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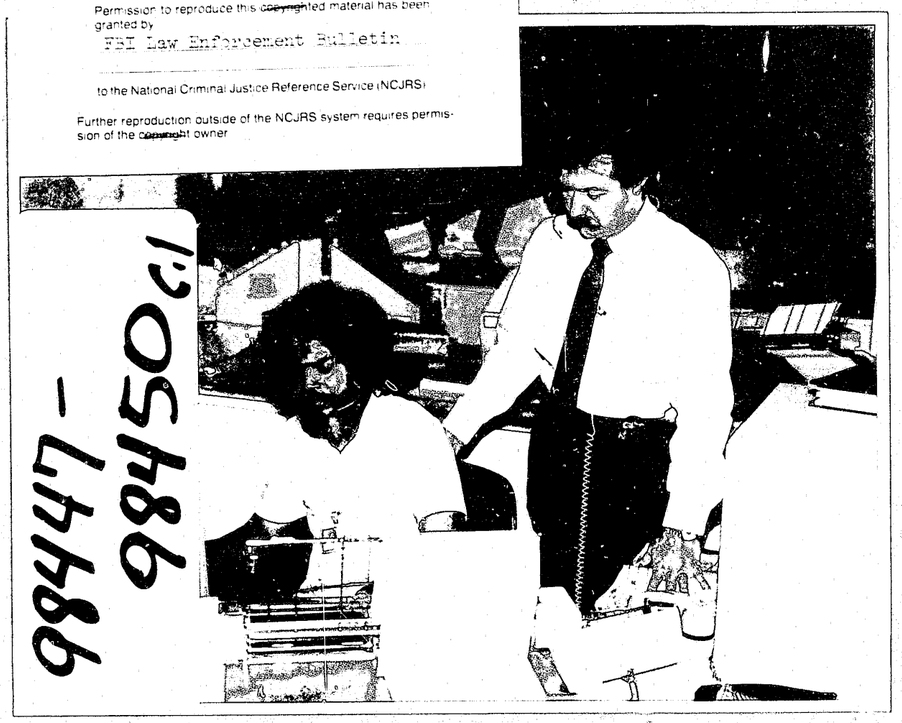

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Training and Evaluating the Police Communications Dispatcher

98450

Defending Law Enforcement Officers Against Personal Liability in Constitutional Tort Litigation
(Part I)

". . . not every injury is of a constitutional dimension, and when there is no constitutional violation, lawsuits under § 1983 are not actionable."

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NOTE: This article presents a general discussion and is not intended to constitute legal advice in any specific situation or case. Legal advice in specific cases should be sought from a practicing member of the bar.

Civil litigation arising from the activities of police officers has become commonplace. Suits alleging damages in the millions of dollars are all too frequently filed against law enforcement officers and officials claiming injury resulting from an arrest, search, or imprisonment. Such suits alleging a violation of the plaintiff's constitutional rights are brought against State law enforcement personnel pursuant to Title 42, United States Code, (U.S.C.) § 1983 and/or Federal law enforcement officers pursuant to the cause of action created in *Bivens* v. *Six Unknown Federal Narcotics Agents*.[1] During one 9-year period, a study conducted by Americans for Effective Law Enforcement, Inc., found that these and related lawsuits filed against law enforcement officers had increased by more than 600 percent.[2]

Even in instances in which the plaintiff who files a civil suit against a police officer loses, the defendant officer is still not the "winner." The very prospect of being sued for a million or more dollars is unnerving at the least, and the specter of being named as a defendant in a potentially long and drawn-out proceeding is certainly disturbing. Moreover, the filing of a civil suit against a police officer or official extracts significant costs from society as a whole, in addition to the burden placed upon the individual defendant. Those costs, as described by the Supreme Court, "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.' "[3]

This article will describe the nature of these civil actions, identify various defenses that may be asserted to expeditiously resolve these actions without having to go to trial, and suggest other means of combating frivolous litigation. Part 1 of this article will focus on an indepth analysis of a recent Supreme Court decision which reworked the qualified immunity defense available to officers sued for alleged constitutional violations. Part 2 will conclude the analysis of the qualified immunity defense and also identify three potential means of redress available to a defendant officer.


Special Agent Higginbotham

THE CAUSE OF ACTION

Suits filed against State law enforcement officers alleging a constitutional violation are generally founded on 42 U.S.C. § 1983. That statute imposes civil liability on any person, acting under the color of State law, who deprives another person of his constitutional rights.[4] A parallel cause of action against Federal law enforcement officers was created by the U.S. Supreme Court in 1971 in their decision in *Bivens* v. *Six Unknown Federal Narcotics Agents*.[5] A plaintiff who alleges a violation of his constitutional rights by a State or Federal law enforcement officer names the individual officer as a defendant and alleges the specific facts constituting his cause of action.[6] The constitutional protection claimed to have been violated is frequently the fourth amendment, as the result of an alleged unlawful arrest or search; the fifth amendment, as the result of an alleged improperly obtained confession or deprivation of liberty or property without proper due process; the sixth amendment, for violations of the right to counsel; or the eighth amendment, as the result of the incarceration of a plaintiff claiming to have been subjected to cruel and unusual punishment. Once sued, the law enforcement officer must retain an attorney either privately or through his agency to defend the action.

DEFENSES IN GENERAL

The immediate objective in defending this type of civil action is to expeditiously resolve it in the defendant(s)' favor with minimum expenditure of resources. In this regard, immediate efforts should be made to assert all possible defenses to resolve the action successfully by dispositive motion without going to trial.

Of course, the first defenses to be asserted, if available, are so-called technical defenses, including improper service and venue and lack of jurisdiction.[7] If those defenses are not applicable, two other principal avenues of defense may be followed for successful and expeditious resolution of these actions. The first argument to be made is that the plaintiff has failed to state a claim against the law enforcement officer upon which relief can be granted. The essence of this defense is that even assuming all of the plaintiff's allegations are true, the law does not entitle the plaintiff to any recovery. The second avenue is the qualified immunity defense, which shields the law enforcement officer from liability if he is found to have acted reasonably under the law existing at the time of the incident which resulted in the suit. These defenses will be discussed in turn.

FAILURE TO STATE A CLAIM—THE DEFENSE OF NO CONSTITUTIONAL VIOLATION

Whenever a police officer or official is sued, the natural reaction of that person is to deny any wrongdoing whatsoever. That natural instinct also forms the basis for the first, and complete, defense to an alleged constitutional violation. Before liability may attach, a constitutional violation must

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have occurred. If no such constitutional injury has been suffered by the plaintiff, he has not stated a cause of action under 42 U.S.C. § 1983 or *Bivens,* and the lawsuit should be dismissed.

An example is found in *Baker* v. *McCollan.*[8] There, Linnie McCollan was arrested for running a red light. Despite his protests of mistaken identity, he was detained when the police learned that a warrant from another department charging a Linnie Carl McCollan was outstanding. The confusion resulted when his brother, Leonard McCollan, obtained a driver's license identical in every respect to Linnie's, except that Leonard's picture was on the license carrying Linnie's name and description. When Leonard (masquerading as Linnie) was arrested on a drug charge, he provided the bogus driver's license as identification. Leonard jumped bail and a warrant for his arrest, under his alias of Linnie Carl McCollan, was issued, and a description of Leonard, based on the driver's license, was released. Consequently, when the police who had arrested and detained Linnie on the traffic violation compared the information on his license with the information contained in the records of the department where the warrant charging Leonard, aka Linnie, was outstanding, the two obviously matched. The police department then understandably concluded it had the right man. The mistake was not discovered for several days until officials compared Linnie's appearance against a file photograph of the wanted man, Leonard. Recognizing the error, they released Linnie, who then filed suit under § 1983 claiming his imprisonment violated his constitutional protection against deprivation of liberty without due process of law. The issue before the Supreme Court was whether Linnie's mistaken incarceration violated his constitutional rights.

The Court recognized that § 1983 actions are predicated on constitutional violations and said, "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' . . . We think that [McCollan] has failed to satisfy this threshold requirement. . . ." [9] Ultimately, finding the police conduct here entirely justified, the Court concluded, "[h]aving been deprived of no rights secured under the United States Constitution, [Linnie McCollan] had no claim cognizable under § 1983." [10]

The teaching of *Baker* v. *McCollan* is clear. It is a complete defense to a § 1983 action to show that even if the plaintiff's allegations are true, plaintiff does not have an actionable claim against a defendant if defendant's alleged misconduct does not rise to the level of a constitutional violation.

A variation of this defense to § 1983 lawsuits was explained by the Supreme Court in *Parratt* v. *Taylor.*[11] Taylor, a prison inmate in Nebraska, litigated his alleged deprivation of a hobby kit valued at $23.50. The hobby kit, paid for by Taylor, was received at the prison in the mail but it never reached Taylor, evidently being lost in the prison mail system. Taylor claimed to have been deprived of his property without due process of law. He filed suit under § 1983 and his $23.50 loss travelled to the Supreme Court. In deciding the case, the Supreme Court agreed that Taylor had been deprived of his property—the hobby kit—by someone negligently acting under color of State law. However, the Court found that standing alone, negligent handling of the prison mail was insufficient to warrant recovery.

The Court ruled that the negligence of the prison officials in the handling of Taylor's hobby kit could be adequately addressed by State proceedings. To allow a § 1983 action to proceed in this instance, or like instances, was simply not consonant with the purpose of § 1983. In essence, the Court held that not every deprivation of property was violative of the Constitution where the deprivation was caused by mere negligence and where there exists adequate State law to redress any injury suffered. Thus, *Parratt,* like *Baker* v. *McCollan,* instructs that not every injury is of a constitutional dimension, and when there is no constitutional violation, lawsuits under § 1983 are not actionable. They are subject to dismissal by properly documented dispositive motion on the basis that plaintiff has failed to state a claim upon which relief could be granted.

THE QUALIFIED IMMUNITY DEFENSE

The Impact of the *Harlow* Decision

Even if a plaintiff has stated a cause of action against the defendant law enforcement officer and the defenses outlined above are not available, the officer may still be shielded from liability by the defense of qualified immunity. This defense is available if the officer can demonstrate the reasonableness of his actions under the law existing at the time of the incident sued upon. It too will permit the speedy resolution of the lawsuit without the necessity of a trial.

Any lawsuit of this type, which states a cause of action, of course, contains competing interests. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. . . . It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty. . . ." [12] Realizing that a plaintiff who sues a public official may have a legitimate claim, but at the same time realizing that many civil suits are insubstantial, the Supreme Court in 1982 sought to reduce the risks of a trial, which it described as "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." [13] It did so by providing an alternative mechanism, where appropriate, for balancing these competing interests.

In *Harlow* v. *Fitzgerald,*[14] a former civilian Air Force employee filed suit against aides to former President Nixon alleging a conspiracy to violate his constitutional rights of free speech under the first amendment and his implied rights under two Federal "whistleblower" statutes. The Supreme Court balanced the need to promote the effective functioning of Government by shielding public officials from insubstantial lawsuits against the need to allow a legitimate plaintiff to seek redress for his injuries. The necessary balance takes the form of qualified immunity. It is a defense, created by the courts, which allows a legitimately injured plaintiff to seek compensation but protects public officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [15]

The qualified immunity defense was not newly established in *Harlow* v. *Fitzgerald.* Available to most public employees sued civilly, it is a defense that has been developed through a series of court decisions.[16] *Harlow* was important not because it created a new defense, but because it modified an already existing, and most significant, defense.

Prior to *Harlow,* the qualified immunity defense had both objective and subjective components, and the shield of qualified immunity was not available if a public official, such as a police officer, "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ." [17] The frequent result of the pre-*Harlow* application of the qualified immunity defense was to focus on a defendant's state of mind, the subjective component. If a defendant did not act with "permissible intentions," [18] the qualified immunity defense was unavailable.

Accordingly, attorneys for plaintiffs suing police officers and other public officials artfully pleaded that the officers or officials acted with malice. To substantiate that allegation, the plaintiff's attorney then sought to engage in discovery, attempting to determine the defendant officer's subjective beliefs at the time of the incident. The discovery phase of a civil suit is often long and expensive, and many times the defendant's state of mind is an issue that can be resolved only by a jury after a trial. Such expensive and protracted proceedings were the very evils the Supreme Court denounced as extracting costs too severe to both an individual defendant and society as a whole.

The Supreme Court's answer to this unnecessary and costly litigation was to rework the qualified immunity defense. The *Harlow* Court jettisoned the subjective component, leaving qualified immunity to be judged solely by an objective standard. The aim of the Supreme Court in adopting an objective standard was to "avoid excessive disruption of government and permit the resolution of many insubstantial claims" [19] at an early stage of the proceedings and without the need for expensive and time-consuming discovery and trials.

Harlow provided the framework for application of the qualified immunity defense. It instructed that:

> ". . . the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law

"Assuming that a plaintiff is able to establish a cognizable constitutional violation, no monetary damages may be imposed against an officer where it is established that he is entitled to qualified immunity."

forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstance and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors." [20]

It is these components of the revised qualified immunity defense together with other litigation tactics available to a defendant that will be examined in the remainder of this article.

The Meaning of "Clearly Established"

Assuming that a plaintiff is able to establish a cognizable constitutional violation, no monetary damages may be imposed against an officer where it is established that he is entitled to qualified immunity. As previously stated, the qualified immunity shield now depends on whether the law governing the conduct complained of was clearly established. If the law was not clearly established, no liability should attach since a defendant should not be punished for conduct which, at the time, had not been pronounced unlawful. Conversely, if the constitutional right alleged to have been violated was clearly established at the time of the incident, liability normally will attach since police officers, like all public officials, are generally expected to know the laws governing their conduct.

While recognizing the importance of the phrase "clearly established" is easy, providing a definition has not been. Though the Supreme Court in *Harlow* v. *Fitzgerald* [21] announced the need to determine if the applicable law is clearly established, it declined to define it. The Court said, "[W]e need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court.' " [22]

The lower courts have had similar difficulty explaining the meaning of clearly established law. In *Hobson* v. *Wilson,*[23] the Circuit Court of Appeals for the District of Columbia explained the problem:

> "At the extremes, the answers are clear. Supreme Court precedent 'establishes' the law; to the extent the Court's opinions give guidance we obviously do not doubt that the law is well established. It is equally clear that the right at issue can be defined neither so broadly as to parrot the language in the Bill of Rights, nor so narrowly as to require that there be *no* distinguishing facts between the instant case and existing precedent. The former reading of *Harlow* would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic. The latter reading, on the other hand, would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation." [24]

Even after outlining the problem however, the circuit court of appeals avoided defining "clearly established" by finding that FBI Agents violated first amendment rights of the plaintiffs that were "well established by any reasonable definition of the phrase."[25]

Courts which have addressed the "clearly established" issue have failed to settle on a single or uniform definition. The courts do, however, seem to use as a starting point the decisions of other courts which address the substantive constitutional violation alleged.[26] They look first to the Supreme Court,[27] and in the absence of an applicable Supreme Court ruling, to the decisions of the appropriate circuit court of appeals and then to the decisions of the district court.[28] However, even if a previous decision dealing with the constitutional violation alleged is found, it may still not create "clearly established" law if the previous opinion was a plurality opinion—one in which the justices or judges voting for the prevailing party could not agree on the rationale for doing so,[29] or if there are real and substantial distinctions, apart from mere trivial factual distinctions, between the present case and the previous decisions.[30]

Other factors making it difficult to declare the law "clearly established" include a conflict between Federal law developed by the courts and a State statute. For example, in *O'Hagan* v. *Soto,*[31] a police detective, Soto, was sued under § 1983 for allegedly violating O'Hagan's sixth amendment right to counsel. Following a trial in which O'Hagan was awarded only $1.00, Detective Soto refused to pay and instead sought an appeal of the award claiming the law was not clearly established, and therefore, qualified immunity shielded him from even $1.00 in damages. The appellate court agreed with Soto, ruling that even though a suspect has a sixth amendment right to counsel upon commencement of formal criminal proceedings, the issue of whether that stage had been reached was clouded by a New York statute and cases interpreting that statute. Thus, there was no "clearly established" law and Soto was protected by qualified immunity. O'Hagan was not even entitled to $1.00.

Several courts have also dealt with the argument advanced by plaintiffs that although there might be no case which makes the law "clearly established" beyond question, there are cases which have pointed to the conclusion or foreshadowed the result which the plaintiff now seeks to establish. However, that argument has not been accepted.

Though the Supreme Court, as mentioned earlier, has failed to define "clearly established," it has indicated that before liability could be found, the constitutional right allegedly violated must have been "authoritatively declared" at the time of the incident.[32] If the right has not been so established, it doesn't matter that other cases may have foreshadowed the newly declared right.

This issue was squarely raised in *Zweibon* v. *Mitchell.*[33] In *Zweibon,* the plaintiffs alleged their constitutional rights had been violated by former Attorney General John Mitchell and others for approving and maintaining an electronic surveillance of them without prior court approval under the guise of a national security claim. The plaintiffs argued that although the prior case law had not definitively required such electronic surveillances to be approved by a court, there was sufficient precedent foreshadowing the requirement to put them on notice that they should have received judicial approval before implementing the electronic surveillance. In explicitly rejecting the plaintiff's argument, the circuit court found that the Supreme Court's "clearly established" test of *Harlow* was meant to refer to "indisputable law" and "unquestioned rights," a test that "cannot be reconciled with the 'clearly foreshadowed' test." [34] Thus, the constitutional right alleged to have been violated must be one that has been specifically recognized prior to the time of the incident about which the plaintiff complains.

The lack of a definition of the phrase "clearly established" can be used to the benefit of the law enforcement officer or official who finds himself the defendant in a lawsuit charging a constitutional violation. The defendant officer and his attorney may argue, in motions and proceedings well before trial, that no court has decided the constitutional issue at the heart of the plaintiff's suit. In the alternative, they should argue that the courts which have addressed the issue are in conflict with one another, that there is a conflict between case law and statutes, or that the constitutional right sued on is at best emerging, and though foreshadowed, has not been authoritatively declared.

What Constitutes "Law"

When the Supreme Court in *Harlow* v. *Fitzgerald* reformulated the qualified immunity standard, it designed the new objective test to hinge on a violation of a clearly established law. The Court further described the nature of qualified immunity as a public official's shield "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."[35] What did the Court mean by that? What constitutes a clearly established constitutional or statutory right for purposes of qualified immunity?

The most frequent basis for civil suits against police officers is an allegation of a constitutional violation. Persons arrested or searched often claim a violation of the fourth amendment's prohibition against unreasonable searches and seizures. A person who is interrogated will allege a violation of the fifth amendment privilege against self incrimination or the sixth amendment guarantee of the effective assistance of counsel during criminal proceedings. Prisoners frequently litigate issues of due process or cruel and unusual punishment. Are such broad constitutional claims actionable under 1983? Do they meet the definition of a clearly established constitutional right? The answer appears to be no.

In *Jensen* v. *Conrad,*[36] several State officials were sued for allegedly depriving a child of the right to life by failing to protect the child from physical abuse by the child's parents. The administratrix of the child's estate claimed the defendant's actions resulted in a violation of the 14th amendment's proscription against deprivation of life without due process of law. The court denied the plaintiff

". . . the defense of qualified immunity . . . is available if the officer can demonstrate the reasonableness of his actions under the law existing at the time of the incident sued upon."

any recovery, however, and found that such general and broad allegations of constitutional violations were not sufficient to defeat the State officials' claims of qualified immunity. "The defense of qualified immunity depends instead on an analysis of whether the courts have decided that a *particular right* is included in the protection of a general constitutional provision." [37]

Further definition of what may constitute a clearly established constitutional right for purposes of the qualified immunity test can be found in pre-*Harlow* cases. Since the import of *Harlow* v. *Fitzgerald* was to remove the subjective prong of the qualified immunity test (and thus remove a major obstacle from the trial court's ability to quickly resolve insubstantial lawsuits), cases which focus on the objective standard, unchanged by *Harlow,* are still instructive. For example, the Supreme Court in *Baker* v. *McCollan,* the suit discussed earlier involving brothers Linnie and Leonard, admonished that §1983 lawsuits must be founded on an "authoritatively declared" [38] constitutional right. Similarly, in *Wood* v. *Strickland,*[39] the Supreme Court spoke of the objective standard of qualified immunity in terms of a public official's presumed knowledge of constitutional provisions which govern his conduct. However, the Supreme Court also made it clear that when a plaintiff alleged a constitutional violation, a public official would be liable for damages only if the constitutional right sued upon was "settled, indisputable law," [40] since a public official is charged only with the "knowledge of the basic, unquestioned constitutional rights" [41] of the plaintiff.

Accordingly, unless a law enforcement officer or official is alleged to have violated a specific constitutional right which has been declared beyond dispute to fall within the more general protection of the constitutional provision sued upon, qualified immunity should be raised to shield the officer or official from any liability for the alleged constitutional violation.

The more troublesome issue in defining "law" for purposes of qualified immunity stems from the language of *Harlow* which made reference to a "clearly established statutory right. . . ." [42] Is qualified immunity available as a defense to a lawsuit alleging a statutory violation? Perhaps a more important question is whether a plaintiff may sue under §1983 or under *Bivens* when the allegation is a violation of a statutory standard? The answer to that question was apparently provided by the Supreme Court in the recent case of *Davis* v. *Scherer.*[43]

In *Davis* v. *Scherer,* a radio-teletype operator for the Florida Highway Patrol asked for permission to accept a second, part-time job as a reserve deputy sheriff. Permission was initially granted but conditioned on the understanding that if the employment as a reserve deputy sheriff interfered with his duties at the Florida Highway Patrol, Scherer would be required to terminate his part-time employment. Approximately 1 month later, Scherer was informed that permission to engage in the part-time employment had been revoked because officials of the Florida Highway Patrol determined the two jobs might conflict. Scherer refused to quit his reserve deputy sheriff job despite being ordered to do so and was fired. Scherer filed an appeal with the Florida Career Service Commission, but before his hearing, was reinstated by the patrol. However, friction between Scherer and his employers continued, ultimately resulting in Scherer's temporary suspension.

In the face of the suspension, Scherer resigned and filed suit under §1983 alleging that his initial discharge, before reinstatement, had violated the due process clause of the 14th amendment for failure to provide a formal pretermination or a prompt posttermination hearing. At the heart of that due process violation, Scherer argued, was the Florida Highway Patrol's failure to abide by its own personnel regulation which required "a complete investigation of the charge [for which dismissal was imposed] and an opportunity [for the employee] to respond in writing." [44] The trial court and the court of appeals found in favor of Scherer and an appeal was taken to the Supreme Court.

In deciding *Davis* v. *Scherer,* the Supreme Court addressed the issue of whether an official sued for a constitutional violation loses the protection of qualified immunity merely because his conduct violates a statutory or administrative provision. The Court answered in the negative. The Court stated that it is not always fair or sound policy to hinge qualified immunity on compliance with statutes or regulations. It reasoned that:

> "Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity, routinely make close decisions in the exercise of broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively.' (citations omitted) In these circumstances, officials should not err always on the side of caution. 'Officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.' *Scheuer* v. *Rhodes,* 416 U.S., at 246." [45]

Accordingly, the Supreme Court ruled that:

> "[O]fficials sued for violations of rights conferred by statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages. And if a statute or regulation does give rise to a cause of action for damages, clear violation of the statute or regulation forfeits immunity only with respect to damages caused by that violation . . . . Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon." [46]

The Court concluded that neither the personnel regulation relied upon by Scherer nor the law under which the regulation was promulgated created a cause of action or provided the foundation for a § 1983 lawsuit.

Thus, the Supreme Court limited lawsuits claiming violations of statutes to those where the statute also gives rise to a constitutional violation actionable either under § 1983 or as a constitutional tort against Federal officials. Unless the statute or regulation has a constitutional foundation, the suit should be dismissed. **FBI**

(Continued next month)

Footnotes

[1] 403 U.S. 388 (1971).

[2] Lawsuits increased from 2,170 in 1967 to 13,410 in 1976. Quoted in the *Los Angeles Times,* March 1, 1984.

[3] *Harlow* v. *Fitzgerald,* 102 S.Ct. 2727, 2736 (1982).

[4] 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons 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 on an action at law, suit in equity, or other proper proceeding for redress."

[5] *Supra* note 1.

[6] A municipality may also be named as a defendant in an action under 42 U.S.C. § 1983 charging a constitutional violation only where the individual law enforcement officer's conduct was the result of a custom, policy, or practice of the municipality. *See, Monnell* v. *Dept. of Social Services,* 436 U.S. 658 (1978). Such suits are not within the scope of this article. For a discussion of municipal liability arising from constitutional tort litigation, *see,* "Law Enforcement and Government Liability: An Analysis of Recent Section 1983 Litigation," Daniel L. Schofield, *FBI Law Enforcement Bulletin,* vol. 50, No. 1, pp. 26–31.

[7] *See,* for example, Federal Rule of Civil Procedure 12(b). The defenses should be asserted by the officer's attorney whenever appropriate. It should be noted, however, that a statute of limitations defense turns on the applicable State period of limitations. Inasmuch as their applicability depends largely on the facts of each case, no extended discussion of their use will be attempted in this article.

[8] 443 U.S. 137 (1979).

[9] *Id.* at 140.

[10] *Id.* at 146.

[11] 101 S.Ct. 1908 (1981).

[12] *Supra* note 3.

[13] *Id.* at 2738.

[14] *Supra* note 3.

[15] *Supra* note 3, at 2736.

[16] *See, Bivens* v. *Six Unknown Federal Narcotics Agents,* 456 F.2d 1339 (2d Cir. 1972); *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Procunier* v. *Navaratte,* 434 U.S. 555 (1978).

[17] *Wood* v. *Strickland,* 420 U.S. 308, 321–22 (1975).

[18] *Id.* at 320.

[19] *Harlow* v. *Fitzgerald, supra* note 3, at 2739 (1982). *Harlow* may also be cited as authority to support a motion to stay discovery or to seek a protective order under Rule 26, Federal Rules of Civil Procedure, pending resolution of the qualified immunity issue.

[20] *Id.*

[21] *Supra* note 3.

[22] 102 S.Ct. at 2739, n. 32, quoting *Procunier* v. *Navaretta,* 434 U.S. 555, 565 (1978).

[23] 737 F.2d 1 (D.C. Cir. 1984).

[24] *Id.* at 26.

[25] *Id.*

[26] *Rheaume* v. *Texas Dept. of Public Safety,* 666 F.2d 925 (5th Cir.), *cert. denied,* 458 U.S. 1106 (1982).

[27] *Jensen* v. *Conrad,* 570 F.Supp. 91 (D. So. Car. 1983), *aff'd* 747 F.2d 185 (4th Cir. 1984).

[28] *Malje* v. *Leis,* 571 F.Supp. 918 (S.D. Ohio 1983).

[29] *Affiliated Capital Corp.* v. *City of Houston,* 735 F.2d 1555 (5th Cir. 1984).

[30] *Zweibon* v. *Mitchell,* 720 F.2d 162 (D.C. Cir. 1983), *cert. denied,* 105 S.Ct. 244 (1984).

[31] 725 F.2d 878 (2d Cir. 1984).

[32] *Baker* v. *McCollan, supra* note 8, at 139.

[33] *Supra* note 30. *See also, Calloway* v. *Fauver,* 544 F.Supp. 584 (D. New Jersey 1982).

[34] 720 F.2d 162, 173 (D.C. Cir. 1983), *cert. denied,* 105 S.Ct. 244 (1984).

[35] 102 S.Ct. at 2738.

[36] *Supra* note 2.

[37] *Id.* at 102. *See also, Hobson* v. *Wilson, supra* note 23, at 26.

[38] 443 U.S. 137, 139 (1979).

[39] 420 U.S. 308 (1975).

[40] *Id.* at 321.

[41] *Id.* at 322.

[42] 102 S.Ct. at 2738 (1982).

[43] 104 S.Ct. 3012 (1984).

[44] *Id.* at 3017.

[45] *Id.* at 3021.

[46] *Id.* at 3020, n. 12. *See also, Jensen* v. *Conrad,* 747 F.2d 185, n. 12 (4th Cir. 1984).

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