

A Second Line of Defense for Public Officials Asserting Qualified Immunity: What “Extraordinary Circumstances” Prevent Officials from Knowing the Law Governing Their Conduct?

“Given the complexities of the law today, it should not be surprising to find intelligent, conscientious, well-trained public servants who do not know all the clearly established law governing their conduct. The statement . . . that reasonably competent public officials know clearly established law is a legal fiction.”¹

I. INTRODUCTION

The qualified immunity defense shields public officials from liability for civil rights violations committed during the exercise of their official duties.² The defense, which the United States Supreme Court deems necessary for officials to perform their duties effectively, has, in practice, caused great confusion in law enforcement.³ Public officials often confront constitutionally uncertain circumstances while performing their everyday duties, but unfortunately, they often lack the legal guidance to know whether their actions are lawful.⁴ Consider a recent Tenth Circuit case, *Lawrence v. Reed*,⁵ in which the Rawlins, Wyoming Police Chief faced an unusual situation.⁶

For years, Rawlins residents had complained to city officials that a certain landowner, Mrs. Lawrence, was storing junk vehicles on her property and creating an eyesore adjacent to the county fairgrounds.⁷ After a number of unsuccessful settlement proposals with Lawrence, the city council consulted the derelict vehicle ordinance to lawfully seize and junk the vehicles.⁸ Pursuant to the ordinance, the city may give notice of intent to impound after it determines that a vehicle is derelict, and may give the property owner thirty days notice of

1. *Lawrence v. Reed*, 406 F.3d 1224, 1236 (10th Cir. 2005) (Hartz, J., dissenting) (citation omitted).

2. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (recognizing qualified immunity defense for public officials); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (explaining qualified immunity rationale).

3. *See infra* Parts III.A-B (detailing extraordinary circumstances case law within qualified immunity left unresolved by Supreme Court); *infra* note 68 (noting continued judicial frustrations in applying qualified immunity doctrine).

4. *See Lawrence*, 406 F.3d at 1236 (Hartz, J., dissenting) (suggesting officials rarely understand the law governing their conduct).

5. 406 F.3d 1224 (10th Cir. 2005).

6. *See id.* at 1227-30 (detailing police chief’s unconstitutional seizure of plaintiff’s property).

7. *See id.* at 1228-29 (citing adjacent fairgoers’ complaints).

8. *See id.* (describing city council’s consideration whether to seize vehicles or judicially enforce private agreement). In 1982, the city and Lawrence agreed to limit the areas on which she could store vehicles. *Id.* at 1228. Due to time constraints, the council elected to follow the city derelict vehicle ordinance procedures for removal, rather than enforce the agreement. *Id.*

removal.⁹ Thereafter, if the owner does not remove the derelict vehicles within twenty-four hours of the second notice, the city may seize them.¹⁰ The Rawlins Police Chief, with the assistance of the city attorney, undertook each step of the mandated procedure without receiving an adequate response from Lawrence and eventually towed her vehicles to a local landfill.¹¹ The chief received approval from the city attorney prior to each critical decision he made.¹²

Following the incident, Lawrence instituted a lawsuit against the chief and other officials under 42 U.S.C. § 1983 (Section 1983), alleging constitutional violations of her Fourth Amendment right against unreasonable seizures and her Fourteenth Amendment right to due process.¹³ After concluding that the chief had violated Lawrence's constitutional rights, the district court held him immune from liability due to his repeated consultations with the city attorney.¹⁴ On Lawrence's appeal, the Tenth Circuit reversed the trial court's application of qualified immunity, rejecting the chief's argument that he relied on the city attorney and the Rawlins derelict vehicle ordinance.¹⁵ The court reasoned that any reasonable officer would have understood that due process requires a hearing before depriving an individual of his property interest, regardless of the existence of a conflicting ordinance or the approval of a practicing attorney.¹⁶ Although his argument failed, the chief was invoking the "extraordinary circumstances" exception to the qualified immunity defense, which has succeeded in many other cases and confused qualified immunity jurisprudence in the federal courts.¹⁷

In *Harlow v. Fitzgerald*,¹⁸ the Supreme Court indicated that there may be

9. See *Lawrence*, 406 F.3d at 1228 n.2 (quoting RAWLINS, WYO., MUNICIPAL CODE § 8.20.020(B)) (outlining city's procedure to remove vehicles).

10. See *id.* (discussing ordinance); see also RAWLINS, WYO., MUNICIPAL CODE § 8.20.020(B) (describing derelict vehicle removal procedure).

11. See *Lawrence v. Reed*, 406 F.3d 1224, 1229 (10th Cir. 2005) (discussing police chief's actions following consultation with city attorney). The city attorney sent notice on August 9, 2002, advising Lawrence to move the vehicles in thirty days or the city would remove them. *Id.* The city received no response, and on October 7, the police chief proceeded with the twenty-four hour tagging requirement. *Id.* The next day Lawrence moved the vehicles to a different portion of her property, but the city attorney advised the police chief to follow through with removal. *Id.*

12. See *id.* at 1228-29 (noting discussions regarding proper action and continuous approval by attorney).

13. See *id.* at 1227 (setting forth plaintiff's Section 1983 claims).

14. See *id.* (describing district court's disposition).

15. See *Lawrence*, 406 F.3d at 1234-36 (addressing chief's contentions on appeal and reversing grant of qualified immunity).

16. See *id.* at 1233 (rejecting police chief's reliance on ordinance and advice as unreasonable).

17. See *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (recognizing an official's extraordinary circumstance defense); see also *Davis v. Zirkelbach*, 149 F.3d 614, 619-20 (7th Cir. 1998) (accepting defendant's extraordinary circumstances argument); *Hollingsworth v. Hill*, 110 F.3d 733, 740-42 (10th Cir. 1997) (invoking extraordinary circumstances defense entitling official to immunity); *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994) (granting qualified immunity where official relied on city ordinance); *infra* Parts II.C.1-2 (assessing various standards employed by circuits when assessing extraordinary circumstances).

18. 457 U.S. 800 (1982).

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some cases where, although the plaintiff has sufficiently alleged a violation of clearly established federal law, “extraordinary circumstances” require the court to sustain the qualified immunity defense.¹⁹ The Court stated that the defendant official must prove that he “neither knew nor should have known of the relevant legal standard.”²⁰ Under the Court’s guidance in *Harlow*, federal courts have recognized a qualified immunity defense for extraordinary circumstances where an official has relied on advice from counsel or a legislative enactment.²¹ The Court has not directly addressed the extraordinary circumstances exception since its *Harlow* decision, leaving the circuit courts to interpret the defense.²²

The purpose of this Note is to explore the application of the extraordinary circumstances defense within the federal judicial system.²³ Specifically, this Note will analyze situations that constitute extraordinary circumstances for purposes of the qualified immunity defense and identify those circuits that accept it.²⁴ Part II.A provides a background of Section 1983 actions and the qualified immunity defense.²⁵ Parts II.B and II.C focus on the early development of qualified immunity, and, in particular, the Supreme Court’s creation of a purely objective, two-part qualified immunity inquiry.²⁶ Part III explores circuit court decisions relating to the extraordinary circumstances defense and highlights two Supreme Court cases that have guided the circuit courts’ analysis.²⁷ Finally, Part IV of this Note suggests that the Supreme Court should revisit the extraordinary circumstances defense and clarify that reliance on legal advice and statutory authority is a critical factor in determining the objective reasonableness of an official’s actions.²⁸ In particular, the Court should impose a presumption of immunity when an official relies on a statute, regulation, or ordinance.²⁹

19. *Id.* at 819 (stating qualified immunity potentially granted based upon existence of extraordinary circumstances).

20. *Id.* (setting forth elements of defense).

21. *See infra* Parts II.C.1-2 (addressing circuit court cases granting immunity based on extraordinary circumstances).

22. *See* John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 475 n.99 (1990) (noting confusion surrounding extraordinary circumstances and lack of Supreme Court guidance).

23. *See infra* Parts II-III (highlighting and analyzing district and circuit court opinions on extraordinary circumstances defense).

24. *See infra* Parts II.A-B (discussing defense when official relies on statute or advice of attorney).

25. *See infra* Part II.A (introducing Section 1983 and purpose of judicially created qualified immunity defense).

26. *See infra* Part II.B-C (discussing evolution of qualified immunity doctrine).

27. *See infra* Part III (discussing qualified immunity cases involving statutory reliance and reliance on counsel).

28. *See infra* Part IV.B (advocating for totality of circumstances approach when courts interpret reliance on counsel or statute).

29. *See infra* Part IV.C (arguing statutory reliance warrants presumption of immunity).

II. THE QUALIFIED IMMUNITY DOCTRINE

A. The Elements of a Section 1983 or Bivens Claim and an Introduction to Qualified Immunity

When facing constitutional tort allegations under Section 1983, public officials may argue qualified immunity as an affirmative defense.³⁰ The Supreme Court describes the defense as a “shield” from liability for government officials performing discretionary functions, provided “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³¹ The immunity provides an exemption from the litigation process, not simply immunity from monetary damages.³² The qualified immunity defense balances the public’s interest in effectively vindicating constitutional guarantees with the state’s equally strong countervailing interest in protecting officials from the threat of liability when performing official duties.³³

Qualified immunity in the United States traces its origins to the doctrine of sovereign immunity that existed in medieval England.³⁴ The principle originally provided that no person could sue the King in his own court, however, the English later reformed the system to permit suits against the King upon his consent.³⁵ English common law eventually extended sovereign immunity to public officials so that government agents could effectively perform their official duties without fear of liability.³⁶

Under United States federal law, qualified immunity, like sovereign immunity, operates to defend government officials from liability for

30. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (defining qualified immunity as affirmative defense and explaining application of defense).

31. *Id.* at 818 (announcing standard for qualified immunity defense).

32. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (clarifying immunity intended to avoid lengthy, distracting litigation).

33. See *Harlow*, 457 U.S. at 813-14 (restating policy interests supporting remedies and defenses in civil rights claims).

34. See *Scheuer v. Rhodes*, 416 U.S. 232, 239 n.4 (1974) (recognizing modern immunity concept rooted in English common law); see also Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-4 (1963) (clarifying meaning of sovereign immunity). The phrase, “the King can do no wrong,” did not mean that the King was incapable of violating people’s rights, but instead recognized that he was “not entitled” to do so. Jaffe, *supra*, at 3-4. Based on this notion, the King chose to either endorse or reject claims against him. *Id.* at 4.

35. See Jaffe, *supra* note 34, at 2-4 (describing evolution of sovereign immunity doctrine). Jaffe points out that as a response to public upheaval, the English system permitted private parties to bring “petitions of right” against the King. *Id.* at 2-3. Before consenting, the Chancellor would screen petitions to ensure that petitioners had asserted a right based on law. *Id.* at 5.

36. See *Scheuer*, 416 U.S. at 240 n.4 (discussing history of immunity for government officials). The Court, in *Scheuer*, cited two policy based justifications for official immunity: the inequity of subjecting officials to liability for exercising discretion when they are required to do so by law, and the potential that threats of liability would deter officials from making decisions. *Id.* at 240.

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constitutional violations under Section 1983 and actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.³⁷ Congress enacted Section 1983 as part of the Civil Rights Act in 1871 to provide citizens with a procedural device to remedy constitutional violations by “state actors.”³⁸ The plaintiff in a Section 1983 action must establish two elements: deprivation of a right secured by the Constitution or other laws of the United States, and the alleged deprivation was committed under color of state law.³⁹ Although federal officials are not included under the statute, the Supreme Court later recognized in *Bivens* an analogous right of action against federal agents.⁴⁰

B. Qualified Immunity Pre-Harlow: A “Good Faith” Defense

In 1967, in *Pierson v. Ray*,⁴¹ the Supreme Court recognized that qualified immunity is a necessary defense to protect public officials who have been sued in an individual capacity.⁴² In *Pierson*, police officers arrested a group of African American and Caucasian clergymen under a Mississippi statute when they attempted to use segregated waiting room and restaurant facilities.⁴³ The statute made it unlawful for anyone to publicly congregate in a manner that breached the peace and refuse to vacate when ordered by an officer.⁴⁴ The Court did not explicitly frame the defense in terms of qualified immunity, but held that the defendant officers could assert a “good faith and probable cause” defense where the officers made the arrests under a state statute that the officers

37. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (introducing doctrine of qualified immunity as defense available for public officials); see also *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 392 (1971) (fashioning implied private right of action for constitutional violations by federal officials); *infra* notes 39-40 and accompanying text (outlining posture of Section 1983 and *Bivens* actions).

38. See 42 U.S.C. § 1983 (2006) (setting forth judicial redress for citizens deprived of protected rights); see also *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000) (describing Section 1983 as device to vindicate rights in federal court rather than conferring substantive rights).

39. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (stating required elements to assert Section 1983 claim); see also Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1037 (2005) (outlining Section 1983 elements).

40. See *Bivens*, 403 U.S. at 392 (granting monetary relief where federal agents violated plaintiff’s Fourth Amendment rights); see also *Butz v. Economou*, 438 U.S. 478, 504 (1978) (stating qualified immunity inquiry identical for Section 1983 and *Bivens* actions).

41. 386 U.S. 547 (1967).

42. See *id.* at 547 (holding defense of “good faith and probable cause” available to officials defending Section 1983 suits). Under the defense announced in *Pierson*, the officers would be entitled to immunity if they acted in good faith and with probable cause in making the arrest, even if the court determined the suspect was innocent. *Id.* at 555.

43. See *id.* at 552-53 (describing facts underlying civil rights claims). The arrests resulted from a peaceful demonstration organized by the ministers to promote racial equality and integration. *Id.* at 553. Two of the respondent police officers waited for the demonstrators at the entrance of the Jackson, Mississippi bus terminal restaurant, which was reserved for whites only. *Id.* After the clergymen were acquitted of all charges in county court, they filed a Section 1983 claim in federal court against the arresting officers. *Id.* at 550.

44. *Id.* at 549 n.2 (quoting Mississippi Code).

believed to be valid.⁴⁵ The Court stated that, even if the arrest was unconstitutional, the jury should enter a verdict for the officers upon finding that the “officers reasonably believed in good faith that the arrest was constitutional.”⁴⁶ The *Pierson* holding reflects the present qualified immunity standard in that the law excuses officials from liability where their conduct is reasonable under the circumstances.⁴⁷

The Supreme Court next addressed the qualified immunity standard in 1974 in *Scheuer v. Rhodes*,⁴⁸ after the Kent State tragedy.⁴⁹ The Court clarified the *Pierson* good faith defense, holding that qualified immunity is available when the official has both “reasonable grounds” and a “good faith belief” for his actions under the circumstances.⁵⁰ The Court’s holding implicitly required government officials to meet both objective and subjective components to establish qualified immunity.⁵¹ *Scheuer* is most significant, however, for the Court’s emphasis on whether the official’s conduct was reasonable in light of all the surrounding circumstances, which continues to be the critical analysis in qualified immunity cases and the prism through which the Court has analyzed more recent cases.⁵²

45. See *Pierson*, 386 U.S. at 555, 557 (holding good faith and probable cause defense available to officers defending Section 1983 claims). Four years after the arrests, the Supreme Court held that the Mississippi statute in question was unconstitutional as applied to similar facts. See *Thomas v. Mississippi*, 380 U.S. 524, 524 (1965) (per curiam) (reversing Mississippi Supreme Court without opinion).

46. *Pierson*, 386 U.S. at 557 (acknowledging result of defense of good faith and probable cause). The jury returned a verdict for the officers on both the Section 1983 and common law counts. *Id.* at 550. In remanding the case for a new trial, the Court noted that officials are not responsible for predicting whether a state statute may be held unconstitutional in the future. *Id.* at 557-58.

47. See *infra* note 57 and accompanying text (setting forth objective qualified immunity standard); see also Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope’s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 567 (2006) (arguing *Pierson* laid groundwork for subsequent decisions establishing objective reasonableness test for qualified immunity).

48. 416 U.S. 232 (1974).

49. *Id.* at 234 (addressing scope of judicial immunity created in *Pierson*). In *Scheuer*, military officials shot and killed several students during a Vietnam War protest at Kent State University after the Ohio governor deployed the National Guard to control the crowd. *Id.* The plaintiffs filed Section 1983 claims against the Governor and other low-level officials, alleging that the governor unnecessarily deployed federal troops, depriving the students of their lives without due process of law. *Id.* at 234-35.

50. *Id.* at 247-248 (requiring uniform qualified immunity standard for high and low level government officials). The Court also summarized the strong policy considerations favoring qualified immunity, stating, “The concept of immunity assumes [that officials may err] and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.” *Id.* at 240-42.

51. See Kirby, *supra* note 22, at 473 (noting test announced in *Scheuer* established two prong test). *Pierson* implicitly recognized both prongs, but the Court did not delineate the test into subjective and objective criteria until *Scheuer*. *Id.* Despite the Court’s holding, circuit courts continued to frame the qualified immunity question as purely objective. See *Strickland v. Inlow*, 485 F.2d 186, 191 (8th Cir. 1973) (citations omitted) (stating qualified immunity purely objective, rather than subjective); *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968) (stating qualified immunity dependent on good faith action).

52. See Golden & Hubbard, *supra* note 47, at 567-68 (describing reasonableness element in context of future qualified immunity cases); *infra* note 57 and accompanying text (focusing on reasonableness of officer’s conduct in qualified immunity analysis).

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One year after *Scheuer*, the Court explicitly held in *Wood v. Strickland*⁵³ that the qualified immunity test contained distinct subjective and objective elements.⁵⁴ The Court stated that school board members should not receive immunity if they “knew or should have known” that expelling students from school would be a constitutional violation, or if they took action with intent to cause constitutional injury.⁵⁵ The dual objective/subjective test prevailed in the federal system from 1975 until 1982.⁵⁶

C. Harlow, Anderson, and an Objective Qualified Immunity Standard

In *Harlow*, the Supreme Court established that the qualified immunity standard should be based solely on objective factors.⁵⁷ The *Harlow* Court also explained two other critical points relating to government immunity: the class of officials entitled to absolute immunity, and the efficiency of resolving qualified immunity claims on summary judgment.⁵⁸ The plaintiff in *Harlow* brought a *Bivens* action against President Nixon’s senior aides and advisors, alleging unlawful discharge from his employment with United States Air Force.⁵⁹ The United States District Court for the District of Columbia denied the defendant’s motion for summary judgment and remanded for trial to resolve

53. 420 U.S. 308 (1975).

54. *See id.* at 321 (stating qualified immunity standard “necessarily contains” objective and subjective tests). The district court dismissed the Section 1983 claim because the plaintiffs presented no evidence that the school board members expelled the students with malice or ill will. *Id.* at 313-14. On appeal, the Eighth Circuit held that the inquiry “is an objective, rather than a subjective one,” and granted immunity without considering the defendant school administrator’s mental state. *Id.* at 314.

55. *See id.* at 322 (defining test focused on objective and subjective inquiries into official’s mental state).

56. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing purely objective test); *see also Kirby, supra* note 22, at 473-74 (noting *Wood* standard prevailed until *Harlow* decision).

57. *See Harlow*, 457 U.S. at 817-18 (altering qualified immunity focus to reasonable person inquiry); *see also Golden & Hubbard, supra* note 47, at 569 (characterizing *Harlow* as definitive qualified immunity standard). In recent qualified immunity cases, the Court has continued to build on the general foundation set forth in *Harlow*. *See infra* notes 69-72 and accompanying text (outlining subsequent decisions expanding on objective standard).

58. *See Harlow*, 457 U.S. at 807-819 (addressing factors related to efficiency and practicality of qualified immunity determination); *infra* note 61 and accompanying text (identifying inconsistency between subjective inquiry and preference for resolving insubstantial claims on summary judgment). The Court recognized that some officials are absolutely immune from civil liability because their functions or constitutional status require complete protection from suit. *See Harlow*, 457 U.S. at 807; *see also Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (holding judges to be absolutely immune when performing judicial functions). The *Harlow* Court reasoned that presidential aides, like members of the cabinet, must be accountable to the public and that Section 1983 actions are “an important means of vindicating constitutional guarantees.” *Harlow*, 457 U.S. at 809 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

59. *See Harlow*, 457 U.S. at 802-03, 805 (alleging two of President Nixon’s close aides involved in conspiracy to terminate his employment). The plaintiff had testified before Congress regarding poor allocation of Air Force resources in Vietnam and he claimed his termination was retaliatory. *Id.* at 802; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 733-736 (1982) (outlining events leading up to dismissal from Air Force). *Harlow*, one of the defendants, countered that he had acted in good faith and moved for summary judgment. *Harlow*, 457 U.S. at 804-05.

disputed issues of fact.⁶⁰ After concluding that the subjective element necessarily required a jury determination, the Supreme Court stated that a purely objective test is most suitable for resolving qualified immunity claims because it avoids “excessive disruption of government” and allows the judge to terminate insubstantial claims on summary judgment.⁶¹

In response to its concern that subjective inquiry may disrupt effective government, the *Harlow* Court established the definitive standard for the qualified immunity test: “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.”⁶² Under the objective *Harlow* approach, the Court measures the reasonableness of the official’s actions on summary judgment, by determining whether the law was clearly established at the time of the alleged infraction.⁶³

Given that the “clearly established” language in *Harlow* left some ambiguity, the Court further defined the qualified immunity test in *Anderson v. Creighton*.⁶⁴ Before the Court granted certiorari, the Eighth Circuit articulated and analyzed whether the right to be free from warrantless searches was clearly

60. See *Harlow*, 457 U.S. at 805-06 (noting denial of officials’ motion for summary judgment based on genuine issues of disputed fact).

61. See *id.* at 818 (recognizing policy interests in avoiding trial). In developing the qualified immunity standard, the Court had assumed that trial judges would quickly terminate insubstantial claims on summary judgment. See *id.* at 814; see also *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (noting only compensable claims should survive motion to dismiss); cf. *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974) (denying motion to dismiss where factual dispute regarding scope of officer’s duties). Despite the growing emphasis on objective factors, some circuit courts persisted in submitting the subjective inquiry to the jury as a question of fact. See *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978) (holding police officers’ good faith question of fact for jury); *Duchesne v. Sugarman*, 566 F.2d 817, 832-33 (2d Cir. 1977) (holding jury must decide issue of good faith and qualified immunity). See generally FED. R. CIV. P. 56(c) (providing summary judgment appropriate only where no genuine issues of material fact). Submitting claims to the jury exposes officials to the numerous social and monetary costs of trial, which the Court intended to avoid. See *Harlow*, 457 U.S. at 816. The Court was also concerned that broad-based fact-finding and exhaustive deposing of an official’s colleagues would disrupt effective administration of government. See *id.* at 817.

62. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (limiting qualified immunity analysis to objective reasonableness test); cf. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (re-characterizing qualified immunity as immunity from suit rather than shield from liability).

63. See *Harlow*, 457 U.S. at 818 (outlining judicial analysis for qualified immunity claims at summary judgment stage). The Court reasoned that if the law was not clearly established at the time of the action, no official could be expected to know that the law prohibited his conduct. *Id.* On the other hand, if the law was clearly established, the claim of immunity should fail because government officials are required to know the law governing their conduct. *Id.* at 818-19. In *Mitchell*, for example, an individual charged the Attorney General with authorizing illegal wiretaps, which were held unconstitutional six months after he instituted the security measure. *Mitchell*, 472 U.S. at 513-515. The Court reiterated that the right must be clearly established at the time the official took action, not at the time of trial. *Id.* at 535. Thus, the Attorney General was entitled to qualified immunity because it was not clearly established that the wiretaps were unconstitutional at the time he took action. *Id.*

64. 483 U.S. 635, 640 (1987) (requiring violated right clearly established in particular context of officer’s actions); see also Catlett, *supra* note 39, at 1040 (arguing *Harlow* Court provided little guidance on how law becomes “clearly established”).

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established in an abstract sense, refusing to consider whether the particular circumstances surrounding the search in question clearly constituted probable cause and exigent circumstances.⁶⁵ The Supreme Court then explained that the court must identify the allegedly infringed legal right in a “more particular and relevant sense,” taking into account the specific circumstances confronting the officer.⁶⁶ Accordingly, “[t]he contours of the citizen’s right must be sufficiently clear that a reasonable official would understand” his actions violated that right.⁶⁷ Following *Anderson*, the qualified immunity test became, at least in theory, more predictable for government officials and more amenable to summary judgment determination.⁶⁸

The *Anderson* Court’s guidance results in a two prong qualified immunity analysis.⁶⁹ First, the court must decide whether the facts, taken in a light most

65. See *Anderson*, 483 U.S. at 640-641 (identifying insufficiency of Eighth Circuit’s holding). The level of generality with which the parties articulate a specific right will often determine the outcome of the qualified immunity analysis. *Id.* at 639. The Court stated that qualified immunity recognizes that government officials may reasonably, but mistakenly, conclude probable cause exists for a warrantless search. *Id.* at 641. The Eighth Circuit’s flawed interpretation of the clearly established prong set the stage for the Court’s discussion in *Anderson*. See *id.* at 637-38. The *Anderson* plaintiffs alleged that an FBI agent, along with state and federal law enforcement officers, performed a warrantless search of their home in violation of the Fourth Amendment. *Id.* at 637. The agents conducted the search, mistakenly believing a suspected bank robber was present. *Id.* at 637. In denying qualified immunity, the Eighth Circuit stated that it was clearly established that citizens have the right to be protected from warrantless home searches, absent probable cause and exigent circumstances. *Id.* at 638. The Supreme Court noted that identifying legal rights “at this level of generality . . . bear[s] no relationship to the objective legal reasonableness that is the touchstone of *Harlow*.” *Id.* at 639 (internal quotations omitted).

66. *Id.* at 639-640 (recognizing defendants would virtually always face liability when alleged violation abstractly identified). The Court observed that the right to due process of law is clearly established by the Due Process Clause, but any action violating Due Process does not necessarily violate a clearly established right. *Id.* Rather, the determination depends on how established it was that the particular action violated the general right. *Id.*

67. *Id.* at 640 (attempting to clarify clearly established prong for circuit courts). To be sufficiently clear, the “unlawfulness must be apparent” in “light of pre-existing law.” *Id.* This standard requires that plaintiffs bringing constitutional tort actions demonstrate that government officials had prior notice or fair warning that their conduct was unlawful. See *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (noting qualified immunity protects officers by ensuring notice of unlawful conduct); *Anderson*, 483 U.S. at 639-640 (arguing for ability of officials to reasonably anticipate when conduct will result in liability).

68. See Golden & Hubbard, *supra* note 47, at 572 (concluding *Anderson* clarified qualified immunity analysis for courts and defendants); James Flynn Mazingo, Comment, *The Confounding Prong of the Harlow v. Fitzgerald Qualified Immunity Test: When Is a Constitutional Right Clearly Established?*, 17 AM. J. TRIAL ADVOC. 797, 806 n.88 (1994) (suggesting circuit complaints about *Harlow*’s ambiguity resolved by *Anderson* Court). In *Anderson*, the Court strived to construct a test under which officials could anticipate whether their conduct would subject them to civil liability. See *Anderson*, 483 U.S. at 639. Some scholars, however, comment that application of the qualified immunity doctrine remains a struggle, despite the *Anderson* Court’s clarification. See, e.g., Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY. L.J. 229, 229-30 (2006) (noting judicial frustration in applying doctrine); Linda Ross Meyer, *When Reasonable Minds Differ*, N.Y.U. L. REV. 1467, 1506-10 (1996) (discussing challenge courts face in identifying level of generality at which law becomes clear); Catlett, *supra* note 39, at 1034 (noting lower courts’ continuing struggle to identify rights at proper level of generality).

69. See *Saucier*, 533 U.S. at 200 (affirming *Anderson* and describing qualified immunity analysis as consisting of two separate inquiries); see also Golden & Hubbard, *supra* note 47, at 574-576 (recognizing

favorable to the plaintiff, establish a violation of a constitutionally protected right.⁷⁰ After establishing a violation, the court must then determine whether the violation was objectively reasonable in light of clearly established law and the surrounding facts and circumstances.⁷¹ Courts must consider the elements in sequence, assessing whether the plaintiff has properly alleged a violation before considering the clearly established prong.⁷²

III. QUALIFIED IMMUNITY IN EXTRAORDINARY CIRCUMSTANCES

In *Harlow*, the Supreme Court set forth a general exception to the qualified immunity standard for officials pleading extraordinary circumstances.⁷³ After concluding its discussion of the clearly established test, the Court stated that qualified immunity may be available in extraordinary circumstances, even where the law is clearly established, if the official can prove that he “neither knew nor should have known of the relevant legal standard.”⁷⁴ The circuits have yet to settle the manner in which the *Harlow* Court intended this doctrine to apply, and as a result, they employ varying approaches.⁷⁵ Subsequent Supreme Court decisions have built on the foundation of *Harlow*, yet none have explicitly reconsidered the extraordinary circumstances defense.⁷⁶ Consequently, federal courts rarely apply the extraordinary circumstances defense and typically only in instances where an official took action in reliance

Anderson established two prong test).

70. See *Saucier*, 533 U.S. at 201 (articulating first prong of qualified immunity inquiry).

71. See *id.* (describing second prong of analysis after plaintiff establishes constitutional violation).

72. See *id.* (describing second prong as “the next sequential step”); see also *Siebert v. Gilley*, 500 U.S. 226, 232 (1991) (ordering consideration of second prong after facts alleged demonstrate constitutional violation).

73. See *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (stating qualified immunity defense sustained where official proves extraordinary circumstances).

74. See *id.* at 819 (creating extraordinary circumstances exception when qualified immunity claim would otherwise fail); see also MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION* § 3.9 (3d ed. 2007) (explaining exception applies only where official has “actual and reasonable ignorance of law”); Kirby, *supra* note 22, at 475 n.99 (interpreting import of extraordinary circumstances defense).

75. Compare *Lawrence v. Reed*, 406 F.3d 1224, 1236-37 (10th Cir. 2005) (grappling with standard established in *Harlow*), and *V-1 Oil Co. v. State of Wyo., Dep’t of Env’tl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir. 1990) (identifying four factors where reliance on legal advice constitutes extraordinary circumstances), with *Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006) (noting it had never held reliance on counsel constitutes extraordinary circumstances), *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) (incorporating counsel’s advice into totality of circumstances when determining qualified immunity), *Connecticut v. Crotty*, 346 F.3d 84, 102 (2d Cir. 2003) (creating presumption officer reasonable in relying on statute), *Putnam v. Keller*, 332 F.3d 541, 545 (8th Cir. 2003) (rejecting reliance on attorney as extraordinary circumstance), and *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) (stating officer enforcing unconstitutional ordinance entitled to assume legislature considered constitutionality).

76. See *supra* Part II.C (outlining holding in *Harlow* and subsequent decisions further defining standards). But see *Crotty*, 346 F.3d at 102-03 (endorsing Supreme Court decisions recognizing officials should rely on legislature unless law flagrantly unconstitutional); *infra* Part III.C (identifying Supreme Court cases analyzing officials relying on judicial authorization and official policy).

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on legal advice or a government regulation.⁷⁷

A. Reliance on Advice of Counsel Argument

Most often, the circuit courts apply the extraordinary circumstances exception to qualified immunity where the defendant official acts only after consulting a practicing attorney as to the lawfulness of their actions.⁷⁸ The circuits recognize that it is not inherently extraordinary for an official to seek and obtain legal advice before taking action, and in fact, officials should be encouraged to do so in questionable situations.⁷⁹ Thus, qualified immunity does not automatically follow if an official received a favorable pre-arrest opinion.⁸⁰ The Ninth Circuit has reasoned that conferring qualified immunity solely on the basis of an attorney's opinion would effectively abdicate the judicial role in 1983 claims and provide an incentive for lawyers to ensure officials that they have immunity.⁸¹ As such, courts routinely determine whether the official's reliance was objectively reasonable in light of all information the official possessed at the time of the incident, including counsel's opinion.⁸²

In general, the circuit courts utilize two distinct tests to address the effect of legal advice in the qualified immunity analysis: those framing the issue as a third consideration after establishing a violation of clearly established law and

77. See *Lawrence*, 406 F.3d at 1230-32 (recognizing application of exception where conduct authorized by statute or consulting attorney); Stacy Hawes Felkner, *Proof of Qualified Immunity Defense in 42 U.S.C. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 AM. JUR. 3D. *Proof of Facts* § 291, 311-15 (explaining instances in which officials raise extraordinary circumstances defense); Karen Blum, *Section 1983: Qualified Immunity*, 748 PRAC. L. INST. 79, October 26-27, 2006 (noting application where official relied on advice of counsel); see also *infra* Parts III.A-B (examining circuit decisions interpreting impact of legal advice and reliance on statute).

78. See, e.g., *Cox*, 391 F.3d at 34-36 (assessing immunity claim of officer who consulted district attorney on probable cause); *Wadkins v. Arnold*, 214 F.3d 535, 541-43 (4th Cir. 2000) (weighing reasonableness of arrest in light of detective's conference with state attorney); *Cannon v. City of Denver*, 998 F.2d 867, 874-75 (10th Cir. 1993) (determining whether officials' reliance on judge's statements prevented knowledge of First Amendment standards); see also Felkner, *supra*, note 77, at 312 (noting reliance on advice of counsel most often considered as "extraordinary").

79. See *Lawrence*, 406 F.3d at 1237 (Hartz, J., dissenting) (encouraging public officials to obtain legal advice regarding questionable practices); *V-1 Oil*, 902 F.2d at 1489 (noting reliance on counsel not inherently extraordinary but rather common practice).

80. See *Cox*, 391 F.3d at 35 (stating mere fact of counsel's authorization does not guarantee qualified immunity); *Wadkins*, 214 F.3d at 542 (noting authorization does not "automatically cloak" official with "shield" of immunity); see also *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (concluding officer applying for and receiving warrant not objectively reasonable per se); *infra* Parts III.C & IV.A (addressing Court's holding in *Malley* and its relevance to reliance on counsel argument).

81. See *Gilbrook v. City of Westminster*, 177 F.3d 839, 870 (9th Cir. 1999) (concluding reliance on counsel alone insufficient to grant qualified immunity). But see *Wadkins*, 214 F.3d at 543 (concluding irrational to require law enforcement to second guess attorneys and magistrates).

82. See *Cox v. Hailey*, 391 F.3d 25, 35 (1st Cir. 2004) (suggesting analysis of all circumstances surrounding pre-arrest consultation). Reliance would be unreasonable, for example, if an officer had reason to believe that the attorney's advice was "flawed, off point, or otherwise untrustworthy." *Id.*

those considering reliance on counsel as part of the totality of the circumstances as to whether the law is clearly established.⁸³ Only the Tenth Circuit uses the former approach, clearly using a three-step analysis to determine the existence of extraordinary circumstances.⁸⁴ The Tenth Circuit follows the extraordinary circumstances language in *Harlow* literally, analyzing the two prong test before considering whether extraordinary circumstances prevented the official from knowing the clearly established law.⁸⁵ As an aid for its analysis, the Tenth Circuit uses a four-part test to determine whether the particular receipt of legal advice warrants the extraordinary circumstances defense: the extent to which counsel's advice was unequivocal and specifically tailored to the particular facts giving rise to the controversy; whether the official provided complete information to the advising attorney(s); the prominence and competence of the attorney(s); and how quickly the official took the disputed action after receiving the advice.⁸⁶ In *Davis v. Zirkelbach*,⁸⁷ the Seventh Circuit adopted the Tenth Circuit's four-part test for reliance on advice of counsel.⁸⁸

In contrast to the Tenth Circuit approach, other circuit courts consider reliance on advice of counsel as one factor, among others, in evaluating

83. Compare *Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005) (analyzing reliance on counsel as third inquiry in qualified immunity), and *V-1 Oil Co. v. State of Wyo., Dep't of Env'tl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir. 1990) (considering effect of consultation after concluding violation of clearly established right), with *Cox*, 391 F.3d at 34 (considering officer's consultation in initial objective legal reasonableness inquiry), and *Wadkins*, 214 F.3d at 542-43 (stating consultation bolsters reasonableness of official's actions). In fact, many courts do not explicitly reference extraordinary circumstances. See, e.g., *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 896-97 (6th Cir. 2006) (analyzing consultation without mention of extraordinary circumstances exception); *Cox*, 391 F.3d at 34-35 (same); *Wadkins*, 214 F.3d at 541-43 (same).

84. See *Lawrence*, 406 F.3d at 1230 (outlining three part test); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1247 (10th Cir. 2003) (providing third inquiry to address rare instance of extraordinary circumstances); *V-1 Oil*, 902 F.2d at 1488-89 (recognizing extraordinary circumstances exception may apply where defendant violated clearly established right). In adopting its analysis for the extraordinary circumstances defense, the *V-1 Oil* court considered a number of federal opinions that analyzed legal advice as constituting a factor in clearly established law determination. See *Arnsberg v. United States*, 757 F.2d 971, 974 (9th Cir. 1985) (incorporating legal advice as part of clearly established analysis); *Wells v. Dallas Ind. Sch. Dist.*, 576 F. Supp. 497, 508-09 (N.D. Tex. 1983) (concluding officials relying on counsel did not "know" law because law not clearly established); *Alexander v. Alexander*, 573 F. Supp. 373, 376 (M.D. Tenn. 1983) (factoring legal consultation into whether law clearly established), *aff'd*, 751 F.2d 384 (6th Cir. 1984).

85. See *Lawrence*, 406 F.3d at 1230 (explaining application of two-part *Harlow* test before assessing extraordinary circumstances); *Hollingsworth v. Hill*, 110 F.3d 733, 740-41 (10th Cir. 1997) (considering extraordinary circumstances after concluding defendant violated clearly established right).

86. See *V-1 Oil*, 902 F.2d at 1489 (holding officer's reliance on "fully informed, high ranking government attorneys" constitutes extraordinary circumstances). The *V-1 Oil* court identified the following relevant factors: "[H]ow unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was . . . whether complete information had been provided to the advising attorney(s) . . . the prominence and competence of the attorney(s) . . . and how soon after the advice was received the disputed action was taken . . ." *Id.*

87. 149 F.3d 614 (7th Cir. 1998).

88. *Id.* at 620 (quoting Tenth Circuit advice of counsel analysis from *V-1 Oil*); see *Felkner*, *supra*, note 77 (confirming *Davis* adopted Tenth Circuit analysis). But see *infra* note 89 (noting conflicting Seventh Circuit case law in context of reliance on advice of counsel).

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whether a reasonable official would have known their conduct was unlawful.⁸⁹ An important factor in assessing the reasonableness of an official's actions is whether he fully presented the relevant information before counsel rendered their legal opinion.⁹⁰ Within these circuits, the Sixth and Eighth Circuits' decisions reveal particularly hazy precedent for the reliance on advice of counsel argument.⁹¹ The Sixth Circuit has implicitly drawn a distinction between instances where counsel provided an express opinion that an official's actions were lawful, and instances where counsel provided inaccurate information, which, in turn, caused the official to commit a constitutional violation.⁹² In the latter scenario, the Sixth Circuit's decisional law is conflicting.⁹³ Likewise, the Eighth Circuit has expressly rejected the argument that reliance on advice of counsel constitutes extraordinary circumstances, but the court has also emphasized the importance of an official's receipt of legal advice in the qualified immunity determination.⁹⁴

89. See, e.g., *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004) (holding consultation and advice obtained factored into totality of circumstances); *Kijonka v. Seitzinger*, 363 F.3d 645, 648 (7th Cir. 2004) (holding consultation with attorney gives reasonable basis for believing probable cause existed); *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003) (identifying relevant questions for determining whether officer reasonably relied on advice of counsel). This approach represents a "totality of the circumstances" analysis. See *Cox*, 391 F.3d at 34. The inquiry here is based on the notion that pre-arrest consultation with an attorney may help show that an official acted reasonably under the circumstances. See *Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2000) (concluding authorization from state attorneys compelling evidence in determining reasonableness of actions).

90. See, e.g., *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1015-16 (7th Cir. 2006) (denying qualified immunity when officers presented only favorable facts); *Cox*, 391 F.3d at 36 (stating withholding facts from prosecutor would render reliance unreasonable); *Dixon*, 336 F.3d at 1019 (listing attorney's knowledge of all relevant circumstances as key factor in analysis).

91. See *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006) (excusing due process violation where officials ill informed as to plaintiff's tenured status); *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006) (stating reliance on advice of counsel defense never found in Sixth Circuit); *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006) (granting qualified immunity where officers relied on prosecutorial opinion as to probable cause); *Putnam v. Keller*, 332 F.3d 541, 545 n.3 (8th Cir. 2003) (holding reliance on advice of counsel alone insufficient to satisfy official's burden of reasonableness under qualified immunity); *E-Z Mart Stores, Inc. v. Kirksey*, 885 F.2d 476, 478 (8th Cir. 1989) (stating reliance on erroneous advice crucial factor in reasonableness determination under qualified immunity).

92. Compare *Armstrong*, 432 F.3d at 701-02 (granting qualified immunity where officers received prosecutorial approval for search warrant), with *Miller*, 448 F.3d at 896-97 (denying qualified immunity in wrongful termination claim where counsel advised that employees were non-tenured), and *Silberstein*, 440 F.3d at 317-18 (excusing post-termination hearing deprivation where officials led to believe employee unclassified civil servant). The *Armstrong* court held that the officer's application for an arrest warrant, supported by a prosecutor's assurances, was objectively reasonable under the circumstances and did not exceed the range of professional judgment accorded under qualified immunity. See *Armstrong*, 432 F.3d at 702. Thus, the officer's mistaken belief that probable cause existed was not so unreasonable as to justify denying qualified immunity. *Id.* In contrast, the official in *Miller*, relying on the city solicitor's advice that the plaintiff was non-tenured, terminated the employee without a hearing. *Miller*, 448 F.3d at 896. The court held that the decision was not unreasonable based on the information the official received. *Id.*

93. Compare *Miller*, 448 F.3d at 897 (applying qualified immunity when officials relied on information about employee's non-tenured status), with *Silberstein*, 440 F.3d at 317-18 (rejecting qualified immunity when officials relied on information about employee's unclassified status under civil service laws).

94. See *Putnam*, 332 F.3d at 545 n.3 (holding reliance on counsel alone does not constitute extraordinary

B. Statutory Reliance Argument

In addition to reliance on advice of counsel, defendant officials may also assert the extraordinary circumstance defense when a statute, regulation, or department policy has allegedly prevented them from knowing that their actions violate clearly established constitutional law.⁹⁵ As with advice of counsel, reliance on an authorizing statute does not automatically confer qualified immunity to a public official.⁹⁶ Those circuit courts addressing the issue recognize that officials who reasonably rely on a duly enacted regulation should be shielded from personal liability.⁹⁷ Courts refuse, however, to extend immunity where a statute is “patently violative” of the Constitution, or where it is applied in a “particularly egregious manner.”⁹⁸

As in the advice of counsel context, the Tenth Circuit uses a detailed four-part analysis for determining whether reliance on a statute renders an official’s conduct objectively reasonable: the degree of specificity with which the statute authorized the conduct in question; whether the officer in fact complied with the statute; whether the statute has fallen into desuetude; and whether the officer could have reasonably concluded that the statute was constitutional.⁹⁹

circumstance under *Harlow*). *But see E-Z Mart Stores*, 885 F.2d at 478 (considering counsel’s advice as part of whether officer’s actions objectively reasonable). These Eighth Circuit decisions suggest that advice of counsel is a significant factor in the totality of the circumstances as to whether the official’s actions were reasonable, but not alone enough to constitute an extraordinary circumstance per se. *See Putnam*, 332 F.3d at 545 (rejecting advice of counsel as extraordinary circumstances); *E-Z Mart Stores*, 885 F.2d at 478 (considering advice of counsel in reasonableness of official’s actions).

95. *See* AVERY, RUDOVSKY & BLUM, *supra* note 74, § 3.9 (noting courts accepting statutory reliance argument for qualified immunity); Felkner, *supra* note 77, at 312 (stating extraordinary circumstances defense often raised when officer relies on regulation or policy); *infra* Part III.B (outlining circuit courts deciding whether reliance on statute gives rise to extraordinary circumstance).

96. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003) (citing *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986)) (clarifying reliance does not make officer’s conduct reasonable per se); *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994) (noting qualified immunity may not always attach where officer relied on legislature). The *Grossman* court noted that officials who blindly rely on government direction may not deserve immunity, as world events such as the Holocaust and the My Lai massacre demonstrate. *Grossman*, 33 F.3d at 1209; *cf. Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003) (imposing strong presumption for qualified immunity where official enforces presumptively valid statute).

97. *See Crotty*, 346 F.3d at 88-89, 104 (finding officers objectively reasonable in relying on regulation prohibiting non-residents from catching lobsters); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002) (holding officer’s arrest under public demonstration regulation reasonable where regulation not flagrantly unconstitutional); *Grossman*, 33 F.3d at 1210 (granting qualified immunity where officer arrested protesters lacking protest permit although ordinance violated First Amendment).

98. *Grossman*, 33 F.3d at 1209-10 (describing scenarios in which statute should not shield officer from liability); *see also Lederman*, 291 F.3d at 47 (quoting *Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979)) (concluding officers may rely on legislature unless it passed “grossly and flagrantly unconstitutional” law).

99. *See Roska*, 328 F.3d at 1251-53 (listing four-part analysis). Desuetude is defined as a “doctrine holding that if a statute or treaty is left unenforced long enough, the courts will no longer regard it as having any legal effect even though it has not been repealed.” BLACK’S LAW DICTIONARY (8th ed. 2004). The Tenth Circuit incorporated the desuetude doctrine into its consideration from Ninth Circuit precedent. *See Grossman*, 33 F.3d at 1209 n.19. The *Roska* court also observed that the presence of a statute is not relevant for

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The Tenth Circuit alone expressly recognizes that reliance on a statute constitutes an “extraordinary circumstance” exception under *Harlow*.¹⁰⁰ For example, the Tenth Circuit in *Lawrence v. Reed*, as discussed in the introduction, determined that a reasonable officer would have known that a local derelict vehicle ordinance, which authorized removal of junked vehicles from an owner’s property, violated the right to due process because it deprived the individual of her property without a hearing.¹⁰¹ The Tenth Circuit commented that an officer is not always entitled to rely on the legislature’s judgment and, where the inquiry is simple and clear, is expected to know that the ordinance is unconstitutional.¹⁰²

The Second, Fourth, Ninth, Eleventh, and D.C. Circuits go as far as to impose a presumption that an official enforcing a validly enacted statute, ordinance, or regulation be entitled to qualified immunity.¹⁰³ The plaintiff can rebut the presumption if the law or policy obviously violates the constitution.¹⁰⁴ Because the Supreme Court has recognized that legislative enactments are entitled to a presumption of constitutionality, the legislature has ostensibly considered the constitutionality of a law before its enactment.¹⁰⁵ Thus, courts

determining whether the law is clearly established. *Roska*, 328 F.3d at 1252-53.

100. See *Roska ex rel. Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006) (stating reliance on statute may constitute extraordinary circumstance rendering conduct reasonable); *Lawrence v. Reed*, 406 F.3d 1224, 1231-32 (10th Cir. 2005) (laying out third part of qualified immunity inquiry to determine whether reliance constitutes extraordinary circumstance).

101. See *supra* notes 13-16 and accompanying text (outlining plaintiff’s claim and *Lawrence* court’s holding).

102. See *Lawrence*, 406 F.3d at 1233, 1235 (noting if statute obviously unconstitutional, officials must refuse to enforce statute or face liability). But see *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) (stating officers may assume city council considered ordinance valid exercise of constitutional authority). In *Lawrence*, the court contrasted the officer’s situation with *V-1 Oil*, where the court found the officer’s reliance on an unconstitutional statute reasonable because the statute’s constitutionality was unclear. *Lawrence*, 406 F.3d at 1234. The court concluded that the derelict vehicle ordinance was distinguishable because it was obviously unconstitutional, as the ordinance lacked a hearing requirement, which is “the fundamental requirement of due process.” *Id.* at 1233 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

103. *Cooper v. Dillon*, 403 F.3d 1208, 1220 (11th Cir. 2005) (stating officer entitled to assume Florida statute “free of constitutional flaws”); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003) (holding enforcement of presumptively valid statute creates presumption in favor of immunity); *Lederman v. United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (concluding official applying non-flagrantly unconstitutional government regulation entitled to qualified immunity); *Grossman*, 33 F.3d at 1209 (concluding officer “ordinarily entitled” to assume duly-enacted ordinance valid and constitutional); *Swanson v. Powers*, 937 F.3d 965, 969 (4th Cir. 1991) (stating official rarely loses immunity for simply enforcing presumptively valid statute); see also Richard Henry Seamon, *U.S. Torture As A Tort*, 37 RUTGERS L.J. 715, 786 (2006) (noting legislation ordinarily presumed constitutional in qualified immunity claims); Martin A. Schwartz, *Qualified Immunity Complexities*, N.Y. L.J., Dec. 9, 2003, at 3 (col. 1) (noting application of presumption in Second Circuit).

104. See *Crotty*, 346 F.3d at 104-05 (concluding law not obviously unconstitutional as to rebut presumption of qualified immunity); see also *Way v. County of Ventura*, 445 F.3d 1157, 1166 (9th Cir. 2006) (granting qualified immunity where state statute and department policy not patently unconstitutional).

105. See *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 17 (1988) (holding legislative classifications presumed valid); *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973) (recognizing presumption of

posit that it is unfair to require a law enforcement officer to second guess the legislature's action and balance the constitutionality of a presumptively valid statute.¹⁰⁶

*C. Wilson and Malley: Supreme Court Guidance in Evaluating
Extraordinary Circumstances*

Although the Supreme Court has not clarified its extraordinary circumstances exception, two of its more recent decisions have informed the qualified immunity analysis where a public official argues reliance on a statute or advice of counsel.¹⁰⁷ In *Malley v. Briggs*,¹⁰⁸ a Rhode Island State Trooper argued that he should be entitled to rely on a judicially authorized arrest warrant and thus receive qualified immunity, even if he lacked probable cause.¹⁰⁹ The Court rejected the argument and held that the trooper's act of applying for and receiving the arrest warrant was not objectively reasonable *per se*.¹¹⁰ The Court framed the issue as "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."¹¹¹ In light of the Court's decision in *Malley*, officers have an independent duty to exercise their professional judgment and should be denied qualified immunity regardless of

constitutional validity as basic principle of constitutional law); *see also Grossman*, 33 F.3d at 1209 (positing assumption legislature concludes law constitutional exercise of authority prior to enactment); 16A AM. JUR. 2D *Constitutional Law* § 166 (2007) (noting strong presumption in favor of duly enacted statute's constitutionality).

106. *See Michigan v. DeFillipo*, 443 U.S. 31, 37 (1979) ("enactment of a law forecloses speculation by enforcement officer concerning its constitutionality"); *Crotty*, 346 F.3d at 104-05 (opining constitutional balancing test not law enforcement responsibility); *Lederman*, 291 F.3d at 47 (concluding reasonable officer not expected to perform narrowly tailored analysis of government regulation). In fact, the Supreme Court in *DeFillipo* recognized that officials are "charged to enforce laws until and unless they are declared unconstitutional." *DeFillipo*, 443 U.S. at 38. The Court reasoned that "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.*; *see also Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (recognizing constitutional inquires do not have mathematical precision).

107. *See Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (weighing officer's reliance on U.S. Marshals Service's policy permitting media ride-alongs during fugitive apprehensions); *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (considering officer's reliance on judicially authorized arrest warrant); *see also Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251-52 (10th Cir. 2003) (applying *Wilson* and *Malley* in statutory reliance claim). As an important side note, neither Supreme Court decision expressly discusses the extraordinary circumstances exception. *See Wilson*, 526 U.S. at 616-18 (excluding reference to extraordinary circumstances exception); *Malley*, 475 U.S. at 344-46 (same).

108. 475 U.S. 335 (1986).

109. *Id.* at 337-38 (setting for defendant's argument in favor of immunity). In *Malley*, the trooper obtained a warrant from a state court judge and then arrested several individuals for conspiring to possess marijuana. *Id.* at 338. Two phone calls monitored by a court-authorized wiretap allegedly established probable cause. *Id.* at 337-38. After the charges were dropped, the individuals who had been arrested filed a Section 1983 claim, alleging that the trooper violated their rights under the Fourth and Fourteenth Amendments in applying for the arrest warrants. *Id.* at 338.

110. *Id.* at 345 (rejecting state trooper's argument for qualified immunity).

111. *Id.* (applying reasonableness standard to probable cause determination).

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whether a judge or prosecutor supports their objectively unreasonable mistake.¹¹² In *Wilson v. Layne*,¹¹³ a Maryland couple sued federal and state law enforcement officials for entering their home under an arrest warrant with members of the media, who observed and recorded the event.¹¹⁴ In determining whether the law was clearly established, the Supreme Court noted a federal ride-along policy that contemplated the presence of media members during apprehensions.¹¹⁵ Because the case law did not clearly prohibit media entry, the Court concluded that the officers were reasonable in relying on the ride-along policy.¹¹⁶ In sum, *Malley* and *Wilson* have generally guided the circuit courts in the qualified immunity analysis where an official relies on a statute or advice of counsel.¹¹⁷

IV. ANALYSIS

A. No Clear Standard Exists for Analyzing Extraordinary Circumstances

Unfortunately, the Supreme Court has not explained the conditions under which courts should apply the extraordinary circumstances exception to qualified immunity.¹¹⁸ Within the circuit courts, advice from counsel and statutory reliance are clearly critical factors in considering qualified immunity claims, regardless of whether the circuits explicitly deem such circumstances extraordinary.¹¹⁹ The Supreme Court's hands-off approach has resulted in vastly different interpretations among the circuit courts as to whether extraordinary circumstances prevented an official from knowing his conduct

112. *Malley*, 475 U.S. at 345-46 (recognizing judges may sometimes approve warrants although unreasonable and without probable); *Cox v. Hailey*, 391 F.3d 25, 35-36 (1st Cir. 2004) (requiring officer's independent judgment despite pre-arrest consultation with prosecutor or judge); *Wadkins v. Arnold*, 214 F.3d 535, 543 (4th Cir. 2000) (mandating official exercise judgment in applying for warrant).

113. 526 U.S. 603 (1999).

114. *See id.* at 607-08 (detailing nature of plaintiffs' action). The judge issued an arrest warrant for the plaintiffs' son, who was not present when the officers arrived. *Id.* Armed officers confronted the father in his living room and physically restrained him while members of the media took pictures. *Id.* at 607.

115. *Id.* at 617 (considering officer's reliance on ride-along policy).

116. *Id.* at 615-17 (discussing implications of policy in determining reasonableness of officer's conduct). The Court stated that accurate media coverage is an important public policy goal. *Id.* at 615-16. Moreover, the Court noted that the circuit courts have not clearly established that such practices violate the Fourth Amendment. *Id.* at 616. Finally, the Court highlighted that the officer's reliance on the ride-along policy was not unreasonable. *Id.* at 617.

117. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251-52 (10th Cir. 2003) (following *Wilson* in considering statutory reliance argument); *supra* note 112 and accompanying text (outlining circuit court cases applying *Malley* to reliance on counsel claims); *see also* *Felkner*, *supra* note 77, at 313 (suggesting *Wilson's* media ride along policy analogous to extraordinary circumstance defense).

118. *See supra* Part II.C (discussing *Harlow's* extraordinary circumstances language and subsequent Supreme Court decisions addressing qualified immunity standards); *supra* note 76 (noting court has not reevaluated extraordinary circumstances standard).

119. *See supra* Part III.A-B (discussing circuit court interpretations of extraordinary circumstances).

was unlawful.¹²⁰ Additionally, the circuit courts have had difficulty distinguishing whether extraordinary circumstances factor into the clearly established law analysis or whether it comprises a third prong to the qualified immunity question.¹²¹

The clear implication of *Harlow* is that the extraordinary circumstances exception arises only where an official has violated clearly established constitutional law, but the court should nevertheless grant immunity.¹²² This language seems to support the Tenth Circuit view that extraordinary circumstances ought to be a third step in the analysis after the court finds a constitutional violation of clearly established law.¹²³ In the Tenth Circuit's view, reliance on a statute and advice of counsel are not relevant to whether the law was clearly established.¹²⁴ Thus, a court in the Tenth Circuit may grant immunity even where it finds a violation of clearly established constitutional rights.¹²⁵ Although the Tenth Circuit presents a clear and fact-intensive framework, its ultimate inquiry begs the same question as circuit courts using a totality of the circumstances approach: whether a reasonable officer in the circumstances, and in light of advice received from counsel, would have known his conduct was unlawful.¹²⁶

Moreover, the Tenth Circuit adopted its standard based on opinions that

120. Compare *supra* note 86 and accompanying text (setting forth Tenth Circuit's four-part test for determining extraordinary circumstances), with *supra* note 89 and accompanying text (highlighting circuit courts considering whether reliance on advice of counsel within totality of circumstances). The First Circuit considers extraordinary circumstances when deciding whether a reasonable official would know their conduct was unlawful. See *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir. 2004). In stark contrast, the Tenth Circuit considers extraordinary circumstances an exception the court analyzes only after the plaintiff establishes both parts of the qualified immunity test. See *Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005). The different approaches reveal a split analysis within the circuits, illustrating the complex nature of the exception and lack of Supreme Court guidance. Compare *Lawrence*, 406 F.3d at 1230, with *Cox*, 391 F.3d at 34.

121. See *Kirby*, *supra* note 22, at 475 n.99 (questioning whether extraordinary circumstances independent or mere part of clearly established law analysis); see also *supra* notes 83-94 and accompanying text (contrasting three-part Tenth Circuit approach with totality of circumstances approach).

122. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (setting forth extraordinary circumstances exception after detailing clearly established prong); see also *AVERY, RUDOVSKY & BLUM*, *supra* note 74, § 3.9 (recognizing extraordinary circumstances defense permitted where law clearly established); *Kirby*, *supra* note 22, at 475 n.99 (reading *Harlow* to provide exception even where violation of clearly established rights exists).

123. See *supra* note 84-85 and accompanying text (formulating three-part test based on literal application of *Harlow*).

124. See *V-1 Oil Co. v. State of Wyo. Dep't of Env'tl. Quality*, 902 F.2d 1482, 1488 n.5 (10th Cir. 1990) (noting legal advice not relevant to whether law clearly established).

125. See *supra* note 85 and accompanying text (citing Tenth Circuit cases employing three-step inquiry).

126. Compare *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (acknowledging fundamental inquiry remains whether officer should have known unlawful nature of conduct), and *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1253 (10th Cir. 2003) (stating statutory reliance merely one factor in determining reasonableness of actions), with *Cox v. Hainey*, 391 F.3d 25, 35 (1st Cir. 2004) (considering officer's pre-arrest consultation in determining reasonableness of conduct), *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2004) (noting reliance on statute entitled to great weight in reasonableness analysis), and *Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994) (holding officer objectively reasonable in relying on state statute).

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expressly identify reliance on legal advice as merely one factor in determining whether the law was clearly established.¹²⁷ The Tenth Circuit's additional test for determining the existence of extraordinary circumstances unnecessarily repeats the second part of the qualified immunity test, despite applying a more literal reading of *Harlow*.¹²⁸ Circuit courts that view statutory reliance and legal advice as part of the totality of circumstances, adequately answer the qualified immunity question without unnecessary complication.¹²⁹ The Supreme Court should revisit this issue and identify those scenarios constituting extraordinary circumstances and elaborate on how such circumstances incorporate into the qualified immunity analysis.¹³⁰

B. The Supreme Court Should Adopt a Totality of the Circumstances Approach to Extraordinary Circumstances

Although the Supreme Court has not reexamined the extraordinary circumstances exception since *Harlow*, several of its decisions suggest that the receipt of legal advice and statutory reliance should be factored into the totality of circumstances in the qualified immunity analysis.¹³¹ Specifically, the holding in *Pierson* supports the conclusion that qualified immunity ought to shield officers who reasonably rely on a statute, even if the court subsequently holds the statute unconstitutional.¹³² Although *Pierson* predates *Harlow*'s objective reasonableness test, its basic premise, that an official ought to be entitled to rely on a statute, is indistinguishable from recent case law addressing statutory reliance.¹³³ Likewise, *Wilson* demonstrates that an official may be

127. See *V-1 Oil*, 902 F.2d at 1488-89 (citing courts addressing legal advice in qualified immunity analysis); see also *supra* note 84 (explaining opinions which provided basis for Tenth Circuit extraordinary circumstances analysis). The lone dissenting judge in *V-1 Oil* argued that a number of cases cited by the majority did not frame reliance on legal consultation as an extraordinary circumstances defense. See *V-1 Oil*, 902 F.2d at 1490-91 (Ebel, J., dissenting). Rather, the supporting cases merely referred to counsel's advice as additional evidence to be considered in the basic two-step *Harlow* test. *Id.* at 1491.

128. See *V-1 Oil*, 902 F.2d at 1490-91 (Ebel, J., dissenting) (suggesting majority erred in adding third inquiry to basic *Harlow* test).

129. See *supra* notes 89-90 (highlighting opinions considering overarching objective reasonableness of official's actions).

130. See Kirby, *supra* note 22, at 475 n.99 (suggesting Court clarify extraordinary circumstance exception to prevent decisions contrary to *Harlow*'s intentions).

131. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (considering effect of U.S. Marshals Service's policy on whether officers could believe their conduct lawful); *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (considering effect of magistrate approval of officer's arrest warrant); see also *Michigan v. DiFillippo*, 443 U.S. 31, 38 (1979) (stating society "ill served if police officers . . . determine which laws are . . . constitutionally entitled to enforcement"); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (analyzing immunity where officer made arrest under statute subsequently held unconstitutional).

132. See *supra* notes 44-46 and accompanying text (providing factual context and holding in *Pierson*).

133. See *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 n.29 (10th Cir. 2003) (asserting principles announced in *Pierson* continue to apply in post-*Harlow* qualified immunity claims); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) (noting courts continue to follow *Pierson* in determining objective reasonableness of statutory reliance).

reasonable in relying on a governmental policy when the constitutional question is a close call, and the officer in *Malley* took action only after consulting with a professional legal authority.¹³⁴ Accordingly, in all three cases, the Supreme Court determined that the primary inquiry is whether a reasonable officer could have believed his actions were constitutional in light of the advice or regulation at hand.¹³⁵

Furthermore, the Supreme Court's jurisprudence clearly supports a two-part qualified immunity test.¹³⁶ The Court's stated goals for the qualified immunity test are simplicity and predictability, so that officers may anticipate when their conduct may give rise to civil liability.¹³⁷ In the past, the Court rejected suggestions to create exceptions to the test, noting that the standard applies "across the board" to all claims.¹³⁸ With these principles in mind, the logical solution to an extraordinary circumstances argument is to calculate legal advice and statutory reliance as part of the totality of the circumstances confronting the official.¹³⁹ As such, the relevant question remains whether, in light of clearly established law and the information the officer possessed, a reasonable officer could have believed his conduct was lawful.¹⁴⁰ This approach would clarify the extraordinary circumstances exception while reinforcing the principles announced throughout the circuit courts regarding the impact of legal advice and statutory reliance.¹⁴¹

134. See *supra* notes 110-112 and accompanying text (citing *Malley* requirement for exercise of reasonable professional judgment despite judicial or prosecutorial approval); *supra* note 117 and accompanying text (suggesting *Wilson* proposes that statute or regulation lends force to objective reasonableness test); see also Felkner, *supra* note 77, at 313 (suggesting reliance on policy in *Wilson* supports extraordinary circumstance defense). Although the *Malley* Court did not conclude that the magistrate's approval bolstered the reasonableness of the official's actions, it has guided courts in analyzing the reliance on advice of counsel argument. See *supra* note 112 (citing First and Fourth Circuit opinions).

135. See *Wilson*, 526 U.S. at 617 (concluding officers acted reasonably in part due to U.S. Marshals Service's policy); *Malley*, 475 U.S. at 345 (framing analysis as whether reasonable officer could conclude probable cause existed despite magistrate's authorization); *Pierson*, 386 U.S. at 555 (asking whether reasonable officer could believe statute was constitutional).

136. See *supra* note 69 and accompanying text (revealing Supreme Court intended two-step qualified immunity analysis).

137. See *Anderson v. Creighton*, 483 U.S. 635, 643-44 (1987) (reinforcing goal to assure public officials of predictability); see also Kirby, *supra* note 22, at 479 (citing simplicity and certainty as goals of qualified immunity doctrine).

138. See *Anderson*, 483 U.S. at 643 (describing potential problems arising from complications of qualified immunity standard). The *Anderson* Court specifically responded to a suggestion that the scope of immunity should depend on the particular character of the alleged violation. *Id.* at 642. The notion that one test applies across the board, however, lends support to a conclusion that the qualified immunity analysis should not be altered regardless of the underlying facts of the case. See *id.* at 642-45.

139. See *Cox v. Hainey*, 391 F.3d 25, 35 (1st Cir. 2004) (incorporating pre-arrest consultation into totality of circumstances).

140. See *Anderson*, 483 U.S. at 641 (setting forth objective standard used to resolve qualified immunity).

141. Compare *Cox*, 391 F.3d at 35 (considering weight of prosecutor's advice in determining objective reasonableness of officer's probable cause), with *Lawrence v. Reed*, 406 F.3d 1224, 1231-32 (10th Cir. 2005) (weighing objective reasonableness of property deprivation without hearing when officer relied on city ordinance). For example, the mere fact of a favorable consultation with an attorney does not guarantee

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C. Public Officials Should be Entitled to a Presumption of Qualified Immunity When Enforcing Statutes, Regulations, and Ordinances

The extraordinary circumstances standard effectively imposes an independent duty on law enforcement officers to exercise their professional judgment and recognizes that they may be liable for objectively unreasonable mistakes.¹⁴² However, requiring police officers and other low-level public officials to second guess presumptively valid legislative enactments imposes an unreasonably burdensome duty.¹⁴³ The ability to balance complex constitutional questions is beyond the expertise of many law enforcement officials who do not have the benefit of a legal education.¹⁴⁴ The fact that the courts have labeled constitutional inquiries as an inexact science strongly supports this conclusion.¹⁴⁵

Admittedly, officers must have some understanding of the law governing their conduct so as to protect fundamental civil liberties of United States citizens.¹⁴⁶ The difficulty in creating a presumption in favor of qualified immunity is that such an approach minimizes the policy interests in favor of plaintiffs.¹⁴⁷ The Supreme Court has clarified the need to protect officers in the performance of their official duties, in addition to the need to compensate individuals for constitutional deprivations.¹⁴⁸ Such a presumption in favor of

qualified immunity if an objectively reasonable officer would know the advice was flawed. *See Cox*, 391 F.3d at 35. Likewise, an officer is entitled to rely on a statute authorizing conduct, but not if the statute is obviously unconstitutional. *See Lawrence*, 406 F.3d at 1231-32.

142. *See Malley v. Briggs*, 475 U.S. 335, 346 (1986) (requiring officer to exercise reasonable professional judgment when applying for warrant); *Lawrence*, 406 F.3d at 1233 (requiring official to understand unlawfulness of city ordinance); *Cox*, 391 F.3d at 35 (recognizing objective duty of officer regardless of whether advice from prosecutor compounds error in judgment).

143. *See Cooper v. Dillon*, 403 F.3d 1208, 1220 (11th Cir. 2005) (rejecting argument official must consider constitutionality of active statute); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003) (determining unreasonable to require officials to perform constitutional analysis before enforcing statute); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002) (concluding reasonable officer not expected to analyze constitutionality before enforcing statute); *Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994) (permitting officer to rely on city council's judgment in promulgating ordinance).

144. *See Lawrence*, 406 F.3d at 1239 (Hartz, J., dissenting) (acknowledging officials not required to conduct research or call law professor to determine constitutionality of actions); *Crotty*, 346 F.3d at 105 (considering unreasonable to require officers to engage in constitutional analysis prior to enforcing statute). The Second Circuit noted, "[W]e require professionalism . . . not . . . prescience." *Crotty*, 346 F.3d at 105.

145. *See Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (admitting constitutional inquires lack mathematical precision); *Crotty*, 346 F.3d at 104-05 (stating no absolutes exist when balancing constitutional principles); *Lederman*, 291 F.3d at 47 (observing process of narrow tailoring "not an exact science").

146. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (setting forth clearly established rule because reasonable officials should know governing legal principles); *see also infra* note 163 and accompanying text (discussing societal importance of upholding individual civil rights).

147. *See Schwartz*, *supra* note 103, at 4 (arguing *Crotty* ignored policy arguments for plaintiffs in raising presumption of qualified immunity).

148. *See Harlow*, 457 F.3d at 813-14 (setting forth public policy arguments giving rise to qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) (balancing competing policy interests in favor of qualified immunity).

defendant officials seems to ignore the fundamental policy balance underlying qualified immunity.¹⁴⁹

In the face of a valid statute or regulation, however, the Tenth Circuit has appropriately labeled this concept a “legal fiction” because it requires officers to perform a task that they are not qualified to administer.¹⁵⁰ Some circuits aptly impose a presumption of objectively reasonable conduct where an official, particularly a field officer, relies on a statute currently in force.¹⁵¹ When enacting law, the legislature is charged with upholding the Constitution and presumably balances constitutional issues.¹⁵² Public officials, on the other hand, are “charged to enforce laws until and unless they are declared unconstitutional.”¹⁵³ The policies underlying qualified immunity, namely the desire that officials perform discretionary duties without fear of liability, suggest this protection is necessary to ensure effective law enforcement.¹⁵⁴

D. Reliance on Advice of Counsel Should Be Merely a Factor in Evaluating the Totality of the Circumstances

Many commentators and courts point out that obtaining legal advice before taking action is a normal practice for officials and is not inherently “extraordinary.”¹⁵⁵ In some circumstances, however, erroneous information from counsel may prevent an official from understanding the situation

149. See Schwartz, *supra* note 103, at 4 (arguing qualified immunity does not authorize special weight for statutory reliance). Schwartz suggests that state and local governments can indemnify officers to minimize concerns raised by requiring officials to second guess statutory direction. *Id.*

150. See *Lawrence v. Reed*, 406 F.3d 1224, 1237 (10th Cir. 2005) (Hartz, J., dissenting) (referring to statement in *Harlow* regarding public officials’ knowledge of law as “legal fiction”). The dissent in *Lawrence* reasoned that there are likely many “intelligent, conscientious, well-trained” officials who do not know the entire body of clearly established American law governing their conduct. *Id.* The dissent argued that public policy overcomes the clearly established rule underlying qualified immunity. *Id.* at 1236-39.

151. See *supra* note 103 and accompanying text (identifying circuit courts applying presumption of qualified immunity for statutory reliance).

152. See U.S. CONST. art VI, cl. 3 (requiring members of state and federal legislatures to take oath to support Constitution); see also *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 17 (1988) (stating legislative classifications presumed constitutional and challenging party maintains burden of showing unconstitutionality); *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) (reasoning enactment of law forecloses conjecture of constitutionality unless flagrantly unconstitutional); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003) (recognizing legislatures balance various constitutional interests when enacting laws); *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1990) (stating regulation makers ordinarily consider constitutionality when enacting law).

153. *DiFillippo*, 443 U.S. at 38 (suggesting law enforcement officers refrain from constitutional inquiry).

154. See *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) (stating more beneficial to risk error in official action than to deter action altogether); *Lawrence*, 406 F.3d at 1237 (Hartz, J., dissenting) (requiring officials to question authority undermines policy of reducing fear of lawsuit in exercising duties).

155. See *Lawrence*, 406 F.3d at 1238 (Hartz, J., dissenting) (querying “how can one view the seeking of legal advice as extraordinary?”); *V-1 Oil Co. v. State of Wyo. Dep’t. of Env’tl. Quality*, 902 F.2d 1482, 1490 (10th Cir. 1990) (Ebel, J., dissenting) (rejecting receipt of legal advice as extraordinary on its own); *Felkner*, *supra* note 77, at 312 (noting reliance on counsel not inherently extraordinary).

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altogether because he is misled as to the underlying facts.¹⁵⁶ The Sixth Circuit impliedly drew this distinction when recognizing that qualified immunity should extend to officers who relied on counsel's false statement that a specific employee was non-tenured.¹⁵⁷ The officials reasonably ignored the legally required formalities for terminating a tenured employee in those circumstances because counsel had provided incorrect information.¹⁵⁸ This scenario actually is unusual and distinct from the common case where an official relies on an attorney's determination that probable cause exists or that a given action is constitutional.¹⁵⁹ Courts must be aware that advice of counsel may constitute extraordinary circumstances only in certain, truly unusual, situations.¹⁶⁰

In contrast to relying on a statute, the circuit courts properly require government officials to ignore advice from counsel that is plainly unconstitutional.¹⁶¹ It is desirable to encourage officers to obtain legal advice before taking action that falls within the grey area between permissible and unconstitutional conduct.¹⁶² In most instances, such consultations mitigate in favor of upholding protected rights.¹⁶³ While resulting personal liability may be a harsh result in some cases, the advice of an attorney does not command the presumptive weight accorded to statutory reliance.¹⁶⁴ Prosecutors are

156. See *supra* note 79 and accompanying text (acknowledging advice of counsel constitutes qualified immunity in extraordinary circumstances). *But see* *Lawrence v. Reed*, 406 F.3d 1224, 1238 (10th Cir. 2005) (Hartz, J., dissenting) (arguing constitutional approval by counsel amounts to extraordinary circumstance).

157. See *supra* notes 78-80 and accompanying text (acknowledging official violating clearly established law possibly entitled to immunity if counsel provided inaccurate factual information).

158. See *supra* note 92 and accompanying text (highlighting case in which court held official's actions reasonable in light of known information). Inexplicably, the Sixth Circuit considered an extremely similar factual situation sixth months prior, but came to the opposite conclusion on qualified immunity. See *Silberstein v. City of Dayton*, 440 F.3d 306, 318 (6th Cir. 2006) (declining qualified immunity where board members attempted to delegate termination decisions to legal department). In both cases, the city attorney advised the officials that the employee in question was non-tenured or non-classified, yet the court only granted qualified immunity in *Miller*. See *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 896-97 (6th Cir. 2006); *Silberstein*, 440 F.3d at 318.

159. Compare *Miller*, 448 F.3d at 896-97 (involving advice as to tenured status of employee), with *Lawrence*, 406 F.3d at 1229 (involving attorney's legal opinion to proceed under local ordinance procedure), and *Cox v. Hainey*, 391 F.3d 25, 35 (1st Cir. 2004) (concerning prosecutor's opinion as to existence of probable cause).

160. See *supra* note 155 (illustrating cases proposing legal advice only extraordinary in certain circumstances).

161. See *supra* note 80 and accompanying text (detailing federal case law requiring official to assess constitutionality of actions despite favorable legal opinion).

162. See *supra* note 79 and accompanying text (identifying public policy considerations in favor of official's seeking legal advice).

163. See *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (stating qualified immunity protects officers in "hazy border" between acceptable and unacceptable conduct); see also *Lawrence v. Reed*, 406 F.3d 1224, 1237 (Hartz, J., dissenting) (10th Cir. 2005) (suggesting public policy favors obtaining legal advice before engaging in questionable practices); *Cox*, 391 F.3d at 35 (noting public policy encourages officers to obtain informed opinion before taking action in uncertain circumstances).

164. See *supra* note 89 and accompanying text (suggesting advice of counsel should comprise one factor in reasonableness determination); see also *Cox*, 391 F.3d at 35 (arguing prosecutor's advice cannot carry presumption of reliability).

susceptible to render a biased opinion, as they often work in tandem with law enforcement officers for the city or state.¹⁶⁵ Further, such a presumption of reasonableness would have the effect of encouraging favorable opinions without fear of resulting liability, thereby undermining the qualified immunity doctrine in its entirety.¹⁶⁶ Thus, a favorable legal opinion should only comprise a factor in evaluating the totality of the circumstances confronting an official.¹⁶⁷

V. CONCLUSION

Government officials are inevitably confronted with constitutionally uncertain situations in performing their daily discretionary functions. The Supreme Court created the qualified immunity standard to protect officials from fear of liability in these situations, while accounting for the constitutional rights of United States citizens. Qualified immunity stringently presumes that officers know the law governing their conduct, when in truth, that is seldomly the case. As a result, government officials must rely on the guidance of both superior legal authorities and the legislature to determine the constitutionality of their actions, and they should be encouraged to do so.

In theory, the Supreme Court created the extraordinary circumstances exception to qualified immunity with these precise concerns in mind. The circuit courts generally recognize that reliance is a significant component of the qualified immunity analysis, but they clearly differ on the proper method of interpretation and weight allocated to these factors. To resolve this confusing body of case law, the Supreme Court should clarify the extraordinary circumstances exception to reflect that reliance on advice of counsel and statutory authority are merely factors courts should consider when deciding the objective reasonableness of an official's conduct. Such an approach promotes the Supreme Court's two-part test for determining qualified immunity claims and reduces uncertainty on the part of public officials. Furthermore, the circuit courts should afford statutory reliance a presumption of qualified immunity because of the presumptive validity attached to government legislation. It is simply unfair to require public officials, particularly field officers, to second guess the legislature and assess whether a particular regulation or statute is constitutional.

Regardless of whether the Court distinguishes between statutory reliance and legal advice, law enforcement agencies would benefit greatly from an understanding of how the law will interpret these confounding situations. Until

165. See *Lawrence*, 406 F.3d at 1238 (noting possibility of collusion between public officials and government attorneys); *Cox v. Hainey*, 391 F.3d 25, 35 n.4 (1st Cir. 2004) (acknowledging prosecutors often work "hand in glove" with officers). The court concluded that a favorable consultation with a prosecutor is not entitled to same deference as neutral opinion. *Cox*, 391 F.3d at 35-36.

166. See *supra* note 127 (detailing arguments in *V-1 Oil* dissent).

167. See *supra* notes 140-141 and accompanying text (proposing fair standard for courts interpreting effect of consulting counsel before taking action).

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the Court offers clarification, officials may hesitate when following advice of counsel and the legislature even though the Supreme Court created qualified immunity to eliminate those exact fears.

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