Qualified Immunity â?? What Every Officer Needs To Know: Part One

Description

History of How Qualified Immunity Came to Be

As I watch what is occurring across the Country I am confused. I have practiced law for nineteen years. And Iâ??ve been in awe over the past couple of months as I have watched legislatures and individuals across the country have conversations about qualified immunity. Like most of my practitioners, we probably didnâ??t think too much about it because it was just something that weâ??re often used to hearing, but the rumbles got louder and louder. So, when media reports, legislatures, politicians, and community activists started talking about getting rid of something like qualified immunity, it sent a lot of my colleagues into a tailspin. We all had to stop for a second and say, â??Wait, what are they doing?â?•

Well, theyâ??re going to legislate qualified immunity. Well, how do you do that? How do you legislate a supreme court decision? Does anybody remember high school? Does anybody remember going to Civics class in and learning about the separation of power, the balance of power, and the three branches of government in this country? What is really going on?

Iâ??m very often in front of a group teaching nuances related to use of force and the First Amendment, and Iâ??ve practiced civil liability for nineteen years, so, I have a working knowledge of qualified immunity. There are many of my colleagues that you would call constitutional experts that would probably get really, really deep into the nooks and crannies of qualified immunity. But thatâ??s not the purpose of this article. The purpose of this article is for law enforcement officials to have information when they speak with their legislatures, when they speak with their community members, and when they speak with community activists about what the real issues are on the table.

One of the biggest concerns when it comes to qualified immunity is the term â??clearly established lawâ?•. Thatâ??s always one of my favorite standards for training. Some individuals push back and say, *â??Eric, well, thatâ??s just a theory.â?•* No, itâ??s not a theory. It is our jurisprudence of Fourth Amendment law, our jurisprudence of First Amendment law. It is the history of law that matters in this case. The last part is why. The question you should be asking here is very simple. Why is qualified immunity an issue? Why are people alleging itâ??s an issue? And why would people want to be messing with it?

Letâ??s start with a brief history lesson on qualified immunity and why it needs to exist. Qualified immunity in application of law shields government officials from damages in lawsuits, most notably under 42 USC section 1983[i]. One of the things that you have to know about the doctrine of qualified immunity is that the doctrine is intended to balance a very important part of our operation; the need to uphold public officialsâ?? accountability. Meaning we need to hold our public officials accountable while also shielding officials from harassment, distraction, and liability when they perform their duties reasonably. In other words, the qualified immunity doctrine gives government officials breathing room to make reasonable but mistaken judgments about certain legal questions. Yes, a government official can

get things wrong because there is no law to guide what they should have been doing. When that occurs, then there has to be some protection.

Letâ??s put it even more simply: you canâ??t know what you donâ??t know. And itâ??s not that you donâ??t know it because you donâ??t want to know it. You donâ??t know it because the jurisprudence of the law has not yet gotten to a point where it has set an applicable standard of identification. In order to qualify for immunity, to fully break down what QUALIFIED immunity means, you must follow a two-part test: one, that there has to be a constitutional deprivation. And number two, that if the constitutional deprivation occurred, then the official has to have violated a clearly established right at the time the violation occurred.

So, when we talk about qualified immunity, letâ??s talk about its history. All law has history. And this one starts with a doctrine created in 1967. In 1967, qualified immunity was called the good faith defense. And in this case, in 1967, (from a 1961 incident) two Mississippi police officers arrested and jailed fifteen priests, three of them who were Black, for refusing to leave a segregated bus terminal waiting room[ii]. The group turned around and sued the police officers for false imprisonment. But the court sided with the officers who said that they believed they were doing their job of preventing imminent violence from a crowd. And the court defined what we called â??the good faith exception.â?•

If you go forward from the good faith exception, you see qualified immunity begin to develop. And as it began to develop over the years, hereâ??s what we learned: the constitutional rights of the plaintiff are clearly delineated. What it comes down to is always the question of reasonableness. So, how do we know if itâ??s reasonable? Now, thereâ??s a lot of times where we could put ten people in a room and look around and go, â??Yeah, thatâ??s not reasonable. We donâ??t believe that thatâ??s the way it should be.â?• But in the legal arena, reasonableness comes from a point where the court has given us some margins to operate by, where the court has said over the years, â??This is too far left. You went too far. You canâ??t do that.â?• Or, â??This is right, and weâ??re okay with that.â?•

So, letâ??s move forward with our history. In 1986, during *Malley vs Briggs*[iii], the supreme court held that qualified immunity does not apply to a police officer when the officer wrongly arrests someone on the basis of a warrant if the officer could not reasonably believe that there was probable cause for a warrant. In this case, the key to analysis was reasonability. Basically, what the court stated here was the idea of if it was reasonable or objectively reasonable for the officer to believe what he did at that time. So, the discretion was evaluated under reasonableness and the challenge was sustained. In 1987, in a case *Anderson vs Creighton*[iv], the court said an officer is entitled to qualified immunity if the officer proves that a reasonable officer could have believed that the search constitutionally complied with the Fourth Amendment. So, before we move on to a key case, take a second to think about this; the public needs to know that there has to be some checks and balances on the reasonableness of an officerâ??s decision, and that does come from the doctrine of qualified immunity.

The qualified immunity doctrine fully came to fruition during a 2001 case, *Saucier vs Katz*[v]. This is where the jurisprudence on clearly established law began to develop. If you donâ??t remember this case, it occurred after a past vice president went to Presidio Air Force Base. They were making part of the air force base into a wildlife reserve. Well, Mr. Katz, a wildlife activist, made a banner to mark this occasion. And the banner wasnâ??t that harmful, but it basically talked about protecting the rights of the animals on the reserve. Law enforcement on the scene were made aware that Mr. Katz would probably make an appearance. And as Vice President Gore was giving a speech, Mr. Katz ran to the

snow fence that separated the distance between the vice president, and threw the banner over the fence, showing and displaying his words of wisdom.

A military police officer working the area scooped up Mr. Katz and brought him to a waiting van. They allegedly threw him in the van and took him away. Now, and oftentimes they look for cases like this, the reason why the court used this case in order to evaluate qualified immunity was because the damages to Mr. Katz in this case were minimal. He alleged that when he was thrown into the back of the van that he injured his wrists and therefore that constituted damages.

So, the court said, â??all right,â?• and then, they came up with a two-part test. Part number one, *do the facts alleged by the plaintiff show that the officerâ??s conduct violated the constitutional rights?* And remember, it must be facts most favorable to the plaintiff, in the plaintiffâ??s view. Now here the court said, â??You know what? Probably not true, but weâ??re going to say yes because we want to get to the second element.â?•

And the second element is, for me, the most important element. The second element is *was the right clearly established? And how was it determined?* Now, if youâ??ve heard any of my training over the last decade, I say it over and over and over again; we have a legal obligation to teach our officers what the courts have defined as clearly established law. No matter what the area, search and seizure, laws of arrest, First Amendment, Fourth Amendment, use of force, you name it; officers need to know clearly established law. There is a jurisprudence, a history of law that clearly identifies what an officer should or should not do, and we have a legal obligation to ensure that our officers know that. Because the court has said, â??We donâ??t want you making the same bad decision again. And if you do, if we were deliberately indifferent in teaching you that clearly established law and you were found to have violated it, then there is no qualified immunity and youâ??re on the hook. Because you should have known, could have known, did know, and you did.â?• The question is that thousand-dollar question, would it be clear to a reasonable officer that his conduct was unlawful in the situation he confronted? Well, that makes up a majority of what we deal with in civil liability. Why do you think in civil liability that the court is going to look at policies, going to look at training, going to look at other incidents, internal affairs, investigations, discipline? They want to see that your officers had the chance to learn the law and will note that they should have.

Now that we know the basics of the history of qualified immunity, part two will discuss the evolution of qualified immunity and its due process in court. Finally, in part three we will break down the importance of qualified immunity in todayâ??s society and what the public should know moving forward.

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[i] 42 U.S. Code Â§ 1983.Civil action for deprivation of rights.

[ii] Pierson v. Ray, 386 U.S. 547 (1967)

[iii] Malley v. Briggs, 475 U.S. 335 (1986)

[iv] Anderson v. Creighton, 483 U.S. 635 (1987)

[v] Saucier v. Katz, 533 U.S. 194 (2001)

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