8th Circ. Ruling Further Narrows Qualified Immunity

By **Thomas Eastmond** (August 5, 2021)

Thomas Eastmond

The doctrine of qualified immunity, in the words of the U.S. Supreme Court's 2011 ruling in Ashcroft v. al-Kidd, "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[1] But this doctrine has come under increased scrutiny over the past year.

Especially in light of high-profile killings of unarmed citizens by police, the doctrine has been criticized as sending a message to officials that — as Supreme Court Justice Sonia Sotomayor put it in her 2018 dissent in Kisela v. Hughes — that they can "shoot first and think later."[2]

Following a series of decisions that tended to expand the scope of qualified immunity, the high court's November 2020 decision in Taylor v. Riojas,[3] in which immunity was denied to corrections officers who forced an inmate to sleep naked on a floor covered in raw sewage, potentially signals that the doctrine's high tide may be cresting.

But the Taylor decision was less than two pages long, and provided relatively little detail as to whether, or how far, the doctrine's tide may now recede.

However, a July 16 decision from the U.S. Court of Appeals for the Eighth Circuit, Intervarsity Christian Fellowship/USA v. University of Iowa[4] — citing a statement by Justice Clarence Thomas on the high court's denial of certiorari in Hoggard v. Rhodes[5] — suggests that qualified immunity may be harder to obtain where officials have time to make "calculated choices" to enforce unconstitutional policies.

The doctrine of qualified immunity, as described in the Supreme Court's 1982 decision in Harlow v. Fitzgerald, protects "government officials performing discretionary functions … from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[6] The right the official is alleged to have violated must have been — in the words of the U.S. Court of Appeals for the Ninth Circuit in 1999's Calabretta v. Floyd — "'clearly established' in an appropriately particularized sense."[7]

This inquiry, per the Supreme Court's 2004 opinion in Brosseau v. Haugen, "must be undertaken in light of the specific context of the case, not as a broad general proposition."[8] The Ninth Circuit elaborated upon this in Brewster v. Board of Education in 2004:

> In other words, courts adjudicating claims of qualified immunity must look not to constitutional guarantees themselves but to the various doctrinal tests and standards that have been developed to implement and administer those guarantees.[9]

In defining the contours of what specific interests are "clearly established" as being constitutionally protected, courts have struggled with defining the rights either at too high a level of generality,[10] or, conversely, at too extreme a degree of factual specificity.[11] Steering thus between Scylla and Charybdis, the Supreme Court, in recent years, has appeared to prefer erring in favor of the latter, often requiring a relatively high level of resemblance between a case and a previous precedent.[12]

In Ashcroft v. al-Kidd, for example, the court reversed the Ninth Circuit's denial of qualified immunity in a case where the plaintiff alleged his arrest, though on an "objectively reasonable" warrant, was pretextual. The Ninth Circuit had held that "the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing," and cited, as the "clearly established" law obviating qualified immunity, "the broad history and purposes of the Fourth Amendment."[13]

With a hint of impatience at the Ninth Circuit's tendency to apply qualified immunity narrowly, the Supreme Court ruled that the "general proposition … that an unreasonable search or seizure violates the Fourth Amendment is of little help."[14]

Because the more particularized legal issue of whether subjective, pretextual motivations rendered an otherwise objectively reasonable warrant improper was not clearly established, qualified immunity would apply.[15]

Earlier Supreme Court cases, however, like 2002's Hope v. Pelzer, had made it clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[16] In that case, the court had "expressly rejected a requirement that previous cases be fundamentally similar."[17]

For a constitutional principle to be clearly established for purposes of qualified immunity, a prior case directly on point, or whose fact pattern is on all fours, is not required. What matters, the court said in al-Kidd, is that the "statutory or constitutional question [be] beyond debate."[18]

It has been suggested that the court's Hope decision and its 1997 U.S. Lanier ruling — with their holdings that prior authority directly on point is not required — are no longer good law, in light of subsequent cases like Brosseau, al-Kidd, 2012's Reichle v. Howards and 2018's District of Columbia v. Wesby, which required a relatively high level of specificity in what constitutes "clearly established" law.[19]

However, as the high court said in 2002's Shalala v. Illinois Council on Long Term Care, it "does not normally overturn, or … dramatically limit, earlier authority sub silentio."[20] If controlling precedents appear to be in tension, they should be reconciled whenever possible.[21] The Eighth Circuit's recent Intervarsity decision suggests one logically coherent framework for such a reconciliation.

In Intervarsity, the University of Iowa was alleged to have applied a nondiscrimination policy in a manner that imposed a preference for certain viewpoints over others, singling out the plaintiff for selectively adverse treatment while other similarly situated groups were "simply glossed over or ignored."[22] The Eighth Circuit found that this conduct constituted viewpoint discrimination in violation of the First Amendment.[23]

Rejecting the defendants' argument that "the law is not clearly established when there is a direct conflict between civil rights laws and First Amendment protections" in a university setting, the Eighth Circuit found that the Supreme Court had clearly stated that universities may not single out groups because of their viewpoint, and that Eighth Circuit precedent had also defined the selective application of a nondiscrimination policy against religious groups as a violation of the First Amendment.[24]

What is particularly intriguing about Intervarsity appears in its last paragraph:

> But as Justice Thomas asked in Hoggard v. Rhodes, "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"[25]

In his concurrence in 2017's Ziglar v. Abbasi, Justice Thomas expressed his "growing concern with … qualified immunity jurisprudence," which he argued "has diverged from the historical inquiry mandated by the statute."[26] His brief statement in Hoggard v. Rhodes, cited in Intervarsity, raises an interesting question: Is a one-size-fits-all qualified immunity doctrine a good fit for officials "who exercise a wide range of responsibilities and functions"?[27]

More precisely, should a different level of specificity in prior precedents be required when inherently subjective, split-second decisions are involved, versus when a case involves officials who can carefully contemplate "the mere application," as the Ninth Circuit framed the issue in 2007's Porter v. Bowen, "of settled law to a new factual permutation"?[28]

Many qualified immunity defenses arise in the context of excessive force by police and probable cause under the Fourth Amendment. The constitutional analysis in these areas depends on highly fact-intensive determinations of what conduct by an officer was reasonable under particular circumstances.[29]

Logically, that requires inquiry into what the particular circumstances of an incident were. In these cases, as the Supreme Court colorfully observed in 2007's Scott v. Harris, courts must "slosh [their] way through the fact-bound morass of 'reasonableness.'"[30]

Naturally, that requires intensive inquiry into what the particular circumstances of an incident were. Thus, even though, as a general rule, materially or fundamentally similar facts are not necessary to establish a constitutional protection,[31] in the limited context of inherently fact-intensive circumstances like those presented in the typical Fourth Amendment case, a body of relevant case law may be necessary to clearly establish the answer.[32]

Courts have recognized that specificity is particularly important in the context of the Fourth Amendment, where it can be difficult for an official to determine, on the spot, how a legal doctrine should apply to a particular factual situation.[33]

In these contexts where, as the Supreme Court observed in Kisela v. Hughes, the border between constitutional and unconstitutional conduct can be "hazy," "the result depends very much on the facts of each case." Accordingly, courts have tended to grant qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue."[34]

Outside this fact-bound morass of Fourth Amendment reasonableness determinations, however, the need for extreme levels of similarity between cases' fact patterns is far less obvious. Unlike the Fourth Amendment, the First Amendment, for example, lends itself to much brighter, binary lines.

With certain well-defined exceptions — such as the Pickering balancing test[35] that applies to free speech claims by government employees — no fact-intensive reasonableness balancing applies in these spheres.[36]

Dissenting in Kisela v. Hughes, Justice Sotomayor lamented that in recent years, the Supreme Court had been making the "clearly established" analysis ever more onerous.[37] As Justice Don Willett, dissenting from the Fifth Circuit's grant of qualified immunity in 2019's Zadeh v. Robinson put it:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior — no matter how palpably unreasonable — as long as they were the first to behave badly. … Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration [of the doctrine]. ... [E]ven if qualified immunity … avoids sweeping reconsideration, it certainly merits a refined approach that more smartly — and fairly — serves its intended objectives.[38]

With multiple Supreme Court justices increasingly questioning either the expanded reach of qualified immunity or (in Justice Thomas' case) its entire legitimacy, further refinements to the doctrine may be imminent.

The Eight Circuit's Intervarsity decision, and its intriguing citation of Justice Thomas' statement in Hoggard, indicates that one such refinement may be a growing divergence between the fact-bound morass of subjective, on-the-spot reasonableness determinations, and cases where officials have ample opportunity to consider how to apply clearly established legal principles to new facts. Officials in the latter category who fail, or refuse, to follow the Constitution may find courts increasingly averse to a qualified immunity.

Thomas Eastmond is an associate at Holland & Knight LLP.

[1] Ashcroft v. al-Kidd , 563 U.S. 731, 743 (2011).

[2] Kisela v. Hughes , 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting).

[3] Taylor v. Riojas , 141 S. Ct. 52 (2020).

[4] Intervarsity Christian Fellowship/USA v. Univ. of Iowa , 2021 U.S. App. LEXIS 21127 ("Intervarsity").

[5] Hoggard v. Rhodes , 2021 U.S. LEXIS 3587 (2021).

[6] Harlow v. Fitzgerald , 457 U.S. 800, 818 (1982).

[7] Calabretta v. Floyd , 189 F.3d 808, 812 (9th Cir. 1999).

[8] Brosseau v. Haugen , 543 U.S. 194, 201 (2004).

[9] Brewster v. Bd. of Educ. , 149 F.3d 971, 977 (9th Cir. 1998).

[10] al-Kidd, 563 U.S. at 742.

[11] U.S. v. Lanier, 520 U.S. 259, 267 (1997).

[12] See, e.g., Ashcroft v. al-Kidd, 563 U.S. 563; Kisela v. Hughes, 138 S. Ct. 1148;

Brosseau v. Haugen, supra, 543 U.S. 194; Reichle v. Howards , 566 U.S. 658 (2012); District of Columbia v. Wesby , 138 S. Ct. 577 (2018).

[13] Al-Kidd, 563 U.S. at 742.

[14] Id.

[15] Id.

[16] Hope v. Pelzer , 536 U.S. 730, 742 (2002).

[17] Id.; U.S. v. Lanier , 520 U.S. at 271.

[18] Al-Kidd, 563 U.S. at 741; see Shafer v. City of Santa Barbara, 868 F.3d 1110, 1118 (9th Cir. 2017).

[19] See, e.g., Bentley v. City of Mesa , 2020 U.S. Dist. LEXIS 66958 (2020).

[20] Shalala v. Ill. Council on Long Term Care , 529 U.S. 1 (2000).

[21] Cisneros-Perez v. Gonzales , 465 F.3d 386, 392 (9th Cir. 2006).

[22] Intervarsity, 2021 U.S. App. LEXIS 21127 at *15-16.

[23] Id. at *17.

[24] Id. at *20.

[25] Id. at *21.

[26] Ziglar v. Abbasi , 137 S. Ct. 1843, 1870-71 (2017) (Thomas, J., concurring.)

[27] Hoggard v. Rhodes , 2021 U.S. LEXIS 3587 at *1.

[28] See Porter v. Bowen , 496 F.3d 1009, 1026 (9th Cir. 2007).

[29] See, e.g., Maryland v. Pringle , 540 U.S. 366 (2003) [probable cause]; Graham v. Connor , 490 U.S. 386, 396-397 (1989) [excessive force].

[30] Scott v. Harris, 550 U.S. 372, 383 (2007).

[31] Hope v. Pelzer, 536 U.S. 730

[32] District of Columbia v. Wesby, 138 S. Ct. at 590.

[33] Kisela v. Hughes, 138 S. Ct. at 1152.

[34] Id. at 1153.

[35] Pickering v. Board of Education , 391 U.S. 563 (1968).

[36] See U.S. v. Alvarez , 132 S. Ct. 2537, 2544 (2012).

[37] Kisela v. Hughes, 138 S. Ct. at 1158.

[38] Zadeh v. Robinson , 928 F.3d 457, 479-480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

[39] Id. at 481.