Qualified Immunity

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A. CREATION AND EVOLUTION OF QUALIFIED IMMUNITY

Although Qualified Immunity (QI) can arise in matters of state law, generally it arises as a defense to liability in response to federal claims; more specifically claims brought under 42 U.S.C. Sec. 1983. That statute, enacted initially in 1871 as part of the Ku Klux Klan Act, was designed to combat civil rights violations in the post Civil War South.

The statute reads as follows:

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 any 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.

Thus, the statute provides remedies against state actors. Or in the typical case for those in this room, our police officers. Notice that the statute does not provide immunity as a defense. In fact, the word is absent from the statutory language. Some commentators who wish QI abolished use this absence to argue that such a judicially created defense is jurisprudential error. I am reminded of the recently leaked draft opinion by Justice Alito on the Mississippi statute which lead the Court to overrules Roe. He argued in the limited sphere of abortion that privacy rights were not well established and well entrenched as societal norms to elevate the abortion procedure to a constitutional right. Similarly, those opposed to the judicially created QI advocate that that immunity was not well established in 1871 as a recognized immunity to justify today's QI doctrine.

B. COMMON LAW OF LIABILITY FOR GOVERNMENT ACTORS

The U.S. Supreme court case of **Little v. Barreme**[i] is representative of the state of the law until the more recent development of the QI defense. In **Barreme,** a naval captain, George Little, captured a Danish ship off the French coast after President Adams had authorized seizures of French ships coming from French ports. The issue was whether Captain Little could rely on the President's instructions to justify the unlawful seizure.

Little acted in reliance on the instructions issued by Adams. In other words, he was in good faith. The court held, however, good faith could not be used to insulate an actor from an otherwise unlawful act. That was generally the state of the law until the 1967 case of **Pierson v. Ray**[ii].

In **Pierson,** a group of Episcopalian clergy went to Mississippi and attempted to use segregated facilities at the bus terminal in Jackson. They were arrested and charged with a misdemeanor violation breach of the peace. The charges were eventually dropped. After that, they brought a damages action in federal court under Section 1983. The statute under which they were charged was subsequently determined to be unconstitutional as applied. Thus, the Court of Appeals was to decide if the officers involved and the judge were liable for an unconstitutional conviction.

For the limited purpose of this primer, the U.S. Supreme Court held that the officers involved were immune if they in good faith believed the statute in question was constitutional and they had probable cause for the arrests. The Court accepted good faith as a defense, which had been expressly rejected by the Court in the 1915 case of **Myers v. Anderson**[iii]. In **Myers,** good faith was not a defense; in **Pierson**, it is. Thus, the Court was evolving in its analysis of immunity in the context of Sec. 1983 claims.

The good faith component of a defense to Sec. 1983 did not remain as a defense for long. It is likely the Court recognized the inherent difficulties of having a standard that is totally subjective. Instead, the Court was searching for a case where an objective test could be applied. The case of **Harlow v. Fitzgerald**[iv] was just such a case.

Harlow was decided in 1982. It broadened the application of the good faith defense. Instead of a defendant attempting to prove that he or she had a sincerely held belief that their behavior was lawful, the Court determined that a defendant is entitled to qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." Subjective good faith is irrelevant. Prior case law is determinative as it existed at the time of the alleged conduct. The "clearly established" standard is the state of the law today.

C. **PEARSON** OVERRULES THE RIGID TWO STEP ANALYSIS OF **SAUCIER**, AND THIS CONTRIBUTES TO THE DEBATE OVER THE ELIMINATION OF QUALIFIED IMMUNITY.

In 2001, the Supreme Court decided the case of **Saucier v. Katz**[v]. In **Saucier** a protestor was arrested at an event where Vice-President Gore was to speak. Katz claimed that excessive force was used in his arrest in violation of the Fourth Amendment. The 9th Circuit had ruled that the reasonableness of the force used to effectuate the arrest was a jury question.

The Supreme Court, in its analysis, adopted a strict two-step process that lower courts must use any time QI is asserted as a defense. The Court stated "...the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered..." Both parts of the test must be met to determine if the QI defense is successful. So, a violation conjoined with clearly established law was adequate to overcome the defense.

The **Saucier** decision was criticized as unworkable and inefficient. In essence, courts and commentators found the rigid two-step analysis created more judicial effort than it was worth. It also led to decisions that were erroneously decided which created inconsistent rulings and just plain bad decisions. For example, First Amendment cases are more difficult to decide than many cases in the Fourth Amendment area. The substantive rulings are difficult when it is clear from the case law that the particular violation is not "clearly established." In fact, many times, the First Amendment issue is new and the case law is sparse. Judges were writing that it was inefficient to decide on the merits question when it was easy to conclude that the law was not "clearly established." The case could be decided on that prong alone.

Eight years after the **Saucier** decision, the Court reversed the rigid two-step analysis required by **Saucier** in the case of **Pearson v. Callahan,** 555 US 223 (2009), attached as EX. 1. **Pearson** is the state of the law today in the area of QI.

Pearson is a case from Utah. It originated out of Millard County. Agents from the Central Utah Drug Task Force arranged to buy some methamphetamine from a dealer in Fillmore. They had a confidential informant to make the buy in the defendant's house. After a pre-arranged signal to the agents was made and the transaction was complete, Mr. Callahan was arrested inside his home. He was charged with distribution to which he entered a conditional plea of guilty. The Utah Court of Appeals set aside his conviction because the agents did not have a warrant to enter his home.

Callahan then filed a Sec. 1983 lawsuit in federal court alleging his constitutional rights were infringed as a result of the entry into the home without a warrant. The agents argued the doctrine of consent once removed, which although had not been adopted by the Tenth Circuit, was recognized in three other circuits. The lower court dismissed on the basis that since the Tenth had not ruled on the issue, the law clearly was not established in this Circuit. In other words, the entry was lawful under the doctrine of consent once removed, which had not been advanced in the state court.

An appeal was taken, and the Tenth Circuit reversed in a 2-1 decision. A Petition for Certiorari was granted by the U.S. Supreme Court. In its order allowing the Petition, the Court expressly asked the parties to brief the question on why **Saucier** should not be overruled. Thus, the parties had a pretty good idea on where the Court was headed. The

Court took this case apparently because it wanted to overrule **Saucier** and free the lower courts from the strict two-step requirement in deciding QI cases going forward. The decision in **Pearson** does precisely that, overruled **Saucier**, and allows lower courts the discretion to decide a case solely on the fact that the law is not "clearly established." Thus in difficult cases, the merits prong can be avoided altogether. The Court stated, "On considering the procedure required in Saucier, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."

Justice Alito, writing for the Court in the 9-0 decision, wrote, "**The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact or a mistake based on mixed questions of law and fact."**

THE CASE LAW

BELOW ARE 10 IMPORTANT CASES WHICH ILLUSTRATE HOW COURTS APPROACH SEC. 1983 CASES. ALL ARE LAW ENFORCEMENT CASES AND MOST ARE EXCESSIVE FORCE CLAIMS. LAW ENFORCEMENT CASES ARE THE MOST RELEVANT KINDS OF CASES THAT MUNICIPAL ATTORNEYS CAN EXPECT.

IT IS IMPORTANT TO UNDERSTAND THAT IF A DISPOSITIVE MOTION ON QI IS DENIED, THERE IS A RIGHT TO INTERLOCUTORY REVIEW. THE REVIEW IS LIMITED TO THE FACTS SUPPORTIVE OF THE PLAINTIFF'S VERSION. THE APPELLATE COURT ONLY DETERMINES THE LEGAL ISSUES INVOLVED. FACTUAL DISPUTES EVIDENCED IN THE RECORD ARE NOT CONSIDERED. THUS, WHILE THE APPEAL IS A MATTER OF RIGHT, GENERALLY THE APPELLATE COURT WILL NOT REVERSE AN ADVERSE RULING DENYING SUMMARY JUDGMENT. I HAVE HAD SEVERAL CASES WHERE THE INTERLOCUTORY APPEAL WAS UNSUCCESSFUL, THE CASE ON REMAND WAS TRIED, AND THE JURY VERDICT WAS IN FAVOR OF THE LAW ENFORCEMENT DEFENDANT. THIS ILLUSTRATES THAT WHILE THE APPELLATE RECORD IS SKEWED IN FAVOR OF PLAINTIFF'S FACTS, A DENIAL ON APPEAL DOES NOT MEAN THAT PLAINTIFF'S CASE WILL ULTIMATELY BE SUCCESSFUL WHEN ALL THE FACTS ARE PRESENTED AND ARGUED.

1. Graham v. Connor, 490 US 386 (1989) This case is important because of its language upon which most federal jury instructions are based. Its concepts are generally applicable to most police encounters, especially claims of excessive force.

The standard is one of objective reasonableness under the Fourth Amendment. The Court requires a" totality of the circumstances" analysis which would include the severity of the crime at issue, the threat presented by the suspect and whether the suspect is resisting or evading.

Key language used in most jury instructions and arguments is "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

The standard is objective and the officers motivations or intent is irrelevant.

2. Brosseau v. Haugen, 543 US 194 (2004)

This is an interesting case where the language "hazy borders" first surfaced. The officer involved shot at a fleeing suspect who was driving a car. The shot went thru the rear window of the vehicle and hit the suspect, injuring him. The officer was not in immediate danger, nor was any third party, except as the officer could speculate a pedestrian or other driver could have been in a congested city street with the suspect traveling in a reckless manner.

The Court tried to find a similar case that would be controlling, but could not find one with this specific fact pattern. As a result, the Court decided the officer had qualified immunity. The Court stated after finding no case right on point that, "they do suggest that Brousseau's actions fell in the "hazy border" between excessive and acceptable force".

3. Kisela v. Hughes, 584 US __ , 138 S. CT. 1148 (Apr. 2, 2018)

This case illustrates a fact pattern that draws criticism of QI. It also is an example of where the Court chose not to decide a difficult Fourth Amendment issue in favor of reviewing the case law to determine that the law was not "clearly established" and therefore determined the officer was not liable.

In this case, a woman, Ms. Chadwick had a large kitchen knife and was seen hacking branches off a tree in her yard. There were other indications of her erratic behavior which prompted a 911 call to the police. When the officers arrived, they observed Chadwick, knife in hand, approximately six feet away from her roommate. Officer Kisela twice commanded Chadwick to put the knife down. Her only response was verbal, "take it easy", and she proceeded to take two steps toward her roommate. At that point Kisela got in a better shooting position and fired four rounds at Chadwick, striking her but causing non-life threatening injuries.

Firing on Chadwick was the use of deadly force. Previously, the Supreme Court had determined that the use of deadly force to stop a fleeing misdemeanant suspect was in violation of the Fourth Amendment. **Tennessee v. Garner**, 471 US 1 (1985). In **Garner**, the Court addressed situations where deadly force is justified; the officer reasonably believes

the force is necessary to prevent the loss of human life or to prevent imminent serious bodily injury.

In this case, given the use of deadly force in an ambiguous circumstance, the Court decided not to decide the merits question, but determined there was not sufficient case law that would give the officer fair notice that his conduct was unconstitutional. Ergo, QI applied.

4. Emmett v. Armstrong, et al, 973 F. 3rd 1136 (10th Cir. 2020)

This case is not novel in any respect, but I included it because it is a Tenth Circuit case.

5. District of Columbia v. Wesby, 583 US ____ (2018)

"The 'clearly established' standard requires that the legal principle clearly prohibits the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

6. Wilkins v. City of Tulsa, case no. 21-2052

Most recent case from the Tenth Circuit. This was an excessive force claim in which the Court found excessive force: a suspect was in cuffs and secured, and an officer who pepper sprayed him. The Court, applying the Graham non exclusive factors of (1) the severity of the crime; (2) whether the suspect poses an immediate threat; and (3) whether the suspect is actively resisting or attempting to evade arrest by flight, determined that spraying a suspect who is under control was excessive.

7. George v. Beaver County, Tenth Circuit no 21-4006 (2022)

This case involves an inmate suicide in the Beaver County jail. The Court determined that there was no showing of a pattern of deliberate indifference or failure to train. The Court determined that the County was not liable under 1983 and that the Sheriff had no liability as well. Good case to read to understand municipal liability under 1983.

8. City and County of San Francisco v. Sheehan, 575 US ____ (2015)

9. Plumhoff v. Rickard, 572 US 765 (2014)

10. Cavanaugh v Woods Cross , Decision #1 decided November 3, 2010; decision #2 decided June 12, 2013
Tenth Circuit

These cases illustrate how radically different outcomes may be comparing the results of an interlocutory appeal on the issue of qualified immunity and a result reached after a trial and all the facts are presented.

Officers were called out to respond to a domestic disturbance at the Cavanaugh residence. Upon arrival, the officers learned the husband and wife had been in an altercation after ingesting pain pills and some alcohol. The wife had made threats with a kitchen knife and, by the time the police arrived, she had fled the house. The officers went around the neighborhood in an attempt to find her and were unsuccessful. One officer stayed behind on the perimeter of the house. He then observed Mrs. Cavanaugh approach the front door. He testified he was concerned that she still may have had the knife, could gain entry, and do harm to her husband. Accordingly, he tried to stop her with verbal commands, and even tried to grab her arm, but could not as she pulled away and moved directly at a fast pace to the front door. The officer felt his only choice was to tase her to keep her from entering the house. He deployed his taser, she fell and hit her head on the cement entryway to their home. She suffered injuries as a result.

After the trial court denied the officer's motion for summary judgment based on qualified immunity and that the force used was not excessive, an interlocutory appeal was taken. The Tenth Circuit decided in Decision #1 that the appeal was not well taken and remanded back to the trial court. That appeal was based on plaintiff's version of the facts only.

Subsequently, the case was tried before a jury in federal court. The trial lasted seven days. At its conclusion, the jury returned a verdict in favor of the officer in less than two hours. The verdict was appealed and, in Decision #2, the Tenth Circuit upheld the verdict.

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[i] 6 US 170 (1804)
[ii] 386 US 547 (1967)
[iii] 238 US 368 (1915)
[iv] 457 US 800 (1982)
[v] 533 US 1914 (201)

129 S.Ct. 808
Supreme Court of the United States

Cordell PEARSON, et al., Petitioners,

v.

Afton CALLAHAN.

No. 07–751.

Argued Oct. 14, 2008.

Decided Jan. 21, 2009.

Synopsis

Background: Arrestee brought § 1983 action alleging that police officers violated his Fourth Amendment rights by entering his home without a warrant. The United States District Court for the District of Utah, 2006 WL 1409130, granted officers summary judgment based on qualified immunity. Arrestee appealed. The United States Court of Appeals for the Tenth Circuit, Murguia, District Judge, sitting by designation, 494 F.3d 891, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

[1] in resolving government officials' qualified immunity claims, courts need not first determine whether facts alleged or shown by plaintiff make out violation of constitutional right, receding from *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272, and

[2] officers were entitled to qualified immunity.

Reversed.

West Headnotes (15)

[1] **Civil Rights** ⇐ Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

17111 Cases that cite this headnote

[2] **Public Employment** ⇐ Qualified immunity

Protection of qualified immunity applies regardless of whether government official's error is mistake of law, mistake of fact, or mistake based on mixed questions of law and fact.

1375 Cases that cite this headnote

[3] **Courts** ⇐ Decisions of Same Court or Co-Ordinate Court

Although Supreme Court approaches reconsideration of its decisions with utmost caution, stare decisis is not an inexorable command.

18 Cases that cite this headnote

[4] **Courts** ⇐ Decisions of Same Court or Co-Ordinate Court

Revisiting precedent is particularly appropriate where departure would not upset expectations, precedent consists of judge-made rule that was recently adopted to improve operation of courts, and experience has pointed up precedent's shortcomings.

25 Cases that cite this headnote

[5] **Courts** ⇐ Previous Decisions as Controlling or as Precedents

Courts ⇐ Rules of Property

Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved; opposite is true in cases involving procedural and evidentiary rules that do not produce such reliance.

9 Cases that cite this headnote

[6] **Courts** ⬅ Previous Decisions as Controlling or as Precedents

Saucier's mandatory, two-step rule for resolving all qualified immunity claims could be appropriately revisited, despite doctrine of stare decisis; two-step protocol was judge made and implicated important matter involving internal Judicial Branch operations, rule did not affect way in which parties ordered their affairs, withdrawing from rule would not upset settled expectations on anyone's part, and general presumption that legislative changes should be left to Congress was not implicated.

406 Cases that cite this headnote

[7] **Courts** ⬅ Construction and operation of statutes

Considerations of stare decisis weigh heavily in area of statutory construction, where Congress is free to change Supreme Court's interpretation of its legislation.

8 Cases that cite this headnote

[8] **Courts** ⬅ Constitutional questions

Courts ⬅ Construction and operation of statutes

Constitutional or statutory precedent is properly challenged, where its justification was badly reasoned or rule has proved to be unworkable.

4 Cases that cite this headnote

[9] **Courts** ⬅ Decisions of Same Court or Co-Ordinate Court

Where decision has been questioned by members of Supreme Court in later decisions and has defied consistent application by lower courts, these factors weigh in favor of reconsideration.

23 Cases that cite this headnote

[10] **Civil Rights** ⬅ Government Agencies and Officers

Civil Rights ⬅ Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

While *Saucier*'s two-step sequence for resolving government officials' qualified immunity claims, whereby court must decide (1) whether facts alleged or shown by plaintiff make out violation of constitutional right, and (2) if so, whether that right was clearly established at time of defendant's alleged misconduct, is often appropriate, courts may exercise their sound discretion in deciding which of the two prongs should be addressed first in light of circumstances in the particular case at hand, receding from *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272.

16507 Cases that cite this headnote

[11] **Public Employment** ⬅ Qualified immunity

Qualified immunity is immunity from suit rather than mere defense to liability.

4687 Cases that cite this headnote

[12] **Civil Rights** ⬅ Sheriffs, police, and other peace officers

Officers' entry into home without warrant to make arrest, based on consent given to informant, did not violate clearly established law, and thus, officers were protected by qualified immunity from arrestee's Fourth Amendment claim; although issue had not been decided in officers' circuit, "consent-once-removed" doctrine had been accepted by three Federal Courts of Appeals and two State Supreme Courts. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

348 Cases that cite this headnote

[13] **Civil Rights** Sheriffs, police, and other peace officers

Officer conducting search is entitled to qualified immunity where clearly established law does not show that search violated Fourth Amendment. U.S.C.A. Const.Amend. 4.

2522 Cases that cite this headnote

[14] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity inquiry turns on objective legal reasonableness of government official's action, assessed in light of legal rules that were clearly established at time it was taken.

1769 Cases that cite this headnote

[15] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Principles of qualified immunity shield officer from personal liability when officer reasonably believes that his or her conduct complies with the law.

1073 Cases that cite this headnote

****810** *Syllabus*[*]

After the Utah Court of Appeals vacated respondent's conviction for possession and distribution of drugs, which he sold to an undercover informant he had voluntarily admitted into his house, he brought this 42 U.S.C. § 1983 damages action in federal court, alleging that petitioners, the officers who supervised and conducted the warrantless search of the premises that led to his arrest after the sale, had violated the Fourth Amendment. The District Court granted summary judgment in favor of the officers. Noting that other courts had adopted the "consent-once-removed" doctrine—which permits a warrantless police entry into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view—the court concluded that the officers were entitled to qualified immunity because they could reasonably have believed that the doctrine authorized their conduct. Following the procedure mandated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272, the Tenth Circuit held that petitioners were not entitled to qualified immunity. The court disapproved broadening the consent-once-removed doctrine to situations in which the person granted initial consent was not an undercover officer, but merely an informant. It further held that the Fourth Amendment right to be free in one's home from unreasonable searches and arrests was clearly established at the time of respondent's arrest, and determined that, under this Court's clearly established precedents, warrantless entries into a home are *per se* unreasonable unless they satisfy one of the two established exceptions for consent and exigent circumstances. The court concluded that petitioners ****811** could not reasonably have believed that their conduct was lawful because they knew that (1) they had no warrant; (2) respondent had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them. In granting certiorari, this Court directed the parties to address whether *Saucier* should be overruled in light of widespread criticism directed at it.

Held:

1. The *Saucier* procedure should not be regarded as an inflexible requirement. Pp. 815 – 822.

(a) *Saucier* mandated, see 533 U.S., at 194, 121 S.Ct. 2151, a two-step sequence for resolving government officials' qualified immunity claims: A court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct, *id.*, at 201, 121 S.Ct. 2151. Qualified immunity applies unless the official's conduct violated such a right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523. Pp. 815 – 816.

(b) *Stare decisis* does not prevent this Court from determining whether the *Saucier* procedure should be modified or abandoned. Revisiting precedent is particularly appropriate where, as here, a departure would not upset settled expectations, see, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444; the precedent consists of a rule that is judge made and adopted to improve court operations, not a statute promulgated by Congress, see, *e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275; and the

precedent has "been questioned by Members of th[is] Court in later decisions and [has] defied consistent application by the lower courts," *Payne v. Tennessee*, 501 U.S. 808, 829–830, 111 S.Ct. 2597, 115 L.Ed.2d 720. Respondent's argument that *Saucier* should not be reconsidered unless the Court concludes that it was "badly reasoned" or that its rule has proved "unworkable," see *Payne, supra*, at 827, 111 S.Ct. 2597, is rejected. Those standards are out of place in the present context, where a considerable body of new experience supports a determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained. Pp. 816 – 818.

(c) Reconsideration of the *Saucier* procedure demonstrates that, while the sequence set forth therein is often appropriate, it should no longer be regarded as mandatory in all cases. Pp. 818 – 822.

(i) The Court continues to recognize that the *Saucier* protocol is often beneficial. In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. And *Saucier* was correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable for questions that do not frequently arise in cases in which a qualified immunity defense is unavailable. See 533 U.S., at 194, 121 S.Ct. 2151. P. 818.

(ii) Nevertheless, experience in this Court and the lower federal courts has pointed out the rigid *Saucier* procedure's shortcomings. For example, it may result in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the case's outcome, and waste the parties' resources by forcing them to assume the costs of litigating constitutional questions and endure delays attributable to resolving those questions when the suit otherwise could be disposed ****812** of more readily. Moreover, although the procedure's first prong is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development, as where, *e.g.*, a court of appeals decision is issued in an opinion marked as not precedential. Further, when qualified immunity is asserted at the pleading stage, the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. And the first step may create a risk of bad decisionmaking, as where the briefing of constitutional questions is woefully inadequate. Application of the *Saucier* rule also may make it hard for affected parties to obtain appellate review of constitutional decisions having a serious prospective effect on their operations. For example, where a court holds that a defendant has committed a constitutional violation, but then holds that the violation was not clearly established, the defendant, as the winning party, may have his right to appeal the adverse constitutional holding challenged. Because rigid adherence to *Saucier* departs from the general rule of constitutional avoidance, cf., *e.g.*, *Scott v. Harris*, 550 U.S. 372, 388, 127 S.Ct. 1769, 167 L.Ed.2d 686, the Court may appropriately decline to mandate the order of decision that the lower courts must follow, see, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674. This flexibility properly reflects the Court's respect for the lower federal courts. Because the two-step *Saucier* procedure is often, but not always, advantageous, those judges are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case. Pp. 818 – 822.

(iii) Misgivings concerning today's decision are unwarranted. It does not prevent the lower courts from following *Saucier*; it simply recognizes that they should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, it will not retard the development of constitutional law, result in a proliferation of damages claims against local governments, or spawn new litigation over the standards for deciding whether to reach the particular case's merits. Pp. 822 – 823.

2. Petitioners are entitled to qualified immunity because it was not clearly established at the time of the search that their conduct was unconstitutional. When the entry occurred, the consent-once-removed doctrine had been accepted by two State Supreme Courts and three Federal Courts of Appeals, and not one of the latter had issued a contrary decision. Petitioners were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on consent-once-removed entries. See *Wilson v. Layne*, 526 U.S. 603, 618, 119 S.Ct. 1692, 143 L.Ed.2d 818. P. 823.

494 F.3d 891, reversed.

ALITO, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Peter Stirba, Salt Lake City, Utah, for petitioners, by Malcolm L. Stewart for United States as amicus curiae, by special leave of Court, supporting petitioners.

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Opinion

Justice ALITO delivered the opinion of the Court.

***227** This is an action brought by respondent under Rev. Stat. § 1979, 42 U.S.C. § 1983, against state law enforcement officers who conducted a warrantless search of his house incident to his arrest for the sale of methamphetamine to an undercover informant whom he had voluntarily admitted to the premises. The Court of Appeals held that petitioners were not entitled to summary judgment on qualified immunity grounds. Following the procedure we mandated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Court of Appeals held, first, that respondent adduced facts sufficient to make out a violation of the Fourth Amendment and, second, that the unconstitutionality of the officers' conduct was clearly established. In granting review, we required the parties to address the additional question whether the mandatory procedure set out in *Saucier* should be retained.

We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement and that petitioners are entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional. We therefore reverse.

I

A

The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales. In 2002, Brian Bartholomew, who became an informant for the task force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day.

That evening, Bartholomew arrived at respondent's residence at about 8 p.m. Once there, Bartholomew went inside and confirmed that respondent had methamphetamine available for sale. Bartholomew then told respondent that he needed to obtain money to make his purchase and left.

***228** Bartholomew met with members of the task force at about 9 p.m. and told them that he would be able to buy a gram of methamphetamine for $100. After concluding that Bartholomew was capable of completing the planned purchase, the officers searched him, determined that he had no controlled substances on his person, gave him a marked $100 bill and a concealed electronic transmitter to monitor his conversations, and agreed on a signal that he would give after completing the purchase.

The officers drove Bartholomew to respondent's trailer home, and respondent's daughter let him inside. Respondent then retrieved a large bag containing methamphetamine from his freezer and sold Bartholomew a gram of methamphetamine, which he put into a small plastic bag. Bartholomew gave the arrest signal to the officers who were monitoring the conversation, and they entered the trailer through a porch door. In the enclosed porch, the officers encountered Bartholomew, respondent, and two other persons, and they saw respondent drop a plastic bag, which they later determined contained methamphetamine. The officers then conducted a protective sweep of the premises. In addition to the large bag of methamphetamine, the officers recovered the marked bill from respondent and a small bag containing methamphetamine from Bartholomew, and they found drug syringes in the residence. ****814** As a result, respondent was charged with the unlawful possession and distribution of methamphetamine.

B

The trial court held that the warrantless arrest and search were supported by exigent circumstances. On respondent's appeal from his conviction, the Utah attorney general conceded the absence of exigent circumstances, but urged that the inevitable discovery doctrine justified introduction of the

fruits of the warrantless search. The Utah Court of Appeals disagreed and vacated respondent's conviction. See *State v. Callahan*, 2004 UT App. 164, 93 P.3d 103. Respondent ***229** then brought this damages action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah, alleging that the officers had violated the Fourth Amendment by entering his home without a warrant. See *Callahan v. Millard Cty.*, No. 2:04–CV–00952, 2006 WL 1409130 (2006).

In granting the officers' motion for summary judgment, the District Court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view. Believing that this doctrine was in tension with our intervening decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), the District Court concluded that "the simplest approach is to assume that the Supreme Court will ultimately reject the [consent-once-removed] doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment." 2006 WL 1409130, *8. The court then held that the officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine authorized their conduct.

On appeal, a divided panel of the Tenth Circuit held that petitioners' conduct violated respondent's Fourth Amendment rights. *Callahan v. Millard Cty.*, 494 F.3d 891, 895–899 (2007). The panel majority stated that "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Id.*, at 896. The majority took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that "broade[n] this doctrine to grant informants the same capabilities as undercover officers." *Ibid.*

***230** The Tenth Circuit panel further held that the Fourth Amendment right that it recognized was clearly established at the time of respondent's arrest. *Id.*, at 898–899. "In this case," the majority stated, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." *Id.*, at 898. The Court determined that, under the clearly established precedents of this Court and the Tenth Circuit, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.*, at 898–899. In the panel's words, "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.*, at 899. Against that backdrop, the panel concluded, petitioners could not reasonably have believed that their conduct was lawful because petitioners "knew (1) they had no warrant; (2) [respondent] had not consented to their entry; and (3) [respondent's] ****815** consent to the entry of an informant could not reasonably be interpreted to extend to them." *Ibid.*

In dissent, Judge Kelly argued that "no constitutional violation occurred in this case" because, by inviting Bartholomew into his house and participating in a narcotics transaction there, respondent had compromised the privacy of the residence and had assumed the risk that Bartholomew would reveal their dealings to the police. *Id.*, at 903. Judge Kelly further concluded that, even if petitioners' conduct had been unlawful, they were nevertheless entitled to qualified immunity because the constitutional right at issue—"the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause"—was not "clearly established" at the time of the events in question. *Id.*, at 903–904.

***231** As noted, the Court of Appeals followed the *Saucier* procedure. The *Saucier* procedure has been criticized by Members of this Court and by lower court judges, who have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages. Accordingly, in granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled. 552 U.S. 1279, 128 S.Ct. 1702, 170 L.Ed.2d 512 (2008).

II

A

[1] **[2]** The doctrine of qualified immunity protects government officials "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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818,

102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (KENNEDY, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").

Because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that " 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v.* ***232** *Creighton*, 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*.

In *Saucier*, 533 U.S. 194, 121 S.Ct. 2151, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must ****816** decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S.Ct. 2151. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Ibid.* Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson, supra*, at 640, 107 S.Ct. 3034.

Our decisions prior to *Saucier* had held that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). *Saucier* made that suggestion a mandate. For the first time, we held that whether "the facts alleged show the officer's conduct violated a constitutional right ... *must* be the initial inquiry" in every qualified immunity case. 533 U.S., at 201, 121 S.Ct. 2151 (emphasis added). Only after completing this first step, we said, may a court turn to "the next, sequential step," namely, "whether the right was clearly established." *Ibid.*

This two-step procedure, the *Saucier* Court reasoned, is necessary to support the Constitution's "elaboration from case to case" and to prevent constitutional stagnation. *Ibid.* "The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Ibid.*

***233** B

[3] **[4]** In considering whether the *Saucier* procedure should be modified or abandoned, we must begin with the doctrine of *stare decisis*. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Although "[w]e approach the reconsideration of [our] decisions ... with the utmost caution," "[*s*]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings.

[5] **[6]** "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases ... involving procedural and evidentiary rules" that do not produce such reliance. *Payne, supra*, at 828, 111 S.Ct. 2597 (citations omitted). Like rules governing procedures and the admission of evidence in the trial courts, *Saucier*'s two-step protocol does not affect the way in which parties order their affairs. Withdrawing from *Saucier*' s categorical rule would not upset settled expectations on anyone's part. See *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

[7] Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan, supra,* at 20, 118 S.Ct. 275. We recognize that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to ****817** change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). But the *Saucier* rule is judge made and implicates an important matter involving internal Judicial ***234** Branch operations. Any change should come from this Court, not Congress.

[8] Respondent argues that the *Saucier* procedure should not be reconsidered unless we conclude that its justification was "badly reasoned" or that the rule has proved to be "unworkable," see *Payne, supra,* at 827, 111 S.Ct. 2597, but those standards, which are appropriate when a constitutional or statutory precedent is challenged, are out of place in the present context. Because of the basis and the nature of the *Saucier* two-step protocol, it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.

Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*'s "rigid order of battle." See, *e.g., Purtell v. Mason,* 527 F.3d 615, 622 (C.A.7 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds"); Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev. 1249, 1275, 1277 (2006) (hereinafter Leval) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that amounts to "a puzzling misadventure in constitutional dictum"). And application of the rule has not always been enthusiastic. See *Higazy v. Templeton,* 505 F.3d 161, 179, n. 19 (C.A.2 2007) ("We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated, because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of a case"); *Cherrington v. Skeeter,* 344 F.3d 631, 640 (C.A.6 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment ***235** command ... because they are entitled to qualified immunity in any event"); *Pearson v. Ramos,* 237 F.3d 881, 884 (C.A.7 2001) ("Whether [the *Saucier*] rule is absolute may be doubted").

Members of this Court have also voiced criticism of the *Saucier* rule. See *Morse v. Frederick,* 551 U.S. 393, 432, 127 S.Ct. 2618, 2642, 168 L.Ed.2d 290 (2007) (BREYER, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now"); *Bunting v. Mellen,* 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.,* at 1025, 124 S.Ct. 1750 (SCALIA, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review ... or else drop any pretense at requiring the ordering in every case" (emphasis in original)); *Brosseau v. Haugen,* 543 U.S. 194, 201–202, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,' " which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the ****818** decision (*e.g.,* qualified immunity) that will satisfactorily resolve the case before the court"); *Saucier,* 533 U.S., at 210, 121 S.Ct. 2151 (GINSBURG, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse").

[9] Where a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," these factors weigh in favor of reconsideration. *Payne,* 501 U.S., at 829–830, 111 S.Ct. 2597; see also *Crawford v. Washington,* 541 U.S. 36, 60, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Collectively, the factors we have noted make our present reevaluation of the *Saucier* two-step protocol appropriate.

***236** III

[10] On reconsidering the procedure required in *Saucier,* we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity

analysis should be addressed first in light of the circumstances in the particular case at hand.

A

Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial. For one thing, there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong. "[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Lyons v. Xenia*, 417 F.3d 565, 581 (C.A.6 2005) (Sutton, J., concurring). In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.

B

At the same time, however, the rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult ***237** questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.

[11] Unnecessary litigation of constitutional issues also wastes the parties' resources. Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell*, 472 U.S., at 526, 105 S.Ct. 2806 (emphasis deleted). *Saucier*'s two-step protocol "disserve[s] the purpose of qualified immunity" when it "forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 30.

****819** Although the first prong of the *Saucier* procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases. See *Scott v. Harris*, 550 U.S. 372, 388, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (BREYER, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity"); *Buchanan v. Maine*, 469 F.3d 158, 168 (C.A.1 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts").

A decision on the underlying constitutional question in a § 1983 damages action or a *Bivens v. Six Unknown Fed. Narcotics* ***238** *Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971),[1] action may have scant value when it appears that the question will soon be decided by a higher court. When presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier's* first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks*, 432 F.3d 1072, 1078, and n. 5 (2005) (en banc). Similar considerations may come into play when a court of appeals panel confronts a constitutional question that is pending before the court en banc or when a district court encounters a constitutional question that is before the court of appeals.

A constitutional decision resting on an uncertain interpretation of state law is also of doubtful precedential importance. As a result, several courts have identified an "exception" to the *Saucier* rule for cases in which resolution of the constitutional question requires clarification of an ambiguous state statute. *Egolf v. Witmer*, 526 F.3d 104, 109–111 (C.A.3 2008); accord, *Tremblay v. McClellan*, 350 F.3d 195, 200 (C.A.1 2003); *Ehrlich v. Glastonbury*, 348 F.3d 48, 57–60 (C.A.2 2003). Justifying the decision to grant qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the Constitution, these courts have observed that *Saucier*'s "underlying principle" of encouraging federal courts to decide unclear legal questions in order to clarify the law for the future "is not meaningfully advanced ... when the definition of constitutional rights depends on a federal court's

uncertain assumptions about state law." *Egolf, supra,* at 110; accord, *Tremblay, supra,* at 200; *Ehrlich, supra,* at 58.

When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims ***239** may be hard to identify. See *Lyons,* 417 F.3d, at 582 (Sutton, J., concurring); *Kwai Fun Wong v. United States,* 373 F.3d 952, 957 (C.A.9 2004); *Mollica v. Volker,* 229 F.3d 366, 374 (C.A.2 2000). Accordingly, several courts have recognized that the two-step inquiry "is an uncomfortable exercise where ... the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" and have suggested that "[i]t may be that *Saucier* was not strictly intended to cover" this situation. *Dirrane v. Brookline Police* ****820** *Dept.,* 315 F.3d 65, 69–70 (C.A.1 2002); see also *Robinette v. Jones,* 476 F.3d 585, 592, n. 8 (C.A.8 2007) (declining to follow *Saucier* because "the parties have provided very few facts to define and limit any holding" on the constitutional question).

There are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking. The lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate. See *Lyons, supra,* at 582 (Sutton, J., concurring) (noting the "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented"); *Mollica, supra,* at 374.

Although the *Saucier* rule prescribes the sequence in which the issues must be discussed by a court in its opinion, the rule does not—and obviously cannot—specify the sequence in which judges reach their conclusions in their own internal thought processes. Thus, there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all. In such situations, there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue. See *Horne v. Coughlin,* 191 F.3d 244, 247 (C.A.2 1999) ("Judges risk being insufficiently thoughtful and cautious in ***240** uttering pronouncements that play no role in their adjudication"); Leval 1278–1279.

Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested. See *Bunting,* 541 U.S., at 1025, 124 S.Ct. 1750 (SCALIA, J., dissenting from denial of certiorari) ("The perception of unreviewability undermines adherence to the sequencing rule we ... created" in Saucier);[2] see also *Kalka v. Hawk,* 215 F.3d 90, 96, n. 9 (C.A.D.C.2000) (noting that "[n]ormally, a party may not appeal from a favorable judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court"). In cases like *Bunting,* the "prevailing" defendant faces an unenviable choice: "compl[y] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "def[y] the views of the lower court, adher[e] to practices that have been declared illegal, and thus ***241** invit[e] new suits" and potential "punitive damages." *Horne, supra,* at 247–248.

****821** Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the "older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.' " *Scott,* 550 U.S., at 388, 127 S.Ct. 1769 (BREYER, J., concurring) (quoting *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944)); see *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

In other analogous contexts, we have appropriately declined to mandate the order of decision that the lower courts must follow. For example, in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we recognized a two-part test for determining whether a criminal defendant was denied the effective assistance of counsel: The defendant must demonstrate (1) that his counsel's performance fell below what could be expected of a reasonably competent practitioner; and (2) that he was prejudiced by that substandard performance. *Id.,* at 687, 104 S.Ct. 2052. After setting forth and applying the analytical framework that courts must use in evaluating claims of ineffective assistance of counsel, we left it to the sound discretion of lower courts to determine the order of decision. *Id.,* at 697, 104 S.Ct. 2052 ("Although we have discussed

the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").

In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), we created an exception to the exclusionary rule when officers reasonably rely on a facially valid search warrant. *Id.*, at 913, 104 S.Ct. 3405. In that context, we recognized that a defendant challenging a ***242** search will lose if either: (1) the warrant issued was supported by probable cause; or (2) it was not, but the officers executing it reasonably believed that it was. Again, after setting forth and applying the analytical framework that courts must use in evaluating the good-faith exception to the Fourth Amendment warrant requirement, we left it to the sound discretion of the lower courts to determine the order of decision. *Id.*, at 924, 925, 104 S.Ct. 3405 ("There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated").

This flexibility properly reflects our respect for the lower federal courts that bear the brunt of adjudicating these cases. Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.

C

Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, the development of constitutional law is by no means entirely dependent ****822** on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S., at 841, n. 5, 118 S.Ct. 1708 (noting that qualified immunity is unavailable ***243** "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion").

We also do not think that relaxation of *Saucier*'s mandate is likely to result in a proliferation of damages claims against local governments. Cf. Brief for National Association of Counties et al. as *Amici Curiae* 29, 30 ("[T]o the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice [damages] claims against local governments"). It is hard to see how the *Saucier* procedure could have a significant effect on a civil rights plaintiff's decision whether to seek damages only from a municipal employee or also from the municipality. Whether the *Saucier* procedure is mandatory or discretionary, the plaintiff will presumably take into account the possibility that the individual defendant will be held to have qualified immunity, and presumably the plaintiff will seek damages from the municipality as well as the individual employee if the benefits of doing so (any increase in the likelihood of recovery or collection of damages) outweigh the litigation costs.

Nor do we think that allowing the lower courts to exercise their discretion with respect to the *Saucier* procedure will spawn "a new cottage industry of litigation ... over the standards for deciding whether to reach the merits in a given case." Brief for National Association of Counties, *supra*, at 29, 30. It does not appear that such a "cottage industry" developed prior to *Saucier*, and we see no reason why our decision today should produce such a result.

IV

[12] **[13]** **[14]** Turning to the conduct of the officers here, we hold that petitioners are entitled to qualified immunity because the entry did not violate clearly established law. An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the ***244** Fourth Amendment. See *Anderson*, 483 U.S., at 641, 107 S.Ct. 3034. This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation marks omitted); see *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) ("[Q]ualified immunity

operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" (internal quotation marks omitted)).

When the entry at issue here occurred in 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, *e.g.*, *United States v. Diaz*, 814 F.2d 454, 459 (CA7), cert. denied, 484 U.S. 857, 108 S.Ct. 166, 98 L.Ed.2d 120 (1987); *United States v. Bramble*, 103 F.3d 1475 (C.A.9 1996); *United States v. Pollard*, 215 F.3d 643, 648–649 (CA6), cert. denied, 531 U.S. 999, 121 S.Ct. 498, 148 L.Ed.2d 469 (2000); ****823** *State v. Henry*, 133 N.J. 104, 627 A.2d 125 (1993); *State v. Johnston*, 184 Wis.2d 794, 518 N.W.2d 759 (1994). It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul*, 808 F.2d 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon*, 398 F.3d 802, 806–808, cert. denied, 546 U.S. 977, 126 S.Ct. 548, 163 L.Ed.2d 460 (2005), and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision.

[15] The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their ***245** actions. In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S., at 618, 119 S.Ct. 1692. Likewise, here, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

Because the unlawfulness of the officers' conduct in this case was not clearly established, petitioners are entitled to qualified immunity. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, and n. 30, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (noting that the Court's decisions equate the qualified immunity of state officials sued under 42 U.S.C. § 1983 with the immunity of federal officers sued directly under the Constitution).

2 In *Bunting*, the Court of Appeals followed the *Saucier* two-step protocol and first held that the Virginia Military Institute's use of the word "God" in a "supper roll call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Mellen v. Bunting*, 327 F.3d 355, 365–376 (C.A.4 2003), cert. denied, 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004). Although they had a judgment in their favor below, the defendants asked this Court to review the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice SCALIA, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." 541 U.S., at 1022, 124 S.Ct. 1750. The "tangle" arose from the Court's " 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, a practice that insulates from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.*, at 1022, 1023, 1024, 124 S.Ct. 1750.

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