QUALIFIED IMMUNITY – THE GREAT POLITICAL DIVIDE

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As a defense lawyer, qualified immunity is the biggest weapon in my arsenal against Section 1983 claims. If I have an officer who is accused of violating someone's constitutional rights, "qualified immunity" are the first words jotted down as an affirmative defense. That doesn't mean I believe it's applicable 100% of the time. Far from it, in fact. But it does create an additional hurdle that plaintiffs must jump in order to get to my officer. And depending on who's court that I am in, that hurdle can be quite difficult to clear. Which means plaintiffs can be more willing (and more realistic) to settle instead of fighting an uphill battle in the briefing war.

Sounds good, right? So why is it that uttering the words "qualified immunity" in today's political climate garner sideways glances and dirty looks? Did qualified immunity suddenly turn into a four-letter word?

The short answer is no – qualified immunity is an effective tool that works when it should. The problem is that it has been applied more and more liberally over the years, creating precedent that perhaps shouldn't exist in the first place. And sadly, this appears to be a problem created by political ideology or perhaps better stated, political loyalty. Don't worry – this paper is not going *there*…… But it is important to understand the climate that you are arguing qualified immunity in. In this case, the confusing world of the Fifth Circuit.

But first – what is "qualified immunity" and where did it come from?

Shortly after the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments were ratified by the States, abolishing slavery, granting the right to vote regardless of color, and giving Congress the power to enforce those rights against the States. Using this new enforcement power, Congress passed a statute referred to as the "Ku Klux Act of 1871," the "Civil Rights Act of 1871," and the "Enforcement Act of 1871." Section I of this statute, now codified and amended as 42 U.S.C. § 1983, provided:

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall…be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress…."

Act. of Apr. 20, 1871, §1, 17 Stat. 13.

Noticeably absent from Section 1983 is the mention of immunity or defenses for good faith official conduct. In fact, it wasn't until the 1950's that the Supreme Court began to ask whether such an immunity should even exist. After the Supreme Court recognized absolute immunity for legislators, in 1967, the Court extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). However, these decisions were limited to specific circumstances based on analogies to the common law.

By the 1970's, the Supreme Court veered off this conservative path and began expanding the qualified immunity doctrine. S*ee Scheuer v. Rhodes*, 416 U.S. 232 (1974)(applying qualified immunity to state executive officials, National Guard members, and a university president); *O'Connor v. Donaldson*, 422 U.S. 563 (1975)(extending qualified immunity to a hospital superintendent sued for deprivation of the right to liberty); *Procunier v. Navarette*, 434 U.S. 555 (1978)(applying it to prison officials and officers). And by 1982, the Court eliminated any subjective component of qualified immunity in one of the most widely cited cases by civil defense lawyers, *Harlow v. Fitzgerald* - "[G]overnment 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. 800, 818 (1982). This statement from *Harlow* created the two-step inquiry that we have all become more than familiar with when arguing for qualified immunity:

> **Step 1:** a court must decide "whether the plaintiff has alleged a violation of a constitutional right." *Charles v. Grief*, 522 F.3d 508, 511 (5th Cir. 2008).
>
> **Step 2:** a court must also decide "whether the defendant's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004), *reversed on other grounds*, 136 S. Ct. 305 (2015).

The first step is fairly self-explanatory. So long as the plaintiff cites a relevant constitutional amendment, they satisfy the first step. (I say relevant because I have had cases where pro se's have erroneously cited the Third Amendment (quartering of officers) as well as the Thirteenth Amendment (abolishment of slavery)). The second step entails a more indepth analysis wherein the court must determine whether the officer's actions were "objectively reasonable" in light of the "clearly established law." Stated differently, "whether it would have been clear to a reasonable [official] in the [defendant's] position that their conduct was unlawful in the situation they confronted." *Wood v. Moss*, 572 U.S. 744, 758 (2014).

In looking at the level of analysis that is required for the second step, one would assume that a defense lawyer would focus the bulk of his argument toward proving that his officer's actions were objectively reasonable. However, in practice, we, or at least myself, tend to attack the first step, arguing that the officer's actions did not violate the plaintiff's constitutional right in the first place. And to be fair, the majority of the time we have a fairly strong argument in support of that position. But that isn't why we focus more on the first step. When a defendant officer moves for summary judgment on qualified immunity, it is the plaintiff's burden to overcome that defense. Which requires a plaintiff to show that "**all** reasonable officials similarly situated would have then known that the alleged acts of the defendants violated the United States Constitution." *Thompson v. Upshur County*, 245 F.3d 447, 460 (5th Cir. 2001)(emphasis added). *I.e.*, the plaintiff must prove step 2. If you think this sounds like an uphill battle for the plaintiff, you would be correct:

> This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." The [United States] Supreme Court does "not require a case directly on point, but existing precedent must have placed the

> statutory or constitutional question beyond debate." "*It is the plaintiff's burden to find a case in favor that does not define the law at a 'high level of generality.*'"

Bustillos v. El Paso Cnty. Hosp. Dist., 891 F.3d 214, 222 (5th Cir. 2018)(internal citations omitted)(emphasis added).

As you can tell by the strongly phrased words of the Fifth Circuit, qualified immunity is a mighty defensive sword to be swung in this Circuit. However, as I alluded to at the beginning of this paper, there is a growing movement calling for the reform or even the abolishment of qualified immunity. Critics have called qualified immunity a "Catch-22" wherein it says to plaintiffs, "Heads, the police win. Tails, you lose." While I think this is extreme, a recent opinion and the various dissents issued by the Fifth Circuit in *Cole v. Carson*[1] are illustrative of the debate around qualified immunity and the changing legal landscape.

***Cole v. Carson* - the Tragic Facts**

On October 25, 2010, Ryan Cole, a 17-year-old boy, visited his friend while carrying two handguns. He voluntarily gave one of the guns to his friend and then left. The friend's father called the police and informed them that Ryan had a gun. The police found Ryan walking in the neighborhood and ordered him to stop. Ryan took the gun from his waistband and placed it against his own head. No confrontation ensued and Ryan walked away, gun to his head, towards a wooded area.

Officer Michael Hunter responded to the area and was told he could leave as they had things under control. Instead of leaving, Officer Hunter decided to go look for Ryan. Upon locating the two officers who were following Ryan, Hunter told another officer, Carl Carson, to join him in circling behind the wooded area to intercept Ryan. Ryan, meanwhile, continued walking, unaware that any officer was following him.

When Ryan exited the woods, Officers Hunter and Carson, as well as a third Officer, Martin Cassidy, were waiting with their guns drawn, concealed in vegetation. They watched Ryan for about five seconds, who had the gun still pointed at his head and his back turned to the two officers. Instead of announcing themselves or giving Ryan the opportunity to put the gun down, Officer Hunter shot Ryan. As Ryan fell to the ground, his body turned towards the officers. Officers Hunter and Cassidy fired again and another bullet hit Ryan. As an involuntary reflex from being shot, Ryan pulled the trigger and shot himself in the head. Ryan did not die from his wounds. But he suffered profound injuries including paralysis to the left side of his body.

The story is tragic enough. Unfortunately, it gets worse for the three officers as are alleged to have fabricated a story that Ryan had turned towards them with his gun aimed at the officers. Ryan was indicted for felony aggravated assault of a public servant. Ballistics later disproved the officers' story and the assault charge was dropped.

[1] 2019 WL 3938014 (5th Cir. Aug. 21, 2019).

Cole v. Carson – the Majority's "Obvious" Opinion

At the beginning, it's worth noting that the Cato Institute not only wrote an amicus brief in this case but was also cited by the majority opinion. For those who are not aware, Cato is a libertarian think-tank who is leading a national campaign to eliminate qualified immunity. For the majority to cite to Cato is extremely telling on which direction the 5th Circuit is beginning to lean on qualified immunity.

Higganbotham delivered the opinion for the majority, joined by Stewart, Dennis, Clement, Elrod, Southwick, Haynes, Graves, Higginson, Costa and Engelhardt. Taking the facts in a light most favorable to the non-movant Coles and drawing reasonable inferences in their favor, the majority concluded that this case was "obvious" and that a reasonable jury could find that Ryan did not pose an immediate threat to the officers when they fired. *Cole*, 2019 WL 3938014, at *6. Citing *Tennessee v. Garner*, the majority stated that the use of deadly force is not permitted where the suspect poses no immediate threat to the officer and no threat to others. The majority also stated that *Garner* required officers to issue a warning before using deadly force "where feasible." *Id*. Based on this, the majority found that the law was clearly established that "shooting a mentally disturbed teenager, who was pointing a gun the entire time at his own head and facing away from the officer, in an open outdoor area, and who was unaware of the officer's presence because no warning was given prior to the officer opening fire, was unlawful." *Id.* The majority further pointed out that the officers were now attempting to argue a different set of facts than what was found by the district court and cited to both the Coles' and amicus Cato Institute briefs in support that it was beyond the Court's jurisdiction to consider the officers' set of facts. *Id*. at *7. The majority concluded that it will be up to a jury to resolve what happened at the time of the shooting and whether the officers are entitled to qualified immunity. *Id.* at *8.

Elrod wrote a concurring opinion, joined by Stewart, Clement, Haynes, Higginson, Costa and Engelhardt, shooting down the dissent's argument that the majority was creating new law or otherwise ignoring old law and pointing out the majority was following the longstanding *en banc* rule that "we lack jurisdiction to review the *genuineness* of a fact issue" on an interlocutory appeal of a denial of summary judgment based on qualified immunity. *Cole*, 2019 WL 3938014, at *9. Elrod further stated that the majority was taking no position on the public policy issues of the day regarding policing and the mentally ill. *Id*.

Cole v. Carson – the No-Holds-Barred Dissenting Opinions

The dissent clearly did not view this as an "obvious" case and blasted the majority for ignoring the direction given by the Supreme Court as well as repeating the same errors as in *Mullenix*.[2] Tellingly, four of the dissenting justices – Ho, Duncan, Oldham and Willett – are Trump appointees.

Edith Jones started her dissent with the scathing line, "What 'clearly established law' says that only a rogue cop would have shot at this mentally disturbed teenager…?" *Cole*, 2019 WL 3938014, at *9. Joined by Smith, Owen, Ho, Duncan and Oldham, Jones stated that the only

[2] In *Mullenix v. Luna*, the Supreme Court reversed the 5th Circuit and held an officer was entitled to qualified immunity as a matter of law when he shot and killed a suspect fleeing form the police in his car at a high rate of speed. 136 S. Ct. 205 (2015)(per curiam).

legal question that needs to be addressed was whether, under the circumstances, *every* reasonable police officer would have reasonably perceived no life-threatening danger such that deadly force could be used against Ryan without first warning him. *Id*. at *11. Jones criticized the majority for ignoring the critical criterion for qualified immunity in Fourth Amendment cases – the reasonableness of the officers' reasonable perceptions. This reasonableness must take into account that police officers are forced to make split-second decisions in situations that "are tense, uncertain, and rapidly evolving." *Id*. at *12. She further stated that qualified immunity must be granted to all but the plainly incompetent or those who knowingly violate the law and that the Supreme Court has enforced immunity for officers who acted negligently.

Jones also criticized the majority for relying on *Garner* for the proposition that the officers had to give a warning and await Ryan's response before shooting, stating that *Garner* does not make this "clearly established" law. *Id*. at * 17. She further pointed out that the majority totally ignored the central question in an immunity case – whether *every* reasonable officer in this factual context would have known he could not use deadly force. Finding that it was not "clearly established" that officers confronting armed, mentally disturbed suspects in close proximity must invariably stand down until they have issued a warning and awaited the suspect's reaction or face the barrel of the gun, Jones found that the officers' actions, if anything, were negligent.

Smith, likewise, began his dissent with a disturbing warning – "Abandon hope, all ye who enter Texas, Louisiana, or Mississippi as peace officers with only a few seconds to react….." *Id*. at * 18. Smith's interpretation of the breakdown of justices on the majority is that "there is little chance that, any time soon, the Fifth Circuit will confer the qualified-immunity protection that heretofore-settled Supreme Court and Fifth Circuit caselaw requires." Like Jones, Smith focused on the facts known to the officers at the time, calling them "red flags." He stated that we expect officers to recognize these red flags and to respond appropriately; the majority opinion, however, orders them to stand down, instead of protecting themselves and the public. *Id*. at *19. He further concluded that the law of qualified immunity had been "turned to dust" by the majority. *Id*.

Willett takes a different approach in his dissent. He appears to have qualms with the qualified immunity doctrine, pointing out that the "clearly established law" analysis allows officers to escape liability for bad behavior "as long as they were the first to behave badly." *Id*. at *19. However, Willett unequivocally stated that he is bound to follow Supreme Court precedent, even if he doesn't agree with it, and offered that qualified immunity needs to be refined rather than abolished. He highlighted that the problem is courts tend to skip the first prong altogether (whether the Constitution has been violated) and that the Supreme Court should "nudge" courts to address the constitutional merits rather than leave the law undeveloped. *Id*. at *21. On a personal note, I have found the same thing when arguing qualified immunity – courts tend to skip my constitutional arguments and go straight to the "clearly established law."

Ho and Oldham take aim at the majority for failing to follow precedent, pointing out right at the start that the Supreme Court summarily reversed the 5th Circuit in *Mullenix v. Luna* for sending a state trooper to the jury "in defiance" of qualified immunity precedent and that the Supreme Court GVR'd[3] **this** case in light of *Mullenix*. *Id*. at *21. Despite this, the majority continue to

[3] "GVR" refers to a grant of certiorari, the vacating of the lower court's decision, and remanding the case to the lower court without hearing oral argument or deciding the case on the merits.

thumb their noses and do what they want, without any real reason other than this is an "obvious" case. But Ho and Oldham found this mentality to be wrong for three reasons: (1) the Supreme Court to date has never identified an "obvious" case in the excessive force context; (2) the Supreme Court has granted qualified immunity in much tougher cases than this one; and (3) this is *Mullenix* all over again. That is, the majority is trying to extrapolate *Garner* by requiring the two officers to announce themselves prior to shooting, which is not clearly established law. And which is what leads to Supreme Court reversals. *Id*. at *22-23.

Finally, Duncan blasted the majority, accusing them of setting a precedent that "seriously undermines officers' ability to trust their judgment during those split seconds when they must decide whether to use lethal force." *Id*. at *28. Further, the majority excluded everything that happened before the officers' 5-second encounter with Ryan, which a reasonable officer acts based on all relevant circumstances, including pre-encounter facts. Duncan also concluded that the only "obvious" thing to him is that no case law told the officers how to respond when they met Ryan emerging from the woods with his finger on the trigger of a loaded gun. *Id*.

Where is Qualified Immunity Heading?

This is the $64,000 question that I wish I had a definitive answer to. Unfortunately, qualified immunity appears to be changing almost daily with the news cycle. In June and July alone, three separate bills were introduced attacking qualified immunity. The first was introduced in the House by Rep. Justin Amash (L-MI). Entitled as the "Ending Qualified Immunity Act" this bill seeks to abolish qualified immunity – "It is the sense of the Congress that we must correct the erroneous interpretation of section 1983 which provides for qualified immunity." Remarkably, the bill has tri-partisan support – with 65 Democrats and 1 Republican co-sponsoring the bill. The Ending Qualified Immunity Act (H.R. 7085) currently is sitting in the House Committee on Judiciary.

In the Senate, Sen. Edward Markey (D-MA) also introduced the "Ending Qualified Immunity Act" (S.4142) with Bernie Sanders (I-VT) and Elizabeth Warren (D-MA) co-sponsoring. This has also been referred to the Committee on the Judiciary.

The third bill was introduced in the Senate by Sen. Mike Braun (R-IN). In light of the current political landscape, I think this proposal illustrates where qualified immunity might be heading. The "Reforming Qualified Immunity Act" (S.4036) effectively eliminates qualified immunity in its present form for *all public officials* and clarifies that a defendant's subjective belief in the legality of their conduct is not enough, on its own, to avoid liability.

Instead, a defendant sued in his individual capacity shall not be liable under two sets of circumstances:

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

- If the defendant could show that, at the time they were alleged to have violated someone's rights, (1) their challenged conduct was specifically authorized by then applicable judicial precedent, and (2) they had a reasonable, good faith belief that their actions were lawful.

This proposal effectively reverses the current application of "clearly established law." In Sen. Braun's bill, if a defendant can show a prior case or statute authorizing his conduct, then he will not be liable.

What does come as a bit of surprise is the application to municipalities and other local governments. Under the Reforming Qualified Immunity Act, a municipality or other unit of local government **shall be liable** for a violation by an agent or employee acting within the scope of his employment. This eliminates the "custom, policy or practice" argument that we have come to recite in our sleep.

While I believe this bill is a bit ambitious (and that *respondeat superior* for municipalities is laughable), some may think this is a good compromise to the "abolish qualified immunity" camp. Officers who are constantly second-guessing themselves out of fear of getting sued are not effective peacekeepers. It takes their focus away from protecting the public and more towards protecting themselves. Worse, if we totally eliminate qualified immunity, why would anyone even want to be an officer in the first place?

But the outcries against qualified immunity are loud and growing. And at some point, some change is likely to occur. Reforming, rather than abolishing, is the last drastic step and maybe the only practical solution. Society needs police officers. And police officers need some form of protection.