Qualified Immunity after *Pearson v. Callahan*: New Hope for Expeditious Dispositions?

by John E. Dorman and Larry V. Simmons



"Qualified immunity" is a judicially-created doctrine that protects government officials from civil liability when their official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[1] 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."[2] Qualified immunity is intended to shield "all but the plainly incompetent or those who knowingly violate the law."[3] It is not only a defense to liability but, also, a defense to the demands of litigation, including discovery.[4] "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.'"[5]

Mechanics of the Defense

The qualified immunity defense may be raised as part of an answer or a motion to dismiss, a motion for summary judgment, or even as a defense at trial.[6] Although labeled as an affirmative defense, it is only nominally so, and is raised by simply showing that, at the time of the challenged action, the defendant was performing public duties.[7] Once the defense is raised, the burden shifts to the plaintiff to prove that immunity should not attach.[8]

Substantively, the basic qualified immunity analysis has remained unchanged from that articulated by the United States Supreme Court in *Harlow v. Fitzgerald*.[9] To overcome a qualified immunity defense, a plaintiff must plead and prove, first, that the government official's conduct violated the plaintiff's federal statutory or constitutional rights, and second, that such right was clearly established in a particularized sense, such that a reasonable person in the official's circumstances would have known he was violating the plaintiff's rights.[10] *Harlow* did not mandate the sequence in which these inquiries were to be addressed. However, in *Siegert v. Gilley*, the Supreme Court stated, in *dicta*, that the constitutional issue (whether the conduct alleged violates federal rights) should, in most instances, be resolved first.[11]

In *Saucier v. Katz*,[12] the Supreme Court mandated a specific analytical sequence: "A court required to rule upon the qualified immunity issue must consider… this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."[13] Only then, it stated, may a court turn to "the next, sequential step"– namely, "whether the right was clearly established."[14] The Court further explained:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[15]

Pearson v. Callahan

Last term, in *Pearson v. Callahan*, the Supreme Court retreated from the rigid *Saucier* sequencing requirement.[16] *Pearson* reached the Court on an appeal from the U.S. Court of Appeals for the Tenth Circuit, denying qualified immunity to police officers who conducted a warrantless arrest of Callahan, a suspected drug dealer, inside his home.[17] The officers entered the home on the signal of a wired citizen-informant, who had just completed a drug buy. After a state appeals court reversed Callahan's conviction on the grounds the warrantless entry was unlawful, Callahan sued the officers under 42 U.S.C. § 1983, alleging a violation of his Fourth Amendment rights. The officers raised the qualified immunity defense and argued that they had acted reasonably under the "consent once removed" doctrine (this permitted a warrantless police entry into a home when consent to enter had already been granted to an undercover officer, who had observed contraband in plain view). The district court granted immunity on this basis. Applying the *Saucier* two-step analysis, the Tenth Circuit reversed, declining to extend the "consent once removed" doctrine to citizen informants, and finding that the law was well established that a warrantless entry by police under such circumstances was unreasonable.[18]

A unanimous Supreme Court reversed the Tenth Circuit's denial of qualified immunity without determining whether the "consent once removed" doctrine was applicable.[19] The Court, instead, focused upon the utility of the *Saucier* mandate. It first acknowledged the criticisms of the *Saucier* two-step analysis, noting that this process had "defied consistent application by the lower courts."[20] It further observed that *Saucier*'s:

> standards…are out of place in the present context… it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that

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> a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.[21]

Accordingly, the Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory."[22]

The Court noted instances when the *Saucier* approach was beneficial: "[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be,"[23] adding that a "discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all."[24] Further, "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[25]

However, the Court also noted that its own experience, and that of the lower federal courts, had demonstrated the shortcomings of *Saucier*'s rigid application:

> The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.[26]

The Court proceeded to catalog such cases. These included cases where "[u]nnecessary litigation of constitutional issues…wastes the parties' resources;"[27] "cases in which the constitutional question [was] so fact-bound that the decision provides little guidance for future cases;"[28] decisions on an underlying constitutional question in a Section 1983 damages action or a *Bivens* action that "may have scant value when it appears that the question will soon be decided by a higher court;"[29] constitutional decisions "resting on an uncertain interpretation of state law, " being "also of doubtful precedential importance;"[30] circumstances in which the first step of the *Saucier* procedure could "create a risk of bad decisionmaking… courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate;"[31] and cases where qualified immunity was asserted at the pleading stage, when the precise factual basis for the claim could be hard to identify and where "the answer [to] whether there was a violation [could] depend on a kaleidoscope of facts not yet fully developed."[32]

Freed from the sequencing mandate, a court can focus on the sufficiency of the allegations and dismiss those complaints which do not contain facts that demonstrate a violation of "clearly established" rights

In addition, the rule did not and could not "specify the sequence in which judges reach[ed] their conclusions in their own internal thought processes," with cases in which a court would "rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts [made] out a constitutional question at all."[33] Lastly, *Saucier*'s two-step protocol departed from the general rule of constitutional avoidance and ran contrary to the "older, wiser judicial counsel 'not to pass on questions of constitutionality…unless such adjudication [was] unavoidable.'"[34]

The Court concluded by stating that any "misgivings" about its "decision to withdraw from the mandate set forth in *Saucier* were unwarranted: "Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[35]

Strategic Considerations

The viability of the qualified immunity defense still rests upon the particular facts of the case. Since *Johnson v. Jones*, the courts have held that, if a dispute of material fact exists, qualified immunity cannot be granted.[36] Under *Saucier*, a court could not determine whether a plaintiff had pled a violation of clearly established law without first addressing whether a constitutional violation had occurred. This often required a fact-driven inquiry which caused the court to defer the immunity determination until discovery had been completed.[37]

Pearson's abrogation of the *Saucier* sequencing requirement may open the door to quicker qualified immunity dispositions.[38] Freed from the sequencing mandate, a court can focus on the sufficiency of the allegations and dismiss those complaints which do not contain facts that demonstrate a violation of "clearly established" rights. Whether an asserted federal right was clearly established at a particular time is purely a legal question.[39] As the Supreme Court recently observed in *Ashcroft v. Iqbal*, "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here."[40]

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[41] Citing *Bell Atlantic Corp. v. Twombly*, the *Ashcroft* Court observed that this Rule does not require "detailed factual allegations," but it does demand more than an unadorned "the-defendant-unlawfully-harmed-me" accusation.[42] A pleading that offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do,"[43] nor will a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."[44]

The *Ashcroft* Court further stated that, to survive a motion to dismiss,

a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that [was] plausible on its face."[45] A claim has facial plausibility when a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is *liable* for the misconduct alleged.[46] The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.[47] Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of "entitlement to relief."[48]

Procedurally, an expeditious dismissal could be accomplished through a motion to dismiss for a failure to state a claim under Rule 12(b)(6), a motion for a more definite statement under Rule 12(e), or, subsequent to a court-ordered reply, under Rule 7(a)(7), to an answer raising the qualified immunity defense.[49]

It should be remembered that, once the qualified immunity defense is raised, the burden will shift to the plaintiff to establish both the existence of the federal right allegedly violated, and that the right was clearly established at the time. The risk that a court will find a violation of federal rights on the pleadings alone is unavoidable;[50] however, keeping in mind research showing that defendants fared well under *Saucier*'s mandatory sequence, defendants should not hesitate to insist that plaintiffs establish both elements early.[51]

Conclusion

Initially touted as an effective means for early disposal of insubstantial claims, the qualified immunity defense has struggled to reach its full potential in this regard. Most of the time, the qualified immunity defense is resolved at the summary judgment stage (often around the time of the pre-trial conference) instead of the "earliest possible stage in the litigation." Two cases have been instrumental in causing this result: *Johnson* and *Saucier*. Now that the Supreme Court has, in *Pearson v. Callahan*, retreated from the mandatory sequencing of *Saucier* and has, in *Ashcroft v. Iqbal*, reaffirmed the plaintiff's burden of pleading facts showing the defendant's *liability*, the prospect of the early disposition of insubstantial claims against government officials appears much improved.[52]

Notes

1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
2. Pearson v. Callahan, ___ U.S.___, 129 S. Ct. 808, 815 (2009).
3. Malley v. Briggs, 475 U.S. 335, 341 (1986). A court may grant immunity regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 129 S. Ct. at 815, citing *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting).
4. Siegert v. Gilley, 500 U.S. 226 (1991).
5. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis deleted). It is also effectively lost if the official raising the defense is subjected to wide-ranging discovery, "or the demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232, citing *Harlow*, 457 U.S. at 818. *See also*, Hunter v. Bryant, 502 U.S. 224, 227 (1991) (*per curiam*).
6. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Crawford-El v. Britton, 523 U.S. 574, 597 (1998).
7. *Harlow*, 457 U.S. at 818.
8. Elder v. Holloway, 510 U.S. 510, 515 (1994); Davis v. Scherer, 468 U.S. 193, 197 (1984).
9. 457 U.S. at 818. Although *Harlow* is generally regarded as the seminal qualified immunity case, the Supreme Court recognized a similar "good faith" immunity in *Pierson v. Ray*, 386 U.S. 547, 557 (1967). *Harlow* retained the immunity recognized in *Pierson*, but dispensed with the subjective "good faith" element in favor of the objective analysis, which focuses upon the status of the law at the time of the alleged constitutional violation.
10. In the second prong of the test, "the focus is on whether the officer had fair notice that her conduct was unlawful." Brousseau v. Haugen, 543 U.S. 194, 198 (2004). The circuit courts have held that a right is considered "particularized" when a plaintiff can identify a Supreme Court or governing circuit court of appeals case that is on point, or demonstrate that the right is supported by the weight of authority from other courts. *See generally*, DAVID W. LEE, 2009 HANDBOOK OF SECTION 1983 LITIGATION, § 7.03(B) (2009); MICHAEL AVERY, DAVID RUDOVSKY, KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION §3:7 (3d ed. 2009) (collecting cases).
11. 500 U.S. 226, 231-233 (1991). Two post-*Siegert* opinions, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) and *Wilson v. Layne*, 526 U.S. 603, 608 (1999) stressed the importance of deciding the constitutional question first. However, the Supreme Court did not make this sequence mandatory, opting, instead, to stress that this was the "better" approach.
12. 533 U.S. 194 (2001).
13. *Id.* at 201.
14. *Id.*
15. *Id.*
16. ___ U.S.___, 129 S. Ct. 808 (2009).
17. Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007).
18. *Id.* at 897-98 ("while our case law would support a holding that the Fourth Amendment allows an undercover officer to summon backup officers within a home after that officer has been invited with consent, neither the case law nor a rational extension of the case law would support including officers summoned by an informant within a home").
19. The Supreme Court granted certiorari on the issue of "consent once removed," but directed the parties "to address whether *Saucier* should be overruled in light of widespread criticism directed at it." 129 S. Ct. at 811, 813, 815.
20. *Id.* at 818.
21. *Id.* at 817.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* These are the same reasons the Supreme Court used to justify the mandatory two-step analysis in *Saucier*, 533 U.S. at 201-02.
26. *Id.* at 818.
27. *Id.*
28. *Id.* at 819.
29. *Id.*
30. *Id.*
31. *Id.* at 820.

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32. *Id.*
33. *Id.* The Court added that there would also be difficulties when a court held that a defendant committed a constitutional violation but that the violation was not clearly established, as "the [successful] defendant may face a difficult situation… [the] right to appeal the adverse holding on the constitutional question may be contested." *Id.*
34. *Id.* at 821.
35. *Id.*
36. 515 U.S. 304, 314 (1995) ("a fact-related legal inquiry").
37. *Pearson*, 129 S. Ct. at 820.
38. Asserting the defense in a motion to dismiss does not waive the right to assert the defense again in a motion for summary judgment. Behrens v. Pelletier, 516 U.S. 299, 308 (1996).
39. Elder v. Holloway, 510 U.S. 510, 516 (1994) ("a question of law, not one of 'legal facts'").
40. 129 S. Ct. 1937, 1947 (2009) (citing *Johnson*, 515 U.S. 304, 314 (1995)).
41. Fed. R. Civ. P. 8(a)(2).
42. 129 S. Ct. at 1949; Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
43. 129 S. Ct. at 1949.
44. *Id.*
45. *Id.*
46. *Id.* (emphasis added).
47. *Id.*
48. *Id.*
49. *See* Fed. R. Civ. P. 12; Fed. R. Civ. P. 7; Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (describing dispositive motions and holding that a trial court is obligated to "exercise its discretion in a way that protects the substance of the qualified immunity defense").
50. *Pearson*, 129 S. Ct. at 820-21, discussing the Court's concern over the possibility that constitutional issues may get resolved on less than complete records.
51. *See* Leong, Nancy, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. Law Rev. (2009).
52. *See* Hannon, Kendall. W., *Much Ado About* Twombly*? A Study on the Impact* of Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev.1811 (2008). **ML**

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6. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).
7. 129 S. Ct. 2658, 2674 (2009).
8. *Id.* at 2673.
9. *Id.* at 2681.
10. *Id.* at 2678-79.
11. 29 U.S.C. § 621 *et seq.* (West 2009).
12. 129 S. Ct. 2343 (2009).
13. *Id.* at 2347.
14. Gross v. FBL Fin. Group, Inc., No. 4:04-CV-60209-TJS, 2006 WL 6151670 at * 13 (S.D. Iowa June 23, 2006).
15. 526 F.3d 356 (8th Cir. 2008).
16. 129 S. Ct. at 2350.
17. *Id.* at 2351.
18. 129 S. Ct. 846 (2009).
19. 42 U.S.C. § 2000e-3(a) (West 2009).
20. Crawford v. Metro. Gov't, No. 3:03-0996, 2005 WL 6011557 (M.D. Tenn. Jan. 06, 2005).
21. 211 Fed. Appx. 373 (6th Cir. 2006).
22. 129 S. Ct. at 851.
23. *Id.*
24. *Id.* at 853.
25. *Id.* at 854.
26. 42 U.S.C. § 2000e(k) (West 2009). The PDA was an amendment to Title VII and took effect on April 29, 1979.
27. AT & T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).
28. Pub. L. 111-2, § 3(A), 123 Stat. 5-6.
29. 129 S. Ct. 1456 (2009).
30. *Id.* at 1465.
31. 129 S. Ct. 1093 (2009).
32. Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 WL 3241745 (D. Idaho Nov. 23, 2005).
33. 504 F.3d 1053 (9th Cir 2007).
34. 129 S. Ct. at 1095.
35. 129 S. Ct. 798 (2009).
36. Locke v. Karass, 425 F. Supp.2d 137 (D. Me. 2006), *aff'd*, 498 F.3d 49 (1st Cir. 2007).
37. *Id.* at 806 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)). **ML**

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country of racial discrimination in voting. Tremendous progress in race relations has been made as a result of an increasingly accessible electoral process, and facilitated the the Act's subsequent revisions and extensions. That racial progress is palpable. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full. We have learned how to pull, haul, and trade in the marketplace of political competition. We have witnessed the transformation of *E Pluribus Unum* from a nice-sounding phrase to a political reality.

We are indeed a better country as a result.

Notes

1. 42 U.S.C. § 1973 to 1973aa-6 (West 2009).
2. U.S. Const. amend. XV.
3. South Carolina v. Katzenbach, 383 U.S. 301, 314, 328 (1966).
4. 42 U.S.C. § 1973(a) (West 2009).
5. 383 U.S. 301(1966).
6. *Id.* at 327-28.
7. *Id.* at 328.
8. *Id.*
9. For more information, *see About Section 5 of the Voting Rights Act*, U.S. Department of Justice, Civil Rights Division, at http://www.justice.gov/crt/voting/sec_5/about.php.
10. Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (1982).
11. Pub. L 109–246, 120 Stat. 577 (2006).
12. As pointed out by the Supreme Court, the Act "retained 1972 as the last baseline year for triggering coverage under § 5." Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S.Ct. 2504, 2510 (2009).
13. *Id.*
14. 573 F. Supp. 2d 221 (S.D. Tex. 2008).
15. 129 S. Ct. at 2516.
16. *Id.* at 2515-16.
17. *Id.* at 2508.
18. *Id.* at 2513, citing *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927).
19. *Id.* at 2512.
20. *Id.* at 2517.
21. *Id.* at 2525.
22. *Id.* at 2516.
23. *Id.* at 2519 n 1.
24. *First Local Government Seeks Voting Rights Bailout Post Supreme Court Ruling,* The BLT: The Blog of Legal