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## PERSPECTIVE

## What is qualified immunity— and what is the future of the doctrine?

By Sean De Burgh

Recent protests arising from the death of George Floyd at the hands of a Minneapolis officer has generated debate concerning the future of qualified immunity. But what exactly is qualified immunity? Why does it exist? How is it applied?

### What Exactly Is Qualified Immunity?

Qualified immunity may be asserted as an affirmative defense to officers that are sued civilly for civil right violations and is most often invoked in excessive force cases. To determine whether an officer is protected by the defense of qualified immunity, courts must determine (1) whether the facts the plaintiff alleges make out a violation of a constitutional right, and (2) whether the right was clearly established at the time the officer acted. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Qualified immunity is a question of law, not a question of fact. *Torres v. City of L.A.*, 548 F.3d 1197, 1210 (9th Cir. 2008). “[An officer’s] conduct violates clearly established federal law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable [officer] would have understood that what he is doing violates that right.” *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (other citation and internal quotation marks omitted)).

In order to show that a right was clearly established, there need not be a case directly on point establishing the right, “but

existing precedent must have placed the ... constitutional question beyond debate.” *Id.* (quoting *al-Kidd*, 563 U.S. at 741). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.” *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (quoting *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012)). Thus, whether the qualified immunity defense will apply in any particular case requires an extremely fact-intensive inquiry that hinges on the objective reasonableness of the officer’s conduct when viewed in light of existing rules that were “clearly established” at the time of the incident.

### The Rationale Behind Qualified Immunity

The doctrine of qualified immunity seeks to safeguard government officials, including police officers, from personal liability for constitutional violations if their conduct did not violate “clearly established” law. In the context of law enforcement, qualified immunity seeks to balance the competing interests of holding officers accountable for their conduct without creating a threat that depresses effective law enforcement.

Officers are often called upon to address very difficult, challenging, and sometimes life-threatening situations where quick decisions must be made. Recognizing this reality, proponents of qualified immunity contend that officers should be afforded a certain

amount of deference that avoids the 20/20 vision hindsight evaluation of an officer’s conduct and ensures that only those officers that clearly violate established law are held personally liable for such conduct.

However, critics of qualified immunity argue that it has swung the pendulum too far in favor of officers, allowing officers to violate an individual’s constitutional rights without fear of repercussion. One of their principal arguments is that the “clearly established” right prong of the qualified immunity analysis creates a Catch-22 where officers cannot be held liable if no one has been found liable for the same conduct before. Additionally, the heightened evidentiary standard in criminal cases, critics argue, further assures that only the most egregious actors will face consequences for their actions.

### The Future of Qualified Immunity

With police reform seemingly at the forefront political and legal discussions throughout the country, the future of qualified immunity remains uncertain. Calls to reform or end qualified immunity have come from diverse ideological perspectives, including members of both political parties, and members of the judiciary that include, among others, Supreme Court Justices Clarence Thomas and Sonia Sotomayor. In recent days, bills that would abolish or significantly alter qualified immunity as we know it have been introduced by members of Congress. The U.S. Supreme Court deferred any reevaluation of the doctrine

just this month when it denied all of the major cert petitions addressing the qualified immunity issue. Hence, for now, all eyes remain on Congress as to whether adjustments to or abolition of qualified immunity will be part of any broader police reform legislation.

One thing for certain is that this is not an issue that is likely to go away any time soon. The ever increasing number of departments throughout the country requiring officers to wear body worn cameras, coupled with everyone walking around with a video camera in their pocket (i.e., smart phone) that can immediately upload pictures and video to social media has put a microscope on police officer conduct that doesn’t show any sign of slowing down. The last several years has taught us that an officer’s interaction with a citizen can go viral within hours, if not minutes, with public scrutiny to follow. Whether the doctrine of qualified immunity will survive this current climate remains to be seen. ■

Sean De Burgh is a partner with Cole Huber LLP.

