

Issue: VA-Criminal Justice

Qualified Immunity

What immunity is qualified immunity?

Qualified immunity is a defense available to government officials, including police officers, to a claim of liability asserted against the government official for violating the constitutional rights of the person making the claim. Importantly, this defense is available only in civil cases seeking money damages. It is not available in criminal cases. Also, it is a federal law concept, created and embellished by the Supreme Court and other federal courts. The defense can be asserted in cases brought under a federal statute passed following the Civil War which provides a cause of action for persons alleging a violation of their constitutional or other legal rights by “state actors”. Unfortunately, qualified immunity as refined by court decisions has become a barrier to relief for victims and to accountability for police officers whose actions harm people and violate their rights.¹

A little history

In the third of three Enforcement Acts passed in 1871, called the Ku Klux Klan Act, Congress created a right of action for persons to recover damages for the violation of their constitutional rights.² The applicable provision of that act (now codified at 42 U.S.C. §1983 and commonly referred to as “Section 1983”) *did not* provide the government official accused of violating a constitutional right with any immunity, qualified or otherwise

Section 1983 was little cited until the civil rights movement in the 1960’s when Blacks began using it to allege violations of constitutional rights by police officers. The constitutional rights alleged to have been violated were often false arrest or unreasonable force under the Fourth Amendment (protection against unreasonable searches or seizures) or wrongful prosecution under the Fourteenth Amendment (equal protection under the law).³ In the 1967 case of *Pierson v. Ray*, the U.S. Supreme Court held that a police officer accused of false arrest was entitled to immunity from the allegation if he was acting in good faith. The Court based this qualified immunity on principles of common law it believed existed when Congress enacted Section 1983. As modified by several Court decisions following the 1967 case, to overcome the assertion of qualified immunity today, plaintiffs must show a violation of their constitutional rights and that those rights were *clearly established* such that a reasonable police officer would know rights were being violated.⁴

Qualified Immunity in operation.

In cases involving the qualified immunity defense, the critical analysis is whether the right alleged to have been violated is “clearly established”. As currently interpreted, if the Supreme Court or a lower federal court has previously treated the conduct involved in the violation as unconstitutional, a right is clearly established. Thus, the facts of any given case become critically important in determining whether a prior case exists in which a court has held that qualified immunity was not available and that constitutional rights were violated.⁵

A couple of examples illustrate the difficulties faced by persons seeking remedies under Section 1983 for violations of their rights:

- In an often cited case, a police officer pursued a suspect into the backyard of a family. With the family on the ground, the officer was startled by a dog and fired his weapon several times, not hitting the dog but injuring a child on the ground. A trial court determined that qualified immunity was not available, reasoning that the conduct was obviously wrongful. This decision was overturned on appeal, with the appellate court finding that no previous case existed involving the same facts. The family's case for damages was dismissed.
- In an even more startling case, police officers executing a search warrant were accused of stealing \$225,000 in cash and rare coins. The court decided that while the theft is immoral, the officers were entitled to qualified immunity because no prior case existed in which the same misconduct was determined to violate constitutional rights. This case also demonstrates that the prior requirement of good faith for application of the defense of qualified immunity has been dropped by courts.⁶

As these cases illustrate, the doctrine of qualified immunity as interpreted today by federal courts is dependent principally on the happenstance of a prior case having been decided on nearly identical facts rather than on any legal or doctrinal analysis. Not only are victims frustrated, but the ability to hold police accountable for their actions is degraded.⁷

Qualified Immunity and Virginia law.

The doctrine of qualified immunity is a principle of federal law created by the U.S. Supreme Court and, therefore, cannot be modified or eliminated by Virginia state courts or the Virginia legislature. In order to permit Virginia plaintiffs to proceed with claims based on violations of constitutional rights without the burden of the qualified immunity doctrine, Virginia must enact a state law comparable to Section 1983 creating the right to bring such claims in Virginia state courts without allowing qualified immunity to be used as a defense.⁸

Just such a bill was introduced in the Virginia General Assembly in 2021 by Jeffrey Bourne (D – Richmond). The bill, HB 2045, would create the right to bring a civil action by persons who are deprived of “any rights, privileges, or immunities...under the constitutions and laws of the United States and the Commonwealth” and to seek compensatory damages, punitive, damages and equitable relief. The bill explicitly provides that qualified immunity will not be a defense to any action under the new law.⁹ This bill and a similar but more limited one in the Senate did not advance beyond committee and are no longer under active consideration.¹⁰

It is important to recognize that along with federal Section 1983 claims for money damages based on violations of constitutional rights, there also exists a state system of tort law (personal injury suits for negligence, assault, battery, etc.) in Virginia (and all other states) that can be pursued by those alleging violations of their rights for alleged torts such as assault, battery, false imprisonment and the like committed by police and other government officials. These cases have their own set of barriers to recovery when government officials are involved, such as various privileges provided under Virginia state law for government officials, excusing or insulating them under certain conditions from liability, and often involve indemnification available to the government official, preventing accountability of the police. A complete assessment of the barriers to relief for violations of civil rights and the barriers to proper accountability for police officers should involve both the federal qualified immunity doctrine as well as privileges and indemnification rights available under state law.¹¹

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1. See generally <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure>
 2. <https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html?DCMP=google:ppc:K->
 3. <https://www.hcbattorneys.com/wp-content/uploads/2017/02/Fundamentals-of-Section-1983-Litigation-11.22.16.pdf>
 4. See note 2.
 5. See note 2.
 6. https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/
 7. See note 1.
 8. See note 6.
 9. <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB2045>
 10. <https://www.wsls.com/news/virginia/2021/02/10/police-reform-advocates-in-virginia-frustrated-by-bills-defeat>
 11. <https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity>