



Qualified Immunity in Section 1983 Cases

by Tillman J. Breckenridge

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Through the William and Mary Appellate and Supreme Court Clinic, I have handled numerous Section 1983 appeals all over the country. Our clinic identifies cases with issues of public import, then offers to handle the appeal for the side the students think has the law right, whether the plaintiff or the defendant. Through this work, I have run across many preservation issues and other issues that affect an appeal. In light of the qualified immunity doctrine's strength in federal courts, trial counsel must be vigilant in protecting the client's rights and careful not to waive a factual claim or a legal issue on either side.

Factual Issues

Many, if not most, Section 1983 cases are resolved on a motion to dismiss, either because relief cannot be granted on the merits or because the defendants enjoy qualified immunity against the right asserted in the context

of the case. Preservation of factual issues becomes particularly important in this context because of the hybrid evidentiary standard applied that does not normally apply in cases involving a motion to dismiss.

In most litigation, a motion to dismiss based on the pleadings simply takes the complaint and construes it in the light most favorable to the non-moving party. Voila! The facts are resolved for the purposes of the motion. To succeed on a motion to dismiss—particularly based on qualified immunity—the facts supporting the resolution must be apparent on the face of the complaint. But different circuits have competing approaches. For instance, some circuits allow a bending of the rules of motions to dismiss, by allowing municipalities and officers to attach affidavits to motions to dismiss actions based on qualified immunity. *See, e.g., Coyne v. Cronin*, 386 F.3d 280, 285 (1st Cir. 2004). The Fourth Circuit, meanwhile, has adhered to the traditional rule that qualified immunity must be apparent on the face of the complaint for the complaint to be dismissed. *Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013).

The Fourth Circuit standard is advantageous to plaintiffs in Virginia and it is a helpful way of preventing litigation from being cut off at the knees before discovery can reveal the specific facts necessary to prove the claim. Plaintiffs can craft their complaints to ensure that they do not state facts establishing a right to qualified immunity. That puts defendant officers and municipalities in the unenviable position of having to decide whether to move for summary judgment right out of the gate. Plaintiffs can bolster their complaints by utilizing the Freedom of Information Act and relevant state corollary laws. To the extent participants are unknown, there should be a thorough pre-suit investigation because it is not enough to simply allege bad acts by “defendants.” The plaintiff must personally identify which defendant engaged in which unconstitutional act.

Legal Issues

Plaintiffs should carefully consider the legal allegations they make. Constitutional precedent can create a tricky thicket through which a plaintiff must navigate. For example, the Supreme Court of the United States will take up an issue that has vexed plaintiffs this term—under what amendment malicious prosecution fits—in *Case no. 14-9496, Manuel v. City of Joliet*. On that issue, plaintiffs have gone all the way to the Supreme Court before, only to find that they alleged violation of the wrong clause of the wrong amendment. The long arc of this issue underscores the necessity of counsel to thoroughly research and think about the structures of the legal rights to be asserted.

When briefing a motion to dismiss a Section 1983 case on the qualified immunity ground, the basic questions are (1) whether a constitutional right was violated, and (2) whether that right was clearly established. Both of these questions require thorough research and briefing to avoid waiving aspects of them. The first question is often left unanswered, as the Supreme Court has expressly given district courts permission to skip the first step to determine whether the plaintiff correctly stated a constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Fourth Circuit had expressed some concern over skipping the first inquiry, noting that the first “inquiry is made at the outset in order to promote clarity in the law and to ensure that legal standards may evolve from case to case.”

Mellen v. Bunting, 327 F.3d 355, 365 (4th Cir. 2003). The current regime thus “results in a self-perpetuating cycle in [qualified immunity cases]: district courts will skip the constitutional inquiry in favor of disposing of cases on the ‘clearly established’ prong, so there will never be an actual finding that an officer’s conduct shocks the conscience, so courts will continue to be able to dispose of cases on the ‘clearly established’ prong, and so on.” *Jones v. Byrnes*, 585 F.3d 971, 980-81 (6th Cir. 2009).

District courts have not been shy about taking the Supreme Court up on the option to skip the first step of the analysis. Thus, it is critical for plaintiffs that they make a clear argument in response to a motion to dismiss on the second step, and state and local governments should place special emphasis on whether a right is clearly established in their motions to dismiss actions based on qualified immunity. On this second step, the most common problem I see is a failure to define the constitutional right at an appropriate level of generality. I also see a failure to cite and apply precedent in the most meaningful possible way.

Describing the right at the correct level of generality

Defining the right at the most appropriate level of generality is challenging. Indeed, the courts cannot find consistency in this realm, and they employ different analytical frameworks to determine the level of factual similarity needed between cases to render a right clearly established. Sometimes it seems the right is defined at a level of generality that the question is simply whether there is a Fourth Amendment right against being stopped with-

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out reasonable suspicion. Other times it seems the right is defined so narrowly as to require similarity between the day of the week and what brand of gum the plaintiff was chewing.

Some circuits have determined that broad principles of law can establish that a right under specific circumstances is clearly established even though there is no particular case

following the same fact pattern. Others have a narrower notice-based analysis that allows for a right to be clearly established if prior cases put officers on notice that their conduct is unconstitutional. A third group only allows use of broad principles in “extraordinary cases.”

The Fourth Circuit fits into the first category. It has held that the law can be clearly established in novel factual circumstances, even without a body of specific case law. Case law need not address the right in a “specific context before such right may be held ‘clearly established.’” *Meyers v. Balt. Cnty.*, 713 F.3d 723, 734 (4th Cir. 2013).

I think the Fourth Circuit gets it right. There are times that broad principles of constitutional law lay out a clear framework for law enforcement officers to understand what they can and cannot do. Take, for instance, one of the Clinic’s first cases: *Ortega v. United States Immigration and Customs Enforcement*, 737 F.3d 435 (6th Cir. 2013). That case involved a third-generation American citizen, Ricky Ortega, who was on home-confinement for a DUI offense. Immigration and Customs Enforcement issued a detainer for him, which tells local officials to retain control over someone and notify ICE at least twenty-four hours before release.

On receiving the detainer, local officials went to Ortega’s home and took him to jail. The district court had resolved that Ortega had no right at all against being taken from home confinement to jail and thus local officers were entitled to judgment in their favor. The Sixth Circuit affirmed though it ruled the district court erred by finding Ortega lacked a right against the change in conditions of confinement. The Sixth Circuit went on to state that the right was not clearly established.

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In dissent, Judge Keith expressed the approach embraced by the Fourth Circuit—broad principles of constitutional law can render a right clearly established if they make it obvious to a reasonable officer that the conduct alleged is not allowable. He deter-

mined that the case’s “core constitutional principle—that an officer must provide some process before seizing an individual from his home and taking him to jail—is unquestionably enshrined in our case law.” *Id.* at 442. The majority had rejected cases applying this principle in the parole and probation contexts.

The case thus squarely raised the question of at what level of generality a constitutional right should be evaluated to determine whether it is clearly established. Litigants on both sides of qualified immunity cases should take care to describe a right at a point of generality at which a factual distinction no longer makes a difference. In *Ortega*, that would have meant that the parole and probation contexts of other potentially guiding cases is irrelevant—if the constitutional comparison is being at home versus being in jail, the reason for being at home does not make a difference.

Sources of law on what is clearly established
Another issue on which the circuits disagree is which sources of law are appropriate for use to determine what is clearly established. Again, three camps appear to emerge in general. A few circuits have a very broad standard for appropriate sources of law to determine what constitutional rights are clearly established. These circuits, at their broadest, consider law from other circuits, district courts, and state courts. There is a group of circuits with a narrower approach; they only consider out-of-circuit or unpublished dispositions if, together, they form a consensus. The Fourth Circuit falls into the third group, which has the narrowest standard—it does not consider unpublished dispositions, and it confines its analysis of precedent to the relevant jurisdiction.

Again, the Fourth Circuit appears to have the right recipe. It seems unfair to hold law enforcement officers responsible for knowing another circuit’s law. Perhaps a consensus from other circuits can be useful to help recognize that law from the Supreme Court should have provided sufficient guidance to officers but beyond that it would be an incredible burden on law enforcement officers to hold them responsible for knowing that eight of thirteen circuits, but not their own, have ruled certain conduct unconstitutional.

In any event, Virginia practitioners should be aware—on both sides—that published Fourth Circuit precedent, precedent from the Supreme Court of the United States,

and precedent from the Supreme Court of Virginia take on a nearly exclusive role as the necessary precedent to establish the contours of a clearly established right.

For Virginia practitioners, the strongest route toward convincing the court to your side on issues of qualified immunity, whether you represent the plaintiff or the defendant, is to focus on cases arising out of the relevant jurisdiction and recognize that the courts are not instructed to take an unduly narrow approach to defining the right at issue. When combined with carefully considering the correct constitutional provision to apply, and smartly forming the facts, parties can put their best feet forward in asserting a claim under Section 1983. Developing your case in this way will help the district court and also help to preserve the legal issues in their best possible form, in case an appeal is unfortunately necessary.



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