

Qualified Immunity/Fair Notice Defenses

Presented by: Attorney Elliot B. Spector
Spector Criminal Justice Training Network
ebspector52@earthlink.net
www.cclfinc.org

Reasonable Mistakes



- ▶ Even if officers are found to have violated a person's civil rights they may still be entitled to qualified immunity.
- ▶ Officers who make reasonable mistakes of fact or reasonable mistakes in the application of legal standards should be entitled to qualified immunity.

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

Willingham v. Loughnan, 321 F.3d 1299 (2003), 537 U.S. 801 (2002)

Intended Purposes

- ▶ The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability.

Elder v. Holloway, 510 U.S. 510, 514 (1994)

- ▶ Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence without fear of consequences.

Pierson v. Ray, 386 U.S. 574 (1967)

- ▶ It shields government officials from liability for their performance of discretionary actions and offers them the benefit of avoiding costly, time-consuming and, ultimately unsuccessful litigation.

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

Unintended Purposes

- ▶ Improve settlement position
- ▶ Discourage future suits



Fundamental Right Not to Be Tried

- ▶ *Harlow* recognized an entitlement not stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is immunity from suit rather than a mere defense to liability; and like an absolute immunity, is effectively lost if a case is erroneously permitted to go to trial.

Seigert v. Gilley, 500 U.S. 226 (1991)

Two Tests & Burden

- ▶ Do the facts amount to a constitutional violation?
- ▶ Was the right **CLEARLY ESTABLISHED** at the time?

When a defendant invokes qualified immunity, the **BURDEN** is on the plaintiff to demonstrate that the defendant is not entitled to this defense.



Where to Find Clearly Established Law

- ▶ U.S. Supreme Court
- ▶ Controlling Circuit
- ▶ Highest State Court
- ▶ Specific Language of Federal Law or Constitutional Provision
- ▶ Consensus of other Circuits

(courts may consider government studies and regional standards)



Similar Facts

- ▶ How **similar** do facts have to be?
- ▶ NOVEL but obviously unconstitutional.




Benefit of the Doubt

- ▶ Far beyond the hazy border between constitutional and unconstitutional conduct.
- ▶ Would reasonable officers differ?



Miscellaneous Issues

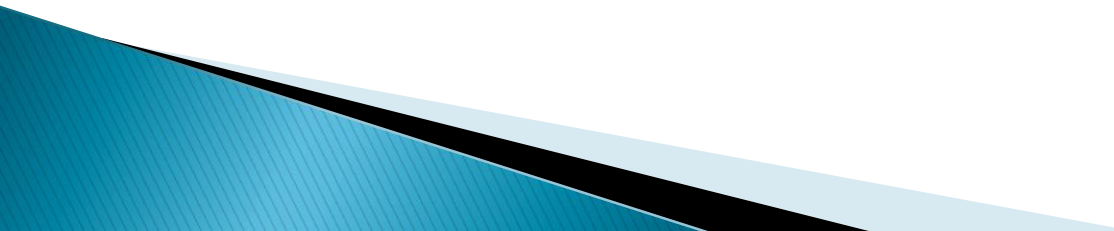
- ▶ Can the qualified immunity issue go to the jury?
 - ▶ Is a supervisor's liability dependent on the officer's qualified immunity?
 - ▶ Is a municipality's liability dependent on the officer's qualified immunity?
 - ▶ Can an officer appeal a favorable ruling on qualified immunity?
- 

Fair Notice/Warning

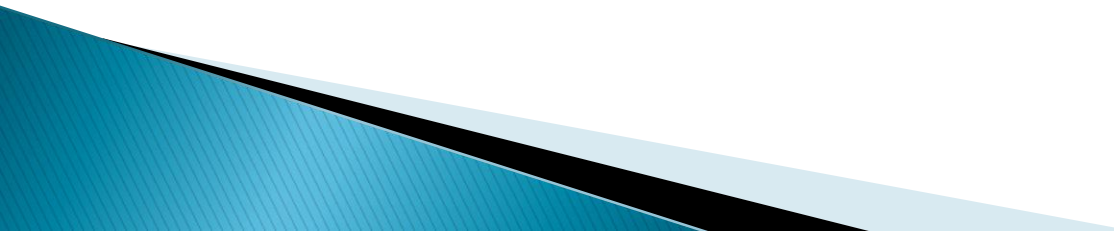
Re: 18 USC §§ 241 & 242

- ▶ The fair warning requirement ensures that “no man should be held criminally responsible for conduct which he could not reasonably understand to be prescribed.” *United States v Harris*, 347 U.S. 621, 617 (1954)”
- ▶ ...all that can usefully be said about criminal liability under section 242 is that it may be imposed for deprivation of a constitutional right if, but only if, in light of pre-existing law the unlawfulness (under the Constitution is) apparent,” *Lanier* at 1228.

Qualified Immunity & Fair Notice are Analogous

- ▶ Officers sued in a civil action for damages have the same right to fair notice as do defendants charged with a criminal offense, *Hope v. Pelzar*, 536 U.S. 730,741 (2002).
 - ▶ It is clearly established that 42 U.S.C. 1983 claims are analogous to 18 U.S.C 242 claims and identical except for the standards of proof and sanctions.
- 

The Rationales and Purposes of Qualified Immunity Are Even More Applicable in the Context of a Fair Notice Defense

- ▶ Defense counsel and expenses
 - ▶ Consequences
 - ▶ Continued work
 - ▶ Cost of participation in defense
- 

Public Benefit of Allowing Early Judicial Decision Based on Undisputed Facts and Clearly Established Law

- ▶ Government trial costs
- ▶ Adverse publicity and negative effect on image of Department and morale of officers
- ▶ Indemnification costs



Tale of Two Cases

Offense	Stole Grandmother's Car	Trespass, Breach, Harassment, Criminal Mischief
Subject	14 Year Old Slim Boy	22 Year Old, 220lb Drunk
Action	Malingering?	Destroying Cell, Injuring Himself
Force	Hit, Kicked, Dragged	Pepper-Sprayed
Harm	Death	Pain & Discomfort for 40 Minutes
Policy/Training	?	Okay, Department & DOJ & POST
Law	?	In Accordance With All Prior Case Law

Questions

- ▶ How are police federal criminal cases screened?
- ▶ What is the process for reviewing cases?
- ▶ Who decides to proceed with prosecutions?
- ▶ Why is there an increase in prosecutions?
- ▶ Is the law reviewed for FAIR NOTICE?



What Do We Do Now?

- ▶ Training
- ▶ Administrative Decisions
- ▶ Rules Change

