



Virginia Lawmakers Advance Bill That Bans Qualified Immunity for Cops

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August 26, 2020

RICHMOND, Va. (CN) — Thomas Roberts still remembers his early optimism when he first entered civil rights litigation over 30 years ago.

“You go to law school, you know your Constitution and civil rights and you think ‘Well federal court is the place to be’ until you get smacked down a few times with qualified immunity,” he said in a phone interview Tuesday afternoon.

Qualified immunity, a legal doctrine that protects state actors like police from civil rights lawsuits, along with sovereign immunity which offers similar protections, have erupted in recent conversations about race and policing in the wake of George Floyd and others who have ended up on the wrong end of police interactions.

While state governments and activists around the country have talked about rolling back these shields, by a vote of 12-8, Virginia legislators appear to be on their way to doing it.

“This legal doctrine effectively denies access to justice,” said the bill’s author Delegate Jeff Bourne, D-Richmond, in the House Courts and Justice Committee that moved his bill on to its next step Wednesday evening. “None of these bills are particularly radical; at the core they allow Virginians to pursue the same rights they have in federal courts.”

Bourne’s bill specifically creates a new cause of action — a new kind of law suit under the statute itself — to file a complaint for violation of rights which are “granted to such person[s] under the constitutions and laws of the United States and the Commonwealth.”

It also specifically denies the use of “sovereign immunity and any other statutory immunities” as a defense against these claims.

“We’re trying to give our citizens an opportunity to seek redress in the appropriate situation and this bill does that,” said Delegate Jay Jones, D-Norfolk, in a phone interview ahead of Wednesday’s hearing. Jones is a co-patron of the bill and is running for Attorney General when the seat opens in 2021.

“We all respect law enforcement but we want to make sure that they are properly trained and equipped to handle these scenarios and do so in a way that’s safe for our communities,” Jones said.

Qualified immunity and sovereign immunity are not easy legal concepts to understand.

The core principle started in 1871 as section 1 of the Klu Klux Klan Act of 1871. The act was created to offer recently freed slaves a legal channel to file a civil lawsuit against police officers for violating their recently earned 14th Amendment rights.

The relevant section said any government actor who participates in 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.”

While it didn’t create a civil rights law, it created a cause of action to sue over the violation of those rights. And evidently it worked for a bit during Reconstruction with federal troops acting as police and offenders facing jury trials full of black freed slaves.

It was later codified federally under Section 1893 under the Civil Rights Act. But in 1967 the U.S. Supreme Court, in *Pierson v. Ray*, which involved a handful of black clergymen participating in a protest against segregation in an interstate bus terminal in Jackson, Mississippi, weakened the law by finding “good faith” exceptions which can allow violators to skirt punishment.

Critics, like the CATO Institute’s Criminal Justice Reform Policy Analyst Jay Schweikert, argue it has since gotten much worse.

In a phone interview ahead of Wednesday’s vote, Schweikert called modern courts’ interpretation of the doctrine the “primary stumbling block to meaningful accountability for law enforcement.”

“If you don’t have a means of redressing the public’s rights against public officials, especially law enforcement, then it doesn’t matter what rules or rights you say you have on the front end,” he said. “If those rights are being violated with impunity, then they’re not really doing anything to protect someone.”

Schweikert has been following attempts to reign in qualified immunity for the past few years and pointed to Colorado, which similarly created a new state-level cause of action for claims against police while nullifying qualified or sovereign immunity as a defense in June of this year. Jones said the Colorado effort was part of the inspiration for Virginia’s, a method the CATO Institute continues to support.

Still, concerns about the impact of removing these protections for law enforcement exist.

“Somehow people think we have some blanket immunity, that is absolutely not true,” said Wayne Huggins, executive director of the Virginia State Police Association, during the hearing’s public comment section.

He said the morale for the officers he represents is already at an all-time low. Add to that the nearly 300 job vacancies the agency is facing and Huggins said passing this bill could do even more damage.

“This issue is widely misunderstood,” he said. “This would open the door to countless frivolous lawsuits and most definitely become another impediment to hiring and retention.”

But others wonder if that kind of feedback, localities paying out settlements when they violate someone’s rights, would actually show how bad the problem is.

“If we see an increase in the cost of police doing their job then hopefully the state will be wise enough to look at effective ways to train officers so that we don’t [commit] these constitutional violations,” said Andrew Bodoh, a senior associate with Roberts & Associates.

Bodoh’s firm — under the Roberts mentioned above — specializes in state-court civil rights fights and as the law stands now, he says they turn away up to 95% of clients who approach them with cases. The high bar for evidence, or the complicated and often expensive nature of fighting such claims in either state or federal court makes it nearly impossible.

But with this new legislation, he not only thinks he’ll be able to take more cases, he also thinks police officers themselves will benefit from its passage as well.

“If an officer is fired for making a First Amendment protected statement — maybe he calls the department racist on Facebook and gets fired for it — generally speaking he won’t win that constitutional claim,” Bodoh said, explaining there’s an even more complicated test for such employment violations within the police force.

But because the new law specifically targets “any law-enforcement officer” it could open the door for such a claim along with its shield against immunity.

Bodoh also hopes the increase in liability will weed out bad actors.

“If we can cut down the number of laws and the number of officers then we can pay those good officers more and have better law enforcement,” he said.

“This is one of the most important things to do for victims on the civil side of our justice system,” Bourn said. “A bad actor, an officer who violates someone’s constitutional rights will not be absolved because of court-made doctrine.”

The next step for this bill will be a full floor vote before the House. If it survives there it’ll then go to the Senate for another subcommittee hearing. However, a similar Senate version, patroned by Senator Joe Morrissey, D-Richmond, was passed by for the session Wednesday morning.