

Qualified Immunity



By Paul Engel

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- Can government actor hid behind “qualified immunity”?
- What is qualified immunity and how is it different from sovereign immunity?
- How can We the People push back against these violations of the Constitution?

Imagine you have immunity for any bad actions you take. You’ve probably heard of diplomatic immunity, where officials of other countries are shielded from prosecution. Then there’s sovereign immunity, when the head of government cannot be charged. In America though, our legal system has come up with the idea of qualified immunity. While the idea of qualified immunity may make sense in some situation, and like so many other things, it has been badly abused by those in government.

The State of New York is considering legislation that may put the brakes on some of the abuses of qualified immunity. Would this make things better or worse?

Think of immunity as a “get out of jail free card”. Under the right conditions, you are not held accountable for your actions. In monarchies, the sovereign has their own form of immunity.

Sovereign immunity, or crown immunity, is a legal doctrine whereby a sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution,

[Sovereign immunity – The Free Legal Dictionary](#)

We've all seen examples of diplomatic immunity in movies or television. It's usually a bad guy using his or her diplomatic position to get away with their criminal activity, and we cheer when they get their comeuppance.

Diplomatic immunity is a form of legal immunity that ensures diplomats are given safe passage and are considered not susceptible to lawsuit or prosecution under the host country's laws, although they may still be expelled.

[Diplomatic immunity – The Free Legal Dictionary](#)

In the United States, we don't have a king so there's no sovereign immunity. We do extend diplomatic immunity where appropriate. Our courts, however, have created a qualified version of immunity.

Qualified Immunity

Qualified immunity is not like diplomatic immunity, it's more like sovereign immunity lite.

In the United States, qualified immunity is a legal principle that grants government officials performing discretionary functions immunity from civil suits unless the plaintiff shows that the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known".

[Qualified immunity – The Free Legal Dictionary](#)

The idea behind qualified immunity has some merit. A government official cannot be sued unless the petitioner shows that there was clearly established rights that were violated. It's those words "clearly established" that have led to so many problems. What is a "clearly established right"? You would think that the plain language of the Constitution and laws of the United States would "clearly establish" the protections of those rights, but judges don't always agree.

Just look at how often federal judges, including justices of the Supreme Court, claim that a right clearly established in the Constitution can be violated if there's a "compelling state interest".

In U.S. constitutional law, when a court finds that a law infringes a fundamental constitutional right, it may apply the strict scrutiny standard to nevertheless hold the law or policy constitutionally valid if the government can demonstrate in court that the law or regulation is necessary to achieve a "compelling state interest".

[Strict scrutiny – The Free Legal Dictionary](#)

I find this standard very interesting. You see not only does the Constitution clearly state that certain rights will not be infringed or abridged, but it's actually a violation of federal law for government actors to do so. They can even be sued for depriving someone of a right protected by the Constitution or laws of the United States.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

[42 USC §1983](#)

Why do the courts still claim that a right has to be clearly established before someone can be sued, simply because that someone was working for a government when they violated your rights? With this in mind, let's take a look at the legislation submitted to the New York State Senate.

New York State Civil Rights Law

This legislation would amend New York State's civil rights law with the following language.

- *79-r. Civil action for deprivation of rights. 1. (a) A person or public entity acting under color of law that subjects or causes to be subjected any other person to the deprivation of any rights, privileges, or immunities secured by the federal or state Constitution or laws, is liable to the injured party for legal or equitable relief or any other appropriate relief.*

[New York Senate Bill 182](#)

Similar to 42 USC §1983, this law would insure that someone who deprives another of a right protected by the constitution or laws of either the United States or the State of New York, can be sued for damages. That, however, is not where the question of qualified immunity comes in. That comes in section 3:

- 3. 3 (a) *Statutory immunities and statutory limitations on liability, damages or attorney fees do not apply to claims brought pursuant to this section.*

[New York Senate Bill 182](#)

I have plenty of complaints about the Empire State, but if they pass this legislation into law with this language, I will give them full credit for doing something right. There is no reason someone who deprives others of a right or privilege should be held not just criminally, but civilly, liable simply because they work for government. There needs to be consequences for such bad behavior.

(b) It shall not be a defense or immunity to any action brought for the deprivation of any rights, privileges, or immunities secured by the federal or state Constitution and laws, that such defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that their

conduct was lawful at the time such conduct was committed. ...

[New York Senate Bill 182](#)

Have you ever heard the saying, “Ignorance of the law is no excuse? What’s good for the citizen should be good for the government actor. Just because someone believed what they were doing was lawful isn’t a defense for anyone else, so why should it be one for a government actor? Doesn’t that effectively put them above the law?

... Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the federal or state Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether their conduct was lawful.

[New York Senate Bill 182](#)

And here we deal with that “clearly established” language. I remember reading about a case where a law enforcement officer was acquitted for shooting a family dog because no court had ever said it was a clearly established violation of the owners right to do so. If New York State enacts this legislation, then that would no longer be a defense within the state.

Conclusion

The immunity language in NY SB182 is pretty good. The real question is why it’s not standard practice? Why isn’t the plain language of the Constitution and laws of the United States not considered “clearly established”? Why does a court need to put their blessing on a law for it to be so? I have my ideas.

One of the ways to control something is to shroud it in mystery and special knowledge. If the law means exactly what

it says it means, then why would we need all of these lawyers? By wrapping up the whole legal process in jargon and commentary, it's easier to keep everyday people out of the loop.

That though, cannot be the only reason. Let's face it, power corrupts. If you have the power to reinterpret the laws to your own advantage, it's difficult not to take advantage of such a power. And since the judicial branches are just as much a part of government as the legislative and executive, why wouldn't they feel the need to protect their fellow government actors? It may not even be a malicious intention, but one drilled into our attorneys in law school and by the judicial opinions they are taught to worship.

If you live in the State of New York, I would keep an eye on SB182; it may become a great tool to protect your rights from the bad actions of government employees. For the rest of us, I think we should consider approaching our state and federal representatives about including similar language in the laws of all of our states, and the United States as well. It would put us one step closer to the land of the free we so often sing about.

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