Research Paper on Qualified Immunity

Word Count: 2526 Words

Qualified immunity exists as an imperfect, albeit necessary protection of government officials from the people they seek to serve. The qualified immunity of today finds its roots in the Supreme Court's 1967 case, *Pierson v. Ray*, developing of necessity to preserve the police power that the government desperately requires to function properly and efficiently. In its infancy this doctrine originates in judicial interpretation of 42 U.S.C. Sec. 1983, a civil rights statute that enables citizens to sue government officials over violations of their civil rights, against which the majority opinion in *Pierson* grants police officers "the defense of good faith and probable cause … under [Sec.] 1983" (*Pierson v. Ray*, 1967). This defense available to officers meant that qualified immunity provides protection to officers from civil liability for actions performed during the course of their official duties, as long as the actions in question did not violate clearly established constitutional or statutory rights that a reasonable person would have known about. The ability of citizens to bring civil suits was expanded in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) to federal officers who violate constitutionally protected rights, and qualified immunity was soon extended to federal officials that do not have absolute immunity as a result of their station in *Harlow v. Fitzgerald* (1982).

Even with these expansive developments, as a defense qualified immunity is used primarily to guard the police from undue civil lawsuits. Such can be seen in the *Saucier* Test, implemented first in *Saucier v. Katz* (2001) and modified in the unanimous decision found in *Pearson v. Callahan* (2009). The doctrine of qualified immunity as it now stands has sparked some conversation among legal scholars, with most declaring that the doctrine is essentially a tool that prevents government officials from being held accountable in civil suits—an immutable

shield for police brutality. It is certain that qualified immunity has been established primarily to preserve the efficiency and effectiveness of government officials in the performance of their official capacities, duties, and responsibilities. However, the implementation of this doctrine is not above being criticized and improved—a fact acknowledged even by supporters of the doctrine—though it is a doctrine worth improving and maintaining.

Criticisms of Qualified Immunity

Joanna Schwartz, a pioneering scholar on the doctrine of qualified immunity, suggests a number of criticisms that have entered the field of academic work on the subject:

"The Supreme Court originally described qualified immunity as an extension of common law defenses in existence when Section 1983 became law and later justified the doctrine on policy grounds—as a means of balancing an interest in government accountability against an interest in shielding government officials from the burdens of suit in insubstantial cases. Yet critics contend that the doctrine bears little resemblance to the common law immunities in existence when Congress enacted Section 1983, undermines government accountability, and is both unnecessary and ill-suited to shield government officials from the burdens and distractions of being sued" (Schwartz, 2020).

Schwartz indicates that recently, some Supreme Court Justices "appear sympathetic to these critiques" (2020). As cited by Schwartz, Justice Sotomayer has stated that qualified immunity undermines "government accountability by 'sanctioning a "shoot first, think later" approach to policing'" (2020). Justice Breyer believes that qualified immunity "was unnecessary for private defendants because they were likely to be indemnified by their employers—a rationale that would apply to government defendants who almost never satisfy settlements and judgments entered against them" (Schwartz, 2020). And just as well, "Justice Thomas has

criticized the doctrine for straying from its common law foundations and recommended to his colleagues that '[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence'" (Schwartz, 2020).

These and other criticisms of the doctrine of qualified immunity conjure the image that qualified immunity in its current form exists to shield the government's employees from any type of accountability during litigation, preventing wronged citizens from being awarded their dues in court. Some criticize qualified immunity as being blatantly unlawful as it stands today. These criticisms suggest that defenders of the doctrine must account for several questions of critical import: (1) Is qualified immunity a hindrance to government accountability? (2) Is qualified immunity effective when applied? (3) Is qualified immunity lawful, either in its common law origins or as a judicially created or justified right?

Defenses of Qualified Immunity

The first point of contention, if qualified immunity hinders government accountability, is more of a rhetorical move than a legitimate critique. The narrative hinges entirely on perspective; should one view qualified immunity as a necessity for the function of government employees, they will not view the principle as a hindrance to accountability. Rather, they will see it as a protection for the innocent from frivolous litigation and will argue that those who are truly guilty are not found to benefit from qualified immunity. If one takes the opposite stance, then qualified immunity is an unnecessary benefit that allows the guilty to go free and, to make a more sensational point, gives government employees license to violate the rights of average citizens as they please. This point is too ambiguous, as well, leaving unanswered questions such as "what does it look like when government is held accountable?" It would be more effective to examine the more specific critical points, regarding lawfulness and effectiveness. The assessment of this

point, then, concludes that it is merely a rhetorical move used to generate attention on the issue of qualified immunity as a whole.

On the effectiveness of qualified immunity, Nielson and Walker write, "The *Harlow* Court identified four 'social costs' that qualified immunity aims to minimize: (1) 'the expenses of litigation,' (2) 'the diversion of official energy from pressing public issues,' (3) 'the deterrence of able citizens from acceptance of public office,' and (4) 'the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."'" (2018). While they acknowledge the legitimacy of the work that Schwartz has done in empirical studies, creating criticism on this point, Nielson and Walker note two major criticisms with Schwartz's work: first, if qualified immunity is ineffective as a matter of accomplishing its policy goals, this should be settled by stare decisis—in other words, it becomes a matter for Congress to handle through statutory law; and second, where her work points out the "*formal* role" in settling cases in federal courts, it does not highlight the "*functional* effect" that qualified immunity has in "in narrowing potential monetary liability in civil rights actions, in encouraging cases to settle, or in otherwise disposing of civil actions under Section 1983" (2018). When it comes to qualified immunity's effectiveness, such assessment does not provide sufficient motivation for the Court to modify the doctrine in a way that increases effectiveness—that is a matter of new or revised statutory law.

On the legality of qualified immunity, Nielson and Walker again make use of stare decisis. Should one have an issue with the doctrine, they indicate that the issue should be taken to Congress. Nielson and Walker states that this is because "stare decisis is also part of 'our law'" (2018). Expanding on the work of defending the lawfulness of qualified immunity, Rosenthal "offers a novel justification: Congress's delegation of authority to the federal courts to

develop common law rules for the administration of liability under the Civil Rights Act of 1866" (2021). Qualified immunity would be one such rule of common law that the federal courts have developed.

The *Saucier* Test and The Application of Qualified Immunity, Today

First developed in a case where two military police apprehended a protestor during a speech delivered by Vice President Al Gore, the *Saucier* Test states that in determining when qualified immunity applies, courts must consider two questions: (1) Whether "the facts alleged show the officer's conduct violated a constitutional right" (*Saucier v. Katz*, 2001). (2) If a constitutional right was clearly violated, whether that constitutional right was "clearly established" (*Saucier v. Katz*, 2001). Articulating this new test was necessary, in the Court's eyes, because the Court of Appeals that saw this case had denied Saucier summary judgement based on qualified immunity through a two-pronged test of their own, which they synthesized with objective reasonableness inquiries that are used to determine excessive force cases. Justice Kennedy, in the opinion of the Court, wrote that "The approach the Court of Appeals adopted -- to deny summary judgment any time a material issue of fact remains on the excessive force claim -- could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment'" (*Saucier v. Katz*, 2001). The new *Saucier* Test would remain the standard in qualified immunity cases for the next several years.

Pearson v. Callahan (2009)—a similar case where the Central Utah Narcotics Task Force apprehended a suspected methamphetamine dealer on the signal from an informant—modifies the *Saucier* Test. Originally, lower courts were instructed to apply the questions of the test in order; in *Pearson*, however, the Court lifted the instruction that these questions must be asked

and answered in rigid order, thus providing lower courts the discretion to apply these questions as seems best to the particular details of their cases. This modification results in an increased availability of judicial resources that enables lower courts to streamline their approach to qualified immunity cases, according to the logic of *Pearson*'s held decision.

Both *Saucier* and *Pearson* originate from the issue of whether police intervention had violated the Fourth Amendment rights of an individual, attempting to use the precedent established under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) that allows for individuals to sue federal agents in civil court for violations of their constitutional rights. *Bivens*' precedent grants opportunity for citizens to overcome the defense of qualified immunity in all cases—not merely those involving State and local officials—and the *Saucier* Test with the modifications made to it via *Pearson* enable a path forward for citizens in court, especially given the discretion that lower courts have as of *Pearson*. Legal scholar Alex Bodaken suggests that "three strategies may be particularly effective for plaintiff-appellants to combat qualified immunity: (A) focusing on procedural posture, (B) segmenting case facts temporally, and (C) establishing facts so outrageous that the "clearly established" law standard is ignored or lowered" (2020).

On procedural posture, Bodaken highlights two grants to defendants that generate most appeals: "(1) summary judgement or (2) a motion to dismiss" (2020). When appealing on summary judgment, Bodaken states that facts are reexamined in the light most favourable to the plaintiff, and that as "long as the plaintiff can identify at least one material fact that (a) is disputed and (b) would change the outcome of the case if construed in the plaintiff's favor, a court should reverse a summary judgment grant for the defendant" (2020). Bodaken then states that the defendant is under even more difficulty under review on appeal from a motion to

dismiss, “as plausible allegations in a complaint that would prove clearly established law was broken are sufficient to continue to trial” (2020). Though it would take waiting for an appeal, Bodaken does note that it is very likely that plaintiffs can overcome qualified immunity on appeal.

Explaining his second point, segmenting case facts temporally, Bodaken writes, “Segmenting a case into discrete temporal parts can defeat qualified immunity because developing facts can turn an initially reasonable action into a violation of clearly established law” (2020). Establishing a sense of time in a sequence of events cements an opportunity for the defendant’s actions to create separate points in time, at which points they move from benefitting from qualified immunity to being in clear violation of the qualification by engaging in activity that is no longer reasonable. Sharing an example, Bodaken writes, “in *McCoy v. Meyers,* police officers barged into a hotel room and encountered plaintiff McCoy holding a gun. After the officers yelled, ‘drop the gun!’ for 30-45 seconds, McCoy complied and officers subdued him. The officers put McCoy in a chokehold and he went unconscious. The officers then handcuffed McCoy and zip-tied his legs together before reviving him. Finally, they hit McCoy ten more times until he again passed out” (2020). The plaintiff in this case made progress on appeal when the court segmented the events into two periods of time, “pre-restraint” and “post-restraint”. Where the pre-restraint actions were reasonable, given that McCoy was armed, the post-restraint actions were not; this segmentation of events and the subsequent reversal of the initial summary judgment demonstrates that in order for a defendant to qualify for qualified immunity, the defense must be applicable through the entirety of the encounter and not merely at the outset of one.

Emphasizing outrageous or egregious facts, essentially highlighting the very worst things an officer did during an encounter, may preclude qualified immunity entirely as a defense. These facts may highlight "conduct was so blatantly illegal that the court did not 'need [to] decide' whether the law … was clearly established in order to find a Fourth Amendment violation" (Bodaken, 2020). If those "bad" facts do not demonstrate conduct quite so extreme, the Court may still become lenient in their determination of what is "clearly established" law. Elaborating on this, Bodaken states, "Courts have discretion to find clearly established law at different levels of generality because the Supreme Court has given contradictory guidance on how specific a law must be to qualify as clearly established" (2020).

Conclusion

Qualified immunity is pointed out by some as a doctrine that is unlawful, ineffective, and harmful to the general public. However, it is viewed by proponents as important for ensuring government efficiency and continued government function. Defenders of the doctrine highlight that it can be viewed as lawful through Congressional decision, and that if it is found to be ineffective in accomplishing its policy goals, Congress should be viewed as the avenue for reform. On the matter of harm, scholars such as Bodaken have found that qualified immunity can in fact be overcome in cases where it is truly not a legitimate defense. As such, this paper finds that qualified immunity, though it may be flawed, does serve its purpose and is thus worth keeping in the face of growing criticism.

References

1. Aaron L. Nielson & Christopher J. Walker, A Qualified Defense of Qualified Immunity, Notre Dame Law Review Vol. 93 (2018). Available at: https://scholarship.law.nd.edu/ndlr/vol93/iss5/3
2. Alex Bodaken, Beating Qualified Immunity on Appeal, American Criminal Law Review Vol. 57 (2020). Available at: https://www.law.georgetown.edu/american-criminal-law-review/aclr-online/volume-57/beating-qualified-immunity-on-appeal/
3. *Anderson v. Creighton* (1987)
4. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971)
5. *Harlow v. Fitzgerald* (1982)
6. Joanna C. Schwartz, After Qualified Immunity, Columbia Law Review Vol. 120 (2020). Available at: https://columbialawreview.org/content/after-qualified-immunity/
7. *Lane v. Franks* (2014)
8. Lawrence Rosenthal, Defending Qualified Immunity, South Carolina Law Review Vol. 72 (2021). Available at: https://ssrn.com/abstract=3559852
9. *Pearson v. Callahan* (2009)
10. *Pierson v. Ray* (1967)
11. *Saucier v. Katz* (2001)