

Judicial Trends

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Lawyers Association

Advancing Excellence in the practice of Local Government Law

Overview

- **Supreme Court Qualified Immunity Cases**
- **First Amendment Case Law Update**
- **Sanctuary City
Litigation**



Qualified Immunity Cases

- *County of Los Angeles v. Mendez*
- *District of Columbia v. Wesby*
- *White v. Pauly*
- *Manuel v. City of Joliet*
- *Hernandez v. Mesa*
- **Terrorism /Qualified Immunity cases**



Qualified Immunity Refresher

- ▶ State and local government officials can be sued for money damages in their individual capacity if they violate a person's constitutional rights
- ▶ Where a person's constitutional rights have been violated, qualified immunity protects government officials from such lawsuits where the law they violated isn't "clearly established"
- ▶ No qualified immunity for obvious violations of the law. It is meant to protect all but the "plainly incompetent."



County of Los Angeles v. Mendez

- ▶ In theory, police officers cannot be liable for their **reasonable** use of force
- ▶ But there is a different rule in the Ninth Circuit where they can be liable if they “**provoke**” the need to use force by, for example, not having a warrant.



Los Angeles County v. Mendez: Facts

- Police are told that a parolee is at a certain house
- Police do not obtain a warrant to search the house
- Officers assigned to clear backyard encountered a shed and opened the door and do not announce themselves

- When they opened the door, they saw a man holding what appeared to be a gun pointed in their direction.
- Officers fired a number of shots, seriously injuring both occupants of the shed
- Turns out it was a BB gun and the occupant was moving it so he could sit up in bed

Lower Court Ruling

- The district court concluded that the officer's shooting of the plaintiffs was not excessive force
- Still liable under the “provocation doctrine” because the search of the shack was unlawful and the officers therefore “provoked” the violent confrontation
- Ninth Circuit affirmed

Issues for the Court

- **Provocation Doctrine:** “[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.”
- ▶ In *Graham v. Connor* (1989) the Supreme Court articulated a non-exhaustive list of factors to consider in determining reasonableness in an excessive force claim
- ▶ Los Angeles County argues the provocation rule conflicts with *Graham* by subjecting a police officer to liability for a use of force that was reasonable *at the moment it occurred* and reasonable under *Graham*

Prediction



- ▶ Facts are sympathetic to both sides
- ▶ Only the 9th Circuit has adopted the provocation rule
- ▶ Police officers make mistakes all the time that could mean invoking the provocation rule
- ▶ Arguably the same sequences of events would have happened if police officers had a warrant

District of Columbia v. Wesby



Facts

- Police were called to a vacant house with a complaint about a loud party
- Partiers all gave different stories about why they were there; some claimed “Peaches” had invited them
- “Peaches” admitted she did not have owner’s permission

- Officers arrested the parties for trespassing, though prosecutors did not pursue charges
- Parties brought Section 1983 claim against officers, claiming lacked probable cause to arrest them

Lower Court Holding

- The district court granted the parties' motion for summary judgment and denied qualified immunity
- \$1 million dollar verdict against officers
- The District of Columbia Circuit Court affirmed in a 2-1 decision

Narrow Question Presented to Supreme Court

Issues: (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for **trespassing** under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for **trespassing** may discredit the suspects' questionable claims of an innocent mental state; and (2) whether, even if there was no probable cause to arrest the apparent **trespassers**, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

Broad Question Framed by IMLA in Amicus Brief

Issues:

- 1) whether law enforcement officers must credit a suspect's non-credible claim of an innocent mental state over other circumstantial evidence of culpability in assessing probable cause for arrest; and
- 2) whether, even if an officer is not entitled to do so, the law was clearly established in this regard.

D.C. Circuit Dissent

When police officers confront a situation in which people appear to be engaged in unlawful activity, the officers often hear a variety of mens rea-related excuses. “The drugs in my locker aren't mine.” “I don't know how the loaded gun got under my seat.” “I didn't realize the under-aged high school kids in my basement had a keg.” “I wasn't looking at child pornography on my computer, I was hacked.” “I don't know how the stolen money got in my trunk.” “I didn't see the red light.” “I punched my girlfriend in self-defense.”

But in the heat of the moment, police officers are entitled to make reasonable credibility judgments and to disbelieve protests of innocence from, for example, those holding a smoking gun, or driving a car with a stash of drugs under the seat, or partying late at night with strippers and drugs in a vacant house without the owner or renter present

White v. Pauly

- ▶ Police officer arrives late at the scene where shots are being fired; doesn't know other officers failed to announce themselves; he doesn't announce himself; shoots after another officer is shot at;
- ▶ Lower court denied officer qualified immunity. The Tenth Circuit concluded that it was clearly established that a reasonable officer in White's position would have known that a warning was required in these circumstances before utilizing deadly force.

White v. Pauly

- ▶ **Held:** “Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.”
- ▶ Forecasting for Provocation case?

Manuel v. City of Joliet

- ▶ Manuel should have brought a false arrest claim but he missed the statute of limitations so he brought a malicious prosecution claims
- ▶ Malicious prosecution claims can't be brought until a person prevails in the underlying prosecution
- ▶ Issue: Can malicious prosecutions be brought under the 4th Amendment?
- ▶ The Fourth Amendment forbids unreasonable searches and seizures, not unwarranted or malicious prosecutions

City of Joliet Implications

- ▶ Increased Costs: As with any §1983 claim, should the Court find that these claims do exist and may be brought as constitutional violations, municipalities will face increased lawsuits/claims for damages and attorney's fees
- ▶ Old/Stale Claims: Some plaintiffs would be able to resurrect claims that would otherwise be time-barred under state law, by styling the suit as a §1983 claim.

Hernandez v. Mesa / Cross Border Shooting

- ▶ Involves a case of a US Border Patrol officer shooting an unarmed Mexican teenager on Mexican soil
- ▶ Family argues the Fourth Amendment's bar on the unjustified use of deadly force applied to the boy, even if he was outside the United States when the shooting occurred.

Cross Border Shooting Case Implications

- ▶ Another issue in the case: Can qualified immunity be granted or denied based on facts unknown to the officer at the time of the incident
- ▶ Qualified immunity should be based on what the officers knows or reasonably can assume at the time

Terrorism / 9/11 Cases

- ▶ Plaintiffs who were detained in the aftermath of the September 11th terrorist attacks long after it was determined they were cleared for not being involved in terrorist activities
- ▶ Claims: substantive due process (confinement conditions failed to meet due process); (2) equal protection (detainees were confined to these conditions because of their race, religion, etc.); (3) conspiracy under 42 U.S.C. § 1985(3) (government officials conspired together to violate equal protection rights of the detainees)
- ▶ Second circuit denies all qualified immunity claims

First Amendment Cases

- **First Amendment Overview / *Reed***
- *Packingham v. North Carolina*
- *Expressions Hair Design v. Schneiderman*
- *Lee v. Tam*
- **Lower Court Cases / Trends**

Reed v. Town of Gilbert (June 2015)

- ▶ Content-based distinctions in sign codes (and generally) are subject to strict (fatal) scrutiny
- ▶ Content-based is defined very broadly
 - ▶ Regulation is content based if it draws distinctions "on its face" - no need to consider what the government's justifications or purposes for enacting the provisions were to determine what level of scrutiny to apply.
- ▶ Court had previously defined content-based more narrowly



Packingham v. North Carolina



- ▶ Issue: Whether a North Carolina statute prohibiting registered sex offenders from accessing commercial social networking websites where they know minors can create or maintain a profile violates the First Amendment
- ▶ Lester Packingham was charged with violating the North Carolina statute because he accessed Facebook
- ▶ In the posting that got him in trouble Packingham thanked God for the dismissal of a ticket

North Carolina Supreme Court Ruling

- ▶ North Carolina Supreme Court applied intermediate scrutiny to the North Carolina law – content neutral
- ▶ Dissenting judge below says:
 - ▶ “I think there is a strong argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites...”

SLLC / IMLA Arguments

- ▶ SLLC / IMLA argue: A conviction under the statute does not turn on the content of the speech; it turns on whether sex offenders have accessed websites where minors can maintain profiles
 - ▶ If a minor can maintain a profile in a cooking, religious, or general interest (like Facebook) social networking site sex offenders can't participate
- ▶ Ruling as we ask will mean the Court doesn't expand *Reed* (at this time)

Oral Argument / Predictions

- ▶ The State / Government will likely lose this case but ...
- ▶ Based on the oral argument at least, the government hopefully will not lose in a way that broadens *Reed*'s applicability.

Expressions Hair Design

- ▶ **Issue:** Whether state no-surcharge laws unconstitutionally restrict speech conveying price information or regulate economic conduct
- ▶ **Concern:** Another *amicus* brief argued that strict scrutiny should apply to commercial speech post-*Reed*.



Lee v. Tam

- ▶ **Issue:** Whether the disparagement provision of the Lanham Act, which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it “[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute” is facially invalid under the Free Speech Clause of the First Amendment.



Lower Courts Litigation / Trends on *Reed*

- ▶ Billboards / Off-Site Commercial Speech
- ▶ Panhandling / Solicitation Ordinances
- ▶ Ballot Selfies / Robo Calls
- ▶ Child Pornography Statute



Sanctuary City Litigation

- ▶ **Executive Order**
- ▶ **8 U.S.C. 1373**
- ▶ **Ice Detainers**
- ▶ **City & County Lawsuits**
- ▶ **Federal Government Response**
- ▶ **Impacts to Local Governments**

Executive Order 13768 / “Sanctuary Jurisdictions”

- ▶ **Executive Order 13768:** Enhancing Public Safety in the Interior of the United States (the “EO”)
- ▶ **Sec. 9. Sanctuary Jurisdictions.** It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State/ political subdivisions, shall comply with 8 U.S.C. 1373. (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.

8 U.S.C. 1373

- ▶ Bars local governments from prohibiting “any government entity or official from sending to, or receiving from, the [INS] information regarding the citizenship or immigration status . . . of any individual”
- ▶ DOJ has implied that complying that ICE detainers might be required by 8 U.S.C. 1373

ICE Detainers

- ▶ People arrested are fingerprinted; fingerprint records go to ICE; ICE notices an undocumented person is in custody
- ▶ ICE contacts the local jail asking that the person in custody be held until ICE can pick them up and deport them - supposed to be for 48 hours

Questions Left Open by EO?

- ▶ What is a sanctuary jurisdiction?
- ▶ What is the scope of 8 U.S.C. 1373?
- ▶ Does this executive order require cities to comply with ICE detainers?
- ▶ Beyond 8 U.S.C. 1373 and ICE detainers what other non-compliance violates the executive order?
- ▶ What federal funding is at risk? All of it?

City/County Litigation

- ▶ San Francisco Lawsuit (first filed complaint and also filed preliminary injunction)
- ▶ Santa Clara Lawsuit (first to file a preliminary injunction)
- ▶ Massachusetts lawsuits (Chelsea & Lawrence)

Santa Clara Preliminary Injunction

- ▶ Unconstitutionally vague
- ▶ EO violates separation of powers (Tenth Amendment) by giving President spending powers only Congress possesses
- ▶ Violates the Fifth Amendment / Due Process – notice and opportunity to be heard (by municipalities)
- ▶ Violates the Tenth Amendment by commandeering state & local officials

San Francisco v. Trump

- ▶ Challenging the EO before same Judge as Santa Clara / similar claims
- ▶ Filed Preliminary Injunction on 3/8/17
- ▶ San Francisco also challenges constitutionality of 1373 both on its face (by commandeering state/local government officials) and as applied (by interpreting it to require compliance with ICE detainers)

Massachusetts Lawsuits / Chelsea & Lawrence

- ▶ Seeks declaratory and injunctive relief
- ▶ EO violates Fifth and Tenth Amendment / principles of federalism and separation of powers
- ▶ Unconstitutionally vague

Federal Government's Response

- ▶ Federal government filed its opposition to the Santa Clara PI on 3/9/17
- ▶ **Arguments:**
 - ▶ County cannot show irreparable harm – didn't change the law, only seeking to enforce existing law
 - ▶ Not ripe / no standing (hasn't taken any action)
 - ▶ Claims cannot seek nationwide injunction and injunction, if issued, should only apply to County

Fed Response: Irreparable Harm

- ▶ Claims the EO incorporates the law regarding grant conditions and procedures.
- ▶ Too speculative / not concrete: “The County does not allege that the Federal Government has taken any of these actions. Nor does the County claim that it has been designated as a “sanctuary jurisdiction” or that it has been denied any federal funds. The County likewise does not allege that it has been notified that any funds will be denied. None of those actions has occurred, and those events may never occur. The County’s conjecture about the “possibility” of future harm alone does not justify preliminary injunctive relief.”

Local Government Interest/Problems

- ▶ Loss of Federal Funding = Billions of dollars for local governments at stake
- ▶ Sanctuary Jurisdiction not defined and will be decided in sole discretion of federal government = arbitrary / uncertainty
- ▶ Commandeering local government time and resources by requiring police and jail officials to act as immigration enforcement officers and to hold immigrants in jails without reimbursement from federal government
- ▶ Potential Fourth Amendment violations holding immigrants for up to 48 hours without probable cause if abiding by ICE detainers.



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