A Fresh Look at Qualified Immunity

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Aaron Nielson & Christopher J. Walker, *The New Qualified Immunity*, 87 **S. Cal. L. Rev.** (forthcoming 2015), available at SSRN.

Qualified immunity—the doctrine that prescribes whether government officials alleged to have committed constitutional violations should be immune from suit—has traveled a winding path. It asks two questions: whether a constitutional violation was actually committed, and whether the constitutional right in question was clearly established at the time of the violation. If the answer to either or both questions is "no," then the government official is entitled to qualified immunity and the suit against her is dismissed.

Over the past two decades, the question of whether and in what order courts should decide these two questions has preoccupied the Supreme Court. The Court indicated in Wilson v. Layne (1996) that it generally was better for courts to resolve the constitutional merits question first, and then held in Saucier v. Katz (2001) that courts were *required* to do so. Its reasoning, in both instances, is that courts must articulate constitutional law in order to guide the conduct of government officials in the future. Just eight years later in Pearson v. Callahan, however, the Court shifted course, holding that deciding the constitutional merits question was discretionary, not mandatory.

In *The New Qualified Immunity*, Aaron Nielson and Chris Walker explore what has actually happened since *Pearson* by surveying both published and unpublished decisions in the federal appellate and district courts. Their work is a painstaking effort to examine how *Pearson* is playing out on the ground, and the result is a wealth of important data that provide critical insight into the development of constitutional rights. The article should stand as a seminal contribution to the post-*Pearson* literature—indeed, to the qualified immunity literature in general. It's the place where all those interested in evaluating qualified immunity should begin in the future.

Nielson and Walker begin with an admirably detailed survey of the development of qualified immunity doctrine. They also survey the empirical literature on qualified immunity, including my own (now somewhat dated) pre-*Pearson* contribution.

They then examine how *Pearson* has affected judicial behavior. Unsurprisingly, courts reach the constitutional merits question less frequently after *Pearson*—as Nielson and Walker are correct to note, it would be very surprising if they did not. And the rate at which courts decline to decide constitutional question has returned to the roughly pre-*Saucier* rate of approximately one case in four, compared to less than 6% during the *Saucier* period. Yet among the cases where courts do reach the constitutional question, Nielson and Walker present an intriguing and, for some of us, troubling finding. They explain: "Courts…appear to find constitutional violations yet grant qualified immunity less frequently now…than they did before *Pearson*." (p. 5.)

In other words, courts are now choosing to skip the merits more frequently now, but when they do decide the merits, they are less likely to find a constitutional violation. The first finding is unsurprising; the second is surprising and perhaps troubling. Admittedly, it is difficult to attribute the latter behavior to *Saucier* with certainty, which the authors appropriately acknowledge. There might be other factors at play. For example, perhaps judges are less likely overall to recognize an expansive view of constitutional rights; thus, fewer cases articulate an expansive view of constitutional rights not as a result of *Pearson* itself, but as a result of a broader trend among federal judges. I would be interested to hear the authors' thoughts on alternative explanations for the judicial behavior they have observed. Perhaps a project for future work (by Nielson and Walker or anyone else) might eliminate some of these alternative explanations or

determine the degree to which they contribute to the overall trend.

Nielson and Walker provide another interesting contribution to the empirical qualified immunity literature by examining disparities in the way that different circuits apply *Pearson*. For example, the Fifth Circuit chooses to reach constitutional questions 57.6% of the time, while the Ninth Circuit does so only 37% of the time. Another difference lies in the way that the circuits decide cases when they do choose to reach constitutional merits: the Ninth Circuit finds constitutional violations 16.4% of the time, while the Fifth Circuit does so only 1.3% of the time and the Sixth Circuit only 0.8% of the time. As Nielson and Walker observe, "these circuit-by-circuit disparities may reveal a geographic distortion in the development of constitutional law," such that "one could reasonably fear that constitutional law may develop quite differently in the various circuits." (p. 36.) While the numbers are small, the finding is sufficiently interesting—and perhaps sufficiently troubling—to warrant further examination by researchers. (This would be an interesting and feasible project for a student note.)

Many excellent law review articles falter in their prescriptions, but one of the strengths of Nielson and Walker's work lies in their proposal for what we should do. One problem after *Pearson* is that the Supreme Court has failed to provide guidance for when courts should decide the constitutional merits. Nielson and Walker offer a neat solution, borrowed from administrative law. They propose: "the Court should require lower courts—both trial and appellate courts—to give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions." (p. 46.) This proposal has a number of merits: it has already been well developed in administrative law; a number of scholars have previously argued that we should incorporate reason-giving into an array of civil procedure contexts; the act of giving reasons for a decision has, in itself, been shown to improve a decision; and it offers guidance to other courts about when a decision may or may not be appropriate. Over time, if the Supreme Court becomes concerned about why lower courts are deciding (or not deciding) constitutional questions, it can elaborate on what are and are not appropriate reasons.

The New Qualified Immunity has considerable significance for the bench and bar. It provides a great example of how legal scholarship simultaneously may be of great use to legal scholars, judges, and practitioners—there is no conflict among the various audiences for such a piece. The article is a wake-up call to judges to examine their own behavior and think about why they are choosing to decide or skip constitutional questions. Particularly in light of inter-circuit disparities, whether to decide the constitutional merits is not a foregone conclusion and judges would do well to consider how their own behavior measures up against national norms. For attorneys, it is useful to know whether one practices in a circuit where judges tend to decide or deflect the merits question, and potentially valuable to be able to call that information to judges' attention, whether as a call to reach the merits or as a caution to judges against stepping too far out of line with their colleagues.

In short, *The New Qualified Immunity* is a gift, beautifully packaged, for those of us who write about constitutional litigation. It provides an adept summary of what has come before it. It adds a valuable empirical contribution with enough data to play with for months. And it offers a plausible prescription for improving judicial decisionmaking and, as a direct result of the latter, an improvement to the law itself. If and when the Supreme Court refines *Pearson*, I look forward to more fine analysis from Nielson and Walker.

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