



Could the Supreme Court Cool on Qualified Immunity?

November 2017

By: Lisa Soronen, State and Local Legal Center, Washington, D.C.

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 held that police officers have violated clearly established law.¹ In the last few years the Supreme Court has reversed a handful of lower court cases denying police officers qualified immunity each term.² This may not seem like a big deal but the Court is deciding less than 70 cases per term. 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.³ Recognizing this is unlikely, Baude offers the Court two other suggestions: stop taking qualified immunity cases that all come out the same way (the government official wins) and stop giving qualified immunity cases “special” status by summarily reversing lower court denials of qualified immunity without extensive briefing and oral argument.⁴ 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

¹ William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 101, 137 (forthcoming 2018), available at <https://poseidon01.ssrn.com/delivery.php?ID=433000088031098016097100076089028124028072042008084011092124085113084028108097080005098003032035018116033081104106121031092087106080012039033080072104116069003099089032030090086096098084064089110091079076066018028099000078093028122096094065102082002&EXT=pdf>.

² See, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014).

³ Baude, *supra* note 1, at 134-35.

⁴ See *id.* at 136-42.

through discovery and a trial.⁵ But her research reveals that qualified immunity rarely accomplishes this goal because it is more often raised and granted after discovery has begun.⁶

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.

According to Baude, the Supreme Court has articulated three legal justifications for qualified immunity; but all are flawed.⁷ The most well-known is that qualified immunity “derives from a putative common-law rule that existed when Section 1983 was adopted” in 1871.⁸ But Baude claims “there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted.”⁹ However, Baude points out that even 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.¹⁰ Modern qualified immunity jurisprudence has followed a different course. As Justice Thomas noted in criticism of qualified immunity in his concurring opinion in [Ziglar v. Abbasi](#), “[i]nstead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff’s claim under §1983, we instead grant immunity to any officer whose conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”¹¹

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 1871.¹² His opinion concludes as follows: “Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.”¹³

⁵ Joanna C. Schwartz, *How Qualified Immunity Fails*, 127:2 YALE L. J. 1, 9 (2017), available at <https://www.yalelawjournal.org/article/how-qualified-immunity-fails>.

⁶ See *id.* at 9-10.

⁷ According to Baude a second justification for a broad interpretation of qualified immunity is that Section 1983 has been read too broadly. In particular the “under color” of any statute, ordinance, regulation, etc. has been interpreted to cover constitutional violations without statutory, ordinance, regulatory, etc. authority. Baude thinks Section 1983’s broad interpretation is correct and that even if it isn’t two wrongs don’t make a right. The Court’s oldest justification for qualified immunity is lenity—the idea that government officials should be given fair warning before being liable for a violation of the law. Baude rejects lenity because it comes from another Reconstruction-era statute that enforces constitutional rights against state officials. But that statute prohibits *criminal* conduct while Section 1983 prohibits *civil* conduct. And the Supreme Court currently rarely applies lenity in criminal cases. Baude, *supra* note 1, at 117-32.

⁸ *Id.* at 106.

⁹ *Id.* at 110.

¹⁰ See *id.* at 116.

¹¹ 137 S. Ct. 1843, 1871 (2017).

¹² See *id.*

¹³ *Id.* at 1872.

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.”¹⁴

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.”¹⁵ 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.

She 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).¹⁶ It is raised much more often at summary judgment (64.3% of the time) but again rarely granted (13.8% of the time).¹⁷ 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.¹⁸ 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.¹⁹ Also Schwartz found most cases are dismissed on grounds other than qualified immunity. In Schwartz’s study when courts granted state and local government officials’ motions for summary judgment they only relied on qualified immunity 39.7% of the time; more often plaintiffs could not establish a genuine issue about a material fact.²⁰

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 to “align the doctrine with evidence of its role in constitutional litigation” 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.²¹ This suggestion of course only adds additional

¹⁴ Schwartz, *supra* note 5, at 127.

¹⁵ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

¹⁶ Schwartz, *supra* note 5, at 48.

¹⁷ *See id.* at 49.

¹⁸ *See id.* at 51.

¹⁹ *See id.* at 53-4.

²⁰ *See id.* at 57.

²¹ *See id.* at 73.

factual inquiries. Finally, even if the Justices find her article²² completely convincing it doesn't fully address all of the harms qualified immunity is intended to address: the expense of litigation, the diversion of official energy from important public issues, that public officials will fail to act "in an unflinching discharge of their duties" for fear of being sued, and that citizens will be deterred for accepting public office."²³

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, with some notable exceptions,²⁴ 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.

²² In a previous article Schwartz took on the Court's justification that qualified immunity protects government officials from financial liability. Her findings were that local police departments usually indemnify police officers for money damages owed. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

²³ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted).

²⁴ *See, e.g.*, Justice Sotomayor's solo dissent in *Mullenix v. Luna*, 136 S. Ct. 305 (2015).