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# Qualified Immunity When Facts are in Dispute

Leon Friedman

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# QUALIFIED IMMUNITY WHEN FACTS ARE IN DISPUTE

*Leon Friedman\**

JUDGE PRATT:

I look forward to an exciting day here. So let's get started with the qualified immunity problems, and Leon, it is all yours.

PROFESSOR FRIEDMAN:

There were two Supreme Court cases on qualified immunity.<sup>1</sup> I want to be sure to cover those. There was also a case that was almost decided by the Court and I would like to spend a little more attention on that one.<sup>2</sup>

The cases on qualified immunity that were decided emphasized and perhaps changed the law, a little bit, on the sequence of deciding issues in a section 1983 case.<sup>3</sup> At one time, when someone would assert that his or her constitutional rights were violated, the defense to such an assertion was that this is not a constitutional right. Even if there was a constitutional right, there is doubt as to whether such a right was clearly established, thereby entitling the government official to qualified immunity. The courts for the most part would not get into the issue of whether there was

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\* Leon Friedman, Joseph Kushner Dist. Prof. Hofstra. B.A., 1954; LL.B., 1960, Harvard. Grad. Student, Hist., Harvard GSAS, 1954-55.

<sup>1</sup> *Conn v. Gabbert*, 526 U.S. 286 (1999) and *Wilson v. Layne*, 119 S. Ct. 1692 (1999).

<sup>2</sup> *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998) City found not liable and police officer granted qualified immunity in § 1983 action brought by civil rights plaintiff who was shot in the back while fleeing the officer.

<sup>3</sup> 42 U.S.C. § 1983 (1994) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

a constitutional right because in any event the right was not clearly established at the time.<sup>4</sup> The Supreme Court dealt with that issue a second time, and it is an easy way to get out of the whole issue.

Indeed, the Second Circuit and other circuits have had a doctrine that avoids constitutional questions.<sup>5</sup> Therefore a case is decided without getting to a constitutional question. It was easy for a court to say that a constitutional right was asserted, and we are not really sure whether there is such a constitutional right, but in any event it was not clearly established. Therefore, the defendants are entitled to qualified immunity.

The trouble with such an approach is that you never know whether there is a constitutional right. Qualified immunity can go on forever, because no one ever decides whether there was a constitutional right. Therefore, if the whole point is to establish a right, then make sure everybody knows what it is, and enforce it thereafter. By deciding a case on qualified immunity you stop the process from continuing.

In 1998, the Supreme Court in *County of Sacramento v. Lewis*<sup>6</sup> stated that the preferred approach is for district court judges to define the right, to decide whether there is a constitutional right, and then to reach the issue of qualified immunity.<sup>7</sup> The preferred approach is to look at the right, define it, make sure you know what it is and then turn to the issue of qualified immunity.

If the government claims that there is such a right but it was not established until they told you there was such a right, at least thereafter it is established. If a government official acts thereafter, he would not be able to rely on qualified immunity. In two cases from last term, the Supreme Court, instead of saying this is the preferred approach, held that this is the approach district courts *must* use.

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<sup>4</sup> See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (noting that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”).

<sup>5</sup> See, e.g., *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999).

<sup>6</sup> *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). A high-speed chase with no intent to harm that resulted in the death of a passenger did not violate a 14<sup>th</sup> Amendment substantive due process right.

<sup>7</sup> 523 U.S. 833, 841, n.5.

In *Conn v. Gabbert*,<sup>8</sup> a lawyer was searched outside the grand jury room. The Ninth Circuit felt that this conduct was so clearly a constitutional violation that they did not have to look at any precedent.<sup>9</sup> Government officials cannot search a lawyer while he is advising his client outside the grand jury room.<sup>10</sup> The Supreme Court found the case to be a slam dunk. The Court held there was no such right.<sup>11</sup> It just goes to show how the law is an exact science, right?<sup>12</sup>

Therefore, according to *Conn v. Gabbert*, a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right.<sup>13</sup> Once the plaintiff alleges a deprivation, they must determine whether that right was clearly established at the time of the alleged violation.<sup>14</sup>

Almost immediately in *Wilson v. Layne*, the press “ride-along” case, the Court repeats the language of *Siegert v. Gilley*.<sup>15</sup> The Court found that “a court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.”<sup>16</sup> In theory, that is the preferred method.

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<sup>8</sup> *Conn v. Gabbert*, 119 S. Ct. 1292. (1999). Prosecutors in the “Menendez Brothers” murder trial learned that Lyle Menendez had written a letter to Traci Baker, in which he may have instructed her to testify falsely at the first trial. Baker later responded that she had given the letter to her attorney, Paul Gabbert. When Baker appeared to testify before the grand jury, accompanied by Gabbert, prosecutor Conn directed police to secure a warrant to search Gabbert for the letter. *Id.* at 1292-1294.

<sup>9</sup> *Id.* at 1295. “The Court of Appeals also held that based upon notions of “common sense,” the right allegedly violated in this case was clearly established, and as a result, Conn and Najera were not entitled to qualified immunity....” *Id.* quoting *Gabbert v. Conn*, 131 F.3d, 793, 801 (9th Cir. 1997).

<sup>10</sup> *Conn* at 1295.

<sup>11</sup> *Id.* at 1296.

<sup>12</sup> *Id.* at 1295.

<sup>13</sup> *Conn*, 119 S. Ct. 1292, 1295 (citing *Siegert v. Gilley*, 500 U.S. 226, 232-233(1991)).

<sup>14</sup> *Wilson v. Layne*, 119 S. Ct. 1692 (1999). Homeowners’ 14<sup>th</sup> Amendment rights were violated when federal marshals brought third parties into the home when the presence of such persons did not aid in the execution of the warrant. *See Siegert*, 500 U.S. at 232. *See also County of Sacramento v. Lewis* 523 U.S. 883 (1998).

<sup>15</sup> *Wilson*, 119 S. Ct. at 1697 (citing *Siegert*, 500 U.S. at 232).

<sup>16</sup> *Id.*

In *Horne v. Coughlin*,<sup>17</sup> the Second Circuit found that “must means may.” Therefore, it is still not necessary, we still believe that you should avoid constitutional questions.<sup>18</sup>

“Must” means “must” to me, therefore I do not know what is going to happen in that area, but there are now three Supreme Court cases speaking to this and the last two say “must.”<sup>19</sup> “Must” sounds to me like “must.”

Another issue decided at the Supreme Court level last year, that goes to the heart of what I am talking about, is the issue of a division of responsibility between a judge and a jury concerning qualified immunity. The Court also addressed the issue of whether certain constitutional rights have a qualified immunity component at all.

The issue is framed as whether there is a qualified immunity defense when there is a Fourth Amendment violation.<sup>20</sup> In other words, can a government official have a reasonable belief in an illegal search or seizure? Additionally, and more importantly, is there qualified immunity in an excessive force case? The whole point of qualified immunity is, of course, whether the law is clearly established. Accordingly, a government official violates clearly established rights, which a reasonable government official would have been aware of.<sup>21</sup> The issue of a reasonable government official is addressed in *Harlow v. Fitzgerald*.<sup>22</sup>

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<sup>17</sup> *Horne v. Coughlin*, 155 F.3d 26, 29 (2d Cir.1998). Prison official entitled to qualified immunity even though it did not provide inmate with substitute counsel in a disciplinary hearing that resulted in the prisoner’s confinement for six months, because the hardship suffered by the prisoner was not an “atypical and significant hardship.” *Id.*

<sup>18</sup> *Conn*, 119 S. Ct. at 1295, *Wilson*, 119 S. Ct. at 1697.

<sup>19</sup> *See Siegert*, 500 U.S. at 232; *Conn*, 119 S. Ct. at 1295, *Wilson*, 119 S. Ct. at 1700.

<sup>20</sup> *See* U.S. CONST. amend. IV. This amendment provides in pertinent part that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

<sup>21</sup> *See Anderson v. Creighton*, 483 U.S. 635 (1987).

<sup>22</sup> 457 U.S. 800, 818 (1982). In *Harlow*, a civilian employee who had been terminated from his position filed suit against two senior aides and advisors of the President of the United States alleging conspiracy to violate his

When you are dealing with the Fourth Amendment, and unreasonable search and seizure or excessive force, the Fourth Amendment prohibits an unreasonable search and seizure.<sup>23</sup> However, the qualified immunity defense relates to whether a government official violated clearly established laws, and clearly established rights of which a reasonable official would have been aware.

How can a government official believe that a search was reasonable if a court has determined that it is unreasonable? Is there an additional layer of protection? The question you ask a jury is, "Was this reasonable?" and they answer, "Not reasonable." Can you then ask the jury, "But could this officer have reasonably believed that his search was reasonable?" In other words, is there still some scope for an extra layer of protection, and more important, who decides that question? Is it the judge or the jury? Can an officer reasonably believe in probable cause if the court later finds no probable cause? In the Fourth Amendment area, regarding unreasonable search and seizure, there is a split.

Many courts have found that it is possible for an officer to reasonably believe that what he was doing did not violate the Fourth Amendment, even if a court ultimately concludes that the officer's actions did violate the Fourth Amendment. The courts have found that all the officer has to have is arguable probable cause.

There is a very good decision by Judge Posner on the Seventh Circuit where he says, "How can you reasonably believe in something that we decide was unreasonable?"<sup>24</sup> In *Boyce v. Fernandes*, the court held that a probable cause and an immunity

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constitutional and statutory rights to result in his unlawful discharge. *Id.* at 802. The U.S. District Court held that the aides were not entitled to absolute immunity. *Id.* at 805. The U.S. Court of Appeals dismissed the appeal of the aides. *Id.* at 806. On certiorari, the U.S. Supreme Court held that in a civil suit for damages based upon their official acts, aides and advisors of the President of the United States are not entitled to absolute immunity, but are entitled to application of the qualified immunity standard thereby permitting the defeat of insubstantial claims without resulting in trial insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818.

<sup>23</sup> *Id.*

<sup>24</sup> See *Boyce v. Fernandes*, 77 F.3d 946 (7th Cir. 1996).

determination merge and the issue is the same under both concepts with no additional layer of protection beyond that which is implicit in the right to arrest on probable cause.<sup>25</sup>

In regards to excessive force, I thought that would be easier. At least with probable cause there may be a little doubt about a government official's reasonable belief in whether he can search or seize. However, excessive force means the official has used force that is unreasonable under the circumstances.

How can a government official reasonably believe that he could use force that either a judge or jury decides was unreasonable under the circumstances? Most of the courts have found that reasonableness concerning excessive force is for the judge or the jury to decide. Accordingly, if either finds there was excessive force, then that is the end of it and there is no qualified immunity anymore and the two concepts merge.

I think most of the courts went that way until the Fifth Circuit's decision in *Snyder v. Trepagnier*.<sup>26</sup> In *Snyder*, an officer shot someone, who was running away from the scene of a crime, in the back.<sup>27</sup> When the case was given to the jury, the trial judge gave the jury two questions to decide: the first question was whether the officer used excessive force in shooting the individual in the back; the second question was whether the officer had a reasonable belief that his actions would not violate Snyder's constitutional rights.<sup>28</sup>

The judge in this case did two things. First he divided the case into parts. The judge gave the jury a separate qualified immunity question. Then the judge gave the jury a separate question of whether or not excessive force was used, and if so was the officer entitled to qualified immunity because he reasonably believed that the force was not excessive.<sup>29</sup>

Guess what the jury did? You know they are going to make life hard for you. The jury decided yes, the force was excessive, but

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<sup>25</sup> *Id.* at 948. In *Boyce*, Claudine Boyce filed suit for damages from false arrest against Vera Fernandes, a Peoria police officer. *Id.* The suit was dismissed on the ground of public officer's immunity. *Id.* The U.S. Court of Appeals affirmed the decision in favor of Fernandes. *Id.* at 951.

<sup>26</sup> *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998).

<sup>27</sup> *Id.* at 794.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

the officer had a reasonable belief that it was not excessive and that the force used did not violate any constitutional rights.<sup>30</sup>

The case went before the Fifth Circuit, and the court was unsure whether or not the issue of qualified immunity should go to the jury.<sup>31</sup> The court found that sometimes a qualified immunity issue can go to the jury, however, the issue of qualified immunity is usually one that is reserved for the court to decide. Certainly what the right was, and whether it was clearly established, is an issue for the court to decide.

The first problem is whether there is an extra layer of protection afforded to an officer under qualified immunity. The second problem is, if there is an extra layer of protection, who decides it? Who decides what that extra layer of protection is? Is it a jury question or is it a judge question?

There was a petition for certiorari to the Supreme Court on the issue.<sup>32</sup> The Court granted certiorari and reframed the question. The Court found that the first question was whether a jury who finds that a constitutional violation was incurred by the use of excessive force in an arrest necessarily precludes a finding of qualified immunity so as to make such dual findings irreconcilable.<sup>33</sup> The Court found that the second question that must be determined is whether a review in court may reconcile apparent inconsistencies in special jury verdicts, despite possible defects in special interrogatories submitted, by determining upon review of the entire record whether the verdict as a whole was reasonable and supported by the evidence.<sup>34</sup>

What the Court was really asking is whether it takes one or two questions to determine whether qualified immunity applies. This whole business about excessive force and qualified immunity, is that one question or two? As Posner asked, do the two things merge and become one question, namely the reasonableness of the officer's actions, or could you say that the force was objectively unreasonable, but the official reasonably believed that it was not

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<sup>30</sup> *Id.* at 799.

<sup>31</sup> *Id.*

<sup>32</sup> *Snyder v. Trepagnier*, 119 S. Ct. 863 (1999).

<sup>33</sup> *Id.* at 863.

<sup>34</sup> *Id.* at 863-64.



unreasonable.<sup>35</sup> Unfortunately, the case was settled and the Court dismissed it pursuant to Rule 46 without making a determination on the issue.<sup>36</sup> This is a major issue, what do you do on something like this. Qualified immunity in the Fourth Amendment area is an issue that will come up again and again.

Suppose an officer testifies, "He turned and took something out and I thought it was a gun and that is why I shot him." Further suppose that the person shot testifies, "I did not do anything, I did not have anything in my hand." On this type of record, one cannot decide the qualified immunity issue.

If the only issue is evidentiary sufficiency, or in other words if there is a dispute on the facts, does the qualified immunity issue depend upon a factual determination? If it does, then there is no qualified immunity and the defendant cannot appeal. The Court of Appeals will scold you, those of you who represent police, for trying to frame the issue as a qualified immunity issue when it is a sufficiency of the evidence issue.

The court will look at whether there is a dispute over the facts that the person had a gun, whether he was running away, whether he looked suspicious or whatever issues arise in the Fourth Amendment area. Those issues, as in any summary judgment motion, are supposed to be determined at the trial and it does not become a qualified immunity issue, which of course, is a major contention in Fourth Amendment excessive force and unreasonable search and seizure issues.<sup>37</sup>

As you can see from the cases, there is at least some authority for holding that there is an extra layer of protection beyond the factual determination of what happened. Even if a court did determine that there was a Fourth Amendment violation, an officer may have had a reasonable belief in what he did. The Supreme Court found in *Anderson v. Creighton*<sup>38</sup> and in *Hunter v. Bryant*<sup>39</sup>

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<sup>35</sup> See *Boyce v. Fernandes*, 77 F.3d 946 (7th Cir. 1996).

<sup>36</sup> *Snyder v. Trepagnier*, 119 S. Ct. 1493 (1999).

<sup>37</sup> See U.S. CONST. amend. IV.

<sup>38</sup> 483 U.S. 635 (1987).

<sup>39</sup> 502 U.S. 224 (1991).

that if a reasonable officer could have believed that probable cause existed, the officer may be entitled to qualified immunity.<sup>40</sup>

However, the more difficult issue is who decides whether the officer should receive the extra protection of qualified immunity. Suppose you go to trial in those circuits where the courts have decided there is an extra layer of protection, then the question is not only whether the Fourth Amendment was violated, but whether the officer reasonably believed in what he could do. Who decides that question at the trial? Do you ask for a set of special instructions? Does the judge decide that question? In *Snyder v. Trepagnier*, we thought we were going to get an answer and could talk about it,<sup>41</sup> however, there really are two major questions in that area that we are going to have to take a look at.

A couple of years ago in *County of Sacramento*, the Supreme Court attempted to provide a road map for qualified immunity cases.<sup>42</sup> There was a whole issue as to whether there is a special pleading requirement for qualified immunity. The Supreme Court said no, you do not have to anticipate a defense of qualified immunity, just lay it out.<sup>43</sup>

However, the Fifth Circuit had a special pleading requirement for qualified immunity. After *Crawford-El v. Britton*,<sup>44</sup> I thought

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<sup>40</sup> *Id.* The Court held that Secret Service agents who had arrested the plaintiff after he delivered a letter threatening the president, were entitled to qualified immunity because their decision to arrest the plaintiff was reasonable, even if mistaken. *Id.* at 228-29; *See also Anderson*, 483 U.S. at 636. The Court held that an FBI agent was entitled to qualified immunity after conducting a warrantless search of a home because he had a reasonable belief a bank robbery suspect was in the home. *Id.*

<sup>41</sup> 142 F.3d. 791 (5th Cir. 1998), 119 S. Ct. 1493 (1999)(cert. denied).

<sup>42</sup> 523 U.S. 833 (1998). The case involved a Sacramento Police Officer who entered into a high-speed automobile chase with a motorcycle, resulting in the death of one of the passengers of the motorcycle. *Id.* at 837. The estate of the decedent commenced an action claiming the decedent was deprived of his Fourteenth Amendment right to due process, more specifically, his right to life. *Id.* at 837.

<sup>43</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

<sup>44</sup> *See Crawford-El v. Britton*, 523 U.S. 574 (1998). The Petitioner was a prison inmate who commenced an action claiming Respondent had diverted boxes with legal materials, belonging to him, in order to interfere with his constitutional right of access to the courts. *Id.* at 580. The Supreme Court held that the petitioner was not required to adduce clear and convincing evidence of

there goes the Fifth Circuit qualified immunity. However, I did some research and found a more recent case called *Reyes v. Sazan*, in which the Fifth Circuit did not believe that the Supreme Court decision in *Crawford-El* had undermined their heightened pleading requirement in qualified immunity cases.<sup>45</sup>

In *Crawford-El*, the Supreme Court laid out a whole procedure for what happens in qualified immunity cases.<sup>46</sup> First the Court found that there is no heightened pleading requirement, but if there is an affirmative defense of qualified immunity, a judge can order a reply.<sup>47</sup> Therefore, at that point you do not have to plead under a heightened requirement, but a judge may order a reply.

The Supreme Court held in *Crawford-El* that “we are not going to allow the qualified immunity defense, it is not only a defense on the merits, but it is a defense to a government official having to undergo trial and we will give trial judges some weapons or procedures to try to get rid of cases that should not go forward.”<sup>48</sup>

Therefore, there is no heightened pleading requirement. A judge can order a reply and can limit the discovery to issues of whether the events occurred at all or not. You can then have a summary judgment motion. The Court provides a four or five-step process for trying to get rid of cases early without having to go through the entire issue.<sup>49</sup> The Court further provides a road map for dealing with a qualified immunity defense. The Court is streamlining the whole process concerning the qualified immunity defense.

The issue then becomes when is a right clearly established. In *Wilson*, the Supreme Court actually dealt with that issue.<sup>50</sup> The major problem here is determining how narrowly or how broadly to define the right. In *Anderson v. Creighton*, the Supreme Court found that the violated right cannot be defined so broadly that it becomes an issue of whether the Fourth Amendment establishes that unreasonable searches and seizures violate the Constitution.<sup>51</sup>

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improper motive in order to withstand a motion for summary judgment. *Id.* at 594.

<sup>45</sup> 168 F.3d. 158 (5th Cir. 1999).

<sup>46</sup> *Crawford-El*, 523 U.S. 574.

<sup>47</sup> *Id.* at 595-98.

<sup>48</sup> *Id.* at 597.

<sup>49</sup> *Id.*

<sup>50</sup> *Wilson v. Layne*, 119 S. Ct. 1629 (1999).

<sup>51</sup> *Anderson v. Creighton*, 483 U.S. 635 (1987).

You will never get qualified immunity if the issue is that broad. Plaintiffs would be able to convert the defense of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Therefore, it cannot be relied upon that the Fourth Amendment clearly establishes that a government official cannot make an unreasonable search and seizure.

On the other hand, you cannot require a fact pattern that fits exactly this situation. I have seen the Second Circuit on numerous occasions say that there are only three people in this case and only two people in this case and therefore the right was not clearly established. Moreover, I have seen a number of cases come down recently where a right is defined in such narrow terms that it is not clearly established whether the officer could not do this thing on this day. Then, of course, the officer is entitled to qualified immunity.

There has to be some kind of generality connected with whatever the right is, but it cannot be so broad that everything will fit within it. There are several cases dealing with the contrast and tension between trying to define the right broadly and trying to define it narrowly.<sup>52</sup>

Since we are dealing with abstract principles, if you cannot retaliate against a teacher for saying certain things, then the fact that a deputy sheriff performed the same type of act should not make a difference because the right was clearly established with respect to all public employees. There is a series of cases dealing with that issue where parallel decisions were sufficiently precise to define the right.<sup>53</sup>

Sometimes there is absolutely no precedent of any kind, however, it is clear to the court that even without precedent an officer cannot take certain action. An example of the lack of precedent can be found in *Conn v. Gabbert*.<sup>54</sup> In *Gabbert v. Conn*, the Ninth Circuit found that while no precedent exists, it is obvious that a police officer cannot search a lawyer while the lawyer is

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<sup>52</sup> See *County of Sacramento v. Lewis*, 523 U.S.833 (1998); see also *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>53</sup> See *Harlow v. Fitzgerald*, 457 U.S. at 818; see also *Anderson*, 483 U.S. at 641.

<sup>54</sup> 526 U.S. 286 (1999).

outside the grand jury room and thereby deprive the attorney of his liberty interest in practicing law.<sup>55</sup> However, the Supreme Court found that no Fourteenth Amendment right was violated in this case by the "brief interruption" of the attorney's right to engage in his calling.<sup>56</sup>

There are several cases, one from the Seventh Circuit, in which an officer acted in a way that is so far outside the realm of reasonableness that you do not have to look for a precedent on point.<sup>57</sup> Therefore, there are cases where the actions of the officer are extremely unreasonable.

There is a case that I used to cite, *Doe v. Renfrow*,<sup>58</sup> where an officer conducted a strip search of a 13-year-old female student in school. There is just no justification, no circumstances under which an officer can do that. The Seventh Circuit held that even though there is no precedent concerning the officer's actions, such actions cannot be performed.<sup>59</sup>

On the other hand, there may be times when you do have to look for a precedent. Then the question becomes what precedent do you look at. Clearly, Supreme Court precedent will do. Moreover, ruling precedent within the circuit or within the state may suffice. Additionally, precedents from other circuits will suffice if there is nothing to the contrary in your circuit.

In *Wilson*,<sup>60</sup> the Supreme Court had to decide whether a homeowner's right had been violated when federal marshalls permitted a media "ride-along" during the execution of an arrest

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<sup>55</sup> *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997).

<sup>56</sup> *Conn*, 526 U.S. at 292.

<sup>57</sup> *See Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980)

<sup>58</sup> *Id.* at 91. Junior high school students brought a civil action suit against police chief and school administrators after they were sniffed by police dogs during school hours. "As part of the drug investigation, plaintiff alleged that she and three other students 'were compelled to remove their clothing and submit to visual inspection by defendant's' agents.'" *Id.* at 91-92.

<sup>59</sup> *Id.* at 93. "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." *Id.*

<sup>60</sup> *Wilson v. Layne*, 119 S. Ct. 1692 (1999). In *Wilson*, the Court held "A media "ride-along" in a home violates the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers are entitled to qualified immunity." *Id.* at 1693.

warrant for the petitioner's son. Deputy federal marshalls and local sheriff's deputies allowed a newspaper reporter and a photographer to accompany them on their early morning raid of the petitioner's home.<sup>61</sup> The Court held it was a Fourth Amendment violation although the question was not obvious from the general principles of the Fourth Amendment that the authorized intrusion of the media into the petitioner's home violated the Amendment.<sup>62</sup> The Court did not look to precedent at all, and the general principles of the Fourth Amendment did not dictate a result. Moreover, it was a common police practice. Everybody did it. Therefore, if everybody did it, then the practice was not clearly established. That is what the Court held. Additionally, there were no judicial opinions holding that this practice was unlawful.

The only published decision referenced in *Wilson* as being directly on point was a state intermediate court decision which, although it did not engage in extensive Fourth Amendment analysis, nonetheless held that such conduct was not unreasonable.<sup>63</sup> The respondents also identified two unpublished District Court decisions dealing with media entry.<sup>64</sup> However this was not enough. Intermediate courts, unreported unpublished District Court decisions, how could they establish the law if it is not published? The last reason proffered was that the federal marshalls had a published rule and regulation that permitted media accompaniment and, in effect, told them that what they did was acceptable.<sup>65</sup>

Therefore, on those four grounds the Supreme Court suggested that the practice was not clearly established.<sup>66</sup> However, you have

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<sup>61</sup> *Id.* at 1693.

<sup>62</sup> *Id.* at 1700. The Court found that "[a]ccurate media coverage of police activities serves an important public purpose, and it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment." *Id.*

<sup>63</sup> *Id.* (citing *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. 1980)).

<sup>64</sup> *Id.* (citing *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (ND Ohio 1984)); *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (SD Cal. 1980).

<sup>65</sup> *Wilson*, 119 S. Ct. at 1700-1701 n.4.

<sup>66</sup> *Id.* at 1701. The Court determined that, "Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" *Id.* (quoting *Procunier v. Mavarette*, 434 U.S. 555, 562, (1978)).

to look at the general principles of the Constitution and the fact that everybody did it. The case law is not conclusive one way or the other and there is not a lot of it, nor is there much instruction concerning the rules and regulations governing the practice. In combination, those four elements established that the law was not clearly established and therefore the marshals were entitled to their Fourth Amendment liability to qualified immunity.<sup>67</sup>

What I have outlined is how qualified immunity is established. Sometimes it can be established by a specific court decision, and sometimes it can be established by a prior decision. There are cases dealing with court orders where sometimes there is a court decree or order. Therefore, the law on qualified immunity in a Supreme Court decision should be followed, then a lower court decision in the same jurisdiction, and finally lower court decisions in other jurisdictions.

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<sup>67</sup> *Id.* (pointing to the split among the circuit courts on this Fourth Amendment issue, the Court states that “If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy”).