



Washington Examiner

In the wake of George Floyd's killing, let's revisit government immunity

Ross Marchand

June 15, 2020

In the days following the tragic death of George Floyd, millions of protesters have called for wide-ranging reforms. After years of tireless advocacy by organizations such as the Cato Institute, policymakers are finally focused on issues such as unfair “qualified immunity” protections for police officers. It’s next to impossible for officers, and government employees in general, to be held legally responsible for actions taken on the job, even if they result in needless death and suffering.

Although the abolition of qualified immunity is a top priority, the conversation shouldn’t end there. States and government agencies are largely shielded from legal liability of any sort, creating a disturbing array of unintended consequences. Now is the time to roll back government immunity and hold irresponsible officials, agencies, and states accountable in a court of law.

In the aftermath of Floyd’s death, many U.S. citizens learned for the first time that officers are all-but-immune from being successfully sued and held legally liable for misconduct. But this is just the tip of the iceberg for far-reaching immunity provisions that keep overzealous officials, states, and agencies out of dodge. If a state wrongs a citizen and, say, steals their intellectual property, it is practically impossible to hold them accountable in federal court.

Photographer and videographer Frederick Allen found this out the hard way after he and his production company Nautilus Productions had their footage stolen by the state of North Carolina. Allen had filmed and photographed the shipwreck of *Queen Anne’s Revenge* (at great risk to himself), only to find out in 2013 that the state government had been using his material without his consent.

North Carolina not only had no intention of compensating Allen but actually passed a law allowing unlimited public use of all photographic and video material of shipwrecks in North Carolina’s custody. While Allen reasonably argued that this antagonistic behavior by the state government violated the Takings and Due Process clauses of the Constitution, the Supreme Court held in *Allen v. Cooper* (decided in March 2020) that states enjoy sovereign immunity under the 11th Amendment and are effectively above the law.

But there’s one small problem: The 11th Amendment contains no such prohibition on citizens suing their own states. The Constitution only forbids citizens suing nonresident states and

foreigners suing any state. The court acknowledged this basic fact but argued that the amendment stands “not so much for what it says” but rather a “broader presupposition” read into the text. In other words, states are shielded from suits by their own citizens even though the Constitution doesn’t say so explicitly (or even indirectly). Similar to the doctrine of “qualified immunity” for police officers, dubious Supreme Court precedent has allowed government officials to act with impunity and do as they please.

Federal agencies enjoy similar impunity and readily make citizens’ lives difficult without having to answer to the courts. For example, the U.S. Postal Service doesn’t have to face the consequences if they lose a piece of mail, no matter how important or valuable that piece of mail is. The 1946 Federal Tort Claims Act protects the USPS from being sued for “any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”

This protection is particularly convenient for the USPS, considering that the agency has a monopoly over mail weighing less than 12.5 ounces. For these small mail pieces, consumers have no choice but to patronize the USPS but can’t hold the agency accountable if the USPS mishandles their delivery.

Hopefully, the impending reevaluation of “qualified immunity” is the first step in holding misbehaving states and federal agencies legally accountable for their actions. Even if the Supreme Court refuses to budge on the issue of state sovereign immunity, lawmakers should push for state-level legislation that prevents their governments from infringing on residents’ rights. At the federal level, Congress should revise outdated laws such as the Federal Tort Claims Act.

Whether the issue is police brutality, stolen shipwreck photos, or diverted mail, it is finally time to hold the government accountable for its recklessness.