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SCOTUS May Revisit Qualified Immunity Defense to Civil Rights Claims

By Pamela K. Graham

The scope of the doctrine of qualified immunity for government officials sued for damages under civil rights and other statutes has been front and center in recent weeks, with many anticipating the U.S. Supreme Court may reconsider the doctrine's application next term. Many petitions for certiorari are pending and the doctrine is drawing critical fire from both left- and right-leaning commentators. Qualified immunity is often helpful in our defense of law enforcement and other public officials, so we are following developments closely.

Qualified immunity protects public officials and employees from liability for civil damages where allegedly unconstitutional conduct does not violate a "clearly established" right. In effect, damages are due only when a government official violates someone's rights in a way the courts have previously determined is illegal. As clarified by the Supreme Court's 2009 ruling in *Pearson v. Callahan*, qualified immunity 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." Before *Pearson*, courts were required to determine if an official had violated a constitutional right even if the defendant official was protected by qualified immunity. After *Pearson*, lower courts have the option to bypass whether excessive force was used, or some other constitutional violation occurred, to decide only whether or not the challenged conduct violated "clearly established" law. An individual who reasonably, but mistakenly, believes his actions were lawful is protected by qualified immunity.

Critics of the doctrine argue lower courts have granted immunity too generously. They claim that, unless two cases are on all fours factually and legally, courts are loath to deny qualified immunity, finding violation of no "clearly established" statutory or constitutional right. They urge SCOTUS review as necessary to restore accountability to law enforcement and other government officers in cases in which constitutional violations are indisputable. Amicus briefs before the Court supporting the pending cert. petitions argue the victims of current qualified immunity doctrine include not just those whose civil rights have been violated, but the overwhelming majority of law-abiding law enforcement and other public officials who are "tainted by the unpunished unconstitutional behavior of a few."

Defenders of the doctrine, on the other hand, are most concerned with the fundamental rationale for qualified immunity — the need to protect government

officials from threats of punishment and costly lawsuits for violating previously unknown rights, and the threat of chilling legitimate government action. Do we surrender public spaces to drug-dealers rather than risk violating constitutional rights by enforcing the law, they ask? While defenders of the doctrine recognize qualified immunity is inappropriate in some cases, there are also cases in which the law is unclear and it would be unfair to punish an officer for trying to protect the public, who simply guessed wrong as to what a court might later hold. It is the character of common law (judge-made law) development that the law is announced after a case is tried.

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Advocates also argue whether the scope of qualified immunity should rest with SCOTUS or Congress. In thirty cases applying current qualified immunity doctrine, the Court has denied immunity only twice. A recent Reuters investigation analyzed 252 federal appellate opinions, finding the lower courts grant immunity more than half of the time.

Thirteen cert petitions were scheduled for the high Court's May 15, 2020 conference. Several had been fully briefed and ready for resolution since last October, leading many to surmise the Court was preparing to revisit qualified immunity doctrine. This sentiment is particularly shared in light of the recent national protests following the death of George Floyd in Minneapolis. This has reignited calls for national policing reform, including revisiting qualified immunity doctrine. Yet, every week since, most petitions have been deferred to the next conference.

At its mid-May conference, the Court denied petitions in *Kelsay v. Ernst*, *Jessop v. City of Fresno*, and *Clarkson v. White*. In *Jessop*, for example, the 9th Circuit decided that two Fresno police officers, who a plaintiff alleged stole $225,000 while executing a search warrant, could not be sued. Though "the City Officers ought to have recognized that the alleged theft was morally wrong," the unanimous 9th Circuit panel said the officers "did not have clear notice that it violated the Fourth Amendment." When cases are resolved pre-trial, the court is required to assume the truth of plaintiffs' allegations. Had qualified immunity not protected the officers, the case would have proceeded to discovery and perhaps trial and plaintiffs would have had to prove their extraordinary claim. But it is difficult for the general public to focus on this legal subtlety and press coverage tends to leave people with the understanding that there is no remedy for police officers who steal. There is a remedy for the few members of law enforcement who themselves commit crimes, as the lawyers in our police labor and employment practice know.

The Justices may now choose from nine other pending petitions, offering a variety of fact patterns in which officers and others won qualified immunity from suit: *Zadeh v. Robinson*; *Corbitt v. Vickers*; *Baxter v. Bracey*; *Brennan v. Dawson*; *Dawson v. Brennan*; *Anderson v. City of Minneapolis*; *West v. Winfield*; *Mason v. Faul*; and *Hunter v. Cole*. The Court continued these petitions at its conferences on May 15, 21 and 28.

As qualified immunity is fundamental to our police liability defense and other practices, we will be following this closely. Stay tuned!

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Our litigators have broad trial and appellate experience in the defense of law enforcement officers and their employers, including:

- defending liability claims alleging excessive force, officer misconduct and other claims;
- defending Pitchess motions in trial and appellate courts;
- responding to subpoenas for law enforcement records; and,
- advising public agencies on the Public Safety Officers Procedural Bill of Rights, labor and employment, and related issues.

Our attorneys have vigorously defended peace officers in federal and state courts around California against a wide variety of claims, including:

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- false arrest
- WIC § 5150 holds
- wrongful death
- false imprisonment
- civil rights claims
- illegal searches and seizure
- vehicle impounds
- assault and battery claims
- claims arising from custody
- retaliation and discrimination claims

Pamela K. Graham leads our trial practice and Michael G. Colantuono handles our appellate practice in this area. More information about this practice group is available at https://chwlaw.us/practice-areas/, or contact Pamela at (213) 542-5702 or PGraham@chwlaw.us, or Michael at (530) 432-7359 or MColantuono@chwlaw.us.

Colantuono, Highsmith & Whatley is a law firm with offices in Pasadena and Grass Valley in the Sierra Foothills that represents public agencies throughout California. Its municipal law practice includes public revenues, land use, housing, CEQA, LAFCO matters and associated appeals and trial court litigation. We are committed to providing advice that is helpful, understandable, and fairly priced.

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