Qualified Immunity

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Outline of the Presentation

- What is Qualified Immunity?
  - Procedural Issues
- The Collateral Order Rule
- The Circuit Courts
- Settlement

What is Qualified Immunity?

- Not Absolute Immunity
  - Legislators, Judges
- Good Faith Immunity
  - A violation of a constitutional right
  - That is clearly established at the time of the violation.
- Intended to Protect Government Officers
  - Avoid protracted litigation
- Government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties, provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”

Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017)(quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

Procedure

- A court can grant qualified immunity under either prong.
- A court can decide the issue in either order.
- Only an official sued in his or her personal capacity is eligible for qualified immunity.
- A government entity is not entitled to qualified immunity.

Tactical Considerations

- Always try to convince the court that there was no constitutional violation. Do not rely ***only*** on the clearly established prong.

- No constitutional violation = no government liability. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)

Exceptions

- Failure to Train (requires deliberate indifference) *Ostling v. City of Bainbridge Island*, No. 11-CV-5219 RBL, 2012 WL 4480550, at *8 (W.D. Wash. Sept. 28, 2012)
- If a policy caused the injury. *Speer v. City of Wynne, Arkansas*, 276 F.3d 980, 985 (8th Cir. 2002)
- Substantive due process claim arising from a police pursuit. *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994)

What does “Clearly Established” Mean

- “To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.”
- “The rule must be ‘settled law,’ which means it is dictated by ‘controlling authority’ or ‘a robust ‘consensus of cases of persuasive authority,’”
- “It is not enough that the rule is suggested by then-existing precedent.“
- “The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that ‘every reasonable official’ would know.”

- “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.’”
- “We have repeatedly stressed that courts must not ‘define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.’”
- “A rule is too general if the unlawfulness of the officer's conduct ‘does not follow immediately from the conclusion that [the rule] was firmly established.’”

Wesby, Fn. 8

We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. . . . We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them. . . . Instead, we address only how a reasonable official "could have interpreted" them.

The doctrine of qualified immunity gives officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al–Kidd,* 563 U.S. 731, 743 (2011).

The Clearly Established Test is Objective

"[I]f a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability."

Ziglar v. Abbasi, 137 S. Ct. 1843, 1867, 198 L. Ed. 2d 290 (2017)

Courts are not to define clearly established constitutional rights at a high level of generality. of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)

"Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776, (2015)

A Supreme Court or Circuit Court Decision is Required to Establish the Right

Sound Aircraft Servs., Inc. v. Town of E. Hampton, 192 F.3d 329, 337 (2d Cir. 1999)

Cox v. Glanz, 800 F.3d 1231, 1247 (10th Cir. 2015)

Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)

Unpublished decisions provide little support for the notion that the law is clearly established. *Knopf v. Williams*, No. 17-8025, 2018 WL 1178346, at *6 (10th Cir. Mar. 5, 2018)

Examples

- Clearly established that it was unlawful to deploy a taser in dart mode against a nonviolent misdemeanant who had just been tased in dart mode and made no movement when, after the first tasing, the officer instructed her to turn over. *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 732 (7th Cir. 2013)
- Clearly established right to assemble, protest, and demonstrate peacefully. *Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010)
- Clearly established that an official cannot remove children without a court order, unless the child is in imminent danger. *Keates v. Koile*, No. 16-16568, 2018 WL 1161890, at *7 (9th Cir. Mar. 6, 2018

More Examples

- Clearly established that the Fourth Amendment forbids the unannounced, forcible entry of a dwelling in the absence of exigent circumstances. *Greer v. City of Highland Park, Michigan*, No. 17-1281, 2018 WL 1122290, at *4 (6th Cir. Mar. 2, 2018)
- "The constitutional prohibition against use of excessive force in making an arrest had been established long before December 2004; no competent police officer could have failed to comprehend that that principle would encompass repeatedly beating an unresisting, supine, jaywalking suspect with a stick." *Outlaw v. City of Hartford*, No. 16-480(L), 2018 WL 1177403, at *12 (2d Cir. Mar. 7, 2018)

I know it when I see it

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Jacobellis v. State of Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964)(Stewart, J. concurring)

Collateral Order Doctrine

- Interlocutory decisions denying motions for summary judgment generally are not appealable.
- Denial of a motion for summary judgment denying a claim of Qualified Immunity is a collateral order subject to interlocutory appeal.
- The Collateral Order Doctrine is a limited exception allowing for appeals in cases if it falls within "'that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985)(quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Government Liability – The Good

- A government only can be sued if a constitutional violation is the result of a government policy. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978)
- A government cannot be held liable under *Monell* if there is no constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)
- "The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989)

Government Liability – the Bad

- A Government is not entitled to qualified immunity. *Owen v. City of Independence,* 445 U.S. 622, 638 (1980).
- A Government cannot invoke the collateral order doctrine to justify appeal of an otherwise non-appealable decision, *Swint v. Chambers County Comm'n,* 514 U.S. 35 (1995)

Pendent Jurisdiction

- An appellate court may exercise pendent jurisdiction if the issue is "inextricably intertwined" with that subject to the collateral order

- Pendent jurisdiction can be used to seek reversal of a denial of a government's motion for summary judgment.

Moore v. City of Wynnewood, 57 F.3d 924, 929–31 (10th Cir.1995).
Mattox v. City of Forest Park, 183 F.3d 515, 523–24 (6th Cir.1999).
Huskey v. City of San Jose, 204 F.3d 893, 905 (9th Cir. 2000).
Altman v. City of High Point, N.C., 330 F.3d 194, 207, n.7 (4th Cir. 2003)

Some things to look for in the Circuit Courts

Provocation Rule

Provocation Rule - the Ninth Circuit's provocation rule, pursuant to which a law enforcement officer may be held responsible for an otherwise reasonable use of force where the officer intentionally or recklessly provoked a violent confrontation through a warrantless entry that was itself an independent Fourth Amendment violation, is incompatible with the Court's excessive force jurisprudence. *County of Los Angeles, v. Mendez*, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017)

Higher standard for vulnerable individuals

Factors in addition to *Graham* factors to be considered in an excessive force claim involving a person with physical limitations. *Aldaba v. Pickens*, 777 F.3d 1148, 1156 (10th Cir.) *vacated*, 136 S. Ct. 479 (2015) *on remand*, 844 F.3d 870 (10th Cir. 2016).

Death of the Plaintiff

- Precluding summary judgment - *Shirar, v. Guerrero*, 2016 WL 7240215 (9th Cir. Dec. 15, 2016); *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014)

Additional *Graham* Factors

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Use of Tasers

Use of taser was excessive force, but not clearly established in 2006.

Mattos v. Agarano, 661 F.3d 433 (9th Cir.2011).

Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 509 (6th Cir.2012).

Carroll v. Ellington, 800 F.3d 154, 175 (5th Cir. 2015)

Settlement

- Know the cases
  - Mullinex
  - Sheehan
  - Wesbey
  - White v. Pauly
- Emphasize reasonable officer standard
  - Reject second guessing