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Recalibrating Qualified Immunity: How Tanzin v. Tanvir, Taylor v. Riojas, and McCoy v. Alamu Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity

Patrick Jaicomo

Anya Bidwell

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RECALIBRATING QUALIFIED IMMUNITY: HOW *TANZIN V. TANVIR*, *TAYLOR V. RIOJAS*, AND *MCCOY V. ALAMU* SIGNAL THE SUPREME COURT'S DISCOMFORT WITH THE DOCTRINE OF QUALIFIED IMMUNITY

PATRICK JAICOMO & ANYA BIDWELL*

In December 2020, the United States Supreme Court issued its most important decision on qualified immunity since Harlow v. Fitzgerald, *and the issue in the case did not even involve the doctrine. In the Court's unanimous opinion in* Tanzin v. Tanvir, *which dealt with the interpretation of the Religious Freedom Restoration Act, Justice Thomas explicitly distanced the Court from the very type of policy reasoning used to create qualified immunity.*[1] *He also embraced the availability of damages claims against government officials as historically justified and often necessary to vindicate individual rights and to check the government's power.*[2]

The Court's decision in Tanvir*—alongside those in* Taylor v. Riojas *and* McCoy v. Alamu*—offers the strongest signal in decades that the Court is ready to recalibrate its qualified immunity jurisprudence. While it is not time to celebrate the demise of qualified immunity just yet, this Article will discuss how the Court's disposition of those cases reveals the Court is reconsidering both the foundations and applications of qualified immunity.*

* Attorneys at the Institute for Justice and leaders of its Project on Immunity and Accountability. Much of the discussion in this Article expands on arguments made by the authors in a series of amicus briefs. See generally Brief for the Institute for Justice as Amicus Supporting Respondents, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71); Brief for the Institute for Justice as Amicus Curiae Supporting Petitioners, Jessop v. City of Fresno, 140 S. Ct. 2793 (2020) (No. 19-1021); Brief for the Institute for Justice as Amicus Curiae Supporting Petitioners, Hernandez v. Mesa, 149 S. Ct. 735 (2020) (No. 17-1678).

[1] *See* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

[2] *Id.* at 491, 493; *see infra* Section III.B.

INTRODUCTION

In the spring 2020, several high-profile police killings captured the nation's attention. In March, Louisville police executing a late-night, no-knock raid shot Breonna Taylor to death in her apartment.[3] Two months later, Minneapolis police killed George Floyd, kneeling on his neck in the street for nearly nine-and-a-half minutes.[4] Those incidents and others like them inspired widespread outrage and provoked calls for police reform.[5] In the subsequent public discussion, a complex legal doctrine called qualified immunity was recognized as a chief mechanism by which police avoid accountability for constitutional violations.

In 1982, the Supreme Court created the qualified immunity doctrine through its decision in *Harlow v. Fitzgerald*.[6] Qualified immunity shields all government officials—including police—from damages when they violate the Constitution. Under the doctrine, a government official is immune by default. To overcome immunity, a victim of government abuse must prove that the government official who caused the harm harmed violated "clearly established" law,[7] which has come to mean that a plaintiff must point to a prior Supreme Court or circuit court opinion that held nearly identical

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[3] *See, e.g.*, Radley Balko, Opinion, *The No-Knock Warrant for Breonna Taylor was Illegal*, WASH. POST (June 3, 2020), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/ [https://perma.cc/779S-MYNR].

[4] *See, e.g.*, Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. TIMES (Mar. 30, 2021, 10:24 AM), https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html [https://perma.cc/6W9J-4ZXD].

[5] *See, e.g.*, Patrick Jaicomo & Anya Bidwell, *Police Act Like Laws Don't Apply to Them Because of 'Qualified Immunity.' They're Right.*, USA TODAY (May 30, 2020, 4:00 AM), https://www.usatoday.com/story/opinion/2020/05/30/police-george-floyd-qualified-immunity-supreme-court-column/5283349002/ [https://perma.cc/AAG6-77WV].

[6] *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982). As discussed in Part II, *infra*, the Supreme Court also used the phrase "qualified immunity" between 1967 and 1982 to refer to a defense of good faith and reasonableness. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 555 (1967). But, as explained later in the Article, that defense bears no resemblance to the modern doctrine of qualified immunity.

[7] *Harlow*, 457 U.S. at 816–18.

behavior unconstitutional.[8] An officer's subjective intent does not matter. Even if an officer behaves in bad faith, qualified immunity can still provide a shield.

Policy, not law, drove the Supreme Court's adoption of qualified immunity.[9] Concerned that liability and litigation could chill the behavior of government officials, *Harlow* largely exempted them from both.[10] The doctrine metastasized from there, eating away at government accountability almost completely.[11] Today, even victims of the most outrageous unconstitutional conduct are often left without a remedy.[12]

Harlow's approach to official liability would have been unrecognizable to the founders. For the first two centuries of this nation's history, the Supreme Court, relying largely on the English common-law precedent, met the unlawful acts of government officials with strict liability.[13] This liability ensured effective constitutional limits on governmental authority and the separation of powers.[14] The Court addressed law—adjudicating claims and applying remedies to victims of rights violations—while Congress addressed policy—adjusting incentives by crafting immunities and indemnifying government officials who made justifiable mistakes.[15] In 1824, Justice Story articulated those distinct roles in *The Apollon*, writing that policy is for Congress; "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress."[16]

Harlow swapped the judicial and legislative roles, which resulted in a decades-long period of hostility toward valid constitutional claims brought against individual government defendants.[17] But there are recent signs that the Court may be recalibrating on qualified immunity. Three decisions stand out from the 2020 term. In its November decision, *Taylor v. Riojas*, the Supreme Court took the rare step of reversing a grant of qualified immunity.[18]

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[8] Mullenix v. Luna, 577 U.S. 7, 12 (2015).

[9] *See infra* Part II.

[10] *See infra* Section II.B.1.

[11] *See infra* Section II.B.

[12] *See infra* Section II.B.3.

[13] *See infra* Part I.

[14] *Id.*

[15] *See infra* Section I.B–C.

[16] The Apollon, 22 U.S. 362, 367 (1824).

[17] *See infra* Section II.B.1.

[18] *See* Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam). In the 38 years before *Taylor*, the Court had only twice reversed grants of qualified immunity on the ground that the law was clearly established. *See infra* Section II.B.3; Appendix.

Three months later, it did so again in *McCoy v. Alamu*.[19] Between those cases, the Court offered the most promising sign that it may be rethinking qualified immunity in December 2020, through its unanimous decision in *Tanzin v. Tanvir*.[20]

Authored by Justice Thomas, *Tanzin* addressed whether damages against government officials are "appropriate relief" under the Religious Freedom Restoration Act.[21] The decision did not reach the issue of qualified immunity,[22] but its historical analysis of government official liability directly undermines the reasoning cited in *Harlow* to create qualified immunity. And *Tanzin* explicitly rejected, despite the government's best efforts to convince it to the contrary,[23] the Court's ability to carve out policy-based exceptions into government liability. Mirroring the words of Justice Story nearly two centuries earlier in *The Apollon*, Justice Thomas wrote in *Tanzin*, "To the extent the Government asks us to create a . . . policy-based presumption against damages against individual officials, we are not at liberty to do so."[24]

Tanzin, *Taylor*, and *McCoy* provide hope that the Court may be recalibrating qualified immunity to better reflect the historic availability of damages for constitutional violations. The availability of damages against government officials animated the American founding and prevailed through the time Congress passed America's most significant civil rights legislation: 42 U.S.C. § 1983.[25]

Part I describes the legal history of official immunity and its unyieldingly confined nature through the eighteenth, nineteenth, and first half of the twentieth centuries. Part II addresses the Supreme Court's two-step creation of qualified immunity and abandonment of historical government liability beginning in 1967. And Part III discusses how *Tanzin*, *Taylor*, and *McCoy* show the current Court's discomfort with qualified immunity in both theory and practice. Although the Court turned down the opportunity to revisit qualified immunity in its 2019 term,[26] it did so twice in its 2020 term and, through *Tanzin*, signaled strongly that the foundations of qualified immunity are in doubt.

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[19] *See* McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) (mem.).

[20] *See* Tanzin v. Tanvir, 141 S. Ct. 486 (2020).

[21] *Id.* at 489; 42 U.S.C. §§ 2000bb–2000bb-4.

[22] *Tanzin*, 141 S. Ct. at 492 n.*.

[23] *Id*. at 493.

[24] *Id.*

[25] *See infra* Part I.

[26] See *infra* note 169.

I. SUITS FOR DAMAGES AGAINST GOVERNMENT OFFICIALS HAVE BEEN THE CORNERSTONE OF GOVERNMENT ACCOUNTABILITY SINCE AMERICA'S FOUNDING

For most of American history, suits for damages against government officials were at the heart of a constitutional system that prided itself on government accountability.[27] "In the early Republic, an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials for money damages payable by the officer."[28] This not only ensured the accountability of the government and its agents, but it ensured that every right was met with a corresponding remedy.

Rather than worry about policy concerns, such as whether potential liability would chill the conduct of government officials, courts focused on whether rights were violated and, if they were, providing a suitable remedy.[29] The legislature's job, on the other hand, was to weigh policy considerations and fashion indemnities and immunities to address them.[30]

This allocation of responsibility allowed each branch to perform its constitutional duties within the system of checks and balances. Judges, tasked with deciding cases in law and equity, interpreted the law, evaluated whether it was violated, and ordered appropriate relief.[31] Legislators, in charge of the government's purse and matters of public policy, calibrated incentives, ensuring that government officials were protected from, or subject to, liability.[32]

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[27] *See* Wheeldin v. Wheeler, 373 U.S. 647, 656–57 (1963) (Brennan, J., dissenting) (collecting cases beginning in 1765).

[28] *Tanzin*, 141 S. Ct. at 491 (internal quotation marks omitted) (citing James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1871–75 (2010)).

[29] *See infra* Section I.B.

[30] *See infra* Section I.C.

[31] *See* U.S. CONST. art. III, § 2.

[32] *See* U.S. CONST. art. I, § 8.

A. THE AVAILABILITY OF SUITS AGAINST INDIVIDUAL GOVERNMENT OFFICIALS ANIMATED AMERICAN CONSTITUTIONAL DESIGN

Suits against government officials date back to English common law,[33] where they grew from the maxim, "the king can do no wrong."[34] By the eighteenth century, courts interpreted that fiction to mean: because the king was incapable of wrongdoing, any wrong done in the king's name was attributable to the individual government officials responsible.[35] But those officials—unlike the king—could be sued.[36]

At the core of this long tradition was the concern that without enforcement, there is no accountability, and without accountability, there are no rights. Thus, in *Ashby v. White*, the House of Lords allowed a suit for damages against a commissioner who prevented an individual from voting in a local election.[37] According to Lord Chief Justice Holt, whose dissent the House of Lords later upheld, the ability to file such a suit would not only "make publick officers more careful," but would also vindicate the principle that if "the plaintiff is obstructed of his right, [he] shall therefore have his action."[38] "[I]ndeed it is a vain thing to imagine a right without a remedy."[39]

The famous search-and-seizure cases involving Lord Halifax's general warrants issued to crack down on John Wilkes and his associates reaffirmed this precedent.[40] These cases upheld jury verdicts in suits for damages to redress injuries caused by government officials that "violat[ed] Magna Charta, and attempt[ed] to destroy the liberty of the kingdom."[41]

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[33] Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963) ("From time immemorial many claims affecting the Crown could be pursued in the regular courts if they did not take the form of a suit against the Crown . . . . Long before 1789 it was true that sovereign immunity was not a bar to relief.").

[34] *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 2–5 (1972).

[35] *Id.* at 4.

[36] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 237 (1765) ("For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished.").

[37] Ashby v. White (1703) 92 Eng. Rep. 126, 135–36; 2 Ld. Raym. 938, 952–54 (Lord Holt CJ, dissenting).

[38] *Id.* at 137; 2 Ld. Raym. at 955.

[39] *Id.* at 136; 2 Ld. Raym. at 953.

[40] *See* Entick v. Carrington (1765) 19 How. St. Tr. 1029, 1063; Money v. Leach (1765) 97 Eng. Rep. 1075, 1088–89; 3 Burr. 1742, 1766–68; Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498–99; Lofft. 1, 17–19; Huckle v. Money (1763) 95 Eng. Rep. 768, 768–69; 2 Wils. K.B. 206, 206–07.

[41] *Huckle*, 95 Eng. Rep. at 768–69; 2 Wils. K.B. at 206–07.

In *Entick v. Carrington*, perhaps the most famous of these search-and-seizure cases, the King's Chief Messenger broke into the house of John Wilkes's associate and under the power of a general warrant searched through the associate's home and papers.[42] The associate sued for trespass.[43] In defense, the messenger argued that the general warrant authorized him "to seize and apprehend [the associate] and bring together with his books and papers in safe custody, before the Earl of Halifax."[44] The court dismissed the general warrant defense and upheld the damages award against both the messenger and Lord Halifax.[45] After all, the general warrant "to seize and carry away the party's papers . . . . is illegal and void."[46] Allowing it "would destroy all the comforts of society" and would violate liberty by subjecting individuals to "the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author . . . of a seditious libel."[47]

Before the American founding, English courts allowed claims for damages in individual-rights cases.[48] Just like their American descendants, they could not countenance a legal system with rights but no remedies, seeing civil damages actions as a way to protect fundamental liberties and check government power.[49] "American courts seized this principle of personal official liability . . . and applied it with unprecedented vigor."[50]

B. EARLY AMERICAN COURTS APPLIED STRICT LIABILITY AGAINST GOVERNMENT OFFICIALS WHO VIOLATED INDIVIDUAL RIGHTS

Entick was a "monument of English freedom, undoubtedly familiar to every American statesman at the time the Constitution was adopted, and

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[42] *Entick*, 19 How. St. Tr. at 1030.

[43] *Id.*

[44] *Id.* at 1031.

[45] *See* Boyd v. United States, 116 U.S. 616, 626 (1886) (describing the outcome of *Entick*).

[46] *Entick*, 19 How. St. Tr. at 1074.

[47] *Id.* at 1063, 1066.

[48] *See, e.g.*, *Boyd*, 116 U.S. at 626 (noting that in *Entick*, John Wilkes "obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the secretary of state, who issued the warrant.").

[49] Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 531 (2013) ("Federal officials have never been categorically exempt from damages suits under the common law simply by virtue of their status as federal officers. From the beginning of the nation's history, federal (and state) officials have been subject to common-law suits as if they were private individuals, just as English officials were at the time of the Founding.").

[50] Engdahl, *supra* note 34, at 14.

considered to be the true and ultimate expression of constitutional law . . . ."[51] From its earliest decisions, the Supreme Court regarded "effective judicial redress for positive governmental wrongs" "as paramount and essential to American constitutional government . . . ."[52] This redress was achieved through various common-law causes of action against responsible government officials, including trespass and assumpsit, both of which resulted in the entry of judgment for money damages.[53] The rule was strict and did not spare even officers who acted in good faith or under orders.[54] If a public official violated the law, he was answerable in damages without exception for reasonableness or good faith.[55] That rule—like its English counterpart—grew out of agency principles and the recognition that sovereign immunity demanded individual official liability to ensure that rights had corresponding remedies.[56]

The historical rule of strict liability is perhaps best displayed in the famous case of *Little v. Barreme*.[57] On December 2, 1799, U.S. Navy Captain George Little seized the Danish vessel the *Flying-Fish* as it was en route from a French port.[58] Captain Little was acting on the orders of President John Adams, but those orders hinged on a statutory misconstruction and the seizure was, thus, unauthorized by law.[59] The owner of the vessel sued for its return and damages from Captain Little.[60] The federal district court ordered

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[51] United States v. Jones, 565 U.S. 400, 405 (2012) (internal quotation marks omitted) (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989)).

[52] Engdahl, *supra* note 34, at 27; *see also, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

[53] *See* Pfander & Hunt, *supra* note 28, at 1874; James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 134 (2009) ("[F]or much of the nation's history, state common law provided victims with a right of action that, although somewhat cumbersome, could eventually result in a vindication of their constitutional rights. For example, the victim of an unlawful search might sue the responsible federal official for a trespass.").

[54] *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 145–48 (2012); *id.* at 147 ("[I]mmunizing an officer from damages is a way of authorizing or 'legalizing' his conduct, and because the enumeration principle prohibits an unconstitutional act from being 'legalized,' it also prohibited immunizing an officer from damages.").

[55] *See* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987).

[56] *See* Engdahl, *supra* note 34, at 19.

[57] 6 U.S. (2 Cranch) 170 (1804).

[58] *Id.* at 178.

[59] *Id.* at 170.

[60] *Id.* at 176.

the vessel returned but declined to award damages. On appeal, the circuit court reversed and entered judgment for more than $8,500 against Captain Little (about $130,000 today).[61] The Supreme Court affirmed on certiorari, declaring: "A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution."[62]

The unforgiving rule prompted Chief Justice Marshall to admit that his "first bias" was "in favor of the opinion that though instructions of the executive could not give a right, they might yet excuse from damages."[63] Ultimately, the Court refused to consider a policy-driven exception. It focused instead on the lawfulness of government conduct, since attenuating circumstances, like good faith on the part of the officer, could not "change the nature of the transaction, or legalize an act which without [such attenuating circumstances] would have been a plain trespass." Congress later mitigated Captain Little's harsh consequences by passing private legislation to indemnify him from damages.[64]

Two fundamental concepts are central to this founding government accountability principle: the importance of redress and the separation of powers.

The first concept hardly needs explanation. As William Blackstone famously proclaimed—in words like those of Lord Chief Justice Holt in *Ashby*—without a method for "recovering and asserting" fundamental rights, "in vain would rights be declared, in vain directed to be observed."[65] The Supreme Court cited a similar quote from Blackstone in *Marbury v. Madison*: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[66] Consonant with that principle, federal courts ordered redress by the government, including through judgments for money damages, payable by the responsible official well into the twentieth century.[67] The Court

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[61] Engdahl, *supra* note 34, at 14; Pfander & Hunt, *supra* note 28, at 1877–81.

[62] *Little*, 6 U.S. at 170 (italics omitted).

[63] *Id.* at 179.

[64] *See* Pfander & Hunt, *supra* note 28, at 1900–03.

[65] BLACKSTONE, *supra* note 36, at 55–56.

[66] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (internal quotation marks omitted).

[67] *See, e.g.*, Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20–21 (1940) (admitting plaintiffs can sue federal officers for damages if they exceed their authority or the claimed authority is not within the government's constitutional power to confer); Philadelphia Co. v. Stimson, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have

emphasized that an alternative framework, in which "courts cannot give remedy when the citizen has been deprived of [his rights] by force" would go against the nation's character and would "sanction[] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."[68]

The second concept—fidelity to the separation of powers—was perhaps best articulated by Justice Story in *The Apollon*. There, he distinguished the judicial role from the legislative by writing that the judiciary "cannot enter into political considerations, on points of national policy . . . ."[69] The Court's "duty lies in a more narrow compass; and we must administer the laws as they exist, without straining them to reach public mischiefs . . . ."[70] As a result, "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress."[71] It was not the judiciary's job to perform policy analyses and adjust the incentives of government officials by providing them with protections from liability.[72] That was the legislature's province.[73]

Tracy v. Swartwout aptly demonstrates both ideas.[74] There, importers of sugarcane syrup sued a New York customs collector for demanding they pay much higher taxes on the import than those owed.[75] Because the importers could not afford the payment, the collector seized the syrup and kept it "for a long time," causing deterioration in value.[76] When the importers sued for

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wrongfully invaded."); Belknap v. Schild, 161 U.S. 10, 18 (1896) (reasoning federal officers can be "personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States"); Bates v. Clark, 95 U.S. 204, 209 (1877) (holding federal officers personally liable for wrongfully seizing private property under official orders); *cf.* Buck v. Colbath, 70 U.S. (3 Wall.) 334, 344 (1865) (explaining that an officer in "the exercise of his judgment and discretion . . . is legally responsible to any person for the consequences of any error or mistake").

[68] United States v. Lee, 106 U.S. 196, 221 (1882).

[69] The Apollon, 22 U.S. 362, 366 (1824).

[70] *Id.*

[71] *Id.* at 367.

[72] *See* Pfander & Hunt, *supra* note 28, at 1870.

[73] *See The Apollon*, 22 U.S. at 366–67 (reasoning that the role of the courts is to analyze legal claims; the Legislature "will doubtless apply a proper indemnity" if good public policy requires); *see also* Pfander & Hunt, *supra* note 28, at 1868–69 ("[P]erhaps as early as 1804, when the Marshall Court decided *Little* and *Murray* [*v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)], and certainly by 1836, the Supreme Court simply assumed that indemnity was routinely available to take the sting out of any official liability.").

[74] *See generally* Tracy v. Swartwout, 35 U.S. (10 Pet.) 80 (1836).

[75] *See id.* at 93, 95.

[76] *Id.* at 93.

damages, the customs collector defended himself by claiming he acted in good faith and in compliance with the Secretary of the Treasury's instructions.[77]

The Court rejected the collector's defense, making it clear that its concern lay with enforcing the law: "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress."[78] But the Court also emphasized that even though it was holding the customs officer responsible in damages "for illegal acts done under instructions of a superior . . . the government [Congress] in such cases is bound to indemnify the officer."[79] In other words, the Court in *Tracy* found that courts do the legal work by deciding whether the government conduct was unlawful and, if so, awarding appropriate relief; Congress does the policy work by determining whether indemnification or immunity is warranted.

C. CONGRESS HISTORICALLY CONSIDERED POLICY IN DETERMINING THE NEED FOR INDEMNITY AND IMMUNITY FROM DAMAGES

On the other side of the constitutional ledger, Congress did not wade into damages. Instead, it dealt with immunity and indemnity.[80] As James Madison described it, "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunal to which the aggressors are responsible . . . ."[81] But once the courts determined that a right was violated and ordered damages against the responsible officer, it was then up to Congress to decide whether to shield the officer from liability as a matter of public policy.[82]

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* Pfander & Hunt, *supra* note 28, at 1873 & n.45 ("Leading thinkers of the day agreed that, from the perspective of the separation of government powers, the task of adjudicating money claims against the government was one that the courts should perform.").

[81] Letter from James Madison to Peder Blicherolsen (Apr. 23, 1802), *in* 3 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 152 (D.B. Mattern, J.C.A. Stagg, Jeanne Kerr Cross & Susan Holbrook Perdue eds., 1995).

[82] The Apollon, 22 U.S. 362, 366–67 (1824):

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity.

Congress did not shy away from this role. Between 1789 and 1860, Congress evaluated fifty-seven petitions of officers held liable in court.[83] It granted some form of indemnification to officers in thirty-six of these fifty-seven petitions, with its determinations focusing on whether the officer acted in good faith and without malice and whether he followed government instructions.[84]

If an officer acted outside the scope of his agency and without attenuating circumstances, as shown in Joel Burt's case, Congress would not offer indemnity.[85] If Congress found that an officer performed his duties with "a strict adherence to the letter of his instructions, with a laudable zeal, and with all good faith,"[86] like in the case of Nathaniel Mitchell,[87] then Congress indemnified.[88] By doing so, Congress calibrated incentives for government officials by encouraging fervent pursuit of official duties, while also making sure that pursuit could not veer outside the scope of those duties.

Along with indemnity, Congress provided narrow statutory immunities for certain officers who acted in good faith. For example, in 1789, Congress passed the Collection Act, which allowed courts to absolve collectors of

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[83] Pfander & Hunt, *supra* note 28, at 1904.

[84] *Id*. at 1905–06; *see also id.* at 1905 ("The forms of relief varied. Some private bills were structured as direct payments to the petitioning government officers; others were structured as payments to the victims of government misconduct.").

[85] Burt served as the collector for one of New York's ports when he arbitrarily refused a shipment of potash from his port to go to another port in New York because the collector there would permit the potash to enter Canada and violate the Embargo Act. *See* Pfander & Hunt, *supra* note 28, at 1907. A New York State court ordered $1,500 in damages against Burt, who petitioned Congress for indemnification. *Id.* The House of Representatives repeatedly denied Burt the indemnity, eventually explaining that "[i]t should not be the policy of the United States to screen their officers from making a just renumeration for losses sustained by her citizens, when the acts of such officers are illegal, unjust, and without palliating circumstances." H.R. REP. NO. 24-255, at 1 (1836).

[86] H.R. REP. NO. 25-780, at 3 (1838).

[87] Mitchell was the postmaster in Portland, Maine, when his superiors tasked him with investigating missing letters containing money. Merriam v. Mitchell, 13 Me. 439, 442–44 (1836). Mitchell set up a trap by putting several test packages in the mail. *Id.* Because one of these packages did not reach its destination, Mitchell concluded that his assistant postmaster William Merriam was the culprit and initiated a criminal investigation against Merriam. *Id.* The missing package eventually turned up, and a grand jury declined to indict Merriam. *Id.* at 445–46. Merriam sued Mitchell for malicious prosecution and requested damages. *Id.* at 439–40. When the jury awarded $1,666 to Merriam and the Maine Supreme Court upheld the verdict, Mitchell petitioned Congress for indemnification. *Id.* at 441, 458; H.R. REP. NO. 25-780, at 2 (1838). His petition succeeded. According to a House committee's report, Mitchell simply followed instructions and performed his duties in good faith. *Id.* at 3. The House appropriated $2,392.21 to cover the judgment against him, plus costs and fees. Act for the Relief of Nathaniel Mitchell, ch. 48, 6 Stat. 754 (1839).

[88] *See* Pfander & Hunt, *supra* note 28, at 1909.

liability, despite adverse jury verdicts, upon finding reasonable cause for a seizure.[89] That same act allowed officers to recover double their costs if the plaintiff lost the suit.[90] Similarly, in a 1799 revenue law, Congress established a reasonable cause defense in certain forfeiture cases, so long as the vessel or merchandise was restored to the claimants.[91]

During the Civil War, Congress adopted legislation immunizing federal officers from liability for "any search, seizure, arrest, or imprisonment" made under a presidential order.[92]

By passing these immunity provisions, Congress—just as in the examples involving indemnity—weighed policy considerations to encourage vigorous pursuit of official duties, discourage rogue behavior, and prevent baseless lawsuits. Congress left remedy questions to courts but ensured that under certain circumstances remedies did not prove counterproductive to government policy goals.

For at least a century and a half after the founding, the allocation of responsibility between Congress and the courts was simple. Courts did law by analyzing whether the conduct by the government officer was illegal and, if so, ordering damages. Congress did policy by carefully adjusting incentives that led to the best outcome.

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[89] *See* Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1330 (2006).

[90] *Id.*

[91] *Id.*; An Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22, 1 Stat. 627, 696 (1799).

[92] Amanda Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 640 (2009). Still, Congress' role as policymaker was limited by its constitutional authority. It could not, therefore, create immunities that would permit the violation of constitutional rights. *See also* Mitchell v. Clark, 110 U.S. 633, 640 (1884) (emphasis added) ("That an act passed after the event, which, in effect, ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, *so far as congress could have conferred such authority* before, admits of no reasonable doubt.");

> Congress may provide for indemnifying those who, in great emergencies, acting under pressing necessities for the public, invade private rights in support of the authority of the government; but between acts of indemnity in such cases and the attempt to deprive the citizen of his right to compensation for wrongs committed against him or his property, or to enforce contract obligations, there is a wide difference, which cannot be disregarded without a plain violation of the constitution.

id. at 649 (Field, J., dissenting); Griffin v. Wilcox, 21 Ind. 370, 373 (1863) ("The question here arises, then, can Congress enact that the citizen shall have no redress for a violation of his rights, secured to him by the . . . Constitution . . . . These sections prohibit the passage of a law by Congress, authorizing the arrest of the citizen, without just cause, because such arrest deprives him of his liberty.").

D. THE HISTORICAL RULE OF STRICT LIABILITY WAS THE LAW OF THE LAND IN 1871 WHEN CONGRESS ENACTED SECTION 1983, AND COURTS CONTINUOUSLY ENFORCED IT WELL INTO THE TWENTIETH CENTURY

The historical rule of strict liability continued in force throughout the nineteenth century,[93] including when Congress enacted the 1871 Ku Klux Klan Act in the wake of the Civil War and ratification of the Fourteenth Amendment. Designed to provide remedies for constitutional violations in the post-war South, the Act created a civil cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws."[94] That provision—now commonly known as "Section 1983" (for its codification at 42 U.S.C. § 1983)—would become "one of the most well-known civil rights statutes" in the United States.[95]

Congress included no exceptions in Section 1983's text.[96] And it was well established that none existed outside the statute either.[97] The historical

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[93] *See*, *e.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851) ("Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed."); Luther v. Borden, 48 U.S. (7 How.) 1, 46 (1849) ("[I]f the power is exercised for the purposes of oppression, or any injury wilfully [sic] done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable."); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 156–58 (1836); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 93 (1836); Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806); *see also* Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927) ("Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts.").

[94] An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

[95] Tanzin v. Tanvir, 141 S. Ct. 486, 490 (2020).

[96] *See supra* note 94 [("[A]ny person who, under color of any law . . . of any State, shall subject . . . . any person . . . to the deprivation of any rights . . . shall, any such law . . . notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress[.]").

[97] In some specialized areas of law, exceptions were made. For instance, citing its "conscientious discretion" when defining rules of capture in admiralty law, the Supreme Court declined to "introduce a rule harsh and severe in a case of first impression" where a lieutenant in the Navy had justifiably captured a Portuguese ship but questions remained over whether he was obligated to release the ship once he discovered that it was not involved in piracy. The Marianna Flora, 24 U.S. (11 Wheat.) 1, 54–56 (1825). Even so, *The Marianna Flora* did not announce or apply a general defense or immunity.

rule of strict liability prevailed throughout this period.[98] In rejecting a request for individual immunity in 1882, Justice Miller powerfully extolled:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.[99]

The availability of claims against government officials continued through the end of the nineteenth century.[100] In *Poindexter v. Greenhow*, for instance, the Supreme Court held a government official personally liable for acting under a Virginia law later declared unconstitutional.[101] *Poindexter* rejected the official's plea for immunity, holding that to grant it would "obliterate[] the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism . . . which enables the agent of the state to declare and decree that he is the state."[102] If "judicial tribunals are forbidden to visit penalties upon individual offenders" "principles of individual liberty and right [cannot] be maintained."[103] *Poindexter* explicitly rejected the consideration of public policy in reaching its holding.[104]

The Supreme Court continued to apply the strict rule into the twentieth century, focusing, instead, on individual rights. In the 1915 *Myers v. Anderson* decision, the Court affirmed a Section 1983 judgment against Maryland election officials who prevented three black men from voting

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[98] *See* Mitchell v. Clark, 110 U.S. 633, 648–49 (1884) (Field, J., dissenting); *see also* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW § 320 (5th ed. 1857) (reasoning that it is not enough for government officials to simply act "bonâ fide, and to the best of their skill and judgment . . . .").

[99] United States v. Lee, 106 U.S. 196, 220 (1882).

[100] *See* Note, *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 832 (1957) ("A government officer who acts without authority is thus subject to the same legal rules as any private person.").

[101] *See* Poindexter v. Greenhow, 114 U.S. 270, 297 (1885).

[102] *Id.* at 291.

[103] *Id.*; *see also* Belknap v. Schild, 161 U.S. 10, 18 (1896) (rejecting an official's defense of reasonableness); Bates v. Clark, 95 U.S. 204, 209 (1877) (rejecting an official's defense of good faith).

[104] *See Poindexter*, 114 U.S. at 297 (permitting individual claims "no matter how much their determination may incidentally and consequentially affect the interests of a state, or the operations of its government").

under an unconstitutional state statute.[105] The officers argued that they should not be held liable because they believed, in good faith, that the statute was constitutional.[106] But *Myers* rejected that argument.[107] Instead, it affirmed the circuit court's holding—echoing *Little*—that anyone enforcing an unconstitutional law "does so at his known peril and is made liable to an action for damages."[108]

Through strict liability, eighteenth and early-nineteenth century courts centuries hewed to their judicial role: doing law. When asked to excuse government officials from liability for one reason or another, the Supreme Court uniformly refused—no matter the quality of the excuse.[109] To stray beyond law would force courts to "enter into political considerations, on points of national policy," which the Court proclaimed it would not do.[110] At least for a time.

II. THE SUPREME COURT'S CREATION OF QUALIFIED IMMUNITY BROKE WITH CENTURIES OF AMERICAN JURISPRUDENCE AND SWAPPED THE JUDICIAL AND LEGISLATIVE ROLES

For two centuries, American courts diligently focused on determining whether rights were violated and, if so, ordering a remedy.[111] Everything else was left for the political branches to address. But the Supreme Court abandoned the principles of accountability by creating broad immunities to official liability, beginning in 1967.

A. IN 1967, THE COURT ANNOUNCED AN EXCEPTION TO STRICT LIABILITY BY SHIELDING GOVERNMENT OFFICIALS WHO ACTED REASONABLY AND IN GOOD FAITH

In 1967, the Supreme Court disclaimed the historical rule of strict liability and drastically changed the law in *Pierson v. Ray*.[112] There, the Court

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[105] *See* Myers v. Anderson, 238 U.S. 368, 377–78 (1915).

[106] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 57 (2018) (citing the officials' briefing).

[107] *See Myers*, 238 U.S. at 378.

[108] Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910).

[109] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 ("[T]he [president's wartime] instructions [to a military officer] cannot . . . legalize an act which without those instructions would have been a plain trespass.").

[110] The Apollon, 22 U.S. 362, 366 (1824).

[111] *See* Tanzin v. Tanvir, 141 S. Ct. 486, 491 (2020) (noting that common-law causes of action against government officials "remained available through the 19th century and into the 20th.").

[112] *See* 386 U.S. 547, 557 (1967). Ahead of *Pierson*, scholars and commentators in the twentieth century began to question the fairness of strict official liability, shifting the

addressed whether Mississippi police were liable under Section 1983 for having unreasonably seized a group of anti-segregationist ministers in violation of the Fourth Amendment.[113] Although the officers acted under a Mississippi statute, that statute was later ruled unconstitutional.[114]

Under the historical rule, the officers would have been personally liable.[115] But *Pierson* held they were not. Instead, the Court shielded the officers from liability under a newly announced general "defense of good faith and probable cause," which the Court imported from the common-law tort of false arrest.[116] The creation of a good faith defense to liability represented a major shift in the jurisprudence. It meant that "the officer obedient to an invalid order or executing an invalid law [wa]s . . . protected from personal liability by his good faith," making "the law of personal official liability . . . radically different and more favorable to the officer . . . than nineteenth century lawyers ever conceived it to be."[117]

But the Court in *Pierson* seemingly envisioned only minor consequences from its shift.[118] Indeed, cases that followed emphasized that the requirement of good faith would not allow bad actors to go unpunished.[119] Government officials who acted in bad faith were *always* liable, and even government officials who acted in good faith were liable unless their actions were also reasonable.[120] Without both safeguards, constitutional guarantees

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discussion from legality to morality. Kian, *supra* note 54, at 151. And "[b]y the 1920s . . . states had begun expanding official immunity to executive officers." *Id.* at 153.

[113] *Pierson*, 368 U.S. at 548–51.

[114] *See id.* at 554–57; *see also* Thomas v. Mississippi, 380 U.S. 524, 524 (1965) (mem.) (holding the Mississippi statute unconstitutional under similar facts).

[115] *See, e.g.*, Myers v. Anderson, 238 U.S. 368, 378–79 (1915); Poindexter v. Greenhow, 114 U.S. 270, 291 (1885).

[116] *Pierson*, 386 U.S. at 556; *see also* Baude, *supra* note 106, at 52–53 (explaining and commenting on *Pierson*'s stated justification for creating a new general defense to Section 1983 claims).

[117] Engdahl, *supra* note 34, at 55.

[118] *See Pierson*, 386 U.S. at 555 (describing the defense as a response to the claim that police officers "should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid"). Notably, *Pierson*'s forgiveness of the officers for their reliance on an unconstitutional statute was not only inconsistent with earlier cases, *see, e.g.*, *Poindexter v. Greenhow*, 114 U.S. 270, 297 (1885), but also inconsistent with the text of Section 1983 as enacted, *see supra* notes 94, 96. That text explicitly made government officials liable for the deprivation of rights "any such law, statute, ordinance, regulation, custom, or usage of the State *to the contrary notwithstanding* . . . ." *Id.* (emphasis added).

[119] *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 321 (1975) (requiring that an "official himself must be acting sincerely and with a belief that he is doing right").

[120] *See* Butz v. Economou, 438 U.S. 478, 484 (1978); Procunier v. Navarette, 434 U.S. 555, 562 (1978); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) ("[T]he relevant question

would be a matter of judicial grace—"[a]ny lesser standard would deny much of the promise of [Section] 1983."[121]

B. WITH THE CREATION OF QUALIFIED IMMUNITY IN 1982, THE SUPREME COURT ERASED THE HISTORICAL RULE OF STRICT LIABILITY AND SHIELDED EVEN BAD-FAITH ACTORS FROM THE CONSEQUENCES OF THEIR LAWLESS CONDUCT

With its decision in *Harlow v. Fitzgerald*, the Supreme Court created the qualified immunity doctrine, which removed good faith from the analysis and converted official liability from the general rule to the rare exception.

1. By Announcing the Doctrine of Qualified Immunity, the Court Acted as a Policymaking Body

In an act of judicial policymaking, *Harlow v. Fitzgerald* discarded the historical standards of liability and replaced them with qualified immunity in 1982.[122] No statutory enactment or constitutional amendment precipitated that radical shift. *Harlow* simply did policy.[123]

In *Harlow*, a federal whistleblower named A. Ernest Fitzgerald brought First Amendment retaliation claims against members of the Nixon Administration, Bryce Harlow and Alexander Butterfield.[124] Both men allegedly terminated Fitzgerald's position as a contractor with the U.S. Air Force because he testified about cost overruns in a Pentagon weapons program.[125] Fitzgerald brought his claims through an implied cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of*

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for the jury is whether O'Connor 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].'") (citation omitted); Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

[121] *Wood*, 420 U.S. at 322.

[122] Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982).

[123] Wyatt v. Cole, 504 U.S. 158, 167 (1992) ("[A]s our precedents make clear, the reasons for recognizing such an immunity were based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials.").

[124] *Harlow*, 457 U.S. at 802–06.

[125] Fitzgerald also sued President Nixon in the companion case, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), where his claims were met with absolute immunity.

Narcotics.[126] Weighing the "competing values" of constitutional guarantees against litigation costs,[127] *Harlow* concluded that it was too costly to require government officials like Harlow and Butterfield to establish good faith for their unlawful acts.[128] So the Court struck that requirement and converted liability from the rule to the exception, pronouncing: "[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[129]

Following *Harlow*, all government officials—state, federal, and local—are, by default, entitled to a "qualified immunity" from suit.[130] Unlike most defenses, qualified immunity places the burden on the plaintiff, not the defendant invoking the defense.[131] And the availability of immunity is only rebuttable, and therefore "qualified," if a plaintiff can prove two things: the "violation of a constitutional right" and that the right was "clearly established" when the alleged misconduct occurred.[132]

Harlow worked a revolution in official liability for unlawful acts. Although the Court's earlier decisions creating and applying sweeping good-faith immunities had purportedly rested on defenses "historically accorded

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[126] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[127] *Harlow*, 457 U.S. at 813–16; *accord id*. at 817 ("Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.") (citations omitted).

[128] Among the costs the Court factored into its policy decision were that "claims frequently run against the innocent as well as the guilty[,]" "expenses of litigation, the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office[,]" and "the danger that [the] fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Id.* at 814 (internal quotation marks omitted).

[129] *Id.* at 818.

[130] On similar policy grounds, the Court applied qualified immunity to state and local officials, even though *Harlow* involved federal officials and, more importantly, Section 1983 "on its face admits of no immunities." Malley v. Briggs, 475 U.S. 335, 339 (1986). Giving short shrift to the holes in its legal reasoning, the Court again reverted to policy, explaining that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 340 n.2 (citing *Harlow*, 457 U.S. at 818 n.30).

[131] *See, e.g.*, Johnson v. Moseley, 790 F.3d 649, 653 (6th Cir. 2015) ("[P]laintiff bears the burden of showing that defendants are not entitled to qualified immunity.").

[132] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 230–33 (2009); Quinn v. Young, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) ("[W]hen this defense is raised, the onus is on the plaintiff to demonstrate '(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.'").

the relevant official at common law,"[133] *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law . . . ."[134] Rather than focusing on the judicial enforcement of individual rights, the Court waded into policy by designing a test for "objective inquiry into the legal reasonableness of the official action."[135] Through *Harlow*, the Court erased two centuries of case law that consistently held government officials liable for their unlawful acts. In its place, *Harlow* enshrined an immunity that consistently shields them from liability.[136]

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[133] Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

[134] Anderson v. Creighton, 483 U.S. 635, 645 (1987). For this reason and others, qualified immunity has been consistently criticized by legal scholars and jurists. *See generally, e.g.*, Baude, *supra* note 106; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Ziglar v. Abbasi, 137 S. Ct. 1843, 1869–72 (2017) (Thomas, J., concurring in part); Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting). Still, a handful of scholars have begun offering defenses of *some* aspects of the doctrine. *See generally* Andrew S. Oldham, Official Immunity at the Founding (April 12, 2021) (unpublished manuscript), https://ssrn.com/abstract=3824983 [https://perma.cc/MN6H-2374] (Judge Oldham's Article does not deal with the main historical criticism of qualified immunity: that in the absence of a statutory intervention, the common law operates without any qualified immunity defenses. *See* Pfander & Hunt, *supra* note 28, at 1881–87); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1368–77 (2021) (Keller's Article only addresses common-law deference to the exercise of lawful discretion by government officials. It does not undermine the argument that when these officials exceeded the scope of their discretion, or violated individual rights, there was no immunity to protect them. *See generally* James E. Pfander, *Zones of Discretion at Common Law*, 116 NW. L. REV. ONLINE 148 (2021); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2021)); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018). Ultimately, even the defenders of qualified immunity agree that *Harlow* was unmoored from legal principle or history, but further discussion of the specific debates over official immunity goes beyond the scope of this Article.

[135] *Anderson*, 483 U.S. at 645; *see also* Reichle v. Howards, 566 U.S. 658, 664 (2012) (acknowledging that the clearly established test is designed to "protect[] the balance between vindication of constitutional rights and government officials' effective performance of their duties") (internal quotation marks omitted). But one of the core purposes of the strict liability observed at the time of the founding and the passage of Section 1983 was explicitly to limit the performance of duties to ensure that those duties never swerved out of their constitutional guiderails. Engdahl, *supra* note 34, at 34 ("The genius of the principle of personal official liability as it had been developed during the nineteenth century was precisely that it *did* provide a means of enforcing the *governments'* compliance with legal and constitutional limit[s]—indirectly, but effectively enough—despite the principles of government[] immunity.").

[136] *Harlow*'s reliance on policy also highlights the practical issues with that approach, as justices immediately began fighting over who should be entitled to immunity and to what degree. *See* Woolhandler, *supra* note 55, at 396–97 n.1. *Compare, e.g.*, Cleavinger v. Saxner, 474 U.S. 193, 203–04 (1985) (providing qualified immunity to members of a federal prison's discipline committee), *with id.* at 212 (Rehnquist, J., dissenting) (arguing members should be given absolute immunity); Mitchell v. Forsyth, 472 U.S. 511, 521 (1985) (providing qualified

2. The Court has Expanded Qualified Immunity by Repeatedly Restricting the Definition of Clearly Established Law

Following *Harlow*, the Court incrementally but consistently increased the category of unlawful acts for which officials are immune by restricting the definition of "clearly established" law needed to overcome qualified immunity.[137] At first, plaintiffs had to show that the "contours" of a right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[138]

By the late 1990s, plaintiffs seeking to overcome qualified immunity not only had to show that a reasonable officer would have known the act was unlawful but point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority."[139]

Soon, on-point authority became insufficient. By the 2000s, even when plaintiffs could point to controlling authority in their circuit, "[the] inquiry [had to] be undertaken in light of the specific context of the case, not as a broad general proposition."[140]

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immunity to the attorney general), *with id.* at 536–37 (Burger, C.J., concurring) (stating presidential aids should have absolute immunity in the area of national security), *and id.* at 540 (Stevens, J., concurring) (same); Nixon v. Fitzgerald, 457 U.S. 731, 749–53 (1982) (providing absolute immunity to the president for his official acts), *with id.* at 764–70, 785–92, 797 (White, J. dissenting) (arguing the president should only have qualified immunity for unlawful dismissal of employees); Harlow v. Fitzgerald, 457 U.S. 800, 807–13 (1982) (creating qualified immunity for presidential aids), *with id.* at 822–29 (Burger, C.J., dissenting) (stating presidential aides should have absolute immunity because congressional aids do). That debate continued. *See* Wyatt v. Cole, 504 U.S. 158, 159 (1992) (denying qualified immunity to private attorney) *with id.* at 175–77 (Rehnquist, J., dissenting) (arguing private attorney should be granted qualified immunity).

[137] The Supreme Court has also magnified the effect of qualified immunity on civil rights litigation in several other key ways that benefit the government and disadvantage plaintiffs. For instance, in *Forsyth*, 472 U.S. at 530, the Court announced that the denial of qualified immunity was immediately appealable under the collateral order doctrine. That procedural giveaway allows government defendants to greatly increase the costs of litigation through lengthy and repeated appeals. *See generally* Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. ONLINE 169 (2019) (arguing that the availability of immediate interlocutory appeals for the denial of qualified immunity is dubious on doctrinal, functional, and institutional grounds). And in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the Court announced that lower courts could decide qualified immunity without ever addressing the underlying constitutional violation. *Cf.* Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willet, J., concurring) ("[T]he inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less clearly doing so. Section 1983 meets Catch-22.") (citations omitted). The Supreme Court itself has only reached the constitutional merits in nine of its 27 decisions granting qualified immunity. *See* Appendix.

[138] *Anderson*, 483 U.S. at 640 (citations omitted).

[139] *See* Wilson v. Layne, 526 U.S. 603, 617 (1999).

[140] *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (citation and quotation marks omitted).

Today, plaintiffs must show that it is "beyond debate" that a question of law is clearly established in the relevant circuit.[141] Although the Supreme Court has stated that plaintiffs need not show that "the very action in question has previously been held unlawful,"[142] the Court has repeatedly cautioned the lower courts "not to define clearly established law at a high level of generality."[143] Presently, "[t]he pages of the *United States Reports* teem with warnings about the difficulty of placing a question beyond debate."[144]

3. Qualified Immunity now Regularly Facilitates Egregious Constitutional Violations

The Court in *Harlow* sensed its ruling would cause concern and promised that "[b]y defining the limits of qualified immunity essentially in objective terms, [the Court] provide[s] no license to lawless conduct."[145] In *Malley v. Briggs*, the Court also assured that qualified immunity's "ample protection" would not extend to "the plainly incompetent or those who knowingly violate the law."[146] Those assurances were hollow.

Nearly forty years later, qualified immunity routinely shields both the plainly incompetent and those who knowingly violate the law. To demonstrate, consider some of the qualified immunity cases the Court collected for its May 25, 2020 conference, but ultimately declined to hear.[147] In those cases, qualified immunity was granted to:

- Police officers who stole more than $225,000;[148]
- A police officer who shot a ten-year-old child, while repeatedly trying to shoot a nonthreatening family dog;[149]

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[141] District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citation omitted).

[142] *Wilson*, 526 U.S. at 615.

[143] Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

[144] Morrow v. Meachum, 917 F.3d 870, 874 (5th Cir. 2019).

[145] *Harlow*, 457 U.S. 800, 819 (1982).

[146] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[147] *See infra* Part III.

[148] Jessop v. City of Fresno, 936 F.3d 937, 939–40, 942 (9th Cir. 2019). Although none of the cases in this list went to trial because of qualified immunity, we—as the courts that awarded qualified immunity had to—treat their allegations as true. One of the more obscure costs of qualified immunity is that it prevents government officials from being exonerated at trial. Instead, courts treat them as if they have committed the unlawful acts alleged and shield them anyhow.

[149] *See* Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

- Police officers who fired gas grenades into a woman's home, despite her providing her keys and permission to enter the home to look for a suspect who was not there;[150]
- Medical board officials who searched a doctor's medical records without a warrant;[151]
- A police officer who spent more than ninety minutes peering into the windows of a home, flashing his lights and blaring his siren in the driveway, beating on the door, and doing various other things to force a resident to submit to a breathalyzer test;[152]
- A police officer who body slammed a nonthreatening woman and broke her collarbone as she walked away from him;[153]
- Police officers who allowed their dog to bite a suspect who had surrendered;[154]
- Police officers who tased a man multiple times before he lost consciousness and later died;[155] and
- A department of education superintendent who denied a charter school application to an organization based on the protected speech of the organization's CEO.[156]

Thanks to *Harlow* and its progeny, American courts now permit these and many, many other governmental wrongs for which officials would have faced liability between 1789 and 1981.

The increasingly muscular application of qualified immunity by the circuit courts can be explained, at least in part, by the Supreme Court's routine reversal of circuit decisions denying qualified immunity. Qualified immunity cases occupy an outsized proportion of the Supreme Court's docket, and the Court rarely grants certiorari to deny qualified immunity, but does frequently grant certiorari to allow it.[157] Moreover, although summary reversal is an "extraordinary remedy" meant for only "manifestly incorrect" decisions,[158] the Court routinely applies that remedy to circuit court decisions that allow government officials to face liability for unconstitutional acts by

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150 *See* West v. City of Caldwell, 931 F.3d 978, 981–82, 984–85 (9th Cir. 2019).

151 *See* Zadeh v. Robinson, 928 F.3d 457, 462, 470 (5th Cir. 2019).

152 *See* Brennan v. Dawson, 752 F. App'x 276, 278–79 (6th Cir. 2018).

153 *See* Kelsay v. Ernst, 933 F.3d 975, 978–79, 982 (8th Cir. 2019).

154 *See* Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018).

155 *See* Cooper v. Flaig, 779 F. App'x 269, 270, 270–72 (5th Cir. 2019) (per curiam).

156 *See* Clarkston v. White, 943 F.3d 988, 990–93 (5th Cir. 2019).

157 *See* Baude, *supra* note 106, at 82–83.

158 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

denying qualified immunity.[159] As a result, circuit courts have grown to consider it their obligation to "think twice before denying qualified immunity."[160]

Similarly, the Supreme Court has nearly always sided with qualified immunity. In the 39 years since it decided *Harlow*, the Supreme Court has considered the clearly established test thirty-six times.[161] It has only found that a government official violated clearly established law three times: in *Groh v. Ramirez*[162] and *Hope v. Pelzer*[163] more than a decade ago, and *Taylor v. Riojas* in November 2020.[164]

In 1967, the Supreme Court created a general defense of good faith that would expand into the doctrine of qualified immunity courts apply today.[165] Over the past 53 years, the trend of Supreme Court precedent has consistently favored granting immunity in a growing number of circumstances.[166] But three decisions from the Court's 2020 term indicate that it may be breaking with that trend. In *Taylor v. Riojas* and *McCoy v. Alamu*, the Court pared back the application of the clearly established test—holding that qualified immunity cannot forgive obvious constitutional violations.[167] And in *Tanzin v. Tanvir* the Court rejected the policy arguments *Harlow* cited to create qualified immunity in the first place.[168] Taken together, *Taylor*, *McCoy*, and

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[159] *See* Appendix (noting summary reversals with a dagger). More than one-third of the Court's qualified immunity decisions are summary reversals (13 of 36), and only one, *Taylor v. Riojas* resulted in a denial of immunity. As of 2014, the Roberts Court summarily reversed an average of 6.2% of its cases. *See* William Baude, *Foreward: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 30 (2015). But when it comes to addressing qualified immunity, the Roberts Court has used summary reversal in 45.8% of its decision (11 of 24). *See* Appendix.

[160] *See* Morrow v. Meachum, 917 F.3d 870, 876 (5th Cir. 2019).

[161] *See infra* Appendix.

[162] *See* 540 U.S. 551, 565 (2004).

[163] *See* 536 U.S. 730, 744 (2002).

[164] *See* 141 S. Ct. 52, 54 (2020) (per curiam). In 2018, the Supreme Court reversed a grant of qualified immunity in *Sause v. Bauer*, a case where the plaintiff alleged police stopped her from praying. 138 S. Ct. 2561, 2562 (2018) (per curiam). But the Court did not address the clearly established test. Instead, it simply reversed the lower court's decision because they had failed to properly construe the allegations in the plaintiff's *pro se* complaint in the light most favorable to the plaintiff, and so the Court could not address whether qualified immunity applied. *Id.* at 2563. That case and others concerning qualified immunity that were decided on procedural grounds without consideration of the clearly established test are not included in the Appendix.

[165] *See supra* Section II.A.

[166] *See supra* Section II.B.

[167] *See infra* Section III.A.

[168] *See infra* Section III.B.

Tanzin suggest a different trend: that the Court may be recalibrating qualified immunity, if not reconsidering the doctrine entirely.

III. THREE RECENT DECISIONS SIGNAL THAT THE SUPREME COURT MAY BE ON ITS WAY TO RECALIBRATING QUALIFIED IMMUNITY

The Supreme Court has been unquestionably steadfast in its pro-defendant application of *Harlow*'s clearly established standard and, until its 2020 term, it showed no signs of wavering. Even near the end of its 2019 term, against the backdrop of demonstrations calling for increased police accountability following the killings of George Floyd and Breonna Taylor, the Supreme Court rejected thirteen petitions urging the reconsideration of qualified immunity.[169] Only Justice Thomas dissented, outlining his "doubts about our qualified immunity jurisprudence" and its faithfulness to American legal history.[170] But several of the Court's recent decisions suggest that it may finally be coming to appreciate that qualified immunity is flawed in both practice and theory. The Court's decisions in *Taylor* and *McCoy*[171] address the former, its decision in *Tanzin* addresses the latter.

It is impossible to understand these decisions' significance, however, without first dealing with *Hope v. Pelzer*,[172] one of the most important Supreme Court precedents rejecting qualified immunity. In that case, Alabama prison inmate Larry Hope sued prison guards after they staked him, shirtless, to a hitching post in the hot sun for seven hours.[173] Prison officials denied Hope bathroom breaks and only gave him water once or twice.[174] At one point a guard taunted Hope by giving water to dogs and kicking over a

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[169] *See* Anderson v. City of Minneapolis, 141 S. Ct. 110 (2020) (mem.); Baxter v. Bracey, 140 S. Ct. 1862 (2020) (mem.); Brennan v. Dawson, 141 S. Ct. 108 (2020) (mem.); Clarkston v. White, 140 S. Ct. 2763 (2020) (mem.); Cooper v. Flaig, 141 S. Ct. 131 (2020) (mem.); Corbitt v. Vickers, 141 S. Ct. 110 (2020) (mem.); Davis v. Ermold, 141 S. Ct. 3 (2020) (mem.); Hunter v. Cole, 141 S. Ct. 111 (2020) (mem.); Jessop v. City of Fresno, 140 S. Ct. 2793 (2020) (mem.); Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (mem.); Mason v. Faul, 141 S. Ct. 116 (2020) (mem.); West v. Winfield, 141 S. Ct. 111 (2020) (mem.); Zadeh v. Robinson, 141 S. Ct. 110 (2020) (mem.).

[170] *Baxter*, 140 S. Ct. at 1862–65 (Thomas, J., dissenting).

[171] Because *McCoy* is a summary order, granting, vacating, and remanding (GVR) the Fifth Circuit's decision, it is not included in the list of cases in which the Court has addressed the clearly established test. *See infra* Appendix. Neither are the many cases the Court has GVRed in favor of qualified immunity. *See, e.g.*, Hunter v. Cole, 137 S. Ct. 497 (2016) (mem.); Piper v. Middaugh, 136 S. Ct. 2408 (2016) (mem.); Pickens v. Aldaba, 136 S. Ct. 479 (2015) (mem.).

[172] 536 U.S. 730 (2002).

[173] *Id.* at 734–35.

[174] *Id*. at 735.

cooler in front of him.[175] The lower courts granted qualified immunity to the guards, finding that the law was not clearly established because the cases Hope cited were not "materially similar to Hope's situation."[176]

The Supreme Court reversed, denying the guards qualified immunity and noting that "the Eighth Amendment violation [wa]s obvious."[177] But *Hope* explained that despite the guards' conduct being in obvious violation of the Constitution, they "may nevertheless be shielded from liability . . . if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[178]

Hope recentered qualified immunity on the concept of "fair warning,"[179] explaining that two earlier cases—where circuit courts explained that "handcuffing inmates to the fence . . . for long periods of time"[180] and withholding water from inmates as a punishment[181] violated the Eighth

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[175] *Id*.

[176] *Id*. at 736 (internal quotation marks omitted). The Eleventh Circuit noted that the clearly established test requires exacting specificity: "[w]hile we recognize that the inappropriateness of the hitching post could be inferred from the[] opinions [cited by *Hope*], a bright-line rule for qualified immunity purposes 'is not to be found in abstractions . . . but in studying how these abstractions have been applied in concrete circumstances.'" Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001) (citing Lassiter v. Ala. A&M Univ. Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994)).

[177] *Hope*, 536 U.S. at 738.

[178] *Id*. at 739 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, despite being considered to have created an "obviousness" exception to qualified immunity, see Brosseau v. Haugen, 543 U.S. 194, 199 (2004), *Hope* actually explains that qualified immunity can shield government officials even for obvious violations. It often does. *See, e.g.*, Frasier v. Evans, 992 F.3d 1003, 1015 (10th Cir. 2021) (granting qualified immunity to police who seized video taken of them by a bystander to an arrest, despite having been trained that the seizure violated the First Amendment); Jessop v. City of Fresno, 936 F.3d 937, 939–40, 943 (9th Cir. 2019) (granting qualified immunity to police who stole more than $225,000 while executing a search warrant).

[179] Touching on another point of confusion surrounding qualified immunity, the "fair warning" requirement derives from Section 1983's criminal analogue, Section 242. 18 U.S.C. § 242. While Section 1983 permits a civil action against a person who violates the Constitution under color of law, Section 242 permits their criminal prosecution, so long as they acted "willfully." The Supreme Court has largely ignored this additional mens rea requirement in Section 242. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 662 & n.38 (1979) (Powell, J., concurring). Moreover, although qualified immunity does not apply to criminal charges under Section 242 and depends on different considerations than the fair warning requirement of Section 242 (qualified immunity's concerns rest on policy, while Section 242 considerations flow from due process), the Court has treated the standards identically. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 264–72 (1997).

[180] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).

[181] *See* Ort v. White, 813 F.3d 318, 325–326 (11th Cir. 1987); *Hope*, 536 U.S. at 743 (explaining that "*Ort*'s premise is that 'physical abuse directed at [a] prisoner *after* he

Amendment—ensured that the guards "were fully aware of the wrongful character of their conduct," especially in light of Alabama prison regulations and a report from the U.S. Department of Justice on the use of hitching posts.[182] In addition, "[t]he obvious cruelty inherent in this practice should have provided . . . [the guards] with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."[183]

Although aptly named, *Hope* failed to amount to much. That case and *Groh*—where the Court denied qualified immunity to an officer who relied on a facially invalid warrant[184]—stood out as aberrations in the Court's qualified immunity jurisprudence. Until the 2020 term.

A. THE RECENT DECISIONS IN *TAYLOR V. RIOJAS* AND *MCCOY V. ALAMU* SUGGEST THAT THE COURT MAY BE ADJUSTING THE APPLICATION OF THE CLEARLY ESTABLISHED TEST

Just months after denying the clutch of qualified immunity cases in June 2020, the Court handed down *Taylor v. Riojas*.[185] In *Taylor*, the Court confronted grotesque horror in an American prison.[186] Trent Taylor, a Texas inmate, spent six days in a pair of inhumane prison cells.[187] In one, "almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with 'massive amounts' of feces that emitted a 'strong fecal odor.'"[188] In that setting, Taylor was naked. He could not eat or drink for fear of contamination because feces was even "packed inside the water faucet."[189] Prison officials were aware of the conditions. Rather than clean Taylor's prison cell, officials laughed at Taylor and told him he was "going to have a long weekend."[190] Taylor was then moved to another cell that had no "toilet, water fountain, or bunk."[191] That cell was extremely cold and referred to by other prisoners as "the cold room."[192] A guard told Taylor that he hoped Taylor would "fucking freeze" in the cell, which had a drain in the

terminate[s] his resistance to authority would constitute an actionable eight amendment violation.'") (quoting *Ort*, 813 F.3d at 324).

182 *Hope*, 536 U.S. at 744–45.

183 *Id.* at 745.

184 Groh v. Ramirez, 540 U.S. 551, 563–65 (2004).

185 141 S. Ct. 52 (2020) (per curiam).

186 *See id.* at 53.

187 Taylor v. Stevens, 946 F.3d 211, 218 (2019) [hereinafter *Stevens*].

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.* at 218 n.9.

floor where guards ordered Taylor to urinate.[193] The drain was clogged and smelled strongly of ammonia.[194] Sewage from the drain also backed up onto the floor, where Taylor had to sleep naked.[195]

Taylor sued the prison officials for violating his Eighth Amendment rights.[196] The Fifth Circuit agreed that the guards subjected Taylor to cruel and unusual punishment, but held that the guards were entitled to qualified immunity because it was not clearly established that "prisoners couldn't be housed in cells teeming with human waste" "for only six days."[197] In an earlier case, the Fifth Circuit noted that it had merely held that prisoners could not be held in those conditions "for months on end."[198] It "hadn't previously held that a time period so short violated the Constitution."[199] According to the Fifth Circuit, "[t]hat doom[ed] Taylor's claim."[200] Surprisingly, it did not.

Addressing the case of "shockingly unsanitary cells,"[201] the Supreme Court breathed new life into *Hope*.[202] Citing that case, the Court held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[203] Going further than *Hope*, *Taylor* did not even identify any earlier decisions or directives that would have provided the officers specific notice of a constitutional violation.[204] Instead, *Taylor* said it was obvious: "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[205]

Taylor could have been written off as another rare instance, like *Hope*, where the Court was so offended by an especially egregious constitutional violation that it was willing to make an exception to the clearly established

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193 *Id.* at 218 & n.9.

194 *Id.* at 218.

195 *Id.*

196 *Id.* at 219.

197 *Id.* at 222.

198 *Id.* (citing McCord v. Maggio, 927 F.2d 844, 848 (5th Cir. 1991)).

199 *Id.* (citing Davis v. Scott, 157 F.3d 1003, 1005–06 (5th Cir. 1998)).

200 *Id.* at 222.

201 Taylor v. Riojas, 141 S. Ct. 52, 53 (2020).

202 The Fifth Circuit had cited *Hope* but held that the prison officials did not have a "'fair warning' that their specific actions were unconstitutional." Taylor v. Stevens, 946 F.3d 211, 222 (2019) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

203 *Taylor*, 141 S. Ct. at 53.

204 *See id.* at 54.

205 *Id.*

test.[206] But the Court doubled down on *Taylor* just three months later with its decision in *McCoy v. Alamu*.[207] In that case, a prison guard sprayed inmate Prince McCoy "directly in the face with his [chemical] spray for no reason at all," while McCoy was locked in his cell.[208] McCoy sued, and the Fifth Circuit again applied qualified immunity.[209] Using a similarly constrained understanding of the clearly established test as its decision in *Taylor*,[210] the Fifth Circuit held that the constitutional violation was not clearly established, despite circuit decisions clearly establishing that a prison guard could not punch, tase, or strike an inmate with a baton for no reason.[211] Dissenting, Judge Costa protested, citing *Hope*: "Qualified immunity is about notice. If a public official knows that using force is unlawful in a given circumstance, there is no reason to protect him for applying excessive and unreasonable force merely because his means of applying it are novel."[212]

The Supreme Court agreed. Employing its rarely used power of summary reversal, much more commonly reserved for cases in which a circuit court *denied* qualified immunity,[213] the Court granted, vacated, and remanded *McCoy* "for further consideration in light of *Taylor*."[214]

Importantly, unlike *Taylor*, *McCoy* cannot be cabined off as just another grotesquely outrageous case.[215] While the actions of the prison guard in the case were undoubtedly despicable, the defining feature of the case was that the Fifth Circuit chose to make weapon-by-weapon comparisons while considering whether precedent was clearly established.[216] Thus, the case

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[206] *See* Jay Schweikert, *The Supreme Court Won't Save Us from Qualified Immunity*, CATO AT LIBERTY (Mar. 3, 2021, 4:58 PM), https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity [https://perma.cc/EF4U-EL2S] (arguing that in *Taylor*, "the Supreme Court at least made some effort to curb the worst excesses of the doctrine").

[207] *See* 141 S. Ct. 1364, 1364 (2021) (mem.).

[208] McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020) [hereinafter *Alamu*].

[209] *Id.* at 232.

[210] *See id.* at 233 n.8 ("Some might find this a puzzling result, insofar as QI might have us find a violation in one breath, but, in the next, hold it too debatable to prevent immunity. No matter. What the first prong gives, the second prong will often snatch back.").

[211] *Id.* at 234–35 (Costa, J., dissenting) (citing Cowart v. Erwin, 837 F.3d 444, 449, 454–55 (5th Cir. 2016); Outlaw v. City of Hartford, 884 F.3d 351, 366–67 (2d Cir. 2018); Newman v. Guedry, 703 F.3d 757, 763–64 (5th Cir. 2012)).

[212] *Alamu*, 950 F.3d. at 235 (citation and internal quotation marks omitted) (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002); *Newman*, 703 F.3d at 764).

[213] *See supra* note 159.

[214] McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) (mem.).

[215] *But see* Schweikert, *supra* note 206 (arguing that just like *Taylor*, *McCoy* is about "the worst excesses of qualified immunity").

[216] *Alamu*, 950 F.3d at 234–35 (Costa, J., dissenting).

stands out not because the facts are "particularly egregious,"[217] but because the Fifth Circuit chose to slice the clearly established law very thinly, in a continuation of the post-*Harlow* circuit court trend. Viewed in this light, *McCoy* becomes a much more significant reversal and a signal from the Court that the lower courts have taken the clearly established test too far.[218]

B. *TANZIN V. TANVIR* CASTS DOUBT ON THE FOUNDATIONS OF QUALIFIED IMMUNITY

Between *Taylor* and *McCoy*, the Supreme Court sent another signal that it may be recalibrating qualified immunity. This time the Court addressed the analytical foundation of the doctrine, instead of its application. It dealt with the backbone of the modern-day doctrine of qualified immunity—policy. In *Tanzin v. Tanvir*,[219] the Court addressed whether damages against individual federal officers were "appropriate relief" under the Religious Freedom Restoration Act (RFRA).[220] Although the appeal explicitly did not address the issue of qualified immunity,[221] *Tanzin*'s unanimous exposition of the historical role of damages against government officials and the Court's institutional inadequacy as a policymaking body directly undermine the foundations of qualified immunity and cast doubt on *Harlow*.

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[217] Taylor v. Riojas, 141 S. Ct. 52, 54 (2020).

[218] At first glance, the Supreme Court sent a different signal during its 2021 term when it summarily reversed denials of qualified immunity in *Rivas-Villegas v. Cortesluna*, 595 U.S. ___ (2021) (per curiam), and *City of Tahlequah v. Bond*, 595 U.S. ___ (2021) (per curiam). Both cases involved excessive-force claims against police who, responding to 9-1-1 calls, faced split-second decisions about how to react to armed individuals. *Id.* Although the pair of decisions understandably engendered pessimism about the likelihood of qualified-immunity reform at the Supreme Court, see Marcia Coyle, *Reading the Tea Leaves on Qualified Immunity*, NAT'L L.J. (Oct. 20, 2021, 10:53 AM), https://www.law.com/supremecourtbrief/2021/10/20/qualified-immunity-scotus-amici-support-u-s-abortion-challenge-the-judge-term-limits/ [https://perma.cc/M87G-USK2], *Rivas-Villegas* and *Tahlequah* represent an unexceptional continuation of the Supreme Court's general deference toward government defendants in its application of the clearly established test, especially in cases involving excessive force claims against law enforcement officers. *See infra* Appendix. Of the 27 cases in which the Court granted immunity, 26 involved law enforcement officers, and, of those, all involved Fourth Amendment claims, ten for excessive force. *Taylor* and *McCoy*, on the other hand, stand out as rare instances in which the Court has sided with plaintiffs under the clearly established test and are unique for their application of an obviousness exception to qualified immunity. *See supra* Section III.A. That exception has already taken root in the circuit courts. *See Villarreal v. City of Laredo*, ___ F.4th ___, *3–4 (5th Cir. 2021) (applying the obviousness exception to reverse a grant of qualified immunity to police for a First Amendment violation).

[219] 141 S. Ct. 486 (2020).

[220] 42 U.S.C. § 2000bb-2(1).

[221] *Tanzin*, 141 S. Ct. at 492, n*.

Tanzin involved claims by several Muslim-American citizens and green card holders, placed on the "No Fly List" by FBI agents in retaliation for their refusal to act as informants in their religious communities.[222] Because of the FBI agents' actions, the men were prohibited from flying for several years, lost substantial sums of money, were unable to visit family in other countries, wasted airline tickets, and lost jobs.[223] The plaintiffs sued various FBI agents in their official and personal capacities, seeking removal from the No Fly List and money damages. More than a year after the plaintiffs sued, the government informed them that they could fly again, thus mooting their injunctive claims, but they continued with their damages claims against the individual FBI agents under RFRA.[224]

RFRA secures the right to free exercise under the First Amendment.[225] Congress passed RFRA in the wake of the Court's decision in *Employment Division v. Smith*, which held that the First Amendment permitted laws that burden religious exercise, so long as those laws were neutral and generally applicable.[226] RFRA sought to restore the pre-*Smith* standard, "provid[ing] a claim . . . to persons whose religious exercise is substantially burdened by government"[227] and enabled a person so burdened to "obtain appropriate relief against a government."[228] RFRA further defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."[229]

The district court dismissed the individual capacity claims against the FBI agents, ruling that RFRA does not permit monetary relief.[230] The Second

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[222] *Id.* at 489.

[223] Tanvir v. Tanzin, 894 F.3d 449, 453 (2d Cir. 2018). The Second Circuit's opinion describes behavior by the FBI that sounds an awful lot like a protection racket. In one instance, Tanvir, a long-haul trucker, was in Atlanta for work when he heard his mother was visiting New York from Pakistan. Tanvir booked a flight back, but an airport employee informed him that he could not fly. At that time, FBI agents approached him and directed him to call another agent who had previously pressured him to become an informant. He was forced to travel back to New York by bus, where an agent told Tanvir that if he answered her questions, "she would help remove his name from the 'No Fly List.'" Because he declined, Tanvir had to quit his job. *Id.* at 456.

[224] *Tanzin*, 141 S. Ct. at 489.

[225] 42 U.S.C. § 2000bb-1.

[226] *See* Employment Division v. Smith, 494 U.S. 872, 885–90 (1990).

[227] 42 U.S.C. § 2000bb(b)(1)–(2).

[228] 42 U.S.C. § 2000bb-1(c).

[229] 42 U.S.C. § 2000bb-2(1).

[230] Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020).

Circuit reversed, finding that "government" includes individual officials[231] and "appropriate relief" includes money damages.[232]

The Supreme Court unanimously affirmed, analogizing RFRA claims to constitutional claims, highlighting the long history of damages claims against government officials in the United States, and explicitly rejecting the government's request that the Court shield government officials from litigation for the very same policy reasons set out in *Harlow*.[233] Writing for the Court, Justice Thomas explained that the "legal 'backdrop against which Congress enacted' RFRA confirms the propriety of individual capacity suits."[234] "The phrase 'persons acting under color of law' draws on one of the most well-known civil rights statutes: 42 U.S.C. § 1983. That statute applies to 'person[s] . . . under color of any statute,' and this Court has long interpreted it to permit suits against officials in their official capacities."[235] Turning to the meaning of "appropriate relief," the Court again drew parallels to constitutional claims, holding that "RFRA made clear that it was reinstating both the pre-Smith substantive protections of the First Amendment and the right to vindicate those protections by a claim."[236]

The Court also explored the historical role damages played against individual government officials. "In the context of suits against Government officials, the Court said, "damages have long been awarded as appropriate relief."[237] *Tanzin* further explained that common-law causes of action against government officials "remained available throughout the 19th century and into the 20th."[238] Noting that damages are still available today against

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[231] Tanvir v. Tanzin, 894 F.3d 449, 462 (2d Cir. 2018) ("[G]iven both RFRA's and Section 1983's applicability to 'person[s]' acting 'under color of law,' we hold that RFRA, like Section 1983, authorizes a plaintiff to bring individual capacity claims against federal officials or other 'person[s] acting under color of [federal] law.'").

[232] *Id.* at 463 (quoting Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 65–66 (1992)) ("[W]hen faced with the question of what remedies are available under a statute that provides a private right of action, [the Court] presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise.") (internal quotation marks omitted).

[233] *Tanzin*, 141 S. Ct. at 490–93.

[234] *Tanzin*, 141 S. Ct. at 490 (citing Stewart v. Dutra Constr. Co., 543 U.S. 481, 487 (2005)).

[235] *Id.* (citing Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305–06 & n.8 (1986)).

[236] *Id.* at 492.

[237] *Id.* at 491 (citing Pfander & Hunt, *supra* note 28, at 1871–75, 1875 n.52).

[238] *Id.* (citing Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Elliot v. Swartwout, 35 U.S. (10 Pet.) 137 (1836); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866); Belknap v. Schlid, 161 U.S. 10 (1896); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912)).

federal,[239] state, and local officials, the Court drew on its experience with Section 1983, explaining that the "availability of damages" under that statute was "particularly salient" to its analysis.[240]

Finally, the Court rejected the government's reliance on policy to create a new immunity. The government argued that the policy decisions underlying the Court's creation of qualified immunity demanded the Court's creation of a similar exemption for damages under RFRA, even citing *Harlow* and other qualified immunity cases for the proposition that damages claims would prevent government officials from properly discharging their duties.[241] Writing for the unanimous court, Justice Thomas responded not only by explaining that the damages remedy "has coexisted with our constitutional system since the dawn of the Republic," but also by emphasizing that although there "may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so . . . there are no constitutional reasons why we must do so in its stead." [242]

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[239] Besides providing a promising nod toward reforming qualified immunity, *Tanzin* also provides the Court's most direct acknowledgement that the Westfall Act, 28 U.S.C. § 2679, provides the statutory basis for some category of *Bivens* claims. *Tanzin*, 141 S. Ct. at 491 ("In 1988 the Westfall Act foreclosed common-law claims for damages against federal officials, but it left open claims for constitutional violations . . . ."); *see also* Hernandez v. Mesa, 140 S. Ct. 735, 748 n.9 (2020) ("The [Westfall] Act . . . permits claims 'brought for a violation of the Constitution.' By enacting this provision, Congress made clear that it was not attempting to abrogate *Bivens* . . . . [T]he provision . . . left *Bivens* where it found it [in 1988].") (citations omitted and responding to Brief for the Institute for Justice as Amicus Curiae Supporting Petitioners 21, Hernandez v. Mesa, 149 S. Ct. 735 (2020) (No. 17-1678); Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017). That codification is crucial because the antipathy from the Court toward an implied cause of action against federal officials under the Constitution has been founded on a concern that Congress has not provided an explicit constitutional cause of action against federal officials. *See, e.g.*, *Ziglar*, 137 S. Ct. at 1857; *Hernandez*, 140 S. Ct. at 752 (Thomas, J., concurring). The Court did not note that concern in *Harlow*, which involved claims against federal officials. Rather, it presumed the availability of *Bivens* claims against the federal defendants and created qualified immunity to address perceived policy concerns with individual liability. *See supra* Section II.B.1. Indeed, one third of the Court's qualified immunity cases have involved claims against federal officials. *See* Appendix. So, it is curious that as the availability of *Bivens* claims has weakened, *see, e.g.*, *Ziglar* and *Hernandez*, *supra*, the availability of qualified immunity has only grown stronger, *see supra* Section II.B.2.

[240] *Tanzin*, 141 S. Ct. at 492.

[241] Petition for Writ of Certiorari, at 13–14, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71) (citing *Ziglar*, 137 S. Ct. at 1858, 1860–61; Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Anderson v. Creighton, 483 U.S. 635, 638 (1987)); *see also* Brief for Petitioners at 29–30, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71) (citations omitted) (arguing that "[d]amages remedies against federal employees in their personal capacities could . . . impose 'costs and consequences to the government itself,' potentially including costs of 'defense and indemnification.'").

[242] *Tanzin*, 141 S. Ct. at 493.

The cases cited by Justice Thomas not only establish the historical availability of damages, but the historical *un*availability of court-created immunities.[243] Illustrating the overlap between *Tanzin*'s analysis and qualified immunity, Justice Thomas cited the same cases, or authorities relying on those cases, in his dissent in *Baxter*, calling for the Court to reconsider qualified immunity.[244]

Driving that point home, Justice Thomas ended *Tanzin* with a statement that sounds much more like Justice Story's in *The Apollon* than Justice Powell's in *Harlow*: "To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. Congress is best suited to create such a policy. Our task is simply to interpret the law as an ordinary person would."[245]

Although presented outside the four walls of qualified immunity, *Tanzin* makes clear that policy cannot permit the Court to create special protections for government officials—no matter how good the policy reasons.[246] Further,

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[243] *See Little*, 6 U.S. at 179 (refusing to excuse legal violations committed by a navy captain at the order of the president); *Swartwout*, 35 U.S. at 158 ("[T]he collector is personally liable to an action to recover back an excess of duties paid to him as collector, under the circumstances stated in the point; although he may have paid over the money into the treasury."); *Mitchell*, 54 U.S. at 137 ("Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed."); *Buck*, 70 U.S. at 344 (noting that a marshal's error in judgment subjects him to liability and "the court can afford him no protection against the parties so injured"); *Belknap*, 161 U.S. at 18 (reasoning federal officers can be "personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States"); *Philadelphia Co.*, 223 U.S. at 619–20 ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.").

[244] Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (citing, for example, Baude, *supra* note 106, at 57; Engdahl, *supra* note 34, at 14–21, 48–55; *Little*, 6 U.S. at 179; Woolhandler, *supra* note 55, at 414–22).

[245] *Id.*

[246] The Court's aversion to policy makes particularly good sense when applied to qualified immunity because empirical research has disproven all of the policy assumptions relied on by the Court in justifying the creation of qualified immunity. *See generally* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). In fact, scholars warned the Court of this knowledge gap *before Harlow*. The Court was aware of those warnings. *Compare* Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. CT. REV. 281, 282 (1980) ("Some of these problems [created by allowing suits against government officials] cannot readily be resolved. The answers turn in part upon empirical data that are unavailable.") *with Harlow*, 457 U.S. at 814 nn.22 & 35 (citing Schuck, *supra*, at 324–27). Moreover, in his paper twice-cited by *Harlow*, Professor Schuck warned that wide-ranging changes to governmental immunity standards should come from Congress, not the Supreme Court. Schuck, *supra*, at 346. The Court did not heed that warning.

Tanzin is explicitly connected by analogy to constitutional claims and the historical backdrop of Section 1983. As noted above, *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law."[247] If consistently applied, the principles set forth in *Tanzin* should cause another reformulation of qualified immunity, if not its wholesale abandonment.

Combined with the Court's decisions in *Taylor* and *McCoy*, *Tanzin* signals that the Court's 2020 term could be the beginning of the end for qualified immunity. Although there is no way to tell when the Court might take more concrete steps toward recalibrating qualified immunity—and it is doubtful that the Court will simply overrule *Harlow* anytime soon—its recent decisions cast doubt on both the application and theory underlying the clearly established test.

CONCLUSION

The Supreme Court created qualified immunity through an act of judicial policymaking. Its creation bucked centuries of American constitutional norms and judicial history. Although the past four decades since *Harlow* have seen the Court make it increasingly difficult for civil rights plaintiffs to overcome the burden of qualified immunity, the Court's decisions this term in *Taylor*, *McCoy*, and *Tanzin* herald a change in the Court's approach. Whether that means that the Court will simply nudge qualified immunity in the opposite direction or revisit the doctrine wholesale remains to be seen. Either way, the stage is set for the Court to apply the historical analysis of *Tanzin* to qualified immunity and confront the reality that qualified immunity has no basis in any American law, congressionally enacted statute, or the Constitution.

[247] Anderson v. Creighton, 483 U.S. 635, 645 (1987).

APPENDIX

Supreme Court Applications of the Qualified Immunity Standard from 1982 through 2021[248]

Case	Official	Claim	Merits Reached	Lower Court
Rivas-Villegas v. Cortesluna,† 595 U.S. ___ (2021)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
City of Tahlequah v. Bond,† 595 U.S. (2021)	Local Law Enforcement	4th Amendment (Excessive Force)	No	10th Cir.
Taylor v. Riojas,† 141 S. Ct. 52 (2020)	State Prison Officials	8th Amendment	Yes	5th Cir.
City of Escondido v. Emmons,*† 139 S. Ct. 500 (2019)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
Kisela v. Hughes,† 138 S. Ct. 1148 (2018)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
District of Columbia v. Wesby, 138 S. Ct. 577 (2018)	Local Law Enforcement	4th Amendment (Arrest)	Yes	D.C. Cir.
Hernandez v. Mesa,* 137 S. Ct. 2003 (2017)	Federal Law Enforcement (Border Patrol)	5th Amendment (Due Process)	No	5th Cir.
Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)	DOJ & Federal Prison Officials	5th Amendment (Equal Protection)	No	2d Cir.
White v. Pauly, *† 137 S. Ct. 548 (2017)	State Law Enforcement	4th Amendment (Excessive Force)	No	10th Cir.

[248] This appendix builds on the appendix assembled by Professor Baude in his 2018 Article *Is Qualified Immunity Unlawful?*, *supra* note 106, at 88. Cases where the Court found no immunity are indicated in bold, cases remanded for further determination of immunity by an asterisk, and summary reversals by a dagger. Thank you to our colleague Daniel Rankin for his help on the appendix.

Case	Official	Claim	Merits Reached	Lower Court
Mullenix v. Luna,† 577 U.S. 7 (2015)	State Law Enforcement	4th Amendment (Excessive Force)	No	5th Cir.
Taylor v. Barkes,† 575 U.S. 822 (2015)	State Prison Officials	8th Amendment	No	3d Cir.
San Francisco v. Sheehan, 575 U.S. 600 (2015)	Local Law Enforcement	4th Amendment (Excessive Force)	No.	9th Cir.
Carroll v. Carman,† 574 U.S. 13 (2014)	State Law Enforcement	4th Amendment (Search)	No	3d Cir.
Lane v. Franks, 573 U.S. 228 (2014)	College President	1st Amendment (Employment)	Yes	11th Cir.
Plumhoff v. Rickard, 572 U.S. 765 (2014)	Local Law Enforcement	4th Amendment (Excessive Force)	Yes	6th Cir.
Wood v. Moss, 572 U.S. 744 (2014)	Federal Law Enforcement (Secret Service)	1st Amendment (Assembly)	No	9th Cir.
Stanton v. Sims,† 571 U.S. 3 (2013)	Local Law Enforcement	4th Amendment (Illegal Entry)	No	9th Cir.
Reichle v. Howards, 566 U.S. 658 (2012)	Federal Law Enforcement (Secret Service)	1st Amendment (Retaliation)	No	10th Cir.
Filarsky v. Delia, 566 U.S. 377 (2012)	City Outside Counsel	4th Amendment (Search)	No	9th Cir.
Messerschmidt v. Millender, 565 U.S. 535 (2012)	Local Law Enforcement	4th Amendment (Search/Seizure)	No	9th Cir.
Ryburn v. Huff,† 565 U.S. 469 (2012)	Local Law Enforcement	4th Amendment (Search)	Yes	9th Cir.

Case	Official	Claim	Merits Reached	Lower Court
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)	U.S. Attorney General	4th Amendment (Arrest)	Yes	9th Cir.
Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009)	School Officials	4th Amendment (Search/Seizure)	Yes	9th Cir.
Pearson v. Callahan, 555 U.S. 223 (2009)	State Law Enforcement	4th Amendment (Illegal Entry)	No	10th Cir.
Brosseau v. Haugen,† 543 U.S. 194 (2004)	Local Law Enforcement	4th Amendment (Excessive Force)	No	9th Cir.
Groh v. Ramirez, 540 U.S. 551 (2004)	Federal Law Enforcement (ATF)	4th Amendment (Search/Seizure)	Yes	9th Cir.
Hope v. Pelzer, 536 U.S. 730 (2002)	State Prison Officials	8th Amendment	Yes	11th Cir.
Saucier v. Katz, 533 U.S. 194 (2001)	Federal Law Enforcement (Military Police)	4th Amendment (Excessive Force)	No	9th Cir.
Hanlon v. Berger, 526 U.S. 808 (1999)	Federal Law Enforcement (Fish and Wildlife)	4th Amendment (Search)	Yes	9th Cir.
Wilson v. Layne, 526 U.S. 603 (1999)	State & Federal Law Enforcement (U.S. Marshals)	4th Amendment (Search)	Yes	4th Cir.
Hunter v. Bryant,† 502 U.S. 224 (1991)	Federal Law Enforcement (Secret Service)	4th Amendment (Arrest)	No	9th Cir.

Case	Official	Claim	Merits Reached	Lower Court
Anderson v. Creighton,* 483 U.S. 635 (1987)	Federal Law Enforcement (FBI)	4th Amendment (Search/Seizure)	No	8th Cir.
Malley v. Briggs,* 475 U.S. 335 (1986)	State Law Enforcement	4th Amendment (Arrest)	No	1st Cir.
Mitchell v. Forsyth, 472 U.S. 511 (1985)	U.S. Attorney General	4th Amendment (Search/Seizure)	Yes	3d Cir.
Davis v. Scherer, 468 U.S. 183 (1984)	State Law Enforcement	14th Amendment (Due Process)	No	11th Cir.
Harlow v. Fitzgerald,* 457 U.S. 800 (1982)	Presidential Aides	1st Amendment (Employment)	No	D.C. Cir.

* Supreme Court found no immunity.

** Case remanded for further determination of immunity.