ACLU Kansas

Hot Topics Series

Qualified Immunity

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Qualified Immunity

Qualified immunity is a judge-made legal protection that shields government officials from claims of unconstitutional conduct. It is a unique and specialized defense available only to government actors and can, if applied, allow those actors to avoid responsibility for constitutional violations. The doctrine shields officials from civil lawsuits for damages. Qualified immunity is an immunity from suit: if it applies, it prevents those officials from needing to put on a defense or litigate at all.[1]

Although it is a legal doctrine, the issue of qualified immunity has gained significant public interest in the context of civil rights lawsuits against law enforcement officers, particularly regarding officers' excessive use of force. When sued for constitutional violations, police officers frequently claim qualified immunity applies and therefore the case should be dismissed.

Qualified immunity has also spawned thousands of sometimes varying and complex court decisions that define and interpret the doctrine's contours. The result is that not only does qualified immunity create a unique legal shield for law enforcement, but it also erects procedural hurdles that make enforcing our Constitution's guarantees complex and difficult.

Origins and Evolution of Qualified Immunity

Qualified immunity has its origins in an explicitly racial context. In *Pierson v. Ray*, the Supreme Court first introduced the precursor to today's doctrine of qualified immunity.[2] The case concerned the arrest of a group of Episcopal priests taking part in the Mississippi Freedom Rides, protesting racism and segregation in the deep south. The group, including both Black and White clergy, disobeyed a "White Waiting Room Only" sign at a bus stop. The police arrested them.

The Court tolerated the unconstitutional conduct, relying in part on the officers' excuse that they did not arrest the priests for violating the sign, but instead arrested the men because a fight was about to start. In reaching its conclusion, the Court found that officers acting in "good faith" had a limited, or qualified, defense to claims for constitutional violations.[3]

The modern test for qualified immunity first appeared in *Harlow v. Fitgerald*.[4] The case arose out of the government's 1970 firing of A. Ernest Fitzgerald, an analyst who testified to Congress about billions of dollars of overages and financial waste in Air Force projects. The plaintiff alleged that the government wrongfully terminated him because of his testimony, and he sued two presidential aides for their alleged involvement.[5] The U.S. Supreme Court held that, while White House aides are not entitled to absolute immunity like the President himself, they are entitled to qualified immunity or "good faith" immunity.[6]

The Court in *Harlow* was concerned about balancing two competing interests: "the vindication of

constitutional guarantees" and plaintiffs' claims, which the Court noted "frequently run against the innocent as well as the guilty." Importantly, the case rejected a standard that previously required courts to evaluate an official's subjective state of mind. Instead, after *Harlow*, courts were to look at an objective standard—whether a reasonable person would have known their actions violated clearly established law. This change meant that it would now be harder for civil rights plaintiffs to advance their cases. Courts, not juries, would now almost exclusively decide whether qualified immunity applied.[8]

After *Harlow*, in *Saucier v. Katz*, the Court set the now-familiar two step analysis used to determine whether qualified immunity applied.[9] First, courts were to decide whether the alleged facts show that an officer violated a constitutional right. If so, courts then determined whether that right was clearly established.[10] This analysis, taken in this order, at least had the potential to clearly define constitutional rights. The individual bringing the claim might not ultimately prevail—no small fact for that person—but the case could at least set a standard going forward, making clear that certain conduct was unconstitutional.

That would change with *Pearson v. Callahan*.[11] In *Pearson* the Supreme Court overruled *Saucier* in part and gave lower courts discretion to decide the two qualified immunity questions in either order. In other words, while courts before *Pearson* at least had to first decide whether there was a constitutional violation, after *Pearson*, courts no longer had to make that inquiry: instead, they could simply ask whether that constitutional violation was clearly established in prior case law. The result is that many courts never actually consider whether alleged law enforcement misconduct violates the constitution. Rather, courts only inquire whether that constitutional violation is "clearly established" and end the inquiry there, leaving the ultimate question of constitutionality undecided.

This change had profound consequences for the breadth of qualified immunity and the ability for people to seek redress for constitution violations. According to one analysis of claims of excessive force, courts of appeals now resolve between 10 to 14% of cases involving qualified immunity without first deciding whether there was even a constitutional violation.[12] Not only does this approach fail to clarify the law, but it also leaves open the very real possibility that police officers or other officials can violate the constitution and avoid accountability.

Current Prevalence of Qualified Immunity

Police officers and other government officials routinely assert qualified immunity when facing a civil suit. Analyzing excessive force claims that reached U.S. appellate courts, Reuters found that from 2011 to 2019, courts have ruled in favor of police officers between roughly 46 to 57% of the time.[13] The rates vary depending on the circuit and include findings that the officer or officers did not use excessive force. At the Supreme Court, the numbers are even more striking. "The Court dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts."[14]

Perhaps most troubling, however, is that in the same courts during the same period, anywhere between 17.5 and 25.4% of excessive force cases

involving qualified immunity found there either was or could have been a constitutional violation. Put another way, in as many as a quarter of federal appellate cases nation-wide, police officers may have broken the law and violated the constitution, but qualified immunity still shielded those officers from liability.

Criticism and Calls for Change

A variety of organizations from across the political and ideological spectrum have called for government accountability and the end of qualified immunity. The libertarian Cato Institute has written that "[t]he doctrine has no valid legal basis, it regularly denies justice to victims whose rights have been violated, and it severely undermines official accountability, especially for members of law enforcement."[15] Coalition groups note that the doctrine "too often leaves individuals without a remedy for abuses of power and constitutional violations."[16]

Even members of the Supreme Court itself have been critical of the doctrine and noted its failures. Dissenting from the denial of certiorari, Justice Sotomayor described "a disturbing trend regarding the use of [the Supreme] Court's resources. [The Supreme Court has] not hesitated to summarily reverse [lower] courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases."[17]

"Such a one-sided approach to qualified immunity[,]" Justice Sotomayor wrote in another dissent, "transforms the doctrine into an absolute shield for law enforcement, gutting the deterrent effect of the Fourth Amendment."[18]

Recognizing the defenses shortcomings, state legislatures have begun to act. In June of 2020, Colorado became the first state to end qualified immunity through passage of the Enhance Law Enforcement Integrity Act.[19]

Ending qualified immunity, or at least limiting its powerful reach, would allow citizens to hold their government accountable and vindicate the many promises our Constitution makes. Kansans should no longer tolerate a system that fails to hold those in power to account and which fosters an environment where government actors, including those charged with enforcing the law, are empowered to violate people's constitutional rights.

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[1] *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis original)). [2] 386 U.S. 547. [3] *Id.* [4] 457 U.S. 800 (1982). [5] *Id.* [6] *Id.* [7] *Id.* at 814. [8] See *id.* at n. 27. [9] 533 U.S. 194. [10] *Id.* at 201. [11] 555 U.S. 223 (2009). [12] *McCleskey v. Kemp*, 481 U.S. 279 (1987). [11] *Id.* at 312. [12] Andrea Januta, Jaimi Dowdell, and Jackie Botts, Taking the measure of qualified immunity: How Reuters analyzed the data, Reuters, Dec. 23, 2020 (available at: https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/). [13] *Id.* [14] Joanna C. Schwartz, The Case Against Qualified Immunity, 93 NOTRE DAME L. REV. 1797, 1798 (2018)(citing William Baude, Is Qualified Immunity Unlawful?, 106 CALIF. L. REV. 45, 82 (2018) (observing that the Supreme Court at the time had decided thirty qualified immunity cases since 1982 but found that defendants violated clearly established law in just two of those cases)). [15] Jay Schweikert, Qualified Immunity: A Legal, Practical, and Moral Failure, Policy Analysis No. 901 (Sept. 14, 2020). [16] Coalition Calls on Congress to End Qualified Immunity, Human Rights Watch (June 21, 2021) (available at: https://www.hrw.org/news/2021/06/21/coalition-calls-congress-end-qualified-immunity). [17] *Salazar-Limon v. Houston*, 137 S.Ct. 1277, 1282-1283 (2017) (Sotomayor, J., dissenting from denial of certiorari). [18] *Kisela v. Hughes*, 138 S.Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). [19] 2020 Colo. SB. 217