

Success On Appeal In Section 1983 Cases: Tips for Litigating Section 1983 Issues On Appeal.

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Overview

- Section 1983 appeals fill the federal courts.
- “[T]here are few days of oral argument in the life of an appellate judge that do not involve at least one qualified immunity interlocutory appeal.” *Romo v. Largen*, 723 F.3d 670, 680 (6th Cir. 2013) (Sutton, J. concurring.).
- Aside from immigration, single largest non-criminal docket in federal appellate courts.

Why So Many?

- Right to appeal denial of QI at any stage.
- Primary means to obtain redress for, or halt, constitutional violations.
- Cases concern high profile issues.
- Potential for significant damages.
- Potential for attorney fees.

When Can you Appeal?

- After a final judgment (28 U.S.C. section 1291)
- Some interlocutory orders under 28 U.S.C section 1292.
- *Some* orders denying qualified immunity.

Overview of Qualified Immunity

- Shields government officials/employees “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.”
Harlow v. Fitzgerald, 457 U.S. 800, 818, (1982)

Two Prongs

- Whether the facts that a plaintiff has alleged (for a motion to dismiss) or shown (for summary judgment or trial) make out a violation of a constitutional right.
- Whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct.
- Court can decide either, or both, in any order.

Appeals From Denial Of QI

- Denial of qualified immunity based on district court's erroneous determination of clearly established law immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).
- Denial of qualified immunity based on issue of fact, not immediately appealable. *Johnson v. Jones*, 515 U.S. 304 (1995)
- Mere fact that district court says there is an issue of fact does not bar review – if qualified immunity argument accepts plaintiff's version or evidence is in fact undisputed, appellate court may review order. *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

Law Based or Fact Based Denial?

- Law very muddy on distinguishing between fact based and law based denial of QI.
- Numerous federal judges, including Justice Gorsuch, have noted confusion and need for clarification.

Circuit Split On Conflicting Inferences From Undisputed Facts

- If jury could draw different inferences from a particular piece of evidence, *Johnson* bars review. *Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring and collecting cases).
- Particularly relevant to motions based on video evidence i.e., the video is “undisputed,” but arguments about how it may be interpreted. See, e.g., *Raines v. Consulting Associates*, 883 F.3d 1071, 1074-75 (8th Cir. 2018).

Can You Piggyback Other Claims Or Parties On The QI Appeal?

- Generally, no. *Swint v. Chambers County Com'n*, 514 U.S. 35, 38, (1995).
- But, if determination of QI claim turns on whether constitutional violation occurred, court may address *Monell* claim against municipality.

Appellate Issues On The Clearly Established Law Prong of Qualified Immunity.

The *Anderson v. Creighton* Standard 483 U.S. 635 (1987)

- Whether the right the officers are alleged to have violated was “clearly established” in a particularized sense: “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”
- “[E]xisting precedent must have placed the . . . constitutional question beyond debate.”
Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

Key Questions For Evaluating Clearly Established Law

- What courts can set the standard?
- How close do the facts have to be to my case?

What Body Of Case Law Makes A Right Clearly Established?

- Other than its own case law, Supreme Court has expressly left open the question of what other body of law would be sufficient to make the law “clearly established.”
- *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n. 8 (2018) “We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.”

Some Hints From The Supreme Court

- “[C]ontrolling authority in their jurisdiction at the time of the incident...” *Wilson v. Layne*, 526 U.S. 603 (1999).
- “[A] ***consensus of cases of persuasive authority*** [out of their jurisdiction] such that a reasonable officer could not have believed that his actions were lawful.” *Id.*

But Maybe Not....

- ***Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law*** in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here." *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012).
- ***"Assuming for the sake of argument*** that a controlling circuit precedent could constitute clearly established federal law in these circumstances...." *Carroll v. Carman*, 135 S. Ct. 348, 350-51 (2014).
- Special circumstances for federal officers – is it ever fair to measure their conduct by a single circuit's precedent?

Only Clear Rule –District Court Decisions Not Enough

- *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) –single district court decision does not make law clearly established.
- *Hope v. Pelzer*, 536 U.S. 730 (2002) – unpublished district court decisions supporting defendant does not mean that law was not clearly established.

Circuit Split Probably Enough To Establish Qualified Immunity

- *Pearson v. Callahan*, 555 U.S. 223 (2009)--officers entitled to qualified immunity because prior to the Tenth Circuit's decision in the case, "three Federal Courts of Appeals and two State Supreme Courts" had found such conduct valid.
- *Stanton v. Sims*, 571 U.S. 3 (2013) qualified immunity proper where circuit courts throughout the country were divided on the underlying legal question.
- *Carroll v. Carman*, 135 S. Ct. 348 (2014) – Officers granted qualified immunity where "other federal and state courts" disagreed with the Circuit court.

How About The Lower Courts?

- Circuit courts apply different standards in determining whether law is clearly established.
- Ninth Circuit precedent renders the law clearly established within the circuit; otherwise the court looks “to whatever decisional law is available,” including “decisions of state courts, other circuits, and district courts.” *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007).
- Even an unpublished district court decision might clearly establish the law if the defendant officials repeatedly chose not to appeal unfavorable district court decisions in order to avoid adverse circuit court precedent. See *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

Generally, “Don’t Tell Us What To Do!”

- The Sixth Circuit – a recent case from one circuit is generally not sufficient to constitute clearly established law in another circuit. *Eugene D. v. Karman*, 889 F.2d 701, 706 (6th Cir. 1989).
- The Tenth Circuit-- a conflict among circuit courts is relevant to the qualified immunity inquiry, **but not dispositive**, because it would effectively “bind this circuit by the decisions of others.” *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987).
- The Fifth Circuit -- presence of a circuit split not dispositive of the qualified immunity issue **when its own precedent** establishes that the conduct in question is unlawful. See *Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995).

Which Court Should You Look To In Your Case?

- Start with SCOTUS – Court has expressly left open many issues.
- Authority from your circuit.
- Authority from other circuits – even if your circuit has addressed issue, a circuit split shows law not clearly established.
- Don't forget state appellate courts –reasonable for officers to conform conduct to state law.
- District court decisions –if trial courts are divided, some indication that law not clear.

How Factually Analogous Must A Case Be To “Clearly Establish” The Law?

- Good news for defendants: SCOTUS has required greater factual similarity.
- “[T]he crucial question [is] whether the official acted reasonably *in the particular circumstances that he or she faced.*” *Plumhoff v. Rickard*, 572 U.S. 765 (2014).

Use of Force Cases Require Closely Analogous facts

- Generalized standards for use of force articulated in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), not sufficient to “clearly establish” the law in other than the most obvious cases. *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam).
- Because use of force evaluated in light of specific facts, case law must be closely analogous in order to clearly establish the law. *Kisela v. Hughes*, 148 S. Ct. 1148, 1152-1153 (2018) (per curiam).

White v. Pauly,
137 S. Ct. 548 (2017)

- Odd Is good: That “this case presents a unique set of facts and circumstances,” “alone should have been an important indication to the majority that White’s conduct did not violate a ‘clearly established’ right.”
- Emphasize any unusual facts in your case.

Kisela v. Hughes,
148 S. Ct. 1148 (2018)

- Most stringent standard applied by SCOTUS in spelling out clearly established law.
- Police officers are entitled to qualified immunity unless “existing precedent ***‘squarely governs’ the specific facts at issue.***” *Id.* at 1153.

Requiring Closely Analogous Facts In Other Fourth Amendment Cases

- Wrongful arrest: “In the context of a warrantless arrest, the rule must **obviously** resolve ‘whether the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.’” *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)

Is The Court Retreating From This Stringent Standard?

- *Taylor v. Riojas*, 141 S. Ct. 52 (2020)(per curiam): Even absent specific case addressing similar facts, no qualified immunity because holding a prisoner in a cell “teeming with human waste” for six days, so egregious that officer on notice that conduct was unlawful.
- *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) and *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam): Officers entitled to qualified immunity based on the absence of clearly established law.

Appellate Issues On The Merits Prong Of Qualified Immunity

Issue Section On Appeal Is Critical.

- Arguing the merits prong can be problematic: Most such determinations are fact intensive, and hence create the risk of a genuine issue of material fact to be resolved by jury.
- Sometimes worth raising merits prong in a close case because it may strengthen argument on the “clearly established law” prong of qualified immunity -- the unlawfulness of the conduct cannot be “clearly established” if there is serious doubt about the issue.

Increased Viability In Force Cases Based On Video

- *Scott v. Harris*, 550 U.S. 372 (2007) -- video of police pursuit and resulting use of force established that the force was reasonable as a matter of law.
- *Plumhoff v. Rickard*, 572 U.S. 765 (2014) -- officers entitled to judgment because the undisputed evidence established that the force used to terminate a pursuit was reasonable as a matter of law.
- Body cameras and video recording in police units spawning more motions on merits in force cases.

Lawfulness Of Search Or Arrest

- Broad standards for assessing probable cause for arrest. *District of Columbia v. Wesby*, 138 S. Ct. 577, 588-589 (2018).
- Pager text search reasonable as a matter of law. *City of Ontario v. Quon*, 560 U.S. 746 (2009).

Dealing With Factual Conflicts

- Assess carefully: Is there a factual conflict that is material to determining qualified immunity?
- Do not raise merits argument if there is a clear factual conflict on a material issue, i.e., plaintiff fought back/offered no resistance.
- A weak argument for one defendant or on one claim, can divert the court from stronger arguments.

Confront Bad Facts – Qualified Immunity Covers Factual Mistakes

- Officer can make a reasonable mistake of fact.
- “The protection of qualified immunity applies 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 v. Callahan*, 555 U.S. 223, 231 (2009).
- Under utilized facet of qualified immunity because reluctant to admit mistake, or undermine officer’s account of events.

Fourth Amendment Standards Leave Room For Mistakes

- Officers need only be reasonable, not right.
- *Graham v. Connor*, 490 U.S. 386, 396 (1989), “The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises,” so too “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,’ violates the Fourth Amendment.”
- “[T]he probable-cause requirement: . . . ‘[D]oes not deal with hard certainties, but with probabilities.’” *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality); *Hill v. California*, 401 U.S. 797, 804 (1971) (“[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . .”).

Avoid The Rule 50 Waiver

Renew Your Qualified Immunity Argument At Trial

- There is no post-judgment appeal of an order denying a motion for summary judgment based on qualified immunity – the defendant *must* renew the argument via a motion for judgment at close of evidence and post-judgment Under FRCP 50(a) and 50(b). *Ortiz v. Jordan*, 562 U.S. 180, 190-191 (2011)
- *Ortiz* left open issue whether denial based on pure issue of law is preserved without Rule 50 motion, and there is a circuit split on the issue.
- Be safe: Always renew your qualified immunity argument.

Evaluating The Downsides Of Appealing

Cost of Interest and Bonds

- Interest on judgment – varies widely from state to state; federal rate low, set by cd auction rates.
- Bond cost – some states exempt public entities from bonding judgment; federal courts follow state law unless judgment not a lien on the debtor, in which case free to set appropriate bond (generally what state rules require for non-public entity defendants.)
- Given historically low federal interest rate on judgments, worth asking for minimal bond above judgment amount, as so little interest will accrue.

Cost Of Record

- Clerk's transcript, i.e. documents in case, free to local public entities in many states, but preparation of a joint appendix in some state courts or an excerpt of record in some federal courts requires expenditure of attorney time.
- States vary on exempting public entities from paying for reporter's transcript; federal courts require payment like any other party.

Cost of Attorney Fees On Appeal

- Often difficult to predict because scope of work determined by what opposing party does, i.e., how good a brief they file, though fixed tasks like reviewing the record and legal research may be more predictable.
- Risk of paying opponent's attorney fees on appeal.

Political Cost/Benefit

- Concern about reinforcing failure.
- Keeping a controversial case in the spotlight.
- Maintaining reputation for strong defense, i.e., reluctance to “rollover” in the face of an improper judgment, which might encourage future suits.
- Could we end up worse?
- If a successful appeal results in a retrial, will there be a greater exposure to damages, or possible recovery on additional theories?
- Could we make bad law appealing a marginal value case on a less than ideal record that will hurt us in future, high value cases?

CAN THE CASE BE SETTLED?

- Problem: Vastly disparate bargaining leverage.
- One party has already “won.”
- Institutional bias towards affirmance means appellees are not likely to settle, conversely, appellants may be more willing to settle.
- Little economic incentive for prevailing party to settle.

Settlement Dynamics On Appeal



Appellate Court Mediation

- Many state courts have voluntary programs with mediators varying in expertise, or justices may mediate cases.
- Some federal circuits have formal mediation programs with trained mediators.

Thanks!

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