

Short Circuit

John Ross 00:06

Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host John Ross from the Institute for Justice's Center for Judicial Engagement. Joining me today are IJ attorneys, Diana Simpson, and Dan Alban. On this week's show, qualified immunity. The Supreme Court has denied all of its fully briefed pending qualified immunity petitions, which means that qualified immunity is back in our wheelhouse in the circuit courts. We have four cases that we're going to talk about today. But before we do that, Diana, why don't you tell us what you think of this week's news?

Diana Simpson 00:39

I mean, it's obviously very disappointing. This is, you know, we're kind of at a focal point in this country, on the relationship between police and society. And qualified immunity is largely responsible for much of the inappropriate incentives and some of the really bad things that police do. And so, you know, it wasn't just the IJ case that presented a really strong cert petition to have the court start to revisit some of the qualified immunity doctrine. All of these cases that were presented had very different and very interesting fact patterns that could have presented the court with some great options. And instead of doing that they just flat denied it with really not much else to say other than a singular dissent by Justice Thomas.

John Ross 02:26

Dan.

Dan Alban 01:27

Yeah. And so that dissent from Justice Thomas is really one of the few silver linings of the court's orders issued on Monday. Justice Thomas wrote a fairly short dissent, reiterating many of the points he's made before about how there is no common law basis for the qualified immunity concept that runs counter to the history of the way the law was interpreted for 100 years before these qualified immunity doctrines were introduced. And points out that even where there were a handful of kind of limited exceptions to liability for constitutional torts and things like that, they involved cases where there's sort of a good faith exception. And even those were limited to authorized actions that were within the

officers' jurisdiction. So it's, it's nice to at least get that dissent from Justice Thomas. But obviously, we would have loved to have seen cert granted, in our case, or, frankly, any of the qualified immunity cases, in the hopes that the Supreme Court would address and hopefully walk back this, this dangerous doctrine that exposes many Americans to much greater dangers, from their interactions with either law enforcement or government officials in general.

Diana Simpson 02:56

And the Court hasn't given a whole lot of cause to be optimistic on the qualified immunity front and many years, it's just continues to expand what it sees is this doctrine, and that's disappointing to a lot of us. But one thing I've seen people talking about is the fact that it was only Justice Thomas dissenting from denial, and there was there were no other justices joining him. Well, because of the way the Supreme Court is basically just a black box in the way that it makes its decisions. We don't know, we don't know if other justices agree with him. And they just didn't want to put their name on paper yet. We don't know if there were the votes to grant cert, they're just they just weren't sure that there were votes to go in a particular direction. Once the case was heard, we don't know. And it's also still possible that it's just Justice Thomas, on an island by himself. I certainly hope that's not the case. I hope that, you know, kind of this movement that that we've finally started to see where people are rejecting qualified immunity continues to expand and perhaps that's at Congress. You know, there's a there's a bill pending there that hopefully Congress can do something useful, even though that's perhaps not, not likely, but perhaps it is, I don't know.

John Ross 04:04

Well, on that note, let's head back to the circuit courts where qualified immunity is going to continue playing out for the time being, Diana, let's start off in the Fifth Circuit.

Diana Simpson 04:16

Yeah. So in the Fifth Circuit, we've got this case about Maria Pena, who at the time was a 17 year old who ran away from home with her younger sister. You imagine things were probably not great at home with their parents. But when they came back, her parents decided they wanted to scare the two of them. And so they called the police and said, "Hey, will you help us scare them into believing that the girls are going to be arrested so that we can teach them a lesson?" There was no suspicion that they had committed a crime, nothing like that. So the parents drove at least Maria over to the police station, and there, things kind of went awry. One of the police officers came over and instructed Maria to get out of the car. She didn't want to. That particular officer called a domestic in progress and requested

assistance and three other cops responded. And then things continued to just go downhill from there. And in 19 seconds, between the time that the original officer called for assistance 19 seconds later, Maria Pena was tased. And she fell face first onto the ground, she's running away from the police, she fell face first onto the ground, and God, broke her nose, broke a bunch of teeth, and got covered in all kinds of cuts in all of this. And the only reason is because the officer ordered her out of the car. She didn't want to, she was afraid. She's a 17 year old kid who's there with her parents. She doesn't want to go to jail, she doesn't know what's happening. And so, she makes a run for it. And the cops chased her, two of them chased her and then tased her. And she gets injured, and she sues. And so, she originally sues in state court, and the cops remove it to federal court. Then from there, the federal court, the district court initially dismissed the entire case, she appealed up to the Fifth Circuit, and this was in 2018. The Fifth Circuit said, "Okay, well, some of these claims can go forward, you need to let her, You need to let them pursue them." So then now we're back at the Fifth Circuit, because the district court said qualified immunity. And the Fifth Circuit says, No, there is no qualified immunity in this case, this is just a dispute about facts and disputes about facts should be resolved by the Fact Finder, whether that's a jury or a judge. And so the court says that there's no qualified immunity, the girl was not she wasn't engaging in a crime. She wasn't she hadn't done anything wrong.

John Ross 06:39

The officers argued that they were doing it for her own good, that the officers were worried she was about to run into traffic. How does how does the court deal with that contention?

Diana Simpson 06:49

Well, it's a ridiculous contention. And the court treats it as such. You know, they say, Look, there's no suggestion she was going to run into traffic. She said she wasn't going to run into traffic. You know, you can't just tase someone for their own good. That's kind of ridiculous statement and the fact that the police can suggest that that's an acceptable thing that the court should sign on to is, I think, a bad sign of where qualified immunity is right now.

Dan Alban 07:13

Yeah, this is a pretty atrocious set of facts. But fortunately, a pretty engaged panel that saw through a lot of the nonsense that was offered by the officers to excuse their conduct. One of the parts of the opinion that I found most interesting was where they sort of summed up everything that had happened based on both the officers' claims and what Pena, Maria Pena said. And they point out, of course, you know, the officers were trying to seek summary judgment against her, so her allegations have to be

accepted as true. And if they are, the incident involved in unarmed teenage girl, who neither threatened the officers herself or anyone else, nor was a suspect in a crime, nor had any criminal record, which sort of gives you an idea of how outrageous it is for officers to pursue her down the street. And without any warning, they didn't even tell her to stop or warn her that they were about to tase her. Fire this taser, dropping her on concrete, and severely injuring her. This is a this is a case where the facts were so, so bad, that even under qualified immunity, the Fifth Circuit was not going to let these officers off the hook.

Diana Simpson 08:37

One of the frustrating things I find about this case is that this decision is unpublished. The Fifth Circuit does not publish this decision. It's written per curiam. And so it's not precedent on except for under very limited circumstances. And what that means for qualified immunity is I think, kind of problematic, because can you use an unpublished decision to later say that a particular holding is clearly established or a particular rule of engagement for polices clearly established? I think, I don't know that the answer is yes. And so that creates another problem where courts can say, "Well, okay, fine, we'll decide this in the plaintiffs favor and say, okay, no qualified immunity on this front. But we're going to so limit the scope of this decision that other people may not be able to use it later." And that's, that's very strange to me.

John Ross 09:26

Okay, and with that, let's move on to the next case, which comes out of the Fourth Circuit, Dan.

Dan Alban 09:31

Yeah, so this case also involves some pretty bad police officer misconduct. In this particular case, it's out of the Fourth Circuit. It's the Jones case involving a gentleman who was homeless at the time who was walking down the street, which is why he was approached by a police officer who said he was investigating the fact that Jones was not complying with the Martinsburg, West Virginia's law saying that if there is a sidewalk, you are supposed to walk on it and not on the street. When the police officer approached him, the police officer began asking for identification and asked him if he had weapons. Jones did have a knife tucked into the cuff of his shirt, to the sleeve area, and asked the officer, what do you mean by a weapon? And the officer kind of gave him a list of things. And Jones said, "Well, I do have something" and then things just went really badly. The officer called for backup started treating Jones. You know, like he was a criminal asked him put his hands on the car. And Jones refused and just started to walk away because in his mind, he hadn't done anything wrong. And he began to shout,

the officer began to shout, "Put your hands on the car," and Jones kept saying things like, "What do you want? What did I do to you?" And at that point, the officer tases Jones. Other officers then arrive on the scene and also tase Jones and then Jones begins running down the street, there may have been some brief physical altercation, it's hard to make out from the opinion quite what happened. It's possible that Jones pulled the officer's hat over his eyes before he ran away according to the officer. Jones runs away down the street and doesn't get very far. He ends up, as the opinion describes it, cornering himself in the entranceway to a bookstore and the officers approach him grab his arms, put them down on the ground. And while they are on top of them, one of the officers claims to have felt the prick of the knife and one of them see claims to have seen it in his hands. And all this is going on while one of the officers is actually choking Jones and probably choking him unconscious. The officers, at least one of them claims he saw a knife in his hand. One of them yells, "knife, knife, knife," and everyone backs away.

John Ross 12:24

There's five officers at this point who are all on top of him,

Dan Alban 12:26

One of them on top of him applying a chokehold and in the audio of the incident, you can hear Jones, sort of gurgling and struggling to breathe. Nonetheless, after one of them yells about the knife, somebody else yells "get back, get back," all of the officers step back, including getting the one who was choking him, they step back about five feet away from him. And the officer, his own testimony is that he was lifeless. At that point, he was motionless on the ground. But a few seconds later, they began firing, and they fired 22 shots into Jones killing him. At that point, the officers realize things have gone very poorly. And the audio apparently records them talking about how this is a cluster and that they were going to have to come up with a story. And so, as it turns out, there is a knife, but it was tucked into Jones's sleeve, and not in his hand. And that becomes a real point of contention. The court, this is apparently a third time that this case has been up to the Fourth Circuit. And so the court analyzes what happens and whether or not these officers have qualified immunity and points out again, much like the case that Diana introduced, there's a lot of there's a lot of contested facts here. And according to Jones's estate, he posed no threat. In fact, he was possibly even unconscious at the time that the officers began shooting at him. And the Fourth Circuit finds that a reasonable jury could find that he posed no threat at the time that they started shooting. First because he had already been secured by the officers. He was held down on the ground, there was an officer choking him, they had secured his arms, and even though they hadn't yet handcuffed him, the Fourth Circuit panel here says that's

enough. You've secured, Jones. Now there is a bit of a factual dispute about whether or not Jones had somehow managed to get this knife that was found in his shirt sleeve and use it against the officer. But they also found that even if that was true at the time, they backed away and actually fired the shots. He was motionless on the ground, or at least he alleged he was motionless on the ground. And if so, he was incapacitated, incapacitated at the time he was shot, and there was no justification for that use of force. Now, there's still factual disputes about what happened here. But the court is declining to grant summary judgment for the officers.

John Ross 15:25

One point of order, I think the Jones' estate did concede that there was a stabbing. And the Fourth Circuit seemed to think that the estate didn't really mean to do that. And in fact, we should be skeptical that there was a stabbing at all, I wonder if you could kind of shed some light on Jones's estates, like, how they litigated the case below because it seems like they made a bunch of factual concessions that the Fourth Circuit really doesn't buy.

Dan Alban 15:51

Yeah, that this was an unusual wrinkle in the case. In what should be a lesson for all attorneys, make sure you respond to discovery in a timely manner. In this case, the attorneys for the for the estate, for Jones's estate, failed to respond to discovery, and I think did so two days late. And as a result of this, they were bound by a number of admissions that were essentially offered by the officers as to the actual facts of the case, including that Jones stabbed an officer with his knife prior to them firing their guns. But the Fourth Circuit does, this panel does seem extremely skeptical of this, given the facts that were also alleged by the officers that they saw him motionless, that the knife was not discovered in his hand, but tucked in his shirt cuff. And so although the estate and you know, made these admissions, the court finds that a reasonable jury could find that there still was excessive force, despite these admitted facts that are obviously extremely unhelpful to Jones. So although not part of, you know, not part of qualified immunity doctrine or anything like that. This is a situation where it seems like a party made a serious mistake, by failing to respond in a timely manner, resulting in a bunch of admissions that seem quite contrary to the testimony of the officers and the other facts. But the panel, it really wants to dig a bit deeper. And so despite these admissions, notes that, you know, there is also testimony, making it pretty clear that he couldn't have possibly have stabbed the officer despite the admission, and even if that had happened, at the time, they actually fired the shot. You know, the allegation is he was laying motionless on the ground, and posed no threat to anyone

John Ross 17:59

Diana?

Diana Simpson 18:01

Well, one thing that I find kind of interesting about this, and maybe the Fourth Circuit just wasn't particularly interested in giving the police the benefit of every doubt, in this particular case. And perhaps because of the police response early on that generated this case, I mean, these are officers who showed up to a man who was walking in the street, and rather than deescalate, ask him, you know, park the car, get out, ask him to walk on the sidewalk, or leave him alone. If there aren't any cars around, you know, there's no indication that there were or weren't. Instead of doing that, they escalated at every possible turn. And so once they, you know, talked with him and figured out that he had a weapon, it was okay, well, this man must be dangerous, right. And so we just have to treat him as an enemy the entire time. And, you know, so they got him on the ground, they had him facedown on the ground, one officer can be heard loudly calling him a mother effor. Another officer can be seen kicking him as he lays on the ground. Another one tased him while he laid on the ground. And then another one applied a dry stun without any probes while he continued to lay on the ground. And so these officers report that the stunning has no effect on him, but he's still, he's laying on the ground this entire time. And then he's motionless. And then the cops stand up and they circle around him, and he's not doing anything, and they fire 22 rounds at him.

Dan Alban 19:26

Yeah, the conclusion of the opinion really sort of goes out of its way to put this incident in context, and references the Michael Brown shooting in Ferguson, Missouri, and says, you know, seven years later, we were being asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lays motionless on the ground. "Although we recognize that our police officers are often asked to make split second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion the FBI opened an investigation into yet another death of a black man at the hands of police. This time George Floyd in Minneapolis, this has to stop. To award qualified immunity at the summary judgment stage in this case, would signal absolute immunity for fear based use of deadly force." So this panel at least sees the context in which immunity is affecting police behavior, and expresses concern about immunizing officers when they use deadly force. When it's clearly not justified. A man is lying motionless on the ground, had already been stunned and tased multiple times, is choked unconscious. And, you know, puts this in a bigger national picture talking about things going on outside of the Fourth Circuit, but that are clearly being affected by the Supreme Court's decisions to grant qualified immunity to police officers, even in many cases where

their behavior is nearly as objectionable or as objectionable as what happened here. And they're let off the hook because the Supreme Court has instituted this qualified immunity doctrine.

John Ross 21:22

It seems like whatever doctrines are being applied in court, the actual law on the street is if you disobey a police officer, for whatever reason, the gentleman in Martinsburg had schizophrenic and homeless and he may just not have been able to. And the girl in the first case, of course, was young and frightened. But they disobeyed police, or at least they weren't, they didn't obey quickly enough. How do you reconcile the, what seems to be a clear pattern, and this will also be the case in the next opinion, we talked about where the police were not immediately complied with and then immediately resorted to force? How do you reconcile sort of the law on the street with what we, with what goes on in court?

Dan Alban 22:15

Well, I think it's pretty hard to reconcile these two things. But unfortunately, as you've seen from these opinions, it takes many years for someone to obtain justice or even get a ruling from an appellate court saying that officers are not entitled to qualified immunity, this, this opinion, in the Jones case is taking place seven years after, after the actual incidents happen. And what I think, you know, the law of the street is police officers will, you know, issue commands, and regardless of whether they are lawful commands, regardless of whether they have probable cause or reasonable suspicion, or anything else, if you don't comply with that command, they feel authorized to use at least some amount of force, not necessarily deadly force right away, but some amount of force. And these opinions are reining that back in very, very slightly, but not nearly quickly enough. So I think, you know, there is a long delay between when these incidents happen, and when there is a final judgment. And while that goes on, these sorts of things are happening on the streets every day.

Diana Simpson 23:33

Yeah. And it seems to me that at least, part of the reason that we're kind of getting to a point where the courts are becoming at least a little more skeptical of police officers is because of body cams and the proliferation of cameras capturing the different events. I mean, you know, either cameras or audio, because it used to be the case that it was just "he said, she said," and you have these cases where it's okay. Who do you believe? Do you believe the police officer who's, you know, sworn an oath and all this other stuff? And, you know, is protecting all of us all the time? Or do you believe this just random person on the street who's saying that nice policeman beat her to a pulp, and are finally getting to a point where you can have this outside view almost, and you can watch these and you'll see in the next

case that we talk about as they rely heavily on that and they go through kind of frame by frame on the video to talk about these different issues and what factually might have happened. And that never used to be the case. And thankfully, that's starting to at least help. But, you know, where does that leave people who were abused by the police, I mean, as Dan said, this case with Wayne Jones has been going on for seven years. They filed it a month after he was killed by the police, and it's now been up to the Fourth Circuit three times. There's no judgement yet, he hasn't had a chance to present this to a jury. And so that's next. But how long? And how much money is it going to cost and take for him to finally or his family to finally get some resolution of an unjustified killing?

John Ross 25:14

Well, with that, let's move on to the next case, Diana, which comes out of the 11th circuit.

Diana Simpson 25:19

So yes, we have another very sad case. This one involves a gentleman who was out for a morning walk in his new neighborhood, he had recently moved to a neighborhood to live with his son and help to raise his grandchildren. He is a 57-year-old immigrant from India. And he weighs 115 pounds. And so he was out for a walk, enjoying cooler weather in his neighborhood. And another neighbor thought that he spotted an unfamiliar man roaming the street. And he assumed that this man was casing houses. So that neighbor called the police and reported that he saw a skinny black man wearing a white or light colored sweater, jeans, and a toboggan hat in the driveway at a particular address. And he thought he was walking around close to the garage. And so he asked the dispatcher to send someone to talk to this man. So the dispatcher then issued a check subject call, and said that there was a man walking in yards, standing by driveways, and looking around the garages. And so this kind of game of telephone, it escalates from, he's at one garage to he's at multiple garages. And now he's a check subject call. And so these two officers respond to the scene. And they say that this particular area is a high crime area, and more generally, that the police officer knew that burglars sometimes commit their crimes in the mid morning after most people have left for work. And that's the time of day that we have here. So they go up to Mr. Patel, and because they, he mostly matches the description, so he is wearing a white sweater jeans, and a toboggan hat, he's skinny, like the color said he only weighs 115 pounds. But there's two pretty big differences. One is that he is not a black man in his 30s. But he's actually a 57 year old Indian grandfather. But regardless, they go up to him, they turn on the dashboard camera, so it starts recording audio and video. And that video ends up being very important to the court as they discuss kind of what happened. So there's this back and forth between Patel and these two officers and they walk up and they say, you know, "let me talk to you what's you know what's going on." And the man

kind of waves at them. You know, he knows who they are because of how they're dressed. But he says "India, no English." He repeats that a couple of times, the police continue trying to talk to him. And he's trying to walk away, and they're trying to figure out where he's going. And he says, "my house, my house, the number of the address walking, India." So at this point, it's extremely clear. He doesn't speak English. And so the police officer says, "I can't understand you, sir. Where is your address? Where do you live, stop walking, stop walking." And so then it just gets worse from there. They can see Mr. Patel, moving at his midsection with his hands. And so, the police officer said that he they thought he was reaching in his pockets, which is always code for "I thought he was reaching for a weapon." And so the officer walked up to him, took his hands, held them behind the back knuckles to knuckles and then started to frisk the man. And then another officer arrived. So at this point, there are three. And there, Patel's just not moving. He's just he's standing there with his hands behind his back. He then tried to pull his hands free, according to the officer, another factual dispute. Unclear from the video, it sounds like there is no pulling of the hand free. He's literally just standing there. But they continue to pat him down. And then Mr. Patel adjusts his foot, about an inch to the side. And then the officer interprets this as just "this man must be taken down." So he uses his left leg to sweep Mr. Patel's leg out from under him, hits him on the ground, hard face and shoulder first. This ends up permanently, partially, paralyzing Mr. Patel. And there were no weapons. There was nothing like that. And so Mr. Patel is laying on the ground with blood running from his nose. He appeared to be out of it. He was drooling and his head was lolling. This case now goes to summary judgment. And it goes up on appeal as to whether these officers had qualified immunity and the 11th Circuit said no, there is no qualified immunity in this particular situation. You know, it's, you just look at the facts and ad to the extent that there are disputed facts, that's what the jury is supposed to do instead. To resolve and so the court keeps looking at the facts. And that's what they say that this needs to go to a jury.

John Ross 30:06

So as was talked about on the last episode, there needs to be clearly established law that puts officers on notice that what they're doing is wrong and it has to be very specific. On the last episode, there was a case where someone surrendered by sitting down with their hands up. But prior case law established surrendering, by laying down was the way to properly surrender if you didn't want to get bitten. As I look through the case law, in this case, I don't see, okay, you're not allowed to leg sweep a guy who maybe is a little bit resisting, but maybe not. The other cases where they certainly applied the use of force to non resisting maybe handcuffed suspects. But they weren't totally on all fours there was one where suspects had was smashed into a patrol car, despite the fact that they were unresisting. That's not the

same thing as a leg sweep. So what accounts for the courts willingness to not cut things so fine in this case,

Diana Simpson 31:10

You know, what they say kind of in regard to that point is that a plaintiff can show that a law is clearly established in one of three ways. The first way is that there is a materially similar case, which is the one I think most people are most familiar with. The second is if a plaintiff can show that there is a broader, clearly established principle that should control the novel facts of a particular situation. And then the last is that if it's so obvious that what is happening is unconstitutional, that you just can't assume that any officer would think otherwise. Even without that case, law. And so it's those latter two that the court rely on here. And it's just, there was nothing going on that perhaps this was an acceptable stop and frisk moment, but it escalated in a way that it should not have and was unconstitutional.

Dan Alban 31:57

Yeah, and so all three of these cases that we've discussed so far reference, rely on to some extent, the Graham case, from 1989, a US Supreme Court decision about the use of force by police. In that case, the Supreme Court said, you know, you look at least three factors, when deciding whether an officer's force is reasonable. First is the severity of the crime. Of course, in this case, there, there was no crime. The second is whether the individual posed an immediate threat to the safety of the officers or others, and there's no indication that he posed any threat at all. And the third is whether the individual actively resisted arrest or attempted to evade arrest by flight. And that's where the counsel for the officers tries to make their arguments and say, "Well, he did actively resist his arrest by pulling his hand away and stepping away. Although the video shows he moved his foot at most an inch and does not show one way or the other, whether he tried to pull his hands away, because it's, the video was taken from the wrong side. And it wasn't possible to see his hands." They also say he did attempt to evade arrest by flight because when the officers asked him, you know what, "what's going on, sir," that sort of thing. He took several steps, I think seven steps on at one point and 10 steps at another, but no more than 20 steps or so toward his house, pointing at it, trying to show them where he lived, because, again, he didn't speak English. And when you're asked, "Where do you live," and you can only sort of make out a very little bit of what you're being asked. It makes sense to sort of walk toward the thing that you hope answers their question and point at it. And so, the court doesn't really buy the claims by the officers that he was fleeing the scene he was he was walking calmly down the sidewalk, not running away from them. And it puts a fair bit of emphasis. It also doesn't really buy the allegations that he was resisting arrest. And certainly, at the summary judgment stage, you have to rely on the plaintiff's allegations. And

so, Mr. Patel, of course, did not allege that he was resisting arrest. But one of the key facts I think that showed how excessive the force was, is the court points out that when the officer did the foot sweep, he was already holding Patel's hands behind his back at that time. And so, if your hands are behind your back and your feet are swept out from underneath you, such that you are falling on your head, you can't block the fall with your with your hands, and so you're going to fall on your head and that's exactly what happened here with, you know, no provocation, no prior active violence, no, no threat to the officers whatsoever. And as a result, Mr. Patel is permanently, partially paralyzed because of this excessive use of force.

Diana Simpson 35:18

It also seems that the police officers have suggested that because Mr. Patel had a pre existing condition that made it more likely that he became paralyzed that perhaps they shouldn't be responsible for the full injury, which is, for anyone who's taken tort law, you understand that not the way that it goes. But it's also just a ridiculous position. You know, this is a man who's walking around his neighborhood. He's recently moved here, and he just has this really bad day that turns into, you know, him being paralyzed, and he wasn't paralyzed that morning, and the cops made it that way.

John Ross 35:52

One other detail in this case that I thought was important was of the two initial officers who arrived at the scene. One was training the other one who was new on the job. And that, of course, is the same fact pattern that's in the George Floyd case in Minneapolis, where the officer who knelt on George Floyd's neck was training the officers who were standing by watching the situation unfold. Dan, what do you what do you make of that?

Dan Alban 36:19

Well, I, I think it shows, you know, these aren't mistakes being made by rookies who are unfamiliar with the standards for use of force. These are experienced officers who are in fact, training other officers, and really should be on their very best behavior. And yet they're engaging in, you know, obviously, excessive uses of force. I think it highlights what we were talking about earlier, the difference between street law and the actual law that you'll get in court. These officers are aware, I think of the degree to which courts defer to them, and will grant them immunity. And they're taking full advantage of that. And I think that's why qualified immunity really needs to be reined back, if not completely eliminated, because as officers become more familiar with the limits of, or lack of limits about what they can do. They exercise the full extent of their powers, and use force in many of these circumstances quite

excessively. And of course, only a handful of these things end up as federal lawsuits. So, to put a to put a stop to that. You need to remove qualified immunity. And, you know, these experienced officers really should have known better, but of course, they're also familiar with the street law and the street law is you get away with pretty much anything.

John Ross 37:49

Okay. And with that, let's move on to the final case. We don't want to give everyone the impression that qualified immunity only protects police officers, in fact, just about any state and local official is protected by qualified immunity. And this case illustrates that, Dan?

Dan Alban 38:04

Yes. So this case is out of the, it comes out of the Flint water crisis in 2014 and 2015, when the city of Flint and officials from the state of Michigan, including the governor decided to begin using water from the Flint River that was untreated, for corrosion, to use that as a primary water source for much of the city. And as a result, there was lead poisoning. There was Legionella contaminations, Legionella outbreaks, a number which is normally called Legionnaires disease. And so, you know, essentially an entire town was poisoned as a result of these terrible actions by state and city officials. There's a class action lawsuit, it's quite complicated. It's actually a consolidated set of class actions from as you would imagine, many people living in Flint who are upset about this. What I think is interesting about this case is it's very different from the sort of split-second kinds of actions that are often excused in sort of police related law enforcement, related qualified immunity cases, in this case is almost the opposite of that. It's something that played out over about 18 months from the spring of 2014 to the fall of 2015. And it's really sort of a slow-motion disaster where there's lots and lots of warnings, lots of officials expressing concern but then giving into orders by higher officials. You know, the original reasons for using this, for using the water from the Flint River were financial. It was going to be much cheaper than using water that was piped in from Detroit. And so there's just really a cornucopia of bad behavior by so many different levels of officials here. And I think it's highlighted by all the different

John Ross 40: 20

Of course, then there's the year long cover up,

Dan Alban 40:24

Right. And when you have an opinion, where I think six pages of it are dedicated to the cover up that occurred after the fact, that's a pretty good sign that the court is not going to find that you're protected

by qualified immunity. For not only, you know, committing pretty atrocious acts that poison an entire city, but then, you know, yeah, covering it up for a year afterward. And so, you know, the court sort of points out as all these things are going on, there are so many warning signs, both from the water tests themselves, the sampling of the water, the sicknesses that are developing. And you know, things like, you know, the University of Michigan-Flint campus decides they're going to stop using water because of from the city system, because of the high lead levels that are tested. And so they shut down. They shut down their drinking fountains on campus and other things.

John Ross 41:23

Dan, so the actual claim that the plaintiffs are making in this case, it's kind of interesting. Usually, in qualified immunity cases, you hear time honored claims about false arrest, wrongful imprisonment, malicious prosecution, excessive force. Here, the claim is based on the right to bodily integrity, which is, it's not a claim that, you know, I'm particularly familiar with, it's not something that you hear about very often. Where does that right come from?

Dan Alban 41:52

Well, that right is grounded in the Due Process Clause. The right to bodily integrity is essentially the right to not be, sort of deliberately poisoned, or, to have something else happened to your body, that that you would not consent to, but is happening sort of, unbeknownst to you. And so, the Sixth Circuit has addressed this several times, including in other lawsuits related to the Flint water crisis, in order to state a claim for bodily integrity, the actions by the officials have to shock the conscience, either through sort of, you know, someone maliciously doing something, or through deliberate indifference. And, you know, that's something where someone is acting recklessly, with little respect for the rights of citizens. And so here, you know, the fact that people are consuming something, the water that they think is perfectly safe and is of course necessary for human life. And yet it is, it has been poisoned and the government officials know it's poisoned, and don't take actions to correct that or to warn anyone and then cover it up after the fact, is pretty clearly acting with deliberate indifference towards someone's bodily integrity.

John Ross 43:19

Okay, that concludes the show. Thanks for listening. And be sure to tune in next time for more judicial engagement.