

**WHITE PAPER**

**Qualified Immunity:  
Striking the Balance for Prosecutor Accountability**



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Most Americans don't appreciate the fact that prosecutors have become the most powerful figure in the criminal justice system. Many aren't aware that over-zealous prosecutors sometimes take ethical short-cuts to secure a conviction. Even fewer realize that if the victim of prosecutorial misconduct were to file a lawsuit against the errant prosecutor, the citizen could *never prevail in a court of law*.

“Absolute immunity” is the legal doctrine that safeguards prosecutors from civil lawsuits, even if the prosecutor fabricates evidence, withholds information, or fails to tell the truth while under oath. Established in a milestone Supreme Court decision,<sup>1</sup> absolute immunity has represented a pillar in the edifice of prosecutorial invincibility for nearly 40 years.

Not only did *Imbler v. Pachtman* remove the specter of legal liability for prosecutors, the decision also sent an unmistakable “hands-off” message to other actors in the criminal justice system. Bar disciplinary committees, in particular, became reluctant to impose sanctions, even for the most egregious examples of prosecutor misconduct.

This phenomenon was illustrated in the wrongful conviction of Alaska Senator Ted Stevens, an episode that represents probably the most notorious example of prosecutorial misconduct in the history of the United States:

Following a three-week trial, Senator Stevens was convicted in October, 2008 on seven felony counts of filing deceptive financial disclosure documents. Eight days later, Stevens lost his re-election bid to the Senate seat he had held for 40 years.

Following a complaint of pervasive wrong-doing by an FBI whistleblower, Attorney General Eric Holder recommended that Sen. Stevens' conviction be vacated. Affirming the AG's petition, Judge Emmett Sullivan blasted the prosecutorial team: “In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case.”<sup>2</sup>

A subsequent Department of Justice investigation revealed alarming irregularities in all phases of the prosecution, documenting malfeasance by high-level DOJ officials, line prosecutors, FBI agents, and witnesses. The probe concluded that U.S. attorneys James Goeke and Joseph Bottini “engaged in professional misconduct by acting in reckless disregard of their disclosure obligations.”<sup>3</sup>

What was the consequence of the egregious wrong-doing? A one-day suspension for prosecutor Goeke, and no sanctions at all applied to Joseph Bottini.

“Apparently, prosecutors can violate the Constitution, deny the defendant exculpatory evidence demonstrating innocence and introduce perjured testimony without any fear that they will be punished,” thundered the dismayed defense team.<sup>4</sup>

<sup>1</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976).

<sup>2</sup> *Sen. Ted Stevens' Conviction Set Aside*, CNN, Apr. 7, 2009, available at <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/index.html>.

<sup>3</sup> U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS, CRIM. NO. 08-231 (D.D.C. 2009) (EGS) 15-16 (2011) at 26. Available at <http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf>

<sup>4</sup> Pete Yost, Ted Stevens Legal Team Criticizes Prosecution Over Misconduct. Huffington Post. May 25, 2012.

This White Paper highlights the long-standing intention of Congress to hold public officials accountable for their misdeeds, recounts the genesis and evolution of the absolute immunity doctrine, reveals the aftermath of the 1976 Supreme Court decision, and proposes a legislative solution to the current state of affairs.

### **CIVIL RIGHTS ACT OF 1871**

In the wake of the Civil War, White supremacist groups sought to perpetuate the disenfranchisement of recently freed African-Americans. Appalled by reports of on-going atrocities, Rep. Samuel Shellbarger introduced the Civil Rights Act in March 1871. The bill was approved and signed into law less than a month later.

Also known as the Ku Klux Klan Act, the law turned a variety of KKK intimidation tactics into federal offenses. More important, however, were provisions in the law that authorized civil action against government officials for deprivation of rights. The legal text reads:

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.<sup>5</sup>

Two Constitutional amendments were viewed as particularly relevant:

1. Fifth Amendment's due process protections which require that legal proceedings be conducted in accordance with established principles of justice, notice, and right to a fair trial<sup>6</sup>
2. Fourteenth Amendment's guarantee that no "State deprive any person of life, liberty, or property, without due process of law"<sup>7</sup>

The 1871 Civil Rights Act was codified in the United States Code at Title 42, Section 1983. Lawsuits brought under authority of this Act are hence referred to as "1983 actions."

Over the years, 1983 actions have been taken against police officers, prison officials, and school board members. But did Congress intend that the Civil Rights Act also apply to prosecutors who violate ethical strictures? The answer would not become known until more than a century later.

### **ERECTING THE FORTRESS OF ABSOLUTE IMMUNITY**

Prosecutors who fail to turn over exculpatory information or otherwise violate ethical codes create an environment that is hostile to the due process rights of criminal defendants. In theory, such actions would place a malfeasant prosecutor at risk for a 1983 action.

But earlier Supreme Court decisions had held that legislators<sup>8</sup> and judges<sup>9</sup> could not be sued under the 1871 Civil Rights Act. So would the High Court employ the same logic to extend these

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<sup>5</sup> 42 U.S.C. §1983 (2006).

<sup>6</sup> Due process definition. BLACK'S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS.

<sup>7</sup> U.S. Const. amend. XIV, § 1.

<sup>8</sup> Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

<sup>9</sup> Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

legal precedents to cover prosecutorial indiscretions? The answer would emerge from a botched robbery that took place in an obscure Los Angeles grocery store:

In 1961, two men staged an armed robbery, fatally wounding the proprietor. Paul Imbler was charged with homicide. The jury returned a guilty verdict and Imbler was sentenced to death.

Afterwards, mitigating evidence came to light. The death sentence was overturned, and the sentence reduced to life imprisonment.

Imbler then charged that prosecutor Richard Pachtman had knowingly used false testimony and suppressed evidence at the trial. The case was brought before the Federal District Court. In its opinion, the Court identified eight instances of prosecutorial misconduct. Imbler was subsequently released.

Imbler eventually filed a lawsuit against Pachtman under the 1871 Civil Rights Act, demanding \$2.7 million in damages. The case eventually reached all the way to the U.S. Supreme Court.

In 1976 the High Court handed down the long-awaited decision. Wary that prosecutors would be tempted to “shade” their prosecutorial decision-making under threat of a lawsuit, the Supreme Court held in *Imbler v. Pachtman* that prosecutors are unconditionally protected from civil liability as long as these actions were performed within the scope of their “advocative” duties. In the Court’s words:

We hold that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under [Section] 1983.<sup>10</sup>

Without a single dissenting vote, America’s highest court erected the doctrine of absolute prosecutorial immunity as the law of the land for prosecutors engaged in their advocative role.

#### *Qualified Immunity for Investigative Duties*

In contrast to absolute immunity, qualified immunity offers a weaker level of legal protection. The qualified immunity doctrine is designed to shield government officials from lawsuits “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>11</sup> Police officers, for example, have long enjoyed this lesser degree of immunity from lawsuits brought against them.

*Imbler* clarified that while prosecutorial advocative functions are protected by absolute immunity, qualified immunity applies to their “investigative” role. Exactly where does the boundary between advocative and investigational activities lie?

This question was addressed in four subsequent High Court cases:

1. *Kalina v. Fletcher* held that submitting an affidavit in support of an arrest warrant constitutes an investigative function.<sup>12</sup>
2. *Burns v. Reed* concluded that giving legal advice to police is an investigative function, while participating in a probable cause hearing is an advocative function.<sup>13</sup>
3. *Buckley v. Fitzsimmons* determined that “a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have someone arrested.”<sup>14</sup>

<sup>10</sup> *Imbler*, 424 U.S. at 427.

<sup>11</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>12</sup> *Kalina v. Fletcher*, 522 U.S. 118 (1997).

<sup>13</sup> *Burns v. Reed*, 500 U.S. 478, 490, 496 (1993).

<sup>14</sup> *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

4. *Rehberg v. Paulk* found that a prosecutor’s testimony before a grand jury as a “complaining witness” is an advocative function.<sup>15</sup>

In sum, these cases clarify that the line between advocative and investigative conduct can be established by reference to whether the prosecutorial activity is:<sup>16</sup>

1. Conducted inside or outside of the courtroom: If a prosecutor is sued for an action conducted outside of court, it is presumptively investigative, and thus only entitles him to qualified immunity. However, if the activity was conducted in-court, such as a statement or presentation of evidence, it is presumptively advocative.
2. Normally performed by another actor: If the conduct consists of an activity normally performed by another actor – such as a police officer – then it is presumptively investigative, entitling the prosecutor to qualified immunity. However, if the conduct is that which a prosecutor normally performs during the course of his duties, it is presumed to be advocative.
3. Viewed as highly discretionary: Conduct that is a required part of a prosecutor’s duties such as presenting evidence in front of a jury or filing a motion in court is considered advocative. However, the more discretionary the action, such as the decision to hold a press conference, the greater will be the presumption that the prosecutor’s action is investigative.

## PROSECUTOR ACCOUNTABILITY IN THE WAKE OF IMBLER

In its *Imbler* ruling, the Supreme Court did foresee the need to enforce professional accountability, envisioning two such mechanisms: criminal action and legal disciplinary committees.

### *Criminal Action*

The High Court anticipated that victims of prosecutorial misconduct could take criminal action against the official wrong-doer. The Court held:

This Court has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. [Section] 242, the criminal analog of [Section] 1983.<sup>17</sup>

But in practice, criminal statutes impose a high bar in order to demonstrate wrongful intent. For example, the Model Penal Code requires that a “purposeful” mental state be proven in order to convict a person for the offense of “Tampering With or Fabricating Physical Evidence.”<sup>18</sup> This represents the highest measure of intent required by any offense under the Penal Code.

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<sup>15</sup> *Rehberg v. Paulk*, 132 S. Ct. 1497 (2014).

<sup>16</sup> See generally Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *TOURO L. REV.* 1643-1656 (1999).

<sup>17</sup> *Id.* (internal citations omitted).

<sup>18</sup> MODEL PENAL CODE §241.7.

In addition, some believe that prosecutors are reluctant to file a criminal charge against a fellow prosecutor, knowing that he might be assigned to collaborate in future cases with the same prosecutor, now possessing a tainted record.

### *Disciplinary Committees*

Regarding the second corrective option, the High Court opined:

Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in their amenability to professional discipline by an association of his peers.<sup>19</sup>

But subsequent experience would reveal the imposition of public sanctions on unethical prosecutors to be the lamentable exception to the rule:

- A 2005 study of convictions reversed on account of prosecutorial misconduct revealed that only 2.2% resulted in bar disciplinary action.<sup>20</sup>
- A recent analysis compiled the findings from nine separate studies involving 3,625 incidents of prosecutorial misconduct, which identified only 63 cases in which public sanctions were imposed.<sup>21</sup>
- One analysis revealed the most common sanction was to simply assess the prosecutor with the financial cost of the disciplinary hearings.<sup>22</sup>

Several factors account for this state of affairs:

- Many cases of misconduct are never detected, for example, when prosecutors fail to turn over exculpatory evidence.
- Defense attorneys fear that filing a disciplinary complaint against a prosecutor could impair congenial working relationships and impede the expeditious resolution of future cases.<sup>23</sup>
- Judges often do not report misconduct observed during the trial, perhaps because they do not want to be seen as “soft on crime” in the upcoming election.
- Citizens do not file ethics complaints because they perceive the process is too cumbersome or inefficient.
- State bar associations do not take the initiative because they are generally disinclined to interfere with criminal proceedings.

By removing a key accountability mechanism and inducing an over-reliance on criminal proceedings and bar disciplinary actions, the *Imbler* decision unwittingly contributed to a culture of professional non-accountability. Without any meaningful prospect of enforcement, the ethical codes’ ability to accomplish the goals of punishment and deterrence has become, for all practical purposes, eviscerated.

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<sup>19</sup> *Imbler*, 424 U.S. at 429.

<sup>20</sup> Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 60 (2005).

<sup>21</sup> *An Epidemic of Prosecutor Misconduct*, CENTER FOR PROSECUTOR INTEGRITY, Appendix B (2013), available at <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

<sup>22</sup> Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CENTER FOR PUBLIC INTEGRITY (last updated May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>.

<sup>23</sup> Ephraim Unell, *A Right Not to be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 960 (2010).

## RESTORING THE BALANCE

In *Imbler v. Pachtman*, the Supreme Court justifiably desired to shield prosecutors from frivolous and malicious lawsuits. In hindsight, the High Court went too far, because civil lawsuits represent the most direct means by which an individual citizen can restore a measure of justice.

As discussed above, qualified immunity is the standard that protects police officers and other government officials from frivolous civil claims. Police officers have managed to accomplish their duties for years without the perception that they are hedging their law enforcement duties for fear of retaliatory litigation.

The most promising strategy at this point is to pursue a legislative remedy to expand the scope qualified immunity to also apply to the prosecutorial advocative function. As drafted by the Center for Prosecutor Integrity, the Federal Prosecutor Integrity Act would remove absolute immunity from federal prosecutors, and restore them to the qualified immunity status of other public officials, as the plain language of 1983 enunciates.

The proposed Act states:<sup>24</sup>

### Civil Action for the Failure to Disclose Exculpatory Evidence---

[1] In General---Every person who, under color of statute, ordinance, regulation, custom or usage of the laws of the United States subjects or causes to be subjected any person charged with a criminal offense or a violation of the laws of the United States to suffer the deprivation of any rights, privileges and immunities established by Section 6 [a] [1] [b] [c] of this Act and the provisions thereof shall be liable for money damages for all damages proximately caused by said deprivation and violation of the terms and provisions of this Act and other relief to the party injured in an action at law, suit in equity, or other proper proceedings for redress, except said action shall not apply to any suit against any judge.

[2] This civil cause of action for money damages directly and proximately caused by a violation of the applicable provisions of this Act and the provisions therein shall apply to all actions that either result in a acquittal of the defendant on the original charges or those convictions overturned and declared naught by a court of competent jurisdiction, including any declaration overturning any conviction due to any post conviction proceeding.

[3] This civil cause of action for money damages shall exist and remain operative and applicable in addition to any other remedy under the terms and provisions of this Act.

[4] Attorney Fees and Cost---Every person who, under color of statute, ordinance, regulation, custom or usage of the laws of the United States held liable for the violation of Section 6 [a] [1] [b] [c] of this Act shall be liable to the injured party not only for monetary damages awarded by judgment, but for all reasonable attorney fees and cost associated with the civil action.

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<sup>24</sup> FEDERAL PROSECUTOR INTEGRITY ACT, CENTER FOR PROSECUTOR INTEGRITY (2014) at Section 6, *available at* <http://www.prosecutorintegrity.org/wp-content/uploads/2014/06/Federal-Prosecutor-Integrity-Act.pdf>.

*Additional Protections from Frivolous Claims*

The evidentiary standard for all pleadings in civil cases, which represents the threshold of facts a person must allege in order to have his case heard, has also changed since *Imbler*. The Supreme Court held in 2009 that “to survive a motion to dismiss, a claim must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>25</sup> In interpreting the federal statute governing this process, the Court established a higher bar for a claim’s plausibility.

Therefore, not only would claims against prosecutors under a qualified standard protect them from frivolous claims, but once the immunity defense is overcome, the claim itself must meet the heightened standard of “*Twigbal*”<sup>26</sup> in order to survive being dismissed by the judge.

**AN END TO PERVERSE INCENTIVES**

The Civil Rights Act of 1871 was inspired by a historically compelling need to protect the rights of African-Americans. A century later, the rights of Blacks accused of criminal actions once again are threatened, this time in the form an over-criminalized legal code, harsh mandatory minimum sentences, and a spate of wrongful convictions. Even though they represent one in 10 Americans, 46.5% of exonerations are found among Blacks.<sup>27</sup>

The constitutional protections of a fair trial and due process of law are hallmarks of this nation’s legal tradition. When an individual is stripped of the right to sue for the violation of these rights, the system fails to compensate these individuals and deter over-zealous prosecutors from engaging in similar conduct in the future.

Because the prospect of criminal sanctions and bar disciplinary action has failed to curb prosecutorial misconduct, it is time for another approach. Expanding qualified immunity to cover prosecutors’ advocative functions is the best mechanism to ensure long-overdue accountability reform and deterrence of prosecutorial wrong-doing.

Federal and state lawmakers should enact legislation to restore limited civil liability to prosecutors, and return a remedy to the persons who suffer the consequences of absolute immunity’s perverse incentives.

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<sup>25</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<sup>26</sup> *Twigbal* is the term used to indicate the two Supreme Court cases that resulted in a higher pleading standard for civil claims.

<sup>27</sup> *Exonerations by Race and Crime*, The National Registry of Exonerations (Aug. 19, 2014), <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx>.



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