The attack on the police officer's qualified immunity defense

Mike Callahan

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On June 5, 2020, CBS News reported that the death of George Floyd has sparked calls for policing reforms. [1] Among items allegedly in need of reform is the "qualified immunity" defense, which assists officers in defending alleged excessive force civil rights lawsuits. This defense is now front and center in the crosshairs of certain groups who believe that it unfairly shields officers accused of excessive force from facing justice and accountability.

The CBS article reports that diverse groups, including the "libertarian Cato Institute, the conservative Americans for Prosperity, and the NAACP Legal Defense and Educational Fund," have joined together to urge the United States Supreme Court to revisit the qualified immunity doctrine. According to CBS, this group wrote in a brief filed with the Supreme Court that, "Qualified immunity denies justice to victims of unconstitutional misconduct [and] … imposes cost prohibitive burdens on civil-rights litigants."

The article says that the Supreme Court is considering whether to grant a review of several cases that involve the qualified immunity defense. It further observes that "legal experts [are] calling on the Supreme Court to rethink qualified immunity" believing that the qualified immunity standard that victims must meet to hold law enforcement accountable has become exceedingly difficult to reach. CBS also interviewed an ACLU senior staff attorney who stated that "Qualified immunity has become a get-out-of-jail-free card" for the police.

The news media reports that the Supreme Court is considering whether to grant a review of several cases that involve the qualified immunity defense. (Photo/Pixabay)

In addition to the assault on qualified immunity at the highest level of the judiciary, there is a parallel move brewing in the United States Congress. CBS News reports that Independent Congressman Justin Amash from Michigan and Democrat Congresswoman Ayanna Pressley of Massachusetts have introduced a bill that would "end qualified immunity." In a letter to colleagues they wrote, "This pattern [of police misconduct] continues because police are legally, politically and culturally insulated from consequences for violating the rights of the people whom they have sworn to serve."

Boston.com reported on 6/5/20 that Pressley's bill, titled "The Ending Qualified Immunity Act," would amend Title 42 U.S.C. §1983 (The Civil Rights Act of 1871 that permits personal lawsuits against police officers) "to say it is not a sufficient defense [for police officers] to say they were acting in good faith or reasonably believed their conduct was lawful … nor is it a defense that the rights violated were not 'clearly established'." [2]

Brief History and Summary of Qualified Immunity

In *Harlow v. Fitzgerald*, [3] the Supreme Court recognized the need for an objective qualified immunity defense to protect public officials, including law enforcement officers, from the often-frivolous lawsuits that flow from their necessary official actions.

The Court made clear that the vast majority of public officials, including police officers, are not entitled to absolute immunity, which is reserved for a select few high-level officials. The Court observed that the goal of the qualified immunity defense was to allow for the "dismissal of insubstantial lawsuits without trial." [4] The Court ruled "that government officials … generally are shielded from liability … insofar as their [objective] conduct does not violate clearly established … constitutional rights of which a reasonable person would have known." [5]

The Court also ruled that denial of a public official's qualified immunity defense by a trial court judge "is an appealable 'final decision'…." [6] In so doing, the Court made clear that when a law enforcement officer's claim of qualified immunity is denied by a trial court judge, that denial is subject to an immediate appeal to the appropriate court of appeals.

In *Anderson v. Creighton*, [7] the Court observed that "qualified immunity protects, 'all but the plainly incompetent or those who knowingly violate the law.'" [8] The Court stated, "We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude [for example] that probable cause is present, and we have indicated that, in such cases, those officials … should not be held personally liable." [9] This statement makes clear that law enforcement officers are entitled to qualified immunity when they have a reasonable basis to believe that their conduct was constitutional, even if their actual conduct falls somewhat short of the constitutional standard.

The Supreme Court's creation of a qualified immunity defense that benefits law enforcement officers should come as no surprise to persons who study the court. The Court has made clear its respect for the often extremely difficult, dangerous and challenging circumstances faced daily by officers across America. For example, in *Graham v. Connor*, [10] the Court ruled that in deciding whether an officer has used excessive force, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" [11] and "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." [12]

Current State of the Qualified Immunity Defense: *Pearson v. Callahan*

In 2009, the Supreme Court in *Pearson v. Callahan* [13] further clarified the application of the qualified immunity doctrine at the trial court level by modifying its earlier ruling in *Saucier v. Katz*. [14]

In *Saucier,* the Court established a rigid two-step analysis that trial court judges were mandated to follow in ruling on the applicability of the qualified immunity defense. *Saucier* required the trial judge to first decide whether the facts alleged by the plaintiff make out a violation of a constitutional right. Second, if the answer is affirmative, the court must decide whether the constitutional right at issue was clearly established. If the answer to either question was no, the qualified immunity defense would require dismissal of the lawsuit.

The *Pearson* Court believed that the rigid two-part application of the qualified immunity defense that it mandated in *Saucier* was too inflexible and caused undue constraint upon trial court judges. The Court decided it is more prudent and efficient when examining the viability of the qualified immunity defense to first consider whether the constitutional right at issue was clearly established. If not, there would be no need to determine whether the facts alleged by the plaintiff made out a constitutional violation and the case would be dismissed.

The *Pearson* ruling provided trial court judges with the choice to juxtapose the order of reviewing the two parts of the qualified immunity test. This allowed but did require lower court judges to examine whether the constitutional right at issue was "clearly established" first. The Court's position simply stated is that an officer should not be personally liable for violating a right not clearly established.

How Effective is Qualified Immunity?

Boston.com reports that legal experts say that qualified immunity "has made it virtually impossible to successfully sue [officers] if their actions haven't previously been found unconstitutional in a case involving 'virtually identical facts.'" [15] This claim suggests that qualified immunity virtually shuts the courtroom doors to worthy victims of police officer misconduct. Is the statement really correct? A recent study on the subject says no.

UCLA School of Law Professor Joanna C. Schwartz is the author of a comprehensive study on the efficacy of the qualified immunity defense that was published in the Yale Law Journal. [16] Schwartz reviewed the dockets of 1,183 civil rights cases filed against law enforcement officers in five separate federal district courts over two years. She found that in the cases examined, defendants raised the defense in 440 pre-trial motions. The lower courts denied the motions (i.e., rejected the qualified immunity defense) approximately 32% of the time. The lower courts only granted the qualified immunity defense motions in full 12% of the time. [17] Schwartz reported that defendant officers filed 41 appeals of lower court qualified immunity denials which resulted in only five (12%) reversals.

Reuters Investigates published a separate much smaller study in May 2020. [18] The findings in the Reuters study appear to directly contradict the Schwartz study set forth above regarding appellate results. The Reuters study examined 252 federal appellate cases from 2015-2019 and determined that the appellate courts granted qualified immunity in more than half the cases. The more comprehensive Schwartz study findings, while suggesting that the defense is not as viable for police officers as some have thought, directly contradicts those critics of the defense who believe that the defense is a universal bar to plaintiffs seeking justice for victims of police misconduct.

My own experience, from reviewing numerous deadly force federal court decisions over the past 30 years. has shown me that the qualified immunity defense is no panacea for cops sued in civil rights litigation. The reason is quite simple to comprehend. Federal judges at the lower court and appellate levels are bound by federal court procedural rules that require judges reviewing qualified immunity motions of defendant law enforcement officers to almost universally accept the plaintiff's version of disputed material facts in deciding the viability of the defense.

A good example of what happens when this is done is found in a recent Ninth Circuit opinion in *George v. Morris*. [19] In *George,* three police officers responded to a request for assistance

from George's wife. She said he was suffering from serious illness and had armed himself with a firearm. Officers arrived, located George in the backyard of his home, saw him with a gun in his hand at his side and told him to drop it. Officers said that he raised the gun at them and fearing for their lives, shot him.

George died from his injuries and his wife sued the officers alleging excessive force. She disputed the officers' claim that George pointed his pistol at them before they fired by claiming that he was too weak to raise and point a gun at them. The lower court and two federal appellate judges rejected the officers' defense of qualified immunity by stating that they must accept George's wife's assertion of disputed material facts even though she did not witness the shooting.

The judges refused to consider the wife's statement right after the shooting that she tried to take the gun from George before the police arrived, but he was strong enough to physically resist her effort. Moreover, the judges refused to consider a statement from George's friend who said George told him that if he ever got cancer, he would get a gun, call the sheriff and have the police kill him.

Conclusion

Notwithstanding the apparent deficiency in success rates in asserting the qualified immunity defense as shown in the Schwartz study, law enforcement officers, their unions and police associations nationwide should contact their elected federal officials and object to legislation that purports to drastically alter, if not abolish, the qualified immunity defense.

This defense, which was implemented by the Supreme Court in 1982, [20] has resulted in several important victories for police officers at the Supreme Court level and should be retained. [21]

The Supreme Court stated unequivocally in *Anderson v. Creighton* [22] that officers should be given the benefit of the doubt when they reasonably but mistakenly believe that their actions conform with the legal standard at issue. Abolishing this defense will leave officers defenseless to the dramatic increase in excessive force lawsuits that will surely follow.

References

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6. Id. at 530.
7. 483 U.S. 635 (1987).
8. Id. at 638 (quoting *Malley v. Briggs*, 475 U. S. 335, 344-345).
9. Id. at 641.
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13. 555 U.S. 223 (2009).

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21. See *Anderson v. Creighton*, 483 U.S. 685 (1987); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Mullenix v. Luna*, 136 S.Ct. 305 (2015).; *White v. Pauly* 137 S.Ct. 548 (2017); and *Kisela v. Hughes*, 138 S.Ct. 1148 (2018).
22. Id.