

Chapter Eleven

INDIVIDUAL IMMUNITY DEFENSES UNDER § 1983

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While the text of § 1983 ostensibly creates a cause of action against “every person” who, while acting under color of state law, deprives another of a federal or constitutional right, “every person” does not include all persons. The U.S. Supreme Court has created special immunity defenses for certain classes of individual defendants who are sued in their individual capacities. These persons may be entitled to an absolute immunity from suit and damages, or to assert a qualified immunity from suit and damages, depending on the particular functions exercised by the individuals.

Recognition and Evolution of Immunity Defenses

Section 1983 was enacted to deter public officials from abusing their authority in a manner that deprives persons of their federally protected rights, and to provide a remedy to victims of unconstitutional acts.¹ Section 1983, however, contains no language addressing either absolute or qualified immunity for public officials alleged to have violated § 1983. Rather, individual immunity defenses from § 1983 liability are judicially created doctrines that stem from the common law as it existed when Congress enacted the Civil Rights Act of 1871, Section 1 of which is now codified as § 1983. These historically recognized common law immunities were public policy driven and designed to protect public officials from litigation that might tend to chill the officials’ proper exercise of discretion and divert the attention of public officials from their duties by unnecessary and time-consuming litigation.² As stated by the U.S. Supreme Court in *Owen v. City of Independence*, “[w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act,

we have construed the statute to incorporate that immunity.”³

Source of Federal Immunities

The Supreme Court has consistently recognized individual immunity defenses that were well-established in 1871 when Congress enacted the Civil Rights Act of 1871. Regardless of strong policy considerations, the Court has not, however, provided immunities from § 1983 actions where such immunities did not exist in 1871.⁴

In developing the federal immunities applicable in § 1983 litigation, the Supreme Court has chosen not to be influenced by the various state law doctrines of immunity for governmental entities and government officials. Rather, the Supreme Court has held that federal law controls the immunity analysis under § 1983 even if the matter in question is pending in state court.⁵ Pursuant to the Supremacy Clause of the United States Constitution, federal laws are enforceable in state courts and state courts are charged with the parallel responsibility of enforcing those laws according to their regular modes of procedure.⁶

No one disputes the general and unassailable proposition relied upon by the [state] Supreme Court below that States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the “federal right cannot be defeated by the forms of local practice.”⁷

Since immunity under the Civil Rights Act is a question of federal law, state courts are obligated to recognize and apply federal law regarding immunities to suits brought under § 1983.⁸

Distinction Between Immunity from Damages and Immunity from Injunctive Relief

There is a distinction from immunity from damages and immunity from injunctive relief. For example, in *Supreme Court of Virginia v. Consumers Union of the United States*,⁹ the U.S. Supreme Court held that the Virginia Supreme Court and its Chief Justice could be sued under §

1983 for injunctive relief in their capacities as enforcers of the Virginia Supreme Court's disciplinary rules for lawyer advertising, which rules had been challenged on First Amendment grounds.¹⁰ The Court held that the Virginia Supreme Court could not, however, be sued for injunctive relief in its legislative capacity in promulgating the challenged rules or in its judicial capacity in adjudicating the constitutionality of the rules.¹¹

Similarly, in *Pulliam v. Allen*,¹² the Supreme Court held that judges are not absolutely immune from injunctive relief under § 1983.¹³ The Court, noting that actions in prohibition and mandamus had historically been used at common law to enjoin judicial actions, held that the lack of absolute immunity from injunctive relief for judicial actions, as compared to immunity from damage suits, would not have a chilling effect on judicial independence.¹⁴

In 1996, however, Congress, in reaction to the holdings in *Consumers Union* and *Pulliam*, amended § 1983 by adding at the end of the first sentence the phrase “except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”¹⁵ As a result, the judicially-created rule that had held that judges were subject to injunctive relief was effectively overruled by Congressional fiat, so that judges are now absolutely immune from injunctive relief liability for their judicial acts unless declaratory relief does not remedy the challenged judicial conduct.

Individual-Capacity Versus Official-Capacity Suits

In *Kentucky v. Graham*,¹⁶ the Supreme Court attempted “to unravel once again the distinction between personal- and official-capacity suits.”¹⁷

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, “generally represent only another way of pleading an action against an entity of which an officer is an agent.” As long as a government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally,

for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damage judgment in an official-capacity suit must look to the government entity itself.¹⁸

Consequently, individuals sued in their official capacities only are not entitled to assert individual immunity defenses.

Functional Approach to Immunity Analysis

The Supreme Court utilizes a functional approach in determining whether a particular class of individual defendants is entitled to assert an absolute immunity or qualified immunity defense.

Running through our cases, with fair consistency, is a “functional” approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption for personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of “qualified” immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.¹⁹

Utilizing a functional analysis, the Supreme Court has determined that state, regional and local legislators (when acting in a legislative capacity), judges (when acting within their jurisdiction) and prosecutors (when acting as advocates in the criminal process) are all absolutely immune from liability for damages under § 1983.²⁰ Under a functional approach, determining what type of immunity applies to a particular official in a given case turns on the nature of the act being performed, rather than on the position or title held by the official. For example, state and regional legislators, when acting administratively rather than legislatively, are protected only by the affirmative defense of qualified immunity.²¹ Moreover, prosecutors, when acting in an investigative capacity rather than as advocates in a criminal process, are not entitled to absolute immunity, but are entitled only to assert the defense of qualified immunity.²²

A critical distinction between absolute immunity and qualified immunity is that absolute

immunity does not look to the reasonableness of the defendant's actions; rather, an absolute immunity analysis is complete once it is determined that the defendant's function entitles that defendant to an absolute immunity, regardless of the defendant's subjective or objective good faith. As is explained below, the functional approach to immunity analysis has extended absolute immunity beyond even legislators, judges and prosecutors to other individual defendants who are engaged in legislative, judicial or prosecutorial acts.

Absolute Immunity

Under a functional approach, absolute immunity protects certain government officials for their official acts regardless of the legality or constitutionality of the acts. Courts have consistently recognized two policy rationales justifying the recognition of absolute immunity: (1) the fear of damages may chill an official's exercise of discretion and (2) the process of defending civil rights claims may divert the official's attention from his or her duties.²³

Legislators

Federal law is well-settled that legislators are entitled to an absolute immunity from suit under § 1983 for conduct in furtherance of their legislative duties.²⁴ Utilizing a functional approach, however, the Court has limited the application of absolute legislative immunity to acts within the sphere of legitimate legislative activities.²⁵

The landmark case of *Tenney v. Brandhove*²⁶ discusses the historical antecedents of legislative immunity. Justice Frankfurter wrote that legislators

are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader, or to the hazard of the judgment against them based upon a jury's speculation as to motives.²⁷

This language was repeated favorably in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*.²⁸ Justice Frankfurter in *Tenney* quoted language from *Coffin v. Coffin*,²⁹ in describing the parameters of absolute legislative immunity:

I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and . . . securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.³⁰

Recognizing this venerable tradition, the U.S. Supreme Court held in 1959 in *Tenney* that state legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities.³¹ In 1979, this immunity was extended to regional legislators in *Lake Country Estate*,³² and in 1998 to local legislators in *Bogan*.³³

The Functional Approach: Legislative Versus Administrative Acts

Under the functional approach, only those persons whose actions are legislative in nature are entitled to the protection of absolute legislative immunity.³⁴

Legislators are absolutely immune while passing laws, holding committee meetings, or when acting “in a field where legislators traditionally have power to act.”³⁵ Absolute legislative immunity attaches to all actions taken “in the sphere of legitimate legislative activity.”³⁶ Legislative immunity has been found for budgeting decisions,³⁷ ordinance enactment,³⁸ zoning decisions,³⁹ and other matters held to be legislative in nature.⁴⁰

When local legislators are acting with respect to a specific situation that does not amount to policymaking, however, they may not have legislative immunity. For example, in the land use area, a vote to change zoning laws or to establish general rules for the use of property may be a legislative act, but an individual decision on a single parcel of land may not be a legislative act. The mere fact

that the complained-of action occurred by way of a vote does not automatically mean the action is legislative. A number of federal appellate courts have recognized that “[a]lthough a local legislator may vote on an issue, [the act of voting] alone does not necessarily determine that he or she was acting in a legislative capacity.”⁴¹

The U.S. Supreme Court has not outlined any definitive test for determining when a particular action taken by a local official is considered legislative and when it is not. Nevertheless, the Fifth and First Circuits have adopted two tests to aid in this determination.⁴² The first test focuses on the nature of the facts used to reach a given decision. Under that test, if the underlying facts on which a decision is based are “legislative facts,” such as generalizations concerning a policy or state of affairs, then the decision is legislative. If, on the other hand, the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative.⁴³

The second test focuses on the “particularity of the impact of the state action.” Under this test, if the action involves establishment of a general policy, it is legislative. If it singles out specific individuals and affects them differently from others, it is administrative.⁴⁴ Other federal appellate courts have adopted the same or similar tests for determining the scope of absolute legislative immunity.⁴⁵

Judges

Absolute judicial immunity was recognized as part of the common law well before the adoption of the Civil Rights Act of 1871.⁴⁶ In *Pierson v. Ray*, the Supreme Court recognized absolute judicial immunity for damages under § 1983: “The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so

provided had it wished to abolish the doctrine [when it enacted § 1983].”⁴⁷ It was not until the Supreme Court’s 1978 decision in *Stump v. Sparkman*,⁴⁸ however, that the Court articulated two limits on judicial immunity. The Court held that (1) acts in the clear absence of a court’s jurisdiction are not entitled to immunity, although immunity does extend to acts in mere excess of jurisdiction, and (2) only judicial acts are protected.⁴⁹

The Supreme Court has articulated at least three policy bases justifying absolute judicial immunity from § 1983 suits: (1) the recognition of the common law history of immunity for judges, (2) the desire not to chill judicial discretion, undermine the finality of judicial proceedings or unfairly punish judges from exercising discretion and (3) the availability of alternative methods of addressing judicial abuse by way of appeal, judicial conduct proceedings, criminal prosecution and the will of the electorate for elected judges.⁵⁰

The Functional Approach: Judicial Versus Non-Judicial Conduct

The functional approach to absolute judicial immunity protects judges at all levels as well as those who act like judges.⁵¹ Only judicial acts, however, are protected by absolute immunity.⁵² In determining whether conduct constitutes a judicial act, the Supreme Court has stated that

the factors determining whether an act by a judge is a “judicial” one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.⁵³

The Supreme Court has upheld judicial immunity even in extreme circumstances.⁵⁴ Lower courts have also upheld such immunity in a variety of circumstances.⁵⁵ Even judges acting outside of, or in excess of, their jurisdiction are entitled to absolute judicial immunity unless the judge is acting in *clear excess* of his territorial jurisdiction.⁵⁶

Judges are not typically entitled to immunity, however, when acting outside of their judicial offices. For example, in *Zarcone v. Perry*,⁵⁷ a judge ordered a sandwich vender brought before him in handcuffs because he sold “putrid” coffee. In the resulting civil rights suit, the judge was held not to have been performing a judicial act and the jury’s verdict of \$80,000 in compensatory damages and \$60,000 in punitive damages was subsequently upheld.⁵⁸ In a rather striking case, the Sixth Circuit concluded in *Archie v. Lanier*⁵⁹ that “[w]e hold that stalking and sexually assaulting a person, no matter the circumstances, do not constitute ‘judicial acts.’ The fact that, regrettably, Lanier happened to be a judge when he committed these reprehensible acts is not relevant to the question of whether he is entitled to immunity. Clearly he is not.”⁶⁰

Judges are not absolutely immune when they act in an administrative capacity,⁶¹ or when they act as supervising employers.⁶² A judge acting in other capacities is not entitled to judicial immunity. For example, a judge who acts as a prosecutor, preparing complaint forms and then acting on them as a judge, is immune for his judicial acts, but not for the prosecutorial acts.⁶³ A judge acting as a legislator, issuing court rules, is absolutely immune in the legislative capacity, but not in enforcing the rules, which is an administrative capacity.⁶⁴

Others Who May Perform Judge-Like Functions

Executive officials performing judge-like functions are also immune,⁶⁵ as are parole officers acting in a judicial capacity.⁶⁶ Persons acting pursuant to court order or in conjunction with judicial activities are typically entitled to absolute immunity. For example, state officials charged with the duty of executing a facially valid court order enjoy absolute judicial immunity.⁶⁷ Court clerks acting in a ministerial role, however, are entitled only to qualified immunity with respect to certain functions.⁶⁸ Persons who are an integral part of the judicial system are also absolutely immune.⁶⁹ For example, grand jurors exercising discretionary judgment on the basis of evidence presented to them in grand jury proceedings are entitled to absolute immunity.⁷⁰ Additionally, law enforcement officers acting pursuant to court orders are typically entitled to absolute immunity.⁷¹

Prosecutors

Prosecutors generally enjoy absolute immunity when performing prosecutorial acts.⁷² As discussed below, however, prosecutors are not absolutely immune for all actions taken. Following a functional approach, the courts have held that while prosecutors are entitled to immunity for traditional litigation activities, they are not absolutely immune for activities such as office administration, criminal investigations or press releases.

Imbler articulated a number of justifications for immunizing prosecutors for their prosecutorial acts. Those justifications, which are substantially similar to those advanced to justify absolute judicial immunity, include: (1) the recognition of the common law history of immunity for prosecutors, (2) policy considerations designed to protect prosecutors from unfounded litigation that would divert attention from their duties and effect independent decision making and (3) the availability of alternative checks on prosecutor's activities by various post trial and appellate procedures, and professional disciplinary review mechanisms.⁷³

The Functional Approach: Advocacy Versus Investigative Acts

Prosecutors are absolutely immune when performing prosecutorial acts such as initiating the prosecution, presenting the case in court and taking appeals.⁷⁴ Similarly, prosecutors are immune for their decisions to prosecute or not prosecute.⁷⁵ Activities associated with prosecutorial decisions are also protected,⁷⁶ including immunity for plea bargaining activities,⁷⁷ and immunity in preparing for trial and in presenting the case in court.⁷⁸

Acts of prosecutors not directly related to the decision to prosecute or the presentation of cases are typically not entitled to absolute immunity. For example, if a prosecutor acts in other ways, such as conducting investigations, making representations to the court or issuing press releases, he may be entitled to a qualified immunity, but not absolute immunity.

Prosecutors who are involved in investigative functions are not usually entitled to absolute immunity.⁷⁹ Similarly, prosecutors are not entitled to absolute immunity for exercising law enforcement functions,⁸⁰ for giving legal advice,⁸¹ or in making public statements.⁸²

A prosecutor's out-of-court treatment of seized evidence or property is not protected by absolute immunity.⁸³ Additionally, when prosecutors order the destruction of exonerating material, they are not entitled to absolute immunity.⁸⁴

Others Who Perform Prosecutorial-like Functions

Persons performing prosecutorial-like functions are entitled to immunity.⁸⁵ Social workers initiating or "prosecuting" child neglect or child abuse proceedings have generally been held to have absolute immunity.⁸⁶ The cases, however, are not entirely consistent.⁸⁷ Activities that have attributes of prosecutorial-like conduct may also be protected.⁸⁸

Witnesses

Witnesses testifying at trial are entitled to absolute immunity.⁸⁹ As described below, however, the circuits are split as to whether witness immunity should be extended to those testifying at proceedings other than trial, such as probable cause and grand jury hearings.

The Supreme Court in *Briscoe* articulated two bases for justifying absolute immunity for witnesses testifying at trial. One, the common law had historically recognized immunity for witnesses, and two, public policy dictated that witnesses should not fear testifying truthfully for fear of a subsequent lawsuit based upon their testimony.⁹⁰

Some circuits hold that witnesses are entitled to immunity for their testimony at proceedings other than trial.⁹¹

Some circuits, however, have refused to extend absolute witness immunity to proceedings other than testifying at trial.⁹² One apparent rationale between the divergent cases denying absolute immunity and those granting absolute immunity is the distinction between being a fact witness and being a complaining witness, *i.e.*, fact witnesses could lie and defame at common law with immunity

in order to protect the integrity of the judicial process, but complaining witnesses were never afforded such immunity for malicious prosecution.⁹³ While this may be a distinction without a difference with respect to law enforcement officials, it is a distinction that appears to have been drawn by some circuits.

Qualified Immunity

The U.S. Supreme Court has held that government officials performing discretionary functions are entitled to qualified immunity from suit and damages where “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁹⁴ The critical issue is not whether a defendant actually infringed upon a plaintiff’s rights: “Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.”⁹⁵ To aid in that determination, the Court has reaffirmed that “whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action 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.”⁹⁶ For the relevant legal standards to be “clearly established,” the “contours” of the right alleged to have been violated “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁹⁷ Under the *Harlow* standard, “a defense of qualified immunity may not be rebutted by evidence that the defendant’s conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant’s subjective intent is simply irrelevant to that defense.”⁹⁸

The Evolution of Qualified Immunity

The doctrine of qualified immunity, like the absolute immunities discussed earlier in this chapter, is a judicially created doctrine that recognizes the common law immunity of public officials for their “good faith” actions. The public policy behind such qualified immunity includes attracting competent individuals to public sector jobs, encouraging individuals to serve in elected offices,

allowing public officials to exercise unfettered discretion in serving the public good and avoiding exposing public officials to unnecessary litigation that would distract them from their civic responsibilities.⁹⁹ This concept of “good faith” qualified immunity has evolved from a two-pronged, objective and subjective test, to a one-pronged, objective test.

Wood v. Strickland and the Subjective Test

In *Wood v. Strickland*,¹⁰⁰ the U.S. Supreme Court defined qualified immunity in § 1983 actions as including both an objective and subjective element. The Court, in a case involving the liability of school board members for disciplinary actions against students, articulated the standard as follows:

[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.¹⁰¹

Under the two-pronged *Wood* test, public officials could be held liable under § 1983 for violations of federal law when their conduct was either objectively unreasonable or in subjective bad faith.

The use of a subjective “good faith” standard in the application of qualified immunity, however, proved problematic because it triggered an examination of the public official’s subjective state of mind at the time of the alleged unconstitutional act. Such a factual determination obviously frustrated the intent of qualified immunity to quickly resolve insubstantial lawsuits by way of a motion to dismiss or a motion for summary judgment.

Harlow v. Fitzgerald and the Objective Test

In *Harlow v. Fitzgerald*,¹⁰² the Supreme Court recognized this problem and significantly redefined the standard for qualified immunity by abandoning the subjective prong of the qualified immunity test and holding that § 1983 defendants would only be liable for damages when their conduct violated clearly established federal law.¹⁰³ The Court discussed the parameters of its newly defined objective qualified immunity test as follows:

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. *We therefore hold that government officials performing discretionary functions generally are shielded 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.*

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment: *On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.* Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the

public interest may be better served by action taken “with independence and without fear of consequences.”¹⁰⁴

The Court’s reasoning in *Harlow* was later elaborated on in *Crawford-El*.

Two reasons that are explicit in our opinion in *Harlow*, together with a third that is implicit in the holding, amply justified *Harlow*’s reformulation of the qualified immunity defense. First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been used to shield baseless lawsuits from summary judgment. The objective standard, in contrast, raises questions concerning the state of the law at the time of the challenged conduct--questions that normally can be resolved on summary judgment. Third, focusing on “the objective legal reasonableness of an official’s acts,” avoids the unfairness of imposing liability on a defendant who “could not reasonably be expected to anticipate subsequent legal developments, nor ... fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.” That unfairness may be present even when the official conduct is motivated, in part, by hostility to the plaintiff.¹⁰⁵

Breaking Down the Harlow Standard

The U.S. Supreme Court has stated that “government officials performing *discretionary functions* generally are shielded 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.”¹⁰⁶ The discretionary versus ministerial function dichotomy in decision making, however, has rarely been used as a disqualifier for undertaking a qualified immunity analysis.

For example, in *Horta v. Sullivan*,¹⁰⁷ the First Circuit downplayed the importance of discretionary versus ministerial functions in a qualified immunity analysis.

[In] spite of the reference to discretionary functions [in *Harlow*], it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity. Judge Cummings, writing for the Seventh Circuit, warned that “it would be unwise to engage in a case by case determination of Section 1983

immunity based upon the ministerial versus the discretionary nature of the particular official act challenged.”¹⁰⁸

Other circuits also have recognized the danger in rejecting qualified immunity claims merely on the basis of a determination that the functions involved are ministerial, rather than discretionary.

The distinction between ministerial and discretionary duties of public officials has a long history. However, the plaintiffs have cited, and we can find, no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty.¹⁰⁹

In *Davis v. Scherer*,¹¹⁰ the Supreme Court dramatically circumscribed the viability of the ministerial duty exception to qualified immunity. In *Davis*, the plaintiff, a discharged employee of the Florida Highway Patrol, sued certain public officials of the Florida Department of Highway Safety and Motor Vehicles under § 1983 alleging that his due process rights had been violated.¹¹¹ The trial and appellate courts had denied the public officials’ qualified immunity because they had not followed certain administrative regulations in discharging the plaintiff and, therefore, were held not to have acted in a discretionary capacity.¹¹² In rejecting this contention, the Supreme Court stated as follows:

Appellee’s contention mistakes the scope of the “ministerial duty” exception to qualified immunity in two respects. First, as we have discussed, breach of a legal duty created by the personnel regulation would forfeit official immunity only if that breach itself gave rise to the appellee’s cause of action for damages. This principle equally applies whether the regulation created discretionary or ministerial duties. Even if the personnel regulation did create a ministerial duty, appellee makes no claim that he is entitled to damages simply because the regulation was violated. . . .

[T]he District Court’s findings that appellants ignored a clear legal command does not bear on the “ministerial” nature of appellants’ duties. *A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused.*¹¹³

The Court also held that “[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.”¹¹⁴ The Court reasoned that the officials could lose their immunity only if the breach of the state regulation, rather than a constitutional duty, gave rise to the plaintiff’s damages claim.¹¹⁵

The narrow application of the ministerial duty exception to qualified immunity also has been recognized by the Fifth Circuit in *Gagne v. City of Galveston*.¹¹⁶

Although the Supreme Court’s qualified immunity opinions have given special attention to the need to avoid inhibiting the ardor of public officials whose positions entail the exercise of discretionary authority, the Court has never implied that the immunity defense is lost when an official is engaged in routine tasks. Indeed, any such suggestion was firmly rejected in footnote 14 of *Davis v. Scherer*, where the Court emphasized that the so-called “ministerial duty” exception to qualified immunity is extremely narrow in scope. . . . Thus, if an official is required to exercise his judgment, even if rarely or to a small degree, the Court would apparently not find an official’s duty to be ministerial in nature.¹¹⁷

In *Sellers v. Baer*¹¹⁸, the Eight Circuit has even gone so far as to opine that the ministerial exception is a “dead letter,” collecting opinions expressing skepticism as to whether a distinction should be drawn between discretionary and ministerial duties for purposes of a qualified-immunity analysis.¹¹⁹

Conduct That Does Not Violate Clearly Established Statutory or Constitutional Rights of Which a Reasonable Person Would Have Known

The doctrine of qualified immunity shields an official performing discretionary functions from liability for damages under § 1983 so long as the official’s conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware. Whether an official can be held personally liable for taking an allegedly unlawful action turns on the “objective legal reasonableness” of the action, assessed in light of the legal rules that were “clearly established” at the time the action was taken.¹²⁰ To be clearly established, the “contours” of the

right allegedly violated must be sufficiently clear that a reasonable official would understand what he is doing violates that right.¹²¹

The appropriate inquiry is whether a reasonable official could have thought that he acted in accordance with the Constitution in taking the action of which is complained.¹²² As noted by the U.S. Supreme Court in *Hunter*, “the court should ask whether the [government official] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact.”¹²³

This deferential standard is also applicable in a summary judgment context: “If, upon viewing the evidence in the light most favorable to the non-movant, reasonable public officials could differ on the lawfulness of the defendant’s actions, the defendant is entitled to qualified immunity.”¹²⁴ The qualified immunity standard “gives ample room for mistaken judgments.”¹²⁵

To properly apply the test for qualified immunity, a court must determine whether the law, as applied to a specific factual situation, was clearly established in such a way that the officials involved should have known that their decision or actions violated constitutional rights or federal law. Simple negligence on the part of a public official is not enough.¹²⁶

That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. Unless a government agent’s act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.¹²⁷

What Is a Clearly Established Right and How Is It Determined?

In *Anderson v. Creighton*,¹²⁸ the Supreme Court required increased fact specificity from plaintiffs alleging that a public official had violated clearly established law. The Court clarified the qualified immunity standard by rejecting the notion that public officials were expected to be able to give concrete application to lofty, abstract principles of constitutional law:

The operation of [the *Harlow*] standard . . . depends substantially upon the level of generality at which the relevant “legal rule” is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that cause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of “clearly established law” were to be applied at this level of generality, it would bear no relationship to the “objective legal reasonableness” that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.¹²⁹

The Court has held that qualified immunity must be analyzed at an “objective, albeit fact-specific” level of abstraction:

[O]ur cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.¹³⁰

The objective reasonableness of the action in question is to be assessed in light of the constitutional norms that were “clearly established” at the time the action was taken.¹³¹

How Is the Law Clearly Established?

It is unquestioned that U.S. Supreme Court precedent directly on point establishes clearly settled law of which a reasonable public official either knows or should know.¹³² What constitutes “clearly established law” outside of U.S. Supreme Court precedent, however, is simply not clearly established. The question of which, and how many, courts must speak on an issue has not been addressed by the Supreme Court. For example, the Sixth Circuit has interpreted “clearly established law,” other than black letter statutory provisions, to mean law that has been established by decisions of (1) the U.S. Supreme Court, (2) the U.S. Court of Appeals in which the incident occurred, (3)

other U.S. Courts of Appeals or (4) the highest state court in the state where the action arose.¹³³

Some cases suggest that Supreme Court precedent or case law from the defendant's own jurisdiction is necessary to clearly establish a constitutional right, while others rely on case law from other jurisdictions.¹³⁴

Some courts of appeals have granted immunity despite case law favoring the plaintiff simply because the number of such cases was insufficient.¹³⁵ If the relevant precedents conflict either within the defendant's own jurisdiction or among various jurisdictions, almost all courts conclude that the right asserted by the plaintiff is not clearly established.¹³⁶

Lower courts conflict as to whether dictum and opinions issued over dissents are relevant in determining whether a right is clearly established.¹³⁷

When Is the Law Clearly Established?

In determining whether the law is "clearly established," courts must look to specific, concrete examples that shed an illuminating light on the factual scenario under review.

For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.¹³⁸

Some cases suggest that there must be a bright line that the officials have clearly transgressed,¹³⁹ and that pre-existing law must dictate that the official's decision or actions violated well established constitutional rights.¹⁴⁰

The U.S. Supreme Court, however, has made it clear that a case on all fours factually is not needed for a defendant to lose the assertion of qualified immunity. As noted in *Hope v. Pelzer*,¹⁴¹

As we have explained, qualified immunity operates “to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” For a constitutional right to be clearly established, its contours “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”¹⁴²

Who Is the Reasonable Person to whom Harlow Refers and to What Extent Does Actual Knowledge of a Violation of Rights Play in an Objective Analysis?

While *Harlow* protects discretionary conduct that does not violate clearly established statutory or constitutional rights of which “a reasonable person would have known,”¹⁴³ neither *Harlow* nor any subsequent Supreme Court precedent has discussed who is the reasonable person to whom *Harlow* refers. Is the reasonable person a reasonable public official in the abstract, or a reasonable person in the defendant’s position? Some lower courts refer to what is reasonable for a defendant in that defendant’s position.¹⁴⁴ These cases seem to imply that the court should consider the defendant’s position in determining whether that defendant acted reasonably. The author is aware of no case, however, that directly discusses this issue.

Another issue not answered in *Harlow* is whether there is a subjective prong involved when a defendant has actual knowledge of a violation of rights, even if the rights are not clearly established. After *Harlow*, there was considerable case law that indicated that in determining whether a government official acted reasonably, the subjective intent of the official was to be ignored and the court was to look only to a test of objective legal reasonableness.¹⁴⁵ The U.S. Supreme Court in *Saucier*,¹⁴⁶ clarified this aspect of the qualified immunity defense, *i.e.*, whether the defense applies *even if* the defendant knew that what he did violated the plaintiff’s constitutional rights.¹⁴⁷

In *Saucier*, the Supreme Court clarified that the qualified immunity defense, available in an excessive force case, is to be reviewed by a district court under a different analysis than the review of the case on the merits. The Court's opinion underscores the strength of the defense, in that these two aspects of the case (review of the merits, then review of whether qualified immunity is nonetheless available) are to be separately analyzed:

Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson [v. Creighton]*, 483 U.S. 635 (1987) still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.¹⁴⁸

It can certainly be argued that while a defendant's subjective state of mind is not relevant to determine whether there is a violation of clearly established law, the defendant's actual subjective knowledge may be important for determining whether that defendant is liable for violating clearly established law if that public official knew that he was violating clearly established law, even where an objective, reasonable defendant would not have known that he was violating clearly established law. The author is aware of no case that directly addresses this issue and those that mention it do so only in passing.¹⁴⁹

The Extraordinary Circumstances Exception

In *Harlow*, the Supreme Court, without discussion, indicated that there could be "extraordinary circumstances" where defendants who violated clearly established law proved that they should not have known of the relevant legal standard.

If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing its conduct. Nevertheless, if the official pleading the defense claims *extraordinary circumstances*

and can prove that he neither knew nor should have known the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.¹⁵⁰

The most common assertion of the extraordinary circumstances exception is when public officials rely on the advice of legal counsel as authority for their actions.¹⁵¹

Other cases strongly suggest that mere reliance on an attorney's advice cannot be used as a shield from liability from actions that violate the constitution and clearly established law.¹⁵²

Notes

1. *See Carey v. Piphus*, 435 U.S. 247, 253-54 (1978).
2. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 319-20 (1975); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).
3. 445 U.S. 622, 638 (1980).
4. *See, e.g., Tower v. Glover*, 467 U.S. 914, 922 (1984) (where no immunity was available in 1871 providing public defenders an absolute immunity from liability for intentional misconduct that deprives clients of their federal rights, even strong public policy reasons do not support providing public defenders such immunity under § 1983).
5. *See Howlett v. Rose*, 496 U.S. 356, 369 (1990) (“A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a ‘valid excuse.’”).
6. *Id.* at 367.
7. *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949)).
8. *See Martinez v. State of California*, 444 U.S. 277, 284 n.8 (1980).
9. 446 U.S. 719 (1980).
10. *Id.* at 736.
11. *Id.* at 731-34.
12. 466 U.S. 522 (1984).
13. *Id.* at 541-42.
14. *Id.* at 536-40.
15. Pub. L. No. 104-317, § 309(c), 1996.
16. 473 U.S. 159 (1985).
17. *Id.* at 163.
18. *Id.* at 165-66 (citations omitted) (emphasis in original).
19. *Forrester v. White*, 484 U.S. 219, 224 (1988).
20. *See Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state legislators); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405-06 (1979) (regional legislators); *Bogan v. Scott-Harris*, 523 U.S. 44,

49 (1998) (local legislators); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (prosecutors).

21. *See Lake Country Estates*, 440 U.S. at 402-06.

22. *Burns v. Reed*, 500 U.S. 478, 492-96 (1991).

23. *See Bogan*, 523 U.S. at 52.

24. *See Id.* at 48-49; *Owen* 445 U.S. at 663 n.6; *Lake Country Estates*, 440 U.S. at 402-06; *Tenney*, 341 U.S. at 379.

25. *See Lake Country Estates*, 440 U.S. at 402-06 (court used functional approach to determine that a bi-state regional planning agency created by California and Nevada was entitled to absolute legislative immunity for its adoption and enforcement of a regional land use plan); *Tenney*, 341 U.S. at 379 (state legislators absolutely immune from liability for damages when they act “in a field where legislators traditionally have power to act”).

26. 341 U.S. 367 (1951).

27. *Id.* at 377.

28. 440 U.S. 391, 405 (1979).

29. 4 Mass. 1, 27 (1808).

30. *Tenney*, 341 U.S. at 379.

31. *Id.*

32. *Lake Country Estates*, 440 U.S. at 402-06.

33. *Bogan*, 523 U.S. at 48-49.

34. *See, e.g., Bogan*, 523 U.S. at 54-55 (local legislators); *Lake Country Estates*, 440 U.S. at 402-06 (regional legislators); *Consumers Union*, 446 U.S. at 731-34 (state supreme court justices in promulgating attorney conduct rules); *Gravel v. United States*, 408 U.S. 606, 616-21 (1972) (legislative aides when performing acts for which a legislator would be immune).

35. *Tenney*, 341 U.S. at 379.

36. *Bogan*, 523 U.S. at 54.

37. *Bogan*, 523 U.S. at 55-56 (city council’s adoption of budget that eliminated employee’s position was a legislative act and thus local legislators were entitled to absolute immunity from suit); *Woods v. Gamel*, 132 F.3d 1417, 1419-20 (11th Cir. 1998) (county commissioners’ act of approving county budget for all county expenses, pursuant to state law, was “legislative act,” because act was policymaking of general application, and commissioners were thus entitled to legislative immunity for that act in § 1983 action brought by county jail

inmates alleging inadequate conditions); *Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983) (mayor and city council were absolutely immune for eliminating position of assistant building inspector).

38. *R.S.W.W. v. City of Keego Harbor*, 397 F.3d 427, 437-38 (6th Cir. 2005) (passage of sign ordinance was a legislative act entitling city council members to absolute immunity); *Mears v. Town of Oxford*, 762 F.2d 368, 371 (4th Cir. 1985) (town commissioners who passed ordinance limiting marina expansion were acting in a legislative capacity and were absolutely immune).

39. *Biblia Abierta v. Banks*, 129 F.3d 899, 903-04 (7th Cir. 1997) (aldermen were entitled to absolute legislative immunity for introducing and voting for zoning ordinances that would prevent churches from purchasing property in aldermen's wards); *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989) (mayor and city council who voted for unconstitutional zoning ordinance held absolutely immune); *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) (members of county council were absolutely immune in passing rezoning ordinance); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980) (city board of directors were absolutely immune for passing zoning amendment).

40. *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997) (legislative body's discipline of one of its members is a core legislative function protected by legislative immunity); *Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (senate president was absolutely immune in compelling legislator to attend session through use of senate sergeant-at-arms and state troopers); *Agromayor v. Goldberg*, 738 F.2d 55, 58-60 (1st Cir. 1984) (Puerto Rico Speaker of the House was absolutely immune in refusing to hire individual of rival political party as a legislative press officer); *Kuzinich v. City of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982) (members of local legislative bodies had complete immunity from suits based on their legislative acts); *Green v. DeCamp*, 612 F.2d 368, 372 (8th Cir. 1980) (state senators who released committee report to media were entitled to legislative immunity).

41. *Brown v. Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992); *Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991). *See also Roberson v. Mullins*, 29 F.2d 132, 134 n. 3 (4th Cir. 1994) (recognizing that member of local governmental body does not necessarily act in legislative capacity when participation takes form of a vote).

42. *See Hughes v. Tarrant County*, 948 F.2d 918, 921 (5th Cir. 1991); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

43. *Hughes*, 948 F.2d at 921; *Cutting*, 724 F.2d at 261. *See also Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 9 (1st Cir. 2000); *Bryan v. City of Madison*, 213 F.3d 267, 273-74 (5th Cir. 2000).

44. *Hughes*, 948 F.2d at 921; *Cutting*, 724 F.2d at 261. *See also Acevedo-Garcia*, 204 F.3d at 9; *Bryan*, 213 F.3d at 273-74.

45. *See, e.g., Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211 (2^d Cir. 2003); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) ("We determine whether an action is legislative by considering four factors: (1) 'whether the act involves ad hoc decisionmaking, or the formulation of policy'; (2) 'whether the act applies to a few individuals, or to the public at large'; (3) 'whether the act is formally legislative in character'; and (4) 'whether it bears all the hallmarks of traditional legislation.' "); *Roberson*, 29 F.3d at 135; *Brown*, 970 F.2d at 437; *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992); *Crymes*, 923 F.2d at 1485; *Ryan v. Burlington County, N.J.*, 889 F.2d 1286, 1290-91 (3^d Cir. 1989); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

46. *See Bradley v. Fisher*, 13 Wall. 335 (1871).
47. 386 U.S. 547, 554-55 (1967).
48. 435 U.S. 349 (1978).
49. *Id.* at 356-62. *See also Mireles v. Waco*, 502 U.S. 9, 11 (1991).
50. *See Pierson*, 386 U.S. at 554-55; *Stump*, 435 U.S. at 355-57.
51. *See, e.g., Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (absolute immunity extended to hearing examiners).
52. *See, e.g., Cleavinger v. Saxner*, 474 U.S. 193, 203-06 (1985) (hearing officers in a prison disciplinary proceeding functioned as adjudicators in an administrative matter and were only entitled to qualified immunity).
53. *Stump*, 435 U.S. at 362.
54. *See, e.g., Mireles*, 502 U.S. at 11-12 (judge was acting within his judicial function when he ordered deputies to physically bring lawyer who was late into his courtroom and excessive force was allegedly applied; judge had absolute judicial immunity since ordering lawyer who was physically present in the courthouse to come to his courtroom was a judicial function); *Stump*, 435 U.S. at 357-60 (judge of court of general jurisdiction who ordered sterilization of 15-year old girl was absolutely immune even if Indiana law did not authorize his acts).
55. *See, e.g., Harvey v. Waldron*, 210 F.3d 1008, 1012 (9th Cir. 2000) (absolute judicial immunity applied to protect justice of the peace from § 1983 liability to antique business owner for issuing ex parte order to destroy or dispose of antique gaming devices seized from owner's property, inasmuch as issuance of order was function that justice of the peace had jurisdiction to perform, and therefore immunity applied even if order was erroneous and its effect was injurious to owner, and irrespective of claimed motivation); *Cooper v. Parrish*, 203 F.3d 937, 945 (6th Cir. 2000) (state court chancellor was acting in his judicial capacity when he allegedly engaged in ex parte contact with state prosecutors and gave them legal advice regarding ways that they could improve their public nuisance case against nightclubs, given that chancellor was judge of court in which public nuisance action was ultimately filed and communications, although possibly improper under state law, were related to chancellor's general judicial functions, including his authority to issue ex parte restraining order prior to commencement of action); *Myers v. Vogal*, 960 F.2d 750 (8th Cir. 1992) (judge who sentenced juvenile as adult was still acting within his jurisdiction and was entitled to absolute judicial immunity); *John v. Barron*, 897 F.2d 1387, 1391-92 (7th Cir. 1990) (judge was absolutely immune in removing trustee of charitable trust); *Mills v. Criminal Dist. Court No. 3*, 837 F.2d 677 (5th Cir. 1988) (trial judge was absolutely immune against allegations of denial of a fundamentally fair trial); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985) (judge who allegedly conspired with prosecutor in speeding ticket case was entitled to absolute immunity); *Halloway v. Walker*, 765 F.2d 517, 522-23 (5th Cir. 1985) (judge was absolutely immune for placing company in receivership and running company improperly); *Adams v. McIlhany*, 764 F.2d 294, 297-99 (5th Cir. 1985) (judge who sentenced woman to 30 days in jail for contempt because she had accused the judge of accepting bribes was absolutely immune); *Emory v. Peeler*, 756 F.2d 1547, 1551 (11th Cir. 1985) (judge who singled out and chastised juror for not voting for death penalty was absolutely immune); *Green v. Maraio*, 722 F.2d 1013, 1017-18 (2d Cir. 1983) (judge who allegedly told court reporter to alter trial transcript after criminal defendant was sentenced was absolutely immune, as was the court reporter who acted pursuant to the judge's explicit instructions); *Scott v. Hayes*, 719 F.2d 1562, 1566-67 (11th Cir. 1983) (judge who ordered party in divorce proceeding to have vasectomy as a condition of obtaining a favorable property settlement was absolutely immune).

56. See, e.g., *Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 770 (3d Cir. 2000) (judge was entitled to absolute judicial immunity from claim by former court administrator that judge invaded his privacy by issuing order releasing to newspaper a petition for protection from abuse filed by administrator's wife, even if order was issued orally; issuance of order releasing court record to public was judicial act, fact that order was issued ex parte did not mean that act was not judicial, and any violation of rule allowing release of information only for use in judicial proceeding established at most that judge acted in excess of jurisdiction, not that she acted in clear absence of jurisdiction); *Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 565-66 (9th Cir. 1990) (even if judge acts outside of jurisdiction, judge still has absolute judicial immunity so long as acts themselves are judicial); *King v. Love*, 766 F.2d 962, 965-66 (6th Cir. 1985) (municipal court judge who acted in excess of his jurisdiction by jailing driver was still absolute immunity since court had subject matter jurisdiction over the underlying offense); *Billingsley v. Kyser*, 691 F.2d 388, 389 (8th Cir. 1982) (judge who amended plaintiff's criminal sentence while plaintiff's appeal was pending was immune even though the judge had lost jurisdiction over the matter); *Turner v. Raynes*, 611 F.2d 92, 93-94 (5th Cir. 1980) (Texas justice of the peace with limited criminal jurisdiction was absolutely immune even if he convicted plaintiff of non-existent crime). *Contra Maestri v. Jatkofsky*, 860 F.2d 50, 53 (2d Cir. 1988) (town judge, who could only hear criminal cases in his own town and in towns immediately adjacent, was not entitled to absolute immunity when he heard a case beyond those limits and issued arrest warrants for acts that took place in a town not within his jurisdiction); *Dykes v. Hosemann*, 743 F.2d 1488, 1496-97 (11th Cir. 1984) (judge acting in clear and complete absence of personal jurisdiction loses judicial immunity).

57. 572 F.2d 52 (2d Cir. 1978).

58. *Id.* at 54-55. See also *Harris v. Harvey*, 605 F.2d 330, 336 (7th Cir. 1979) (where judge initiated criminal proceedings against black police officer based upon racially improper motives and made racial remarks to press, he was not entitled to absolute immunity and jury's award of \$60,000 in compensatory damages and \$200,000 in punitive damages was accordingly upheld).

59. 95 F.3d 438 (6th Cir. 1996).

60. *Id.* at 441.

61. See, e.g., *Kurowski v. Krajewski*, 848 F.2d 767, 773-74 (7th Cir. 1988) (state court judge did not have absolute immunity from civil liability arising from his firing of public defenders on basis of their political beliefs); *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063-64 (8th Cir. 1979) (judge who allegedly unlawfully terminated employee was entitled only to assert qualified immunity defense); *King*, 766 F.2d at 968-69 (judge who deliberately mislead an officer about the identity of the person named in a warrant, which led to that person's arrest, committed a non-judicial act for which no judicial immunity was available).

62. See, e.g., *Forrester v. White*, 484 U.S. 219, 229-30 (1988) (state court judge was acting in an administrative capacity when he demoted and dismissed probation officer and, thus, was not absolutely immune from § 1983 damages suit brought by disgruntled ex-employee); *Meek v. County of Riverside*, 183 F.2d 962, 966-67 (9th Cir. 1999) (decision to fire subordinate judicial employee was administrative decision and, thus, because alleged actions of municipal court judges in voting to terminate court commissioner and thereby force him to retire were administrative rather than judicial acts, judges were not entitled to absolute judicial immunity from commissioner's civil rights action alleging that he was terminated in retaliation for exercising his First Amendment right to campaign for judicial office); *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 545 (8th Cir. 1984) (judge who allegedly transferred female hearing officer on the basis of her sex was not entitled to absolute immunity).

63. See *Barnes v. Winchell*, 105 F.3d 1111, 1118-18 (6th Cir. 1997) (“[D]espite its breadth, the doctrine of absolute judicial immunity does not protect a judge performing the purely prosecutorial functions involved in initiating criminal prosecutions. This is especially true where the judge initiates criminal prosecutions based on the judge’s private interests, completely separate from cases brought to court independently by the parties. Nonetheless, this exception to absolute judicial immunity when a judge engages in purely prosecutorial functions is narrow.”); *Lopez v. Vanderwater*, 620 F.2d 1229, 1234-35 (7th Cir. 1980).

64. *Consumers Union*, 446 U.S. at 731-34.

65. See, e.g., *Butz*, 438 U.S. at 513-14 (administrative law judge and hearing examiner in Agriculture Department were acting in a judicial capacity when they attempted to revoke plaintiff’s registration with the Department and, thus, were absolutely immune); *Scott v. Schmidt*, 773 F.2d 160, 164-65 (7th Cir. 1985) (members of Illinois Racing Board were acting in a judicial capacity in suspending and denying horse owner’s racing license where owner allegedly took a bribe to fix a horse race and, thus, were absolutely immune); *Mills v. Killebrew*, 765 F.2d 69, 72 (6th Cir. 1985) (lawyers who served on mediation panel were entitled to absolute immunity); *Vakas v. Rodriguez*, 728 F.2d 1293, 1296-97 (10th Cir. 1984) (members of Kansas Board of Healing Arts hearing disciplinary charges against doctors were absolutely immune); *Sprecher v. Graber*, 716 F.2d 968, 972-73 (2d Cir. 1983) (SEC officials enjoyed absolute immunity insofar as alleged misconduct in connection with SEC investigation fell within scope of judicial or prosecutorial functions); *Simons v. Bellinger*, 643 F.2d 774, 777-78 (D.C. Cir. 1980) (unauthorized practice of law committee of bar association had absolute immunity in determining compliance with laws and rules governing practice of law); *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980) (commissioners appointed by the court to conduct a partition sale of the divorced plaintiffs’ property were sufficiently related to the judicial process to entitle them to quasi-judicial absolute immunity from federal suit for damages arising from their conduct in handling sale and in distributing proceeds of sale).

66. See, e.g., *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (“[W]e join our sister circuits and hold directly that parole board officials, like judges, are entitled to absolute immunity from suit for damages when they serve a quasi-adjudicative function in deciding whether to grant, deny or revoke parole,” citing *Anton v. Getty*, 78 F.3d 393, 396 (8th Cir.1996); *Littles v. Board of Pardons & Paroles Div.*, 68 F.3d 122, 123 (5th Cir.1995) (per curiam); *Walrath v. United States*, 35 F.3d 277, 281-82 (7th Cir.1994); *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir.1992); *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307, 1310 (11th Cir.1988); *Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir.1987); and *Anderson v. Boyd*, 714 F.2d 906, 908-10 (9th Cir.1983)); *Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 973-76 (5th Cir. 1988) (parole board members were absolutely immune in deciding whether to grant or deny parole); *Nelson v. Balazic*, 802 F.2d 1077, 1078 (8th Cir. 1986) (parole board members who paroled individual who subsequently kidnapped, raped and sodomized plaintiffs were absolutely immune for their decision to parole the perpetrator); *Evans v. Dillahunt*, 711 F.2d 828, 830-31 (8th Cir. 1983) (regional parole commissioner, who rejected parole panel’s recommendation, resulting in prisoner spending four extra months in prison, acted within scope of his official duties in reviewing the recommendation and, therefore, was entitled to absolute immunity); *Sellars v. Procnier*, 641 F.2d 1295, 1302-03 (9th Cir. 1981) (state parole board officials are entitled to absolute immunity from suits by prisoners for actions taken when processing parole applications since, under “functional comparability” test, parole board officials perform functionally comparable tasks to judges when they decide to grant, deny or revoke parole, and parole board officials face same risk of constant unfounded suits by those disappointed by parole board’s decisions). But see *Jones v. Moore*, 986 F.2d 251, 253 (8th Cir. 1993) (parole officer was absolutely immune in revoking parole, but not in issuing false violation report); *Harper v. Jeffries*, 808 F.2d 281, 284 (3d Cir. 1986) (parole board members were absolutely immune when carrying out adjudicatory functions, but not when performing executive or administrative functions); *Ray v. Pickett*, 734 F.2d 370, 373-74 (8th Cir. 1984) (probation officer, in filing report with the United States Parole Commission to secure a parole violator’s warrant, was not functioning in an adjudicatory or prosecutorial capacity, and thus was not entitled to absolute immunity in suit

claiming intentional falsification of report); *Anderson v. Boyd*, 714 F.2d 906, 908 (9th Cir. 1983) (absolute immunity does not extend to the knowing dissemination of false information concerning a parolee to persons outside the parole system).

67. *See Valdez v. City and County of Denver*, 878 F.2d 1285, 1287-88 (10th Cir. 1989). *See also Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (members of the Florida State Bar were acting as agents of the Florida Supreme Court in connection with disciplinary proceeding and were entitled to absolute immunity); *Turney v. O'Toole*, 898 F.2d 1470, 1473-74 (10th Cir. 1990) (superintendent and psychologist at public mental health facility were entitled to absolute quasi-judicial immunity from juvenile's civil rights action insofar as action was based upon fact of juvenile's confinement pursuant to court order, even assuming order was infirm as matter of state law, but such immunity did not extend to any liability arising from placement of juvenile in maximum security ward; superintendent and psychologist were only qualifiedly immune for any liability arising from placement).

68. *See Antoine v. Byers & Anderson*, 508 U.S. 429, 436-37 (1993) (court reporter was not absolutely immune from damages liability for failing to produce transcript of federal criminal trial; tasks performed by court reporter were not discretionary and were not functionally comparable to that of judge); *Snyder v. Nolen*, 380 F.3d 279, 287-88 (7th Cir. 2004) (state-court clerk who, on his own initiative, refused to file prison inmate's pro se marital dissolution pleadings, under mistaken belief that counsel was required to prosecute action, was not entitled to absolute quasi-judicial immunity in inmate's § 1983 action alleging denial of his constitutional right of access to the courts; clerk was not acting in functionally comparable way to a judge, since his duty under state law was purely ministerial one of maintaining official record, and secondly there was no evidence that clerk had acted at direction of any judicial officer); *Henriksen v. Bentley*, 644 F.2d 852, 856 (10th Cir. 1981) (clerks entitled only to qualified immunity when exercising ministerial and non-discretionary duty to file court papers). *But see Kincaid v. Vale*, 969 F.2d 594, 601 (7th Cir. 1992) (court clerks were entitled to absolute immunity against § 1983 action brought by two inmates who alleged that clerks had deprived them of their constitutional right to access to courts by refusing to file inmates' civil suit in Indiana Superior Court; clerks' acts were done at judicial direction, and were not mechanical functions integral to judicial process); *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988) (court clerks held to have absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's direction); *McCaw v. Winter*, 745 F.2d 533, 534 (8th Cir. 1984) (court clerk who followed judge's order in selecting jury was absolutely immune).

69. *See, e.g., Wilson v. Kelkhoff*, 86 F.3d 1438, 1443-44 (7th Cir. 1996) (prisoner review board members are entitled to absolute immunity for activities that are analogous to those performed by judges, such as decision to grant, deny, or revoke parole, as well as activities that are inexorably connected with execution of parole revocation procedures and are analogous to judicial action; thus, not only actual decision to revoke parole, but also activities that are part and parcel of decision process justify absolute immunity); *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995) (court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity provided that the challenged actions are taken in good faith and within the scope of the authority granted to the receiver); *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994) (guardian ad litem was entitled to quasi-judicial immunity on all civil rights claims arising from guardian's actions during child custody dispute, even if guardian lied to judge in open court); *Millspaugh v. County Dept. of Public Welfare*, 937 F.2d 1172, 1176 (7th Cir. 1991) (social service worker initiating child abuse proceeding was absolutely immune); *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985) (court appointed receiver was entitled to absolute immunity in performing acts within the scope of his authority and in carrying out judge's orders); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (state employees who were responsible for prosecution of child neglect and delinquency petitions in state courts, and psychologist and psychiatrists whose findings following examination of child were used by Department of Social Services and state courts to determine what environment best suited interests of child, all of

whom were integral parts of judicial process, were entitled to absolute immunity in action brought by parents individually and as next friends of their son alleging violation of their civil rights).

70. See *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1050-51 (8th Cir. 1992) (members of grand jury had absolute immunity against § 1983 claims against them arising from grand jurors' "co-authoring" of report issued following investigation of child abuse and other charges; grand jurors' comments in report involved exercise of discretionary, quasi judicial function).

71. See, e.g., *In re Foust*, 310 F.3d 849, 855 (5th Cir. 2002) ("Law enforcement officers have absolute immunity for enforcing the terms of a court order but only qualified immunity for the manner in which they choose to enforce it."); *Valdez v. City & County of Denver*, 878 F.2d 1285, 1289 (10th Cir.1989) ("Officials must not be called upon to answer for the legality of decisions which they are powerless to control."); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1239-40 (7th Cir.1986) (explaining that appeal is the sole avenue for challenging an unconstitutional court order).

72. See *Imbler*, 424 U.S. at 430-31; *Burns*, 500 U.S. at 490-91.

73. See *Imbler*, 424 U.S. at 424-27.

74. See, e.g., *Imbler*, 424 U.S. at 430-31; *Reid v. State of New Hampshire*, 56 F.3d 332, 336-37 (1st Cir. 1995) (prosecutors who prosecuted sexual assault action against former defendant had absolute immunity to former defendant's civil rights action which alleged that prosecutors knowingly withheld exculpatory evidence in direct violation of trial court's discovery orders; under *Imbler*, prosecutors have absolute personal immunity for knowing suppression of exculpatory information, even if exculpatory information is suppressed in violation of trial court orders or is suppressed long after a defendant's conviction); *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (city prosecutor entitled to absolute immunity for charging arrestee with violation of city ordinance); *Ryan v. Bilby*, 764 F.2d 1325, 1328 (9th Cir. 1985) (prosecutor involved in taxpayer's prosecution for failure to file tax returns was absolutely immune for damages under § 1983); *Siano v. Justices of Mass.*, 698 F.2d 52, 57-58 (1st Cir. 1983); (county district attorney entitled to prosecutorial immunity from allegations that he initiated prosecution in bad faith and used tactics during trial that violated the criminal defendant's rights to due process and a fair trial); *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir. 1980) (prosecuting attorneys entitled to prosecutorial immunity from § 1983 action based upon alleged falsification of evidence and coercion of perjured testimony); *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979) (alleged unlawful acts of prosecutors, including filing information without investigation, filing charges without jurisdiction, filing a baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate complaints about prison system and threatening defendant with further criminal prosecutions, were all acts protected by prosecutorial immunity).

75. See, e.g., *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002) (prosecutor was entitled to absolute immunity in civil rights action brought by son who was indicted for attempted murder of his mother, although criminal case was dismissed with prejudice, and although jury in criminal case, had case gone to trial, may have ultimately agreed with son that there was no evidence to support charge; prosecutor was absolutely immune for his professional evaluation of evidence assembled, and for his presentation of that evidence to grand jury); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1149-52 (2d Cir. 1995) (prosecutor who presented case to grand jury and accepted plea agreement was entitled to absolute immunity for those acts, but not for delaying for three weeks the transfer of the prisoner back to federal custody after all state charges had been dismissed); *Brummett v. Camble*, 946 F.2d 1178, 1181 (5th Cir. 1991) (prosecutor was entitled to absolute immunity even if he had interest in bank which initiated complaint and even if he knew the charges were baseless); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (decision not to prosecute entitled to absolute immunity); *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990)

(prosecutors were absolutely immune in presenting case to grand jury and in deciding whom to prosecute); *Celia v. O'Malley*, 918 F.2d 1017, 1019-20 (1st Cir. 1990) (prosecutors were absolutely immune in prosecuting case without seeking indictment from grand jury); *Webster v. Gibson*, 913 F.2d 510, 513-14 (8th Cir. 1990) (prosecutor was absolutely immune in failing to file information, even if ordered to do so by the court).

76. See, e.g., *Cousin v. Small*, 325 F.3d 627, 634-35 (5th Cir. 2003) (prosecutor who allegedly instructed State's witness to implicate defendant falsely in murder trial was acting as an advocate rather than as an investigator, and therefore, prosecutor was entitled to absolute immunity from defendant's civil rights claims; prosecutor's interview with witness was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause); *Anderson v. Simon*, 217 F.3d 472, 475-76 (7th Cir. 2000) (county prosecutor's decision not to charge prisoner until lineup could be held was prosecutorial rather than administrative decision, and prosecutor thus was absolutely immune from § 1983 claim by prisoner's widow alleging that delay in charging, after prisoner stated that he wanted to kill himself, led to prisoner's suicide and violated his Fourth and Fourteenth Amendment rights; prosecutor's review of evidence and determination that additional evidence was necessary to support charge were necessary part of his role as advocate); *Grant v. Hollenbach*, 870 F.2d 1135, 1138-39 (6th Cir. 1989) (prosecutor bringing child abuse charges who allegedly conspired with complainant was entitled to absolute immunity); *Baez v. Hennessey*, 853 F.2d 73, 74-75 (2d Cir. 1988) (signing by assistant district attorney of erroneous indictment that grand jury did not return was prosecutorial act for which he was absolutely immune); *Umphlet v. Connick*, 815 F.2d 1061, 1062-63 (5th Cir. 1987) (district attorney was entitled to prosecutorial immunity from liability in § 1983 action for enforcement of state statute); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 246-48 (5th Cir. 1985) (prosecutor who maliciously presented evidence to a grand jury in a manner calculated to clear a suspect of wrongdoing was absolutely immune); *Powers v. Coe*, 728 F.2d 97, 103-04 (2d Cir. 1984) (prosecutor who presented matter to the grand jury in breach of an agreement not to prosecute was absolutely immune); *Lerwill v. Joslin*, 712 F.2d 435, 441 (10th Cir. 1983) (city attorney who only had power to file criminal charges based on a violation of city ordinances was absolutely immune for wrongfully filing state felony charge); *Gray v. Bell*, 712 F.2d 490, 502-03 (D.C. Cir. 1983) (prosecutor was immune in presenting evidence to grand jury); *Dellums v. Powell*, 660 F.2d 802, 805-07 (D.C. Cir. 1981) (United States Attorney General was absolutely immune in ordering prosecution of Vietnam War demonstrators).

77. See, e.g., *Krohn v. United States*, 742 F.2d 24, 29-30 (1st Cir. 1984) (federal prosecutor had absolute immunity from allegations that he conspired to convert plaintiff's property by striking deal with defense counsel to learn the location of plaintiff's safe-deposit box); *McGruder v. Necaize*, 733 F.2d 1146, 1148 (5th Cir. 1984) (prosecutor who offered to drop criminal charges against arrestee if he would dismiss a civil suit against the county jail was absolutely immune); *Taylor v. Kavanagh*, 640 F.2d 450, 453-54 (2d Cir. 1981) (prosecutor was absolutely immune in plea bargaining role).

78. See, e.g., *Burns*, 500 U.S. at 490-91 (prosecutor was absolutely immune in presenting application for search warrant, but not in advising police on investigation); *Geter v. Fortenberry*, 849 F.2d 1550, 1554 (5th Cir. 1988) (act of setting a trial date was a prosecutorial act requiring absolute immunity).

79. See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997) (prosecutor was not entitled to absolute prosecutorial immunity with respect to her actions in executing certification for determination of probable cause in connection with filing of charges against accused in which accused alleged that certification contained false statements; act of filing certification was not one of traditional functions of advocate, as neither federal nor state law required that prosecutor make certification and it could have been made by any competent witness); *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-75 (1993) (prosecutor's alleged misconduct, when endeavoring to determine whether a boot print at a crime scene had been left by a suspect was an investigatory, administrative function, rather than a prosecutorial function, for which the prosecutor was entitled to only qualified immunity in suspect's subsequent § 1983

suit); *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1279 (11th Cir. 2002) (even if prosecutor knowingly proffered perjured testimony and fabricated exhibits at trial, he was entitled to absolute immunity from liability for doing so; however, to the extent he stepped out of his prosecutorial role to perform the investigative functions normally performed by a detective or police officer, prosecutor did not have absolute immunity); *Houston v. Partee*, 978 F.2d 362, 365-66 (7th Cir. 1992) (prosecutors who discovered exculpatory evidence after person was convicted and did not disclose it to the defense had no absolute immunity since they were acting in an investigative capacity); *McSurely v. McClellan*, 697 F.2d 309, 319-20 (D.C. Cir. 1982) (alleged conduct of prosecutor in participating in a public meeting for the purpose, known to him to be unconstitutional, of preventing plaintiffs from disseminating ideas, preparing flagrantly unconstitutional arrest and search warrants, participating in raid on plaintiff's home which went far beyond warrant, and conspiring with representatives of Senate subcommittee to transfer to them documents that had been illegally seized and were irrelevant to the subcommittee's business, and which were required by court order to be returned to plaintiffs or retained in safekeeping, did not implicate state prosecutor's protected advocate function, and thus was not protected by absolute immunity from suit); *Marrero v. City of Hialeah*, 625 F.2d 499, 505-06 (5th Cir. 1980) (prosecutor participating in illegal search and seizure was not entitled to absolute immunity); *Hampton v. Hanrahan*, 600 F.2d 600, 633-34 (7th Cir. 1979) (prosecutors who arranged for police raid on Black Panther headquarters were not entitled to absolute immunity); *Jacobson v. Rose*, 592 F.2d 515, 524 (9th Cir. 1978) (where district attorney ordered and joined with sheriff's office in implementing illegal wiretap, he was not entitled to absolute immunity).

80. See, e.g., *Latimore v. Widseth*, 986 F.2d 292, 294-95 (8th Cir. 1993) (prosecutor was not absolutely immune in disclosing to media that prisoner would be a witness in a case when that prisoner was subsequently attacked by other inmates); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990) (no absolute immunity for coercive interrogation of defendants by prosecutor); *Day v. Morganthau*, 909 F.2d 75, 77-78 (2d Cir. 1990) (prosecutor who ordered person arrested for trespassing was not entitled to absolute immunity); *Price v. Moody*, 677 F.2d 676, 678 (8th Cir. 1982) (no immunity if prosecutor orders mistreatment of prisoner).

81. See, e.g., *Burns*, 500 U.S. at 491-92 (prosecutor giving legal advice to policeman on how to conduct investigation was not entitled to absolute immunity); *Benavidez v. Gunnell*, 722 F.2d 615, 617 (10th Cir. 1983) (no absolute immunity when prosecutor gave legal advice to police).

82. See, e.g., *Buckley*, 509 U.S. at 277-78 (press statements by prosecutors not subject to absolute immunity); *Stepanian v. Addis*, 699 F.2d 1046, 1048 (11th Cir. 1983) (federal prosecutor's statements made at a press conference announcing criminal indictment were not subject to absolute immunity).

83. See *Coleman v. Turpen*, 697 F.2d 1341, 1346 (10th Cir. 1982) (participation in illegal sale of seized property was not protected by absolute immunity).

84. See *Henderson v. Fisher*, 631 F.2d 1115, 1120 (3d Cir. 1980) (prosecutor who allegedly failed to preserve exculpatory evidence was not entitled to absolute immunity).

85. See, e.g., *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999) (physician conducting peer review at behest of Maryland Board of Physician Quality Assurance was entitled to absolute quasi-judicial immunity from reviewed physician's § 1983 claim alleging due process violations; reviewing physician was performing function analogous to prosecutor reviewing evidence to determine if charges should be brought, and absolute immunity was necessary to foster atmosphere in which reviewing physician could exercise professional judgment without fear of retaliation); *Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 701-02 (1st Cir. 1995) (administrative board members initiating professional misconduct charges against a doctor were entitled to absolute prosecutorial immunity).

86. See, e.g., *Doe v Lebbos*, 348 F.3d 820, 826 (9th Cir. 2003) (social worker's alleged failure to investigate possible exculpatory evidence and fabrication of evidence in dependency petitions, if proven, had requisite connection to judicial process to be protected by absolute immunity from § 1983 action filed by child and child's father, where such actions were part of initiation and pursuit of child dependency proceedings); *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (en banc) (critical decision to institute proceedings to make a child a ward of the state is functionally similar to the prosecutorial institution of a criminal proceeding; the decision, therefore, is likely entitled to absolute immunity); *Millsbaugh v. County Dept. of Public Welfare*, 937 F.2d 1172, 1175-76 (7th Cir. 1991) (social service worker initiating child abuse proceeding was absolutely immune); *Vosburg v. Department of Social Services*, 884 F.2d 133, 135-38 (4th Cir. 1989) (in filing a petition for removal of a child from her home, as opposed to conduct in investigating the possibility that removal petition should be filed, Virginia state social workers were acting in a prosecutorial, rather than an investigative or "policing" capacity, and thus were absolutely immune from any liability arising from the decision to file a removal petition); *Salyer v. Patrick*, 874 F.2d 374, 378 (6th Cir. 1989) (social worker investigating child abuse case was absolutely immune); *Meyers v. Contra Costa County Dept. of Social Serv.*, 812 F.2d 1154, 1157-58 (9th Cir. 1987) (absolute immunity provided for social welfare workers who were investigating child abuse); *Coverdell v. Department of Social and Health Services*, 834 F.2d 758, 762-63 (9th Cir. 1987) (social workers prosecuting child abuse cases are absolutely immune); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (social service department employee enjoys absolute immunity in removing child from home and placing it in foster home).

87. See, e.g., *Snell v. Tunnell*, 920 F.2d 673, 690-92 (10th Cir. 1990) (social workers who sought pre-petition conditional protective custody order as part of their investigation into neglect at private home being operated as emergency shelter were entitled to only qualified immunity from § 1983 civil rights liability); *Hodorowski v. Ray*, 844 F.2d 1210, 1213-15 (5th Cir. 1988) (conduct of child protective service workers in temporarily removing children from parents' home without first obtaining court order was more akin to function of police than prosecutor, so that workers were not protected by absolute prosecutorial immunity from civil rights liability arising from removal, but rather were entitled only to qualified immunity); *Austin v. Borel*, 830 F.2d 1356, 1360-63 (5th Cir. 1988) (child protection workers who allegedly filed false charges against parents were not entitled to absolute immunity).

88. See, e.g., *Spear v. Town of West Hartford*, 954 F.2d 63, 66 (2^d Cir. 1992) (city manager's decision to initiate a lawsuit in pursuit of city's governmental interests was similar to the filing of an administrative complaint and, thus, was entitled to absolute immunity); *Hamill v. Wright*, 870 F.2d 1032, 1037 (5th Cir. 1989) (director of county's domestic relations office was entitled to full prosecutorial immunity from civil rights claim based upon his decision to bring contempt proceedings against parent for failure to pay child support); *Werle v. Rhode Island Bar Association*, 755 F.2d 195, 198-99 (1st Cir. 1985) (members of state bar unauthorized practice of law committee were acting as public prosecutors and were entitled to absolute immunity); *Walden v. Wishengrad*, 745 F.2d 149, 152-53 (2^d Cir. 1984) (attorney employed by county social services department who prosecuted child protective orders in family court was acting as a prosecutor and was absolutely immune); *Demery v. Kupperman*, 735 F.2d 1139, 1142-45 (9th Cir. 1984) (deputy attorney general prosecuting an administrative complaint against a doctor to revoke his medical license was absolutely immune in allegedly inducing witnesses to testify falsely); *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir. 1981) (policeman who initiated juvenile delinquency proceeding in his capacity as juvenile officer was acting like a prosecutor and was entitled to absolute immunity).

89. See *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir. 2000) (psychiatrist was absolutely immune from liability for damages under § 1983 based on allegation that she conspired to present her own and another witness's perjured testimony at plaintiff's criminal trial, since her alleged conspiratorial behavior was inextricably tied to her testimony, where plaintiff was tried for 20-year-old murder based, in part, on his daughter's recovered memory, and plaintiff alleged that psychiatrist conspired with daughter

by incorporating information obtained from daughter into her own testimony, and by providing daughter with description of the sort of details that would make her testimony more persuasive).

90. *Briscoe*, 460 U.S. at 333-34.

91. *See Scarbrough v. Myles*, 245 F.3d 1299, 1305 (11th Cir. 2001) (police officer was protected by absolute immunity from imposition of liability under § 1983 based on testimony he gave during preliminary hearing); *Williams v. Hepting*, 844 F.2d 138, 141-43 (3d Cir. 1988) (witness entitled to absolute immunity for alleged perjured testimony given in preliminary criminal hearing); *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987) (police officers were absolutely immune from civil rights liability for their alleged conspiracy to give false and incomplete testimony in grand jury proceedings); *Holt v. Castaneda*, 832 F.2d 123, 127 (9th Cir. 1987) (extending absolute witness immunity to adversarial pretrial proceedings); *Kincaid v. Eberle*, 712 F.2d 1023, 1024 (7th Cir. 1985) (granting absolute immunity to grand jury witnesses).

92. *See, e.g., Newsome v. McCabe*, 319 F.3d 301, 304 (7th Cir. 2003) (police officers who allegedly instructed identifying witness in homicide investigation to pick specific suspect out of lineup and then warned witness that he risked jail time if he informed prosecutors of officers' manipulation were not entitled to absolute immunity owing to their concealment of exculpatory evidence); *Keko v. Hingle*, 318 F.3d 639, 642 (5th Cir. 2003) (physician sued for allegedly conspiring to violate defendant's civil rights in connection with murder prosecution was not entitled to absolute immunity for expert report which was offered, not as evidence at trial, but at hearing to obtain warrant for defendant's arrest, in which physician concluded that bite marks found in victim's body undoubtedly came from defendant); *Paine v. City of Lompoc*, 265 F.3d 975, 982-83 (9th Cir. 2001) (absolute witness immunity does not shield an out-of-court, pretrial conspiracy to engage in non-testimonial acts such as fabricating or suppressing physical or documentary evidence or suppressing the identities of potential witnesses); *White v. Frank*, 855 F.2d 956, 961 (2d Cir. 1988) (police officers who act as complaining witnesses do not have absolute immunity); *Anthony v. Baker*, 767 F.2d 657, 660 (10th Cir. 1985) (refusing to extend absolute witness immunity to grand jury witnesses); *San Filippo v. United States Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984) (no absolute immunity for alleged conspiracy between prosecutor and witnesses to secure false testimony before grand jury); *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254, 261 (5th Cir. 1984) (denying absolute immunity to witness who testified at probable cause hearing).

93. *Curtis v. Bembeneck*, 48 F.3d 281, 284 (7th Cir. 1995) (police officer's absolute immunity from § 1983 liability for testimony given at trial extended to liability for allegedly perjured testimony given during preliminary hearing to determine whether probable cause existed to support warrantless arrest, and during hearing on motion to quash arrest and suppress evidence; policy consideration that witness might shade testimony in order to avoid liability applied with equal force to witness testimony in trial and adversarial pretrial settings, and plaintiff's argument that officer was akin to complaining witness and thus was not immune was inapplicable where plaintiff failed to state claim for malicious prosecution); *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 512 (5th Cir. 1992) ("In resolving questions of immunity, the common law distinguished between defamation actions and actions for malicious prosecution, cloaking with absolute immunity a witness in the former but not the latter.").

94. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *See also Groh v. Ramirez*, 540 U.S. 551, 563-65 (2004); *Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002); *Saucier v. Katz*, 553 U.S. 194, 200-03 (2001); *Crawford-El v. Britton*, 523 U.S. 574, 587-92 (1998).

95. *Davis v. Scherer*, 468 U.S. 183, 190 (1984).

96. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted).

97. *Id.* at 640.
98. *Crawford-El*, 523 U.S. at 588.
99. *Id.* at 590.
100. 420 U.S. 308 (1975).
101. *Id.* at 322.
102. 457 U.S. 800 (1982).
103. *Id.* at 818-19.
104. *Id.* (emphasis added, citations and footnotes omitted).
105. *Crawford-El*, 523 U.S. at 590 (citations and footnotes omitted).
106. *Id.* at 818 (emphasis added).
107. 4 F.3d 2 (1st Cir. 1993).
108. *Id.* at 11 (quoting *Coleman v. Frantz*, 754 F.2d 719, 727 (7th Cir. 1985)).
109. *McIntosh v. Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987), *partially vacated and remanded on other grounds sub. nom. Turner v. McIntosh*, 487 U.S. 1212 (1988) (citation omitted). *See also Ricci v. Key Bancshares of Maine, Inc.*, 768 F.2d 456, 464 (1st Cir. 1985) (“[B]reaking down discretionary acts . . . into discretionary and ministerial components would seem to vitiate much of the protection of discretionary action which absolute immunity was designed to provide.”); *Horta*, 4 F.3d at 15 (“[I]t would be the rare case indeed where an officer is denied qualified immunity because the officer is found to have engaged in ‘ministerial’ rather than ‘discretionary’ conduct.”).
110. 468 U.S. 183 (1984).
111. *Id.* at 185-87.
112. *Id.* at 188-89.
113. *Id.* at 196 n.14 (emphasis added).
114. *Id.* at 194.
115. *Davis*, 468 U.S. at 194 n.12 (“For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages.”).
116. 805 F.2d 558, 559-60 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987).

117. *Id.* at 559-60.
118. 28 F.3d 895 (8th Cir. 1994).
119. *Id.* at 902.
120. *See Harlow*, 457 U.S. at 818-19.
121. *See Anderson*, 483 U.S. at 640.
122. *See McCleary v. Navarro*, 504 U.S. 966 (1992); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).
123. *Hunter*, 502 U.S. at 228.
124. *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994).
125. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). *See also Hunter*, 502 U.S. at 229 (“[A]ccommodation for reasonable error exists because ‘officials should not err always on the side of caution’ because they fear being sued.”) (citing *Davis v. Scherer*, 468 U.S. 183, 196 (1984)).
126. *See Daniel v. Williams*, 474 U.S. 327, 238 (1986); *Davidson v. Cannon*, 474 U.S. 344, 346-47 (1986).
127. *Lassiter v. Alabama A&M Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).
128. 483 U.S. 635 (1987).
129. *Id.* at 639.
130. *Id.* at 640.
131. *Id.* at 639-40.
132. *See, e.g., Groh*, 540 U.S. at 563-65 (Federal agent who had prepared and executed warrant for search of plaintiffs’ ranch could not have reasonably believed in validity either of warrant itself, which utterly failed to describe persons or things to be seized in clear contravention of explicit Fourth Amendment command, or of search conducted pursuant thereto, and was not entitled to qualified immunity from liability in action for violating ranch owners’ Fourth Amendment rights.)
133. *See Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988).
134. *Compare Azeez v. Fairman*, 795 F.2d 1296, 1301-02 (7th Cir. 1986) (noting that “the State of Illinois is not bound to comply with every constitutional ruling by every district judge in the United States” and referring to “[t]he test *in this circuit* for a prison regulation challenged on religious grounds”) (emphasis added) with *LeClair v. Hart*, 800 F.2d 692, 695 (7th Cir. 1986) (denying immunity even though “the Supreme Court has never passed upon the precise type of recording which is involved in this case” because “the lower courts have encountered no difficulty in . . . cases involving analogous circumstances” and *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (in the absence of binding precedent, courts should look to all available cases, including those from other circuits). *See*

also *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827 n.4 (11th Cir. 1997) (*en banc*) (“In this circuit, the law can be ‘clearly established’ for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose.”); *McClendon v. City of Columbia*, 305 F.3d 314, 327-28 (5th Cir. 2002) (in the Fifth Circuit, in determining whether a right was “clearly established” under qualified immunity analysis, it is appropriate for a court to look to the law of other circuits when neither the Fifth Circuit nor the Supreme Court has spoken).

135. See, e.g., *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1113 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989) (referring to three federal court of appeals decisions and three federal district court decisions as only a “few cases”); *Ohio Civil Service Employees Ass’n v. Seiter*, 858 F.2d 1171, 1177-78 (6th Cir. 1988) (“[A] mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit.”); *Coleman v. Frantz*, 754 F.2d 719, 730 n.15 (7th Cir. 1985) (requiring “case law which clearly and consistently recognized the constitutional right”).

136. See, e.g., *Walnut Properties*, 861 F.2d at 1113 (granting immunity despite admitting that six federal decisions supported plaintiff, with none to the contrary); *Benson v. Allphin*, 786 F.2d 268, 275 n.16 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) (suggesting that rights can never be clearly established if the circuits conflict until the Supreme Court resolves the issue).

137. Compare *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 309 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985) (dismissing earlier cases as dictum, and noting that relevant Supreme Court opinion was issued by divided Court) with *LeClair v. Hart*, 800 F.2d 692, 694 n.3 (7th Cir. 1986) (holding that split decisions are equally authoritative as unanimous ones).

138. *Lassiter*, 28 F.3d at 1149-50 (citation omitted).

139. See, e.g., *Hodge v. Jones*, 31 F.3d 157, 167 (4th Cir. 1994) (Under the doctrine of qualified immunity, “officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (“If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.”); *Barts v. Joyner*, 865 F.2d 1187, 1190, 1194 (11th Cir. 1989) (“The *Harlow* decision sets up a bright-line test that is a powerful constraint on causes of action under § 1983,” and “the line is not to be found in abstractions -- to act reasonably, to act with probable cause, and so forth -- but in studying how these abstractions have been applied in concrete circumstances.”).

140. See *Lassiter*, 28 F.3d at 1150 (“For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*”) (emphasis in original). See also *Alexander v. University of North Florida*, 39 F.3d 290, 291 (11th Cir. 1994) (to avoid qualified immunity, a plaintiff must point to pre-existing law that “dictates” and “compels” the conclusion that the defendants violated the constitution).

141. 536 U.S. 730 (2002).

142. *Id.* at 739.

143. *Harlow*, 457 U.S. at 818.

144. See, e.g., *Auriemma v. Wise*, 910 F.2d 1449, 1455 (7th Cir. 1990) (“reasonable police chief of a large metropolitan police force”); *Abel v. Miller*, 824 F.2d 1522, 1531 (7th Cir. 1987) (“a reasonably competent prison official”); *Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988) (“a reasonable PUC official”).

145. See *Anderson*, 483 U.S. at 641 (despite that courts may inquire into “information possessed” by the defendant, the defendant’s “subjective beliefs . . . are irrelevant”); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (in *Harlow*, “this Court purged qualified immunity doctrine of its subjective components”); *Lassiter*, 28 F.3d at 1150 (“The subjective intent of government actor defendants plays no part in qualified immunity analyses.”); *Post*, 7 F.3d 1552 at n.6 (“Qualified immunity invokes an objective standard; that is, if a reasonable person in the defendant’s place could have acted the same way, the defendant’s subjective intent is irrelevant.”); *American Civil Liberties Union of Maryland, Inc. v. Wicomico County, Maryland*, 999 F.2d 780, 784 (4th Cir. 1993) (“The existence of qualified immunity generally turns on the objective legal reasonableness of the actions; without regard to the knowledge or subjective intent of the particular official.”) (citations omitted); *Cartier v. Lussier*, 955 F.2d 841, 843 (2d Cir. 1992) (“A subjective inquiry into an official’s personal belief is rejected in favor of an objective analysis of what a reasonable officer in defendant’s position would believe.”); *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (“The Supreme Court has developed an objective-reasonableness test for evaluating actions of a government official claiming qualified immunity. . . . The use of this test precludes the determination by district courts of subjective good faith in government officials’ conduct in section 1983 actions.”).

146. *Saucier v. Katz*, 553 U.S. 194 (2001).

147. *Id.* at 205-06.

148. *Id.* at 205.

149. Compare *Perry v. Larson*, 794 F.2d 279, 284 n.1 (7th Cir. 1986) (“it would be illogical to extend good faith immunity to a government official who has intentionally violated an individual’s constitutional rights”) and *Fujiwara v. Clark*, 703 F.2d 357, 359 n.3 (9th Cir. 1983) (noting that the *Harlow* standard “has elements of subjectivity” because qualified immunity is available only if the defendant “neither knew nor should have known of the relevant legal standard”) with *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986) (“[i]t is irrelevant whether a particular defendant knew at the time she acted . . . that her actions violated someone’s constitutional rights”) and *Bothke v. Flour Engineers & Constructors, Inc.*, 834 F.2d 804, 811 (9th Cir. 1987) (the defendant’s “ ‘subjective beliefs’ about the lawfulness of her conduct are ‘irrelevant’ ”).

150. *Harlow*, 457 U.S. at 819 (emphasis added).

151. See *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) (state trooper’s consultation with local prosecutor regarding presence of probable cause before he made arrest was factor that could be considered in determining whether he was entitled to qualified immunity in arrestee’s civil rights action for false arrest); *Kijonka v. Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (police officer was entitled to qualified immunity in arrestee’s § 1983 action alleging that officer arrested him for assault without probable cause; officer consulted county prosecutor before making arrest, and thus had reasonable basis for believing that he had probable cause to make arrest); *Pritchett v. Alford*, 973 F.2d 307, 316 (4th Cir. 1992) (“mistaken official advice by legal counsel” given as an example of extraordinary circumstances that might insulate defendant from liability even if the defendant violated clearly established law.); *V-I Oil Co. v. State of Wyoming, Dept. of Environmental Quality*, 902 F.2d 1482, 1489-90 (10th Cir. 1990) (even though the defendant violated clearly settled Fourth Amendment law when he searched the plaintiff’s business premises, the defendant was entitled to qualified immunity given the extraordinary circumstances presented by high-ranking government attorneys advising the defendant that the search was lawful).

152. See *Buonocore v. Harris*, 134 F.3d 245, 253 (4th Cir. 1998) (Although reliance on counsel’s advice may indeed be factor to be considered in deciding whether defendant has demonstrated “extraordinary circumstance” that entitles defendant to qualified immunity despite defendant’s violation of clearly established law, reliance on legal advice alone does not, in and of itself, constitute extraordinary circumstance sufficient to prove entitlement to exception to general rule of § 1983 liability where law is clearly established.); *Melton v. City of Oklahoma City*, 879 F.2d 706, 730-31 (10th Cir. 1989) (court rejected police chief’s defense of good faith reliance on advice of city attorney where law was clearly established, stating that “[a]dopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel”); *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1495 (8th Cir. 1987) (reliance on their attorney’s advice did not make bank and its vice-president qualifiedly immune under § 1983 from liability to lender where the law was clearly established that the actions complained of were unlawful); *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986) (“It is irrelevant whether a particular defendant knew at the time she acted (or failed to act) that her actions violated someone’s constitutional rights. The question is whether the state of the law was such that a reasonable person would have known her actions were unconstitutional.”) (citation omitted); *Wentz v. Klecker*, 721 F.2d 244, 248 (8th Cir. 1983) (rejecting advice of counsel as defense to § 1983 liability since “state employees may not rely on their ignorance of even the most esoteric aspects of the law to deny individuals their due process rights”); *Bier v. Fleming*, 717 F.2d 308, 312 (6th Cir. 1983) (reversed trial court’s rejection of qualified immunity defense, premised upon defendant’s failure to follow the advice of counsel, because the law in question was not clearly established).