]

At least before the Supreme Court, Cato isn't the only game in town. "Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law" has filed a number of *certiorari* stage *amicus* briefs asking the Court to "revisit" the doctrine.[15] Signatories on the cross-ideological brief, true to its names, include left and right leaning organizations most of which don't focus exclusively on law enforcement or criminal justice issues. The cross-ideological brief argues that qualified immunity "regularly denies justice to those deprived of federally guaranteed rights," "imposes prohibitive and unjustified costs on civil-rights litigants," and "harms public officials by eroding public trust and undermining the rule of law."[16]

Finally, in 2018 the *Notre Dame Law Review* published a series of articles mostly explaining how and why to get rid of qualified immunity.[17] Perhaps unsurprisingly, these articles have become the basis of a "Scholars of the Law of Qualified Immunity" *certiorari* stage *amicus* brief. In this brief, a number of professors, mostly citing themselves, argue qualified immunity "lacks a sound legal basis," "fails to achieve its own goals," and may be plausibly improved.[18]

So, the real question is whether all of these briefs and articles have made any difference or are likely to make a difference in the near future. On one hand, less than a year ago, the Supreme Court decided to not revisit the doctrine. On the other hand, critics haven't walked away totally empty handed. In November 2020, in a very brief, unauthored opinion the Supreme Court denied qualified immunity in *Taylor v. Riojas,* 592 U. S. __ (2020), to a number of correctional officers who confined Trent Taylor to a "pair of shockingly unsanitary cells" for six days. Cato joined a cross-ideological groups' brief asking the Court to "revisit" qualified immunity.[19] Likewise, Cato points to Justices and judges who have criticized the doctrine.[20]

Proposed Federal Legislation

While none of the officers involved in George Floyd's death would likely be entitled to qualified immunity, following his death three bills were swiftly introduced into Congress to "reform" the doctrine.

The Amash-Pressely Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020), is the most sweeping. It would eliminate qualified immunity for all state and local government employees and any defense of good faith. One commentator states, the language of this bill "seems broad enough to allow for monetary damages even when an officer follows binding circuit-court or Supreme Court precedent that is later overturned as well as for officers who follow state law that is later deemed unlawful under federal law."[21]

The Braun Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020), also would eliminate qualified immunity for all state and local government employees and any defense of good faith. Jay Schweikert, ardent Cato critic, notes two instances where qualified immunity would still be available:

> If the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by a federal or state statute, or federal regulation, (2) no court had held that this statute or regulation was unconstitutional, and (3) they had a reasonable, good-faith belief that their actions were lawful; or if the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by then-applicable judicial precedent, and (2) they had a reasonable, good-faith belief that their actions were lawful.[22]

The George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020), would have eliminated qualified immunity and any good faith defenses for state and local police officers, but not all state and local government employees.

As of this writing, none of the three measures has become law. Senator Braun ceased promoting his legislation under police union pressure and the George Floyd law failed to advance in the Senate after being passed in the House.

State Legislation

Since George Floyd's death, three states have passed laws limiting police immunity. At the time this article was written Georgia, Maryland, New Jersey, New York, South Carolina, Texas, and Virginia were considering laws.

Colorado's Enhanced Law Enforcement Integrity Act, SB 20-217 (Colo. 2020) (enacted), created a state law version of 42 U.S.C. § 1983 applicable to local (notice not state) government "peace officers" who violate the state constitution. Colorado's new law eliminates qualified immunity as a defense. Interestingly, if the local government determines the peace officer "did not act upon a good faith and reasonable belief that the action was lawful," he or she may not be indemnified for the lesser of $25,000 or five percent of the judgment, unless the peace officer's

Continued on page 26

Supreme Court *cont'd from page 25*

portion of the judgment is "uncollectible." If the peace officer is convicted of a crime the local government doesn't have to indemnify him or her at all.

Connecticut H.B. 6004 (Ct. 2020), creates a cause of action against police officers who, among other things, deprive persons of the "the protections, privileges and immunities guaranteed under article first of the Constitution of the state." The new law disallows governmental immunity as a defense unless "the police officer had an objectively good faith belief that such officer's conduct did not violate the law."

New Mexico's S.B. 8 (N.M. 2020), eliminated statutory immunity for police officers who commit a variety of torts including "failure to comply with duties established pursuant to statute or law or any other deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties."

Conclusion

As long as Congress doesn't modify or eliminate qualified immunity the attack is likely to continue in the lower courts and the Supreme Court. States and local governments have responded. The State and Local Legal Center and the International Municipal Lawyers Association have put together an *amicus* brief defending qualified immunity. Scott Keller has written an article "confirm[ing] that the common law around 1871 did recognize a free-standing qualified immunity protecting all government officers' discretionary duties—like qualified immunity today," responded to Baude's article.[23] Finally, and perhaps most importantly, a law professor has explained in a widely read publication why abolishing qualified immunity won't fix the problem everyone wants solved: eliminating or at least reducing police officer use of unreasonable force.[24]

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Notes

1. John Elwood, *Relist Watch: Looking for the Living among the Dead*, SCOTUSblog (May. 27, 2020, 11:29 AM), https://www.scotusblog.com/2020/05/relist-watch-looking-for-the-living-among-the-dead.
2. *Baxter v. Bracey*, No. 18-5102, 751 Fed.Appx. 86 (6th Cir. Nov. 8, 2018), *petition for cert. denied,* 140 S. Ct. 1862 (U.S. June 15, 2020) (No. 18–1287) (Thomas, J., dissenting from cert. denial).
3. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018).
4. According to Baude a second justification for a broad interpretation of qualified immunity is that Section 1983 has been read too broadly. In particular the "under color" of any statute, ordinance, regulation, etc. has been interpreted to cover constitutional violations without statutory, ordinance, regulatory, etc. authority. Baude thinks Section 1983's broad interpretation is correct and that even if it isn't two wrongs don't make a right. The Court's oldest justification for qualified immunity is lenity—the idea that government officials should be given fair warning before being liable for a violation of the law. Baude rejects lenity because it comes come from another Reconstruction-era statute that enforces constitutional rights against state officials. But that statute prohibits *criminal* conduct while Section 1983 prohibits *civil* conduct. And the Supreme Court currently rarely applies lenity in criminal cases. Baude, *supra* note 3, at 117-32.
5. *Id.* at 106.
6. *Id.* at 110.
7. *Ziglar*, 582 U.S. at *5 (Thomas, J., concurring).
8. *Kisela*, 582 U.S. at *14 (Sotomayor, J., dissenting).
9. Transcript of Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability, CATO Institute, Mar. 1, 2018, *available at* https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability.
10. *See, e.g., See* Brief for CATO as Amici Curiae Supporting Petitioner, Williams v. Cline, 902 F.3d 643 (2018) (No. 17-2603).
11. *Id.*
12. *See, e.g.,* Brief for CATO as Amici Curiae Supporting Petitioner, Allah v. Milling, 139 S.Ct. 49 (2018) (No. 17-8654).
13. Unlawful Shield, https://www.unlawfulshield.com (last visited Jan. 13, 2021).
14. Jay Schweikert, Qualified Immunity: A Legal, Practical, and Moral Failure (2020).
15. *See, e.g.,* Brief of Cross-Ideological Groups as Amici Curiae Supporting Petitioner, Baxter v. Bracey, 140 S.Ct. 1862 (2020) (No. 18-1287).
16. *Id.*
17. Notre Dame Law Review, Symposium, Federal Courts, Practice & Procedure: The Future of Qualified Immunity, ndlawreview.org/publications/archives/volume-93-issue-5/ (last visited Jan. 13, 2021).
18. *See, e.g.,* Brief of Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner, Baxter v. Bracey, 140 S.Ct. 1862 (2020) (No. 18-1287).
19. Brief of Cross-Ideological Groups as Amici Curiae Supporting Petitioner, Taylor v. Roijas, 592 U. S. __ (2020) (No. 19-1261).
20. Schweikert, *supra* n.14.
21. Christopher J. Walker, Legislating Away Qualified Immunity in Section 1983, Yale Journal on Regulation Blog (June 24, 2020), https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/
22. Jay Schweikert, Republican Senator Introduces Legislation to Reform Qualified Immunity, Cato at Liberty Blog (June 23, 2020, 1:01PM), https://www.cato.org/blog/republican-senator-introduces-legislation-reform-qualified-immunity.
23. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. (forthcoming 2021), *available at* https://ssrn.com/abstract=3680714.
24. Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, New York Times, June 16, 2020.