The Qualified Immunity Defense to Individual Liability under 42 U.S.C. § 1983

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The Statute.

42 U.S.C. § 1983 ("Section 1983") provides a remedy for violation of a person's rights secured by the Constitution and laws of the United States by one acting "under color of" state law.[1] While the text of the statute makes no mention of the defenses which might apply to claims brought under Section 1983, the Supreme Court has recognized certain defenses, including the defense of qualified immunity. The qualified immunity defense is available ***only*** to individuals – it is not available to governmental entities, or in "official capacity" claims. It is an affirmative defense, which must be pleaded. *Gomez v. Toledo*, 446 U.S. 635 (1980).

History of the Defense.

The qualified immunity defense found its genesis in *Pierson v. Ray*, 386 U.S. 547 (1967). In that case, Mississippi police officers arrested a group of ministers under an anti-loitering statute for refusing to leave a segregated bus terminal. The policemen were sued alleging that the arrests violated the Fourth Amendment, but the Court held that the officers were entitled to the same defenses that applied to claims under the common law counterpart to the Section 1983 claim – a police officer is not liable for false arrest simply because the innocence of the suspect is later proved. That is, the "constitutional tort" claim should be subject to the same defenses which applied to the common law counterpart at the time that Section 1983 was enacted.[2]

> [Section] 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause. We hold that the defense of good faith and probable cause…is also available to them in the action under [Section] 1983.

386 U.S., at 556-57, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961).[3]

The rationale was that if Congress had intended to abrogate the defenses available at common law in passing Section 1983, it would have done so expressly. Hence, defenses available in 1871 for

[1] In some circumstances, Federal actors may be liable for violation of constitutional rights, as well. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)(Fourth Amendment violation); *Davis v. Passman*, 442 U.S. 228 (1979)(gender discrimination under Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980)(Eighth Amendment cruel and unusual punishment). The law of Section 1983, including the law of qualified immunity, is generally held to apply to such *Bivens* actions.

[2] Section 1983 was originally enacted as a portion of the Civil Rights Act of 1871.

[3] In addition, a judge was held to be absolutely immune for his role in the prosecution.

corresponding claims under the common law were also held to be applicable to claims under Section 1983.[4]

Not long after the Court's decision in *Pierson*, the "good faith immunity" defense was expanded to apply to all executive officials. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

The *Scheuer* case arose out of the 1970 Kent State University protests of the Vietnam War, where the Ohio National Guard opened fire on unarmed student demonstrators, killing four of them and wounding a number of others. The trial court dismissed the case on Eleventh Amendment immunity grounds, but the Supreme Court held that the claims against the personal defendants, including the Governor of Ohio, were not claims against the State itself. It then held:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is based. 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.

416 U.S., at 247-48.

In *Wood v. Strickland*, 420 U.S. 308 (1975), the Court applied qualified "good faith" immunity to a claim against a school board which expelled some students for "spiking" punch served at an extra-curricular organization meeting. The Court explained that good faith immunity necessarily involves both objective and subjective elements:

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. * * * [W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere official responsibility would violate the constitutional rights of the student affected, or he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. * * * A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

420 U.S., at 322.

[4] By the time Pierson was decided, absolute immunity had also been recognized for legislators, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and was later recognized for prosecutors. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Absolute judicial immunity was again recognized in *Stump v. Sparkman*, 435 U.S. 349 (1978).

So, in order for "good faith" immunity to apply to a Section 1983 claim, the law required a determination of both objective and subjective good faith. The objective element involved a presumptive knowledge of and respect for basic, unquestioned constitutional rights. The subjective element referred to "permissible intentions." *Id.*

However, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) the Court recognized that the subjective element of the good faith defense frequently had proved incompatible with the admonition that "insubstantial claims should not proceed to trial."[5] It also recognized that the determination of the subjective element of the defense involved significant costs and the potential disruption of effective government. Therefore, the Court limited the inquiry to the objective element only: "We therefore hold that government officials performing discretionary functions, 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." 457 U.S., at 818. The analysis of the clearly established law is accomplished as of the time of the conduct that is at issue in the case.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court refined what "clearly established law" means. Noting that the Court's precedents had established that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341, (1986), and that officials are immune unless "the law clearly proscribed the actions" they took, *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), the Court acknowledged that further clarification was necessary.

Anderson requires that the right which the plaintiff claims was violated must have been clearly established in a "particularized" way. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (internal citations omitted) *Id.*, at 640.

The determination whether the actions of the defendant violated "clearly established statutory or constitutional rights" is a pure question of law. In order for a right to be "clearly established" under Harlow and its progeny, the ***plaintiff bears the burden of establishing that the contours of the right were "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right."*** (emphasis added). *Sapp v. Cunningham*, 847 F.Supp. 893, 900 (D. Wyo. 1994).

"Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992).

<u>The Particularity of the Precedent is Critical.</u>

[5] *See Butz v. Economou*, 438 U.S. 478 (1978).

Whether or not a defendant can prevail on a qualified immunity defense frequently turns on whether the right allegedly violated was clearly established in a ***particularized*** way. This analysis focuses on the conduct of the defendant, and whether that conduct has been previously held to constitute a constitutional violation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

In *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), Mr. Leija was brought to the hospital suffering from pneumonia. During the hospital stay, he became hypoxic and agitated, and began claiming the staff was trying to poison him. He also claimed to be God and Superman. Eventually, he tried to leave the hospital, and the staff called the police to assist with a disturbed patient. The responding officers used Tasers to try to control Leija, without success. Finally, three officers held Leija down, while hospital staff administered anti-psychotic drugs. Almost immediately after the drugs were injected, Leija went limp and CPR failed to revive him. The Tenth Circuit affirmed the district court's denial of summary judgment based on qualified immunity, finding that the law was clearly established that the officers' conduct constituted excessive force. On certiorari, *Pickens v. Aldaba,* ___ U.S. ___, 136 S.Ct. 479 (2015), the Supreme Court vacated the Tenth Circuit's judgment, and remanded for further consideration in light of *Mullenix v. Luna*, 577 U.S. ___, 136 S.Ct. 305 (2015).

Mullenix, coincidentally involved another Mr. Leija. This Leija fled a Texas police officer who tried to arrest him on a warrant at a drive-in restaurant. Two officers pursued Leija at speeds of up to 110 miles per hour on an interstate highway. During the chase, Leija called police dispatch and threatened to shoot the officers unless they abandoned the pursuit. This threat was relayed over the police radio network, and other officers decided to try to stop Leija with tire-spike strips, set up at three locations along the highway.

Trooper Mullenix arrived at one of the locations too late to assist with the spike strip, but he decided to try to stop Leija by disabling his car with a rifle from the overpass above the spike strip. As Leija approached, Mullenix fired six shots. He missed the engine, radiator and hood, but hit Leija four times. The vehicle then hit the spike strip and flipped two and a half times. Leija was killed by the rifle shots.

When Mullenix was sued for using excessive force, he moved for summary judgment asserting qualified immunity, and the district court denied the motion, concluding that there were genuine issues of material fact as to whether Mullenix acted recklessly. On appeal, the Fifth Circuit affirmed, finding that Mullenix's conduct was objectively unreasonable, and constituted excessive force. The court's rationale was that "several of the factors that had justified deadly force in prior cases were absent here: [t]here were no innocent bystanders, Leija's driving was relatively controlled, Mullenix had not first given the spike strips a chance to work, and Mullenix's decision was not a split-second judgment." 136 S.Ct., at 308. The Fifth Circuit then concluded that "the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial immediate threat, violated the Fourth Amendment." *Id.*

The Supreme Court reversed. It held that the dispositive question is "whether the violative nature of particular conduct is clearly established," and "[t]his inquiry 'must be undertaken in light of the specific conduct of the case, not as a broad general proposition.'" The Supreme Court noted that "when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing toward [another officer's] position." 136 U.S., at 312. The Court noted the "hazy border between excessive and acceptable force." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)(per curiam)), and concluded that there were no precedents that would establish "beyond debate" that Mullenix had acted with excessive force. *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

In other words, the analysis of clearly established law focuses on the specific conduct alleged to have caused the violation, and while that precise conduct need not have been previously found to constitute a violation, the precedent must be close enough such that the conclusion is "beyond debate."

Returning to *Aldaba*, the Tenth Circuit held on remand that the officers who assisted with the disturbed hospital patient were entitled to qualified immunity. *Aldaba v. Pickens,* 844 F.3d 870 (10th Cir. 2016). The Court stated that in its first decision, "[w]e erred…by relying on excessive-force cases markedly different from this one. * * * We also relied on several cases resolving excessive-force claims. But none of those cases remotely involved a situation as here: three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment." *Id.*, at 876. In reviewing its precedent, the Tenth Circuit found no cases that were sufficiently similar to "clearly establish" that the officers' conduct violated Leija's constitutional rights.

Just months after the Supreme Court vacated the Tenth Circuit's original decision in *Aldaba*, it stepped in again to re-emphasize that the factual circumstances in prior cases must be closely similar to those at issue for a right to be "clearly established."

In *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548 (2017), Daniel Pauly was involved in a road rage incident on a highway near Santa Fe, New Mexico. The incident occurred in the evening, and two involved women called 911 to report Daniel as a drunk driver. The women followed Daniel with their bright lights on, until Daniel pulled over at an off-ramp to confront them. After a brief encounter, Daniel drove to a house where he lived with his brother, Samuel Pauly.

Officer Truesdale responded to the 911 call, after Daniel had already departed, and interviewed the two women, who provided a license plate which was registered to the Pauly brothers' address. Truesdale was then joined at the off-ramp by officers White and Mariscal. The three officers agreed that there was insufficient probable cause to arrest Daniel, but decided to speak with Daniel to get his side of the story, make sure nothing else happened, and to see if he was intoxicated. Truesdale and Mariscal then drove to the Pauly's address without using their emergency lights, while White remained at the off-ramp in case Daniel returned. After arrival at the address, and seeing two men moving inside the house, they radioed White, who then left the off-ramp to join the other officers.

As White approached the house, he heard shouting, including the statement from one of the brothers, "We have guns." When he heard that statement, White drew his gun and took cover behind a wall. Daniel then exited the back door of the house and fired two shotgun blasts. Samuel then opened the front window and pointed a handgun in White's direction. Mariscal fired at Samuel, but missed. White fired at Samuel and killed him.

Samuel's estate and Daniel sued under Section 1983, alleging that the officers had used excessive force in violation of the Fourth Amendment, and the officers sought summary judgment based on qualified immunity. The district court denied the motion, and the Tenth Circuit affirmed. With regard to the claim against White, the Tenth Circuit held that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm, and that this rule was clearly established at the time of the event. This ruling was based upon general statements from the Supreme Court's precedent holding "the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force," and "if the suspect threatens the officer with a weapon, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Pauly v. White*, 814 F.3d 1060, 1083 (10th Cir. 2016), citing *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Conner*, 490 U.S. 386 (1989).

The Supreme Court reversed, again observing that the Tenth Circuit had misunderstood the "clearly established" analysis by failing to "identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the [Tenth Circuit] relied on *Graham*, *Garner*, and their Court of Appeals progeny, which…lay out excessive-force principles at only a general level." 137 S.Ct., at 552. The Court noted that the fact that White arrived at the scene late was an important consideration in whether the law required him to shout a warning, and that "[t]his alone should have been an important indication to the [Tenth Circuit] that White's conduct did not violate a "clearly established" right." *Id.*

Timing of a Dispositive Motion Based on Qualified Immunity.

Because qualified immunity is "an immunity from suit rather than a mere defense to liability … it is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). As a result, the Supreme Court "repeatedly has stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id*. (quoting *Hunter v. Bryant,* 502 U.S. 224, 227 (1991)). A defendant pleading qualified immunity is entitled to dismissal before the start of discovery unless the plaintiff's allegations state a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 526. "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Id.* Thus, any individual seeking dismissal based upon qualified immunity should file the appropriate motion as early in litigation as possible.

Note: While qualified immunity is an affirmative defense, when the defendant asserts the defense in a dispositive motion, the burden shifts to the plaintiff to show both (1) a violation of a

constitutional right; and (2) that the constitutional right was clearly established at the time of the violation. Although the court reviews the evidence in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied this heavy two-part burden; otherwise, the defendant is entitled to qualified immunity. *Felders v. Malcom*, 755 F.3d 870, 877-78 (10th Cir. 2014), quoting *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996) ("Unless the plaintiff carries its twofold burden, the defendant prevails."); *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010) ("[E]xcept in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law."); *see also Brosseau,* 543 U.S., at 198 ("It is important to emphasize that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.").

Denial of a Dispositive Motion based upon Qualified Immunity is Immediately Appealable.

Denial of a motion to dismiss, or a motion for summary judgment, based on qualified immunity is "an appealable 'final decision' * * * notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S., at 530. This is so because qualified immunity provides "an immunity from suit rather than a mere defense to liability, and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*, at 526; *see also Saucier,* 533 U.S., at 200-01. Unless the order denying dismissal can be reviewed before trial, it can never be effectively reviewed at all, because the defendant will have already suffered an irreparable loss to his immunity from suit.

Note: If the denial of a motion for summary judgment based on qualified immunity is due to the existence of a dispute of material fact regarding the conduct at issue, the appellate court will not review the denial. For this reason, the defendant should accept all factual claims supported by the evidence as true for the purposes of the motion for summary judgment.

Are the Days of the Qualified Immunity Defense Numbered?

Ziglar v. Abbasi, 582 U.S. ___, 2017 U.S. LEXIS 3874 (June 19, 2017), arose out of the September 11 terror attacks. In the immediate aftermath of those attacks, hundreds of illegal aliens were taken into custody by Federal authorities and detained pending a determination whether any of them had connections to terrorism. Claims were filed against high-level Federal executive officials,[6] as well as the wardens of the detention facility.[7] The majority of the decision concerns whether the Court should recognize a cause of action under *Bivens* for the claims asserted, but the plaintiffs also sued under 42 U.S.C. § 1985(3), which provides a remedy to redress civil conspiracies to deprive persons of the equal protection of the laws. Like Section 1983, claims brought pursuant to Section 1985(3) are subject to a qualified immunity defense.

The Court held, unremarkably, that the Federal authorities who were sued "would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the

[6] Defendants included former Attorney General John Ashcroft, former Director of the FBI, Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar.
[7] The claims were brought directly under the Constitution in a *Bivens* action.

resulting policies that caused the injuries alleged." 2017 U.S. LEXIS 3874, *51. Therefore, they were entitled to qualified immunity on the Section 1985(3) claims.

In his concurring opinion, Justice Thomas expressed his concern with the Court's qualified immunity jurisprudence. Justice Thomas tracked the history of qualified immunity, beginning with the proposition that Section 1983 should be read against the history of the common law in place at the time of its passage in 1871, as the Court held in *Pierson v. Ray*, he noted that since *Pierson* the Court has completely reformulated qualified immunity along principles not at all embodied in the common law. "Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' * * * Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act.…Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." *Id.*, ** 60-62, Thomas, J., concurring.

Some constitutional scholars have also urged that the Court's precedents have taken the law from its appropriate common-law underpinnings to inappropriate judicial policy-making – policy-making is reserved to the Congress. *See* Baude, "In an appropriate case, we should reconsider our qualified immunity jurisprudence." The Washington Post, June 19, 2017.[8] The evolution of the defense summarized above has brought us to a point where the relevant inquiry is no longer whether a government official in the position of the defendant was immune from liability under the common law of 1871 – it is entirely based upon the question whether his conduct violated "clearly established" law at the time of the conduct sued upon.

In a pending petition for certiorari, in *Surratt v. McClarin*, the petitioner asks the Court to discontinue or modify the current formulation of the qualified immunity defense. Perhaps the Court will grant the petition, and we will see another significant change in the law in 2018.

[8] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/in-an-appropriate-case-we-should-reconsider-our-qualified-immunity-jurisprudence/?utm_term=.cc9041a2f7e3