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Lowering the bar for qualified immunity

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In a series of decisions over the last year, the Supreme Court has made it much more difficult for civil rights plaintiffs to recover damages for constitutional violations. The most recent example of this is the Supreme Court's decision in *Reichle v. Howards*, 2012 DJDAR 7318 (June 4, 2012), which held that Secret Service agents could not

be held liable when they allegedly arrested a man in retaliation for his speech critical of then Vice President Dick Cheney. In this and other recent cases, the court has limited the ability to sue government officials for money damages.

Suing individual government officers is often the only way that an injured person can recover for constitutional violations. Suits against government entities are often difficult, if not impossible. Both the federal and state governments are protected by sovereign immunity, which greatly limits suits against them for damages. Local governments can be held liable for civil rights violations only if there is a municipal policy or custom that led to the injury.

State and local government officials can be sued for constitutional violations pursuant to 42 U.S.C. Section 1983, and federal officers can be sued pursuant to the Supreme Court's decision in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Supreme Court, however, has said that all government officials when sued for money damages may raise "immunity" as a defense. Some government officers have absolute immunity to suits for money damages: judges performing judicial tasks, prosecutors performing prosecutorial tasks, legislators performing legislative tasks, police officers testifying as witness and the president for acts taken in office.

All other government officers have "qualified immunity." In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded 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."

In the 30 years since *Harlow*, courts have struggled with how to determine if there is "clearly established" law that the "reasonable person would have known." Must there be a case on point to say that there is such clearly established law?

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the court seemingly resolved this and held that there need not be a prior decision on point in order for the plaintiff to show the existence of clearly established law. Rather, officers can be held liable so long as they had "fair warning" that their conduct was impermissible.

The court has not overruled *Hope v. Pelzer* or

Law Practice

California law graduates struggle to find work

Less than half of last year's graduates from California law schools have found full-time, long-term jobs as lawyers, new data from the American Bar Association shows.

Suing Dewey, and damn the consequences

His past two firms imploded. Can longtime intellectual property litigator Henry C. Bunsow have found his last stop at Bunsow De Mory Smith & Allison LLP?

Government

Homeowners out of luck on energy loan program

Homeowners looking to take advantage of long term loans from local governments to help pay for energy efficiency improvements have been dealt another setback by the Federal Housing Finance Agency .

Litigation

Arbitrators rule against former LA official

Panel didn't agree that a bank reached an oral agreement with Ted Stein to extend a loan on a development deal.

Criminal

Court brushes back ex-governors' effort to speed up executions

Pete Wilson and George Deukmejian want the state to use a one-drug method of execution that has not been approved by the U.S. Supreme Court.

Law Practice

Summer associate works for her father

Summer associate Rebecca Simon shadows her father, managing principal Craig S. Simon at Berger Kahn ALC.

Shartsis Friese snatches MoFo lawyers

In a move that bolstered the firm's real estate practice, Shartsis Friese LLP hired on two partners from Morrison & Foerster LLP in San Francisco.

Criminal

Guilty plea in FCPA case

Another former executive at Control Components Inc. has entered a guilty plea over what

even distinguished it; the court has simply ignored it.

The case involved a prisoner who was tied to a hitching post and left in the hot sun. The federal court of appeals had found that this was cruel and unusual punishment, but that the officers were protected by qualified immunity because there was no case on point holding that such use of the hitching post violated the Constitution. The Supreme Court reversed and said that a case on point is sufficient to show clearly established law, but it is not necessary.

In the decade since *Hope v. Pelzer*, the Supreme Court repeatedly has found qualified immunity based on the absence of a case on point. The court has not overruled *Hope v. Pelzer* or even distinguished it; the court has simply ignored it. In the process, the court has made it much harder for plaintiffs to overcome qualified immunity and hold government officers liable for constitutional violations.

Last term, in *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011), the court held that the attorney general was protected by qualified immunity for authorizing a person to be held on a material witness warrant even though there never had been any desire to use the person as a material witness, and there was no suspicion that the person had committed any crime. The 9th U.S. Circuit Court of Appeals had rejected qualified immunity, stressing that any government officer, let alone the attorney general of the U.S., should know that detaining a person as a material witness, when that was entirely a pretext, violates the Fourth Amendment.

The Supreme Court reversed and in an opinion by Justice Antonin Scalia emphasized the absence of any case on point holding that such use of the material witness statute violates the Constitution. Justice Scalia wrote: "At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." Moreover, in very important language, the Supreme Court said that to be clearly established, a right must be sufficiently clear "that every reasonable official would [have understood] that what he is doing violates that right."

Again this term, in *Ryburn v. Huff*, 132 S.Ct. 987 (2012), the court found qualified immunity based on the absence of a case on point. A rumor circulated in a high school that a student there had threatened violence. The police went to the boy's home to investigate. The boy and his mother came out of the house and answered the police questions. The officer asked permission to enter the home and the mother refused. When the mother entered the home, the police officer followed without permission and against her wishes. The officer said that his experience was that parents usually allow officers in their home when asked for consent. The police found no weapons or other contraband and ultimately concluded that the rumors about the boy were unfounded.

The 9th Circuit rejected qualified immunity. The Supreme Court, in a *per curiam* opinion, reversed. Once more, the court stressed the absence of decisions on point and said: "No decision of this court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." The court said that its precedents had allowed police to enter a home when there was a fear of violence. But those decisions had allowed police to enter when there was reason to believe that there might be violence in the home; here it was a only a rumor and there was no basis for suspicion other than the occupant of the home not wanting the police to enter.

Most recently, in *Reichle v. Howards*, the court again denied recovery based on qualified immunity. Vice President Cheney was speaking at a shopping mall and a Secret Service agent heard Steven Howards say into his cell phone that he "was going to ask [the Vice President] how many kids he's killed today." The Secret Service agents observed Howards enter the line to meet the vice president, tell the vice president that his "policies in Iraq are disgusting," and touch the vice president's shoulder as the vice president was leaving. Howards was then arrested, though charges were later dismissed.

Howards sued the Secret Service agents claiming that his arrest was impermissible retaliation for his speech. The Supreme Court ruled that the Secret Service agents were protected by qualified immunity. The court echoed the words of *Ashcroft v. Al-Kidd*: "To be clearly established, a right must be sufficiently clear 'that every

prosecutors say was a wide-ranging conspiracy to bribe foreign officials.

Discipline

Disciplinary Actions

Here are summaries of lawyer disciplinary actions taken recently by the state Supreme Court or the Bar Court, listing attorney by name, age, city of residence, and date of the court's action.

Firm Watch

On the Move

Entertainment Studios Inc., a Los Angeles-based broadcast syndication company, named Mark P. DeVitre as its first general counsel. DeVitre was previously general counsel at StarGreetz.

U.S. Supreme Court

Lowering the bar for qualified immunity

In the decade since *Hope v. Pelzer*, the Supreme Court repeatedly has found qualified immunity based on the absence of a case on point. By **Erwin Chemerinsky** of UC Irvine School of Law

Law Practice

Examining the real cost of purchasing lateral talent

Part One of a five-part series. By **Edwin B. Reeser**

U.S. Supreme Court

Kelo and the shrinking approval of the Supreme Court

Recent polls suggest that only 44 percent of Americans approve of the job the Supreme Court is doing. By **Gideon Kanner** of Loyola Law School

Securities

Proxy Season 2012: the role of supplemental proxy solicitations

While some have questioned the effectiveness of filing supplemental proxy solicitation materials, it is often important to do so for several reasons. By **Jim Barrall** of Latham & Watkins LLP

Law Practice

Dispatches from the reading room: LOL

Humor in judicial opinions takes many forms, ranging from tired jokes to sly wit to satire so powerful as to make us laugh. By **William Domnarski**

Labor/Employment

Court upholds class action waiver in employment agreement

The 2nd District Court of Appeal determined that *Concepcion* "conclusively invalidates the *Gentry* test." By **John R. Carrigan, Jr.** of Ballard Spahr LLP

reasonable official would [have understood] that what he is doing violates that right." The court concluded: "[W]hen Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation." But if the police arrest a person in retaliation for speech that is protected by the First Amendment, isn't that clearly unconstitutional?

Taken together, these recent cases represent a significant change in the law which makes it much more difficult for those suffering constitutional violations to be able to sue for money damages. The Supreme Court has recognized that such suits are essential to deter wrong-doing and to compensate injured victims. The expansion of qualified immunity undermines both of these crucial objectives.

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Judicial Profile

Oswald Parada

U.S. Magistrate Judge Central District of California (Riverside)

Corporate Counsel

Malissia R. Clinton

General Counsel of The Aerospace Corp. El Segundo

Law Practice

Diversity lacking among mediators, some attorneys say

The bench has long faced criticism for failing to reflect the diversity of the communities it serves, and many attorneys say the options for mediators and arbitrators are little better.