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LEARNING POINTS

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QUALIFIED IMMUNITY UNDER ATTACK

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In the wake of the recent intense criticism of the use of force by law enforcement, the well-established defense of qualified immunity has come under attack by law makers.

Qualified immunity has been targeted as one of the main problems in the national discussions calling for reform and more police accountability.

What is Qualified Immunity and why do we have it?

Qualified immunity is based on the need to shield government officials (including, peace officers) from being held personally liable for civil damages in lawsuits alleging constitutional violations, when their conduct did not violate "clearly established" federal law. See: *Harlow v. Fitzgerald,* 457 US 800, 818 (1982)

In *Harlow*, the Supreme Court wrote **"there is a danger that 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'".**

The Court justified the doctrine as necessary to achieve "balance" between allowing victims to hold officials accountable and minimizing "social costs" to "society as a whole". The Court identified four "social costs" - (1) the expense of litigation; (2) diverting "...official energy from pressing public issues" by requiring officials to respond to such litigation; (3) concern that the threat of litigation would "deter[]...able citizens from acceptance of public office"; and (4) concern that the threat of lawsuits could chill lawful law enforcement conduct.

Recent U.S. Supreme Court cases affirmed the value of qualified immunity in that it "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223 (2009).] As Justice White, writing for the Court, noted ***"QUALIFIED IMMUNITY PROTECTS ALL BUT THE PLAINLY INCOMPETENT OR THOSE WHO KNOWINGLY VIOLATE THE LAW."*** *Malley v. Briggs* 475 US. 335, 341 (1986).

How does Qualified Immunity work?

Generally, a Plaintiff who claims a violation of his/her constitutional rights at the hands of a police officer can seek civil damages under 42 U.S.C 1983.

Say, for example, an officer is sued in federal court for allegedly using excessive force (i.e. a violation of civil rights). The officer asserts the affirmative defense of qualified immunity and brings a motion for summary judgment seeking to have the 1983 lawsuit dismissed at the early stages of the litigation.

The court then determines (1) whether a constitutional right was violated and/or (2) whether that right was clearly established such that a reasonable person would have known that his actions violated that right. If the court finds either prong in the negative, there is no liability, therefore, the litigation ends. So, a finding of qualified immunity doesn't just mean one is immune from having to pay money damages; it means they are immune from having to go through the cost of a trial at all.

However, Qualified Immunity does not protect officials who violate "*clearly established* statutory or constitutional rights of which a *reasonable person would have known*". This is an objective standard, meaning that the standard does not depend on the subjective state of mind of the official, but rather on whether a reasonable person would determine that the relevant conduct violated clearly established law.

What does "Clearly Established" mean?

The law must provide "fair and clear warning" to the officer that his conduct was prohibited. In order to show the law was "clearly established", the court has generally required plaintiffs to point to an *already existing judicial decision, with substantially similar facts*.

For example, in *Estate of Lopez v. Gelhaus* (9th Cir. 2017), deputies observed a suspect carrying what appeared to be an AK-47. The suspect was walking away from the deputies. After being told to drop the weapon, he turned and *partially* raised the barrel. The suspect was shot and killed. After the shooting, it was discovered a 13-year-old boy had a plastic pellet gun made to look like an AK-47. The Ninth Circuit upheld the denial of qualified immunity, basing its ruling on the issue of whether the deputies' perception of a threat of harm was reasonable. The decision noted that as the suspect turned toward deputies the barrel had not been raised to the level of presenting an actual threat to the officers. The Court cited a similar case, *George v. Morris*, (2013) 736 F.3d 829, in support of its ruling.

Thus, to provide a "fair and clear warning that the officer's conduct is prohibited," a plaintiff needs to cite to a court decision that is sufficiently similar to the plaintiff's case. If the Court finds the conduct viewed from the perspective of a reasonable person did not violate clearly established law, qualified immunity serves as a legal defense to the officer's conduct.

In another example, *Kisela v. Hughes*, (2018) 138 S. Ct. 1148, a suspect wielding a large kitchen knife, acting erratically, was shot when he refused the officer's repeated commands to drop the weapon and continued to advance toward a female bystander. The Court granted qualified immunity because the officer involved shooting was justified under existing precedent (*Graham v. Connor*) where the suspect posed a threat of serious physical harm either to the officers or others.

Since 2003, the U.S. Supreme Court has issued 14 decisions reversing District Court denials of qualified immunity in Fourth Amendment cases, including 7 summary reversals. This pattern is most likely influencing the focus on reform.

Recent Developments

On June 15, 2020, the United States Supreme Court declined to hear 8 cases involving qualified immunity, and now various congressional efforts to reform or eliminate qualified immunity altogether are ongoing.

Not waiting for a court to act, one state has taken action to eliminate the qualified immunity defense.

On June 19, 2020, Colorado's governor signed SB 217 into law. The statute creates a new "civil action for deprivation of rights" under *state* law, allowing a person who has suffered a violation of the Colorado Constitution's Bill of Rights by a peace officer, to bring a civil action against the officer in *state* court. The statute eliminates qualified immunity, and the officer's good faith, but erroneous belief in the lawfulness of his conduct, as defenses to the action. Officers who are found civilly liable for using excessive force under this law will have their certification permanently revoked. While the statute requires agencies to indemnify their officers, it also holds them personally liable in cases where they "did not act upon a good faith and reasonable belief that the action was lawful". *In cases where the*

officer is found to have acted unreasonably or in bad faith, the officer is now personally responsible for paying 5% of the judgment, or $25,000, whichever is less. This Colorado law does <u>not</u> apply to Plaintiffs who sue in federal court under 42 USC 1983 where the qualified immunity defense, for now, remains in full force.

The power to alter or abolish federal qualified immunity rests solely in the hands of the Supreme Court or Congress. We will keep our eye on current Congressional action, as the *Justice in Policing Act of 2020* (House) and the *Justice Act* (Senate) are debated by Congress and what changes, if any, may occur to the qualified immunity defense.

Stay Tuned and Stay Safe!

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