



Could the Supreme Court Cool on Qualified Immunity?

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The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.

State and local governments have experienced a winning streak with qualified immunity like no other. In only two cases since 1982 has the Supreme Court denied police officers qualified immunity. In the last few years the Supreme Court has reversed a handful of lower court cases denying police officers qualified immunity each term. This may not seem like a big deal but the Court is deciding less than 70 cases per term.

What is qualified immunity

42 U.S.C. Section 1983 was enacted in 1871 to combat civil rights violations occurring in the South. It subjects state and local government officials to lawsuits for money damages for violating federal constitutional and statutory rights. But the Supreme Court has held qualified immunity applies if the law violated isn't "clearly established." The qualified immunity doctrine is very favorable to state and local government officials. The law is rarely clear because most cases involve different facts. The Supreme Court has gone so far as to say that qualified immunity protects all but the "plainly incompetent."

Qualified immunity under fire

All these victories have left state and local government officials wondering when the winning streak will end and some academics suggesting the doctrine needs to be radically changed. Two academic articles in particular are noteworthy. In *Is Qualified Immunity Unlawful?*, William Baude argues that it is and suggests that the Court or Congress should overrule or modify the doctrine. In *How Qualified Immunity Fails*, Joanna Schwartz notes that one of the reasons the Supreme Court has stated it grants government officials qualified immunity is to save them from the hassle and expense of going through discovery and a trial. But her research reveals that qualified immunity rarely accomplishes this goal because it is more often raised and granted after discovery has begun.

The important question about these articles—beyond what they say and why they say it—is will five Supreme Court Justices rely on either of them in deciding cases.

Qualified immunity unlawful

According to Baude, the Supreme Court’s legal justifications for qualified immunity are flawed rendering the doctrine “unlawful.” The most well-known justification for qualified immunity is that judge made “common law” passed down from England allowed state and local government officials to rely on immunities in 1871 when Section 1983 became law. Baude disputes this claiming “there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted.” But he admits that even if there were, Supreme Court Justices who are sympathetic to the notion that immunities available today should be the same as those available in 1871, have joined opinions granting qualified immunity not based on historical standards.

Last term in *Ziglar v. Abbasi* Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. Justice Thomas cited to Baude’s article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871.

No other Justices joined Thomas’s opinion though Justices Sotomayor, Kagan, and Gorsuch did not participate in *Ziglar*. The fact that Justice Thomas has suggested the Court look at every qualified immunity case through a historical lens, citing Baude’s article, is no small thing. But neither is the fact that no other Justices so far have expressed any interest in Baude’s ideas. What if the majority of the Court were to agree with Justice Thomas that the qualified immunity available today should be the same as the immunity available in 1871? Joanna Schwartz opines that “little would remain of qualified immunity if the Court adopted this approach.”

Avoiding trial and discovery

As recently as 2009 the Supreme Court has described protecting government officials from the burdens of discovery and trial as the “‘driving force’ behind [the] creation of the qualified immunity doctrine.” Schwartz reviewed 1,183 Section 1983 cases filed against state and local law enforcement defendants in five federal district courts over two years. Her goal was to discover whether qualified immunity actually works as the Court suggests and helps state and local government officials avoid discovery and trial. Her research indicates it does not.

State and local government officials may file motions to dismiss and motions for summary judgment asking the court to dismiss the case before trial. Motions to dismiss are filed before discovery; in most cases some discovery will take place before an official may file a motion for summary judgment.

Schwartz found that qualified immunity is only rarely raised at the motion to dismiss stage (13.9% of the time) and is rarely granted (9.1% of the time). It is raised much more often at summary judgment (64.3% of the time) but again rarely granted (13.8% of the time). In trying to

explain these numbers Schwartz concedes that qualified immunity may discourage claims that are unlikely to meet its “exacting standard” and the lower courts may be, as the Supreme Court has suggested, improperly denying qualified immunity motions. But she postulates that the real problem with qualified immunity is that it is a fact-driven analysis which prevents most cases from being resolved at summary judgment or earlier.

It is difficult to predict how the Justices will react to Schwartz’s article. Certainly none of them will be surprised by Schwartz’s speculation that it is factual disputes that drag out litigation. Little can be done about the fact that our legal system is set up to deal with factual disputes at the end of the process (at a trial in front of a jury) and that disputes with government officials, police officers in particular, are very fact driven. And Schwartz doesn’t suggest a solution that resolves factual disputes sooner. One of the “modest alterations” she suggests is that courts should look at the subjective (rather than objective) intent of government officials and deny them qualified immunity if they knew or should have known their conduct was unlawful. This suggestion of course only adds additional factual inquiries.

Conclusion

It is unsurprising that academics are taking a stab at qualified immunity. After all, no one likes someone who always wins! But Supreme Court Justices are more than used to academics telling them they got it wrong and should do it another way. Completely changing course on any major legal doctrine, especially one like qualified immunity, which the liberal and conservative Justices mostly agree on, is unlikely. Changes at the margins are more likely. For example, in the next few terms maybe the Supreme Court will rule that a lower court improperly granted a state or local government official qualified immunity.