Preserving Qualified Immunity Issues for Appellate Review

(Session: "Qualified Immunity Under Attack)"

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As Section 1983 practitioners know, qualified immunity can be a very powerful defense to claims of constitutional violations. Under settled Supreme Court precedent, even someone who has suffered an egregious violation of rights that are embedded in the Constitution can be deprived of a civil remedy if the right at issue is found not to have been "clearly established" in the law. Succinctly stated, the purpose of the qualified immunity defense is to permit public officers to exercise their discretion in a manner that appears appropriate for the circumstances without fear of personal financial retribution if they cross a line that was not clearly visible at the time. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("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.") So, for example, we as a society do not want police officers to be considering whether they will be sued for using force and, but doing so, endanger the public when they reasonably believe that swift action was necessary.

To be sure, there are many critics of the doctrine, and not just the plaintiff's bar. Indeed, criticisms of the defense have found their way into Supreme Court opinions issued by Justices Thomas, Ginsburg and Sotomayor, albeit for very different reasons. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), Justice Thomas concurred separately "to note [his] growing concerning with qualified immunity jurisprudence." *Id*. at 1870. In his view, qualified immunity has expanded beyond those immunities that were established in 1871 – when Section 1983 was enacted – and concluded that "[i]n an appropriate case, we should consider our qualified immunity jurisprudence." *Id*. at 1872. Separately, Justice Sotomayor, in a dissent joined by Justice Ginsburg, criticized her colleagues for having "a one-sided approach to qualified immunity [that] transforms

the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018).

Despite these differences in opinion, the Supreme Court shows no signs of revisiting the existence of the defense. Indeed, in a decision issued *per curiam*, the justices noted that "[i]n the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017). These reversals were deemed necessary in part "because qualified immunity is important to 'society as a whole.'" *Id.* 551 (*quoting City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, n. 3 (2015)).

The recognition of qualified immunity as a benefit to society, as well as a "longstanding principle," *White*, 137 S. Ct. at 552, means that the detractors of the doctrine are unlikely to sway the majority of the Supreme Court to abandon its application particularly in light of recent appointments to the bench. In any given case, however, the immunity is only as strong it has been presented to the courts for review. To that end, this paper reviews the methods employed to both assert and preserve the immunity in the defense of public officials who has been sued for constitutional violations under Section 1983.

Qualified immunity in the district court

Time and again, the Supreme Court has stressed that qualified immunity is not simply an immunity from liability but from being sued in the first place. As explained in *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (Emphasis in original.) Accordingly, it is not only important to include the defense in the answer to a Section 1983, but it "is an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S> 800, 815 (1982).

In appropriate cases, the defense can (and arguably *should*) be raised in a motion to dismiss under Rule 12(b) or post-answer in a motion for judgment on the pleadings under Rule 12(c). Indeed, the courts encourage "early" resolution of qualified immunity claims "so that the cost and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). *See also Mitchell, supra*, 472 U.S. at 527 ("qualified immunity is in part an entitlement not to be forced to litigate.") Moving to dismiss or for judgment on the pleadings at the outset of the case also serves an overarching purpose of immunity to "shield officials from harassment, distraction, and liability." *Pearson, supra,* 555 U.S. at 231. In practice, therefore, many judges will stay discovery while motion is pending under Rule 12, thereby avoiding not only the costs of the proceeding but also the distraction that accompanies the need to respond to discovery requests and submit to depositions.

Because a Rule 12 motion is premised on the allegations in the complaint, they must ordinarily be accepted as true for purposes of conducting the legal analysis. An important consideration in federal court is that the allegations must state a "plausible" claim for relief to survive a motion to dismiss and "unlock the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). *Iqbal*, in fact, was a Section 1983 action in which the plaintiff who had been arrested following the September 11 terrorist attacks contended he was subjected to harsher detention than other inmates, in violation of due process, because he was a Muslim from Pakistan. In finding that he had not stated a plausible claim for relief, the Supreme Court reasoned that noted that the factual allegations of invidious discrimination were *consistent* with Iqbal being treated differently, [b]ut given more likely explanations, they do not plausibly establish this purpose." *Id*. at 682 (emphasis in original). Specifically, detaining "individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the

purpose of the policy was to target neither Arabs nor Muslims." *Id.* In finding that the complaint lacked facial plausibility, the Supreme Court explained that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual content." *Id*. at 686.

Together with *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) that established the plausibility standard of review, the decision in *Iqbal* can give added weight to qualified immunity motions even before an answer needs to be filed. *See* Fed. R. Civ. P. 12(a)(4) (tolling the time to answer until a Rule 12 motion has been resolved).

In many instances, the facts as to what occurred are sufficiently alleged such that the allegations, even if disputed vehemently, meet the plausibility standard. In such instances, instead of moving under Rule 12, a motion for summary judgment may be appropriate depending on the evidence obtained during discovery. For example, in a case against police officers for the use of force, the testimony may not line up with the allegations in which case the question for the court will be whether a jury could find that a constitutional violation occurred. The qualified immunity context adds another dimension, however:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. … An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, supra, 533 U.S. at 205. *See also Pearson, supra,* 555 U.S. at 239 ("there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.") Accordingly, special consideration should be given to the specific

context of the facts in dispute in a Section 1983 claim to determine whether a motion for summary judgment on qualified immunity grounds might be viable nonetheless.

Finally, even if there are acts in dispute that need to be resolved by a jury, the application of qualified immunity is always a question of law to be determined by the court; specifically, the question for the court is "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell, supra*, 472 U.S. at 528. In a case where material facts need to be resolved, the jury should be provided with special interrogatories to decide what took place, at which point the judge would then decide whether the defendant violated clearly established law based on the facts as found by the jury. In addition, a motion for a directed verdict at trial should be made, if appropriate, to preserve an argument that there were no genuine issues or material fact to be resolved by the jury in the first place. In any event, in no circumstances should the jury be instructed on the qualified immunity standard which lies exclusively within the province of the court to apply.

Appeal of qualified immunity decisions

Because qualified immunity is a protection from being sued in the first place, it is "effectively lost" if a case is wrongly allowed to proceed. *Mitchell, supra*, 472 U.S. at 527. As such, the federal courts allow a defendant to pursue an interlocutory appeal from the denial of immunity, provided it is on the legal question of the violation of clearly established law. *Id.* The ability to appeal does not turn on facts having been resolved as to what occurred; instead, the question often posed to the appellate court is whether the defendant's actions *as presented by the plaintiff* would cross a clear constitutional line.

One cautionary note is that evidentiary rulings on the sufficiency of the evidence to support the plaintiff's claim is not a legal matter that can be pursued by means of an interlocutory appeal

even if the qualified immunity defense depends on its resolution. In the seminal case of *Johnson v. Jones*, 515 U.S. 304 (1995), the district court denied the defendant's motion for summary judgment finding that the evidence could support a finding that the officers "stood by and allowed others to beat the plaintiff." *Id*. at 308. The officers filed an interlocutory appeal, arguing that there was no evidence that they either struck the plaintiff or stood by and watched. The Supreme Court reasoned that whether the evidence in the record was sufficient to support the facts alleged was distinct from the legal question for qualified immunity purposes of whether the defendants violated clearly established law by the facts alleged. Stated in legal parlance, it is the "materiality" of the facts for qualified immunity purposes, as opposed to the "genuineness" of a fact issue for trial, that can be appealed on an interlocutory basis. Although this distinction can be elusive in any given case, it is critical in order to establish appellate jurisdiction over an adverse interlocutory ruling in the qualified immunity realm.

Whether to pursue an interlocutory appeal in any given instance requires a full consideration of the factors presented in a given case. In any event, all rulings including evidentiary matters can be brought up by an appeal from a final judgment as in any other civil case. To do so, however, it is essential for the qualified immunity defense to be preserved for appeal by asserting it in the answer and then moving for dispositive relief either on the pleadings or on the evidence presented in the case.

Conclusion

Although qualified immunity can provide strong protection to a Section 1983 claim, it is an affirmative defense that must be asserted timely in the lawsuit and then preserved by seeking judicial rulings at appropriate intervals in the case, including pretrial motions to dismiss, for judgment on the pleadings, or for summary judgment; trial motions for a directed verdict or (if

warranted) for special interrogatories to be answered by the jury; and post-trial motions for new trial or judgment notwithstanding the verdict. Along the way, consideration should be given to the viability of an interlocutory appeal which would allow the appellate court to address legal issues that are material to the qualified immunity defense. By employing these methods, the best defense can be provided to uphold a defendant's immunity from suit.