Attempts to End Qualified Immunity

Police Misconduct Update: Front Burner Topics under Section 1983

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Attempts to End Qualified Immunity

The qualified immunity defense is discussed throughout the "Practitioner's Guide," but particularly in Chapter 14: Absolute and Qualified Immunity, III. Qualified Immunity; Substance, IV. Qualified Immunity; Procedure. The qualified immunity defense is under attack from the left and the right. In articles, symposia, and amicus briefs, liberal law professors, the ACLU, plaintiffs' public interest law groups, and even the libertarian Cato Institute, have identified perceived deficiencies in the defense and called for its elimination.

The amicus briefing in favor of certiorari in *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017) is representative of the arguments. In *Milling*, following a two-day bench trial, the district court ruled that Allah's due process rights were violated when prison officials assigned him to administrative segregation. Allah was a pre-trial detainee at the time. The district court rejected the defendants' assertion of qualified immunity. The Second Circuit panel agreed that Allah's substantive due process rights were violated, but, in a split decision, concluded that the defendants were entitled to qualified immunity. Accordingly, the Circuit panel reversed and remanded. 876 F.3d at 59-60.

A group of law school professors calling themselves "Scholars of the Law" made three central arguments in their amicus brief:

(1) The doctrine of qualified immunity lacks a sound legal basis. The original justification was that qualified immunity borrowed a "good faith" defense from the common law. But the Supreme Court has made subjective good faith irrelevant to the defense, replacing it with an objective "reasonable officer" standard. BRIEF FOR SCHOLARS OF THE LAW OF QUALIFIED IMMUNITY AS AMICUS CURIAE SUPPORTING PETITIONER BRIEF, *Allah v Milling*, No. 17-8654 (2018) (Scholars' Brief), at 5-10.

(2) The doctrine fails to achieve its own goals. The goal of qualified immunity has been to ensure that "the threat of liability" did not inhibit officials in the performance of their duties. The fact that officials are almost always indemnified for damages awards by insurance or their employing municipality reduces that concern. In practice, litigating the qualified immunity defense does not reduce the costs or burdens. Scholars' Brief at 10-13.

(3) There are many plausible improvements to the doctrine. The courts can adopt the rationale of *Hope v. Pelzer*, 536 U.S. 730, 735-736, 741 (2002), which, rather than require that the plaintiff identify cases that are "materially similar" to defeat qualified immunity, focuses on whether pre preexisting law provided a "fair and clear warning" that the conduct was unlawful, even if arising under "novel factual circumstances." Another suggestion is for lower courts to decide whether there has been a constitutional violation on the merits, instead of bypassing that issue to address whether the right was clearly established. That would help to create a body of clearly established law. Other alternatives that are put forth are to return to considering an official's good faith intent; to follow the rule of lenity in criminal cases, which examines whether violation of an ambiguous law was willful; and to eliminate the availability of interlocutory appeals. Scholars' Brief at 10-13.

Another group encompassing the ACLU, public interest lawyers, and the plaintiffs' bar also filed an amicus brief. The brief argues that qualified immunity denies justice to those deprived of federally guaranteed rights; imposes additional litigation costs on civil rights litigants; and harms law enforcement by eroding public trust. BRIEF OF CROSS-IDEOLOGICAL GROUPS DEDICATED TO ENSURING OFFICIAL ACCOUNTABILITY, RESTORING THE PUBLIC'S TRUST IN LAW ENFORCEMENT, AND PROMOTING THE RULE OF LAW AS AMICI CURIAE IN SUPPORT OF PETITIONER, *Allah v Milling*, No. 17-8654 (2018), at 10-24.

Similarly, the Cato Institute, a libertarian think-tank, expressed concern about "the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the erosion of accountability that the doctrine encourages." BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER, *Allah v Milling*, No. 17-8654 (2018) (Cato's Brief), at 1. Cato argues that the circuits are split as to how much factual similarity is required for an issue to have been "clearly established." The Second Circuit went beyond the Supreme Court's instructions and required that the particular practice employed by the defendants to have been declared unlawful. And the common law at the time 42 U.S.C. § 1983 was enacted "provided limited defenses to certain torts, not general immunity for public officials." Cato Brief, at 7-22.

The Supreme Court did not reach the merits in *Milling*, because the case was dismissed by request and agreement of the parties under the Court's Rule 46. *Allah v Milling*, No. 17-8654 (9/4/2018). However, the amici will continue to look for an opportunity to urge the limitation or abolishment of the qualified immunity defense. For additional materials on the subject, see, e.g., Panel Discussion, *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, Cato Institute (Mar. 1, 2018); Symposium, *Federal Courts Practice & Procedure: The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1793 (2018).

Practice Tip: Of course, no one on the defense side wants or expects the Supreme Court to abolish the qualified immunity defense. But the Court's jurisprudence presents problems for the police and for the practitioner:

(1) The Supreme Court has criticized the circuits, more particularly the Ninth, for "defin[ing] clearly established law at a high level of generality." See, e.g., *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018). But a fair criticism of the Court is that it is requiring too high a level of specificity. "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . . This requires a high 'degree of specificity.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citations omitted).

(2) The Court has sanctioned bypassing the underlying question of whether the conduct at issue was unconstitutional to address whether the official is entitled to qualified immunity. *Pearson v. Callahan*, 129 S.Ct. 808, 818-822 (2009). Yet decisions will continue to say the conduct did not violate clearly established law until the relevant law is clearly established through decisions that address the merits.

(3) Although the Court requires a "robust consensus of cases persuasive authority," the Court has not defined that phrase. "We have not yet decided what precedents—other than our

own—qualify as controlling authority for purposes of qualified immunity[,]" *Wesby*, 138 S.Ct. at 591, n 8, citing *Reichle v. Howards*, 566 U. S. 658, 665-666 (2012).

(4) These decisions do not help resolve the practical problems with the qualified immunity defense. A police officer will be faced with a man armed with a knife or a vehicle heading in his/her direction. The idea that a line officer will survey the circuits for "robust consensus of cases persuasive authority" to determine whether his/her decision whether to shoot comports with the Constitution constitutes a complete fiction. Frankly, if the Supreme Court hasn't decided where to look for controlling authority, how is an officer supposed to know? At best, an officer will follow his/her training and operating procedures. Those responsible for training and operating procedures will be the ones, if any, to keep up with legal developments.

(5) A defense motion for summary judgment raising qualified immunity is virtually obligatory. As that juncture, the district court should know whether the law is clearly established. If it is not clearly established, that should end the case; the officer is entitled to qualified immunity. But most cases survive summary judgment, not because the law is not clearly established, but because the facts are not; they are in dispute.

(6) But here comes another conundrum. In *Hunter v. Bryant*, 502 U.S. 224 (1991), the Supreme Court questioned the court of appeals' statement that "[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact." 502 U.S. at 228. Rather than "routinely plac[ing] the question of immunity in the hands of the jury[,] [i]mmunity ordinarily should be decided by the court long before trial." 502 U.S. at 228. *Hunter* thus discouraged, but did not prohibit the jury's playing a role in the qualified immunity determination.

(7) The Seventh Amendment guarantees parties the right to a jury trial in civil cases, in particular fact finding by juries. And the Court in its Fourth Amendment jurisprudence says "[t]he operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1546 (2017), quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). But despite the right to a jury trial and despite the need to consider that "totality of the circumstances," many courts will have the jury answer special interrogatories under Fed. R. Civ. P. 49, and depending on those answers, will grant or deny qualities immunity. Although that process may meet *Hunter's* directive that the trial judge decide the question of qualified immunity, it deprives the parties of a jury determination of the underlying liability question, makes the outcome dependent on a number of isolated facts rather than the "totality of the circumstances," and leads to inconsistent verdicts. To avoid or at least mitigate those problems, the author has previously argued that if the law is clear but the facts are not, the jury can be given a detailed instruction of what is clearly established law and then asked the single question, "Under the facts in this case as you find them, did the officer violate clearly established law as I have instructed you?" If the answer is no, the court awards qualified immunity. See "Practitioner's Guide," Chapter 28: Jury Instructions and Verdict Forms, II. Qualified Immunity: the Role of the Judge and Jury.