Qualified Immunity: A Defense Under Attack

Patricia Y. Beety | General Counsel
League of Minnesota Cities
Phone: (651) 281-1270
pbeety@lmc.org

Jeffrey R. Kivetz, Esq.
The Sotos Law Firm, P.C.
Phone: (630) 735-1318
JKivetz@jsotoslaw.com

Barb Zemlock, Insurance Boards
Legal Counsel
County Commissioner Association of Pa
Phone: (717) 736-4762
bzemlock@pacounties.org

What are we doing today?

• In general, what is qualified immunity?
• When does it apply?
• What is the assault on qualified immunity?
• How could this assault impact pools?
• Are defense counsel raising this defense?
• What should we be doing?

What is Qualified Immunity
What is Qualified Immunity?

- Government officials and employees can be sued in federal court for damages in their individual capacity if they violate an individual’s constitutional rights or other legal rights.

- In general, such claims are usually filed in federal court pursuant to 42 U.S.C. 1983, commonly called, “1983 suits” or “civil rights suits.”

- Qualified immunity is one defense to this type of suit.

What is Qualified Immunity?

Qualified Immunity:

- Law recognizes that people are not perfect.
- Law presumes that government employees are not trying to harm those that they are hired to protect.
- Law recognizes that talented individuals will not work for government if consistently at risk of suit.
What is Qualified Immunity?

- Qualified immunity “shields officials acting and sued in their individual capacities.”
- Qualified immunity has been dubbed, the “good faith” defense.

What is Qualified Immunity?

Reasons stated by courts in support of this defense:

- Balance competing values—the right of citizens to seek damages for a violation of their rights v. protecting officials who “are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.”

What is Qualified Immunity?

Reasons stated by courts in support of this defense:

- Courts recognize the “social costs” of 1983 suits, including:
  - The expenses of litigation;
  - The diversion of official energy from pressing public issues; and
  - The deterrence of able citizens from acceptance of public office.
  QI allows insubstantial suits to be quickly terminated.
What is Qualified Immunity?

Prior to Harlow v. Fitzgerald, 457 U.S. 800 (1982)—Plaintiff could defeat defense of qualified immunity by establishing that:

1. "...an official 'knew or reasonably should have known' that the action he took” would violate the constitutional rights of plaintiff; or

2. an official took action "with the malicious intention to cause a deprivation of constitutional rights or other injury..."

Harlow:

- Abolished the subjective test.
- Focused on the "objective reasonableness of an official's conduct, as measured by reference to clearly established law..."
What is Qualified Immunity?

Harlow rationale—Subjective inquiries:
- Lead to protracted discovery.
- May entail the deposing of numerous people, including professional colleagues.
- Can be “peculiarly disruptive” of effective government.
- Are incompatible with the admonition that insubstantial claims should not proceed to trial.

What is Qualified Immunity?

Qualified Immunity requires consideration of:
- Do the facts alleged show that the state actor violated a constitutional right?
- If so, was the constitutional right “clearly established” so that a reasonable person would know that the conduct was unlawful?

If the answer to both is “yes,” no immunity.
If the answer to either is “no,” there is immunity.

What is Qualified Immunity?

Qualified Immunity:
- Frequently litigated issue: Was the constitutional right “clearly established?”
  - Relevant inquiry—at the time of the event.
  - “A right is clearly established if there is sufficient precedent at the time of the action...to put [the] defendant on notice that his or her conduct is constitutionally prohibited.”
What is Qualified Immunity?

Supreme Court:
- Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”
  *White v. Pauly, ___U.S.____ (Jan. 9, 2017).*
- In other words, “existing precedent must have placed the statutory or constitutional question beyond debate.”
  *Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018)*

To Whom is This Defense Available?
- Law Enforcement, e.g., police officers
- Child welfare workers
- Corrections Officers
- School employees
- Other county employees
- Other municipal employees
Entitled to Qualified Immunity?

**ABSOLUTELY NOT**

- It is well-established that statements extracted through the use of violence will render statements involuntary

*Brown v. Mississippi*, 297 U.S. 278 (1936)

What About This Interrogation?

- 4 hours of sleep
- Requests Medication for Diabetes
- Language Difficulty
- Offered Food and Water
- Police Lie About Evidence, Feed Details
- Push Self-Defense
- Yell, Place Hand on Knees
- Could Last “Days and Days and Days”
**What About This Interrogation?**

**IL District Court Says: NO QI**

- "[a] reasonable officer would have known that verbally and physically intimidating a suspect, as well as manipulating him, lying to him, and coaching him on the details of the confession, all while knowing he was not fluent in English and was operating without food, medications, or sleep, violates the Fifth Amendment. Koh v. Graf, 307 F. Supp. 3d 827, 835 (N.D. Ill. 2018)

- **BUT IS THIS TOO GENERALIZED TO PRECLUDE QI?**

**INSURANCE POOL APPEALED TO 7th CIRCUIT**

No Clearly Established Law Precluding Any Single Tactic or Combination of Tactics:

- 4 hours of sleep
- Requests Medication for Diabetes
- Language Difficulty
- Offered Food and Water
- Police Lie About Evidence, Feed Details
- Push Self-Defense
- Yell, Interrupt, Touch Knees
- Could Last "Days and Days and Days"
SO, WHAT’S THE PROBLEM??

Qualified Immunity at Risk
--
*History, Policy, & Academic Based Attacks*

**History Based Arguments**

- When Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability.
- Regardless of subjective good faith, a government official who engaged in illegal conduct could be held liable.
- No immunity was provided for in Section 1983 but a government official could petition for indemnification.
History Based Arguments

Justice Thomas has written that qualified immunity should conform to the “common-law backdrop against which Congress enacted the 1871 Act.”

*Ziglar v. Abassi, 137 S.Ct. 1843 (2017) (concurring opinion)*

Policy Based Arguments

GENERAL CONCEPTS:
- QI Does Not Shield Officers From Financial Burdens.
- QI Does Not Shield Officers from Burdens of Litigation.
- QI Standard Imposes Undue Costs on Plaintiffs.

Policy Based Arguments

Justice Sotomayor has concerns about Court’s “trend” of summarily reversing denials of QI, finding this “transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment…. [and] sends an alarming signal to law enforcement officers…that they can shoot first and think later.”

*Kisela v. Hughes, 584 U.S.____ (2018) (dissenting opinion, joined by Ginsburg).*
Academic Critiques

Recent academic attacks on QI assert that empirical evidence does not support the underlying basis for the defense.

One well known study*

- Pulled dockets and developed stats from 5 federal district courts.
- Focused on a 2 year period.
- Studied only claims against law enforcement.

Academic Critiques

- Reviewed 1,183 Section 1983 cases.
- Of the 979 cases in which qualified immunity ostensibly could be raised, study supposedly found:
  - Just 38 (3.9%) were dismissed on QI grounds;
  - Just 7 (0.6%) were dismissed at the motion to dismiss stage; and
  - Just 31 (2.6%) were dismissed at summary judgment on QI grounds.

Academic Critiques

Study concludes that the justifications for QI are refuted by factual and empirical evidence:

- Law enforcement defendants are almost always indemnified and rarely pay anything towards settlement;
- QI is raised infrequently before discovery and, hence, does not shield law enforcement from the burdens of discovery;
Academic Critiques

- At the summary judgment stage, disputed facts material to the determination of "reasonableness" may preclude summary judgment.
- Even where motions to dismiss or motions for summary judgment were granted based on QI, other claims usually remained, thus requiring cases to proceed to trial, with officials preparing for and attending trial.

Academic Critiques

- Asserts that "qualified immunity is rarely the reason that Section 1983 cases end."
- Asserts that qualified immunity is "not functioning as assumed, and is not achieving its intended goals."

Academic Critiques – Notable Flaws

The study ignores:
- 89 other federal district court.
- The importance of the application of the QI defense to school employees, corrections officers, children and youth workers and government employees beyond law enforcement.
- The entities "indemnifying" law enforcement and paying for counsel include municipal entities and pools.
Academic Critiques – Notable Flaws

The “empirical study” ignores:

- Even if a municipal entity has standard insurance, premiums will be impacted.
- In essence, these suits are defended by taxpayers.
- In essence, settlements and judgments are paid for by taxpayers.
- “Artfully pled” complaints impact ability of court to dismiss early.

- Even if summary judgment does not result in the dismissal of all claims, the remaining claims may not seek monetary damages, such as, injunctive or declaratory relief.
- Law enforcement, children and youth workers, and certain other government officials are frequently placed in situations where they must make quick decisions or face the risk of harm or even death to themselves or others.
- Recent Supreme Court Precedent Granting QI

Academic Critiques

How Qualified Immunity Fails

Joanna C. Schwartz
CIVIL RIGHTS LAW

ABSTRACT: This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. Qualified immunity shields government officials from constitutional claims for money damages as long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as “incredibly strong”-protecting “all but the plainly incompetent or those who knowingly violate the law.” Legal scholars and commentators describe qualified immunity as equally stark terms, often criticizing the doctrine for “deterring the courthouse doors to plaintiffs whose rights have been violated. The Court has repeatedly explained that qualified immunity must be a powerful as it is to protect government officials from burdens associated with participating in discovery and trial. Yet the Supreme Court has repeatedly warned that the doctrine must not be used to support an assertion that qualified immunity shields government officials from their assumed burdens.

This Article is the first to test this foundational assumption underlying the Supreme Court’s qualified immunity decisions. I reviewed the docket of 1,525 Section 1983 cases filed against state and local law enforcement defendants in the federal court districts over a two-year period and measured the frequency with which qualified immunity motions were granted by defendants, granted by courts, and denied by courts before discovery.

Academic One-Two Punch: “Qualified Immunity Unlawful and Ineffective

- David French, *End Qualified Immunity*, National Review, September 13, 2018
Cato amicus briefs filed (as of 8/28/18):

- Allah v. Milling (Supreme Court)
- Pauly v. White (Supreme Court)
- Rafferty v. Trumbull County (Sixth Circuit)
- Spencer v. Abbott (Supreme Court)
- Williams v. Cline (Seventh Circuit)

Recent Tweet by @AbolishQI

Unfair: When a government official violates your civil rights, you should be compensated. Qualified immunity denies compensation to individuals who have been wronged by the government.

Unaccountable: Law enforcement agencies at every level of government have proven unable or unwilling to appropriately discipline officers who violate people’s constitutional rights. Likewise, it is nearly impossible to convict an officer for violating someone’s rights while they were on duty. Thus, in most cases, suing an officer is the only viable means a victim has of seeking redress for a constitutional violation. But qualified immunity shields officers from lawsuits even when the court finds that they violated an individual’s constitutional rights.

Unjustifiable: Qualified immunity is based on flimsy, historical rationales that have no legitimate basis in the law. There is no ambiguity in the text of federal civil rights law or the relevant legislative history that supports the qualified immunity doctrine.

Unenforceable: Qualified immunity excuses the nation’s most important civil rights law. Specifically, it undermines a part of the U.S. Code—known to its critics as “Section 1983”—that was enacted after the Civil War to make sure state and local government officials were held accountable for violating people’s constitutional rights.

WHAT DOES THIS ALL MEAN and WHY DOES IT MATTER?
Why Does it Matter?

- QI reduces public entity legal costs, ultimately borne by taxpayers, to defend a good faith mistake made by a public official.
- QI helps public entities attract and employ desirable candidates.
- QI allows all government officials (not just law enforcement) to act without hesitation in discharging their duties.
- QI protects government officials from the totality of burdens associated with civil litigation.

Why Does it Matter?

- Any erosion of QI will not be limited to any one group of employees, such as police officers. Will impact all government employees.
- Anticipate an increase in lawsuits with an erosion of the QI defense.
- An increase in lawsuits equates to an increase in litigation expenses.
  - Note that a $1 jury award could result in an award of hundreds of thousands in legal fees.

Why Does it Matter?

- Employees may be exposed to financial liability for not understanding legal nuances.
- If an employee is exposed to financial liability, the governmental entity may be required to indemnify that employee for the adverse judgment.
- The potential financial exposure to government entities, pools and taxpayers will increase.
Why Does it Matter?

- Increase in litigation is disruptive to employees and government entities.
- Quality individuals may be discouraged from becoming employed in public service jobs that could routinely expose them to suit, such as police officers, correctional officers and children and youth workers.

Why Does it Matter?

- For these employees, it is not just about financial harm:
  - Reputational;
  - Psychological;
  - Public criticism;
  - Internal investigations;
  - Administrative leave;
  - Lost productivity.

Why Does it Matter?

- Public safety may be compromised if public servants are hesitant to act out of fear of suit.
  - Should the child be removed from the home?
  - Should the suspect be searched?
  - At what point should a “hands-on” restraint occur?

At times, decisions such as these need to be made with little or no time or opportunity to deliberate!
What should we be doing?

• When faced with a federal claim, discuss this defense with your defense counsel.
• Are pool counsel raising this defense? If not, why???
• Absent a VERY good reason, this defense should be aggressively pursued at all stages of the litigation, including at the motion to dismiss stage.

What should we be doing?

• If a court denies a QI motion, discuss with counsel whether it should be appealed immediately.
  • If the question of appeal is summarily dismissed by counsel, press the issue!
  • Be certain that counsel has compelling reasons for not appealing the issue immediately.

What should we be doing?

• Be certain to obtain and review the motions and briefs. If the argument has been lost by counsel, subsequent motions and briefs should not be “cut and pasted.”
• Be creative and find other persuasive ways to get the court’s attention!
• If in an unfavorable jurisdiction, research tools exist which allow counsel to gather statistics as to what other courts are doing with QI motions.
What should we be doing?

- Be wary of the response, “it will never be granted.”
- Any such comment should be substantiated with legal support.

What are you seeing “in the field?”

- Are you discussing this defense with counsel?
- Are you raising this defense?
- At what stage are you raising this defense?
- Are the motions being granted?
- Are you appealing denials?

Questions?

Thank you for attending!