

Hi, this is Chris Micheli with the Sacramento-based government relations of Aprea & Micheli, and adjunct professor at McGeorge School of Law in its Capital Lawyering program.

Today's podcast is examining whether there's any liability for enacting unconstitutional laws. You know, on occasion I've been asked whether there's any recourse if the Legislature and Governor enact a law that somehow violated the state and/or federal constitutions.

Now, obviously the first action would be to challenge the enacted bill in either a state or federal court, depending on the basis for that constitutional challenge. There's also the referendum process in the state of California that would allow taking the enacted bill to the voters to determine whether or not to keep it in place.

If the other two branches of government enact an objectionable law, there's really only two avenues of recourse - the third branch of government, i.e. the judiciary, the court system, or the ballot through the referendum process here in California. However, to make a determination of whether an enacted law, that is a statute, there's really only one avenue, the state or the federal courts.

When the proper court determines that a legislative act, that is a law, conflicts with the Constitution, it finds that the law was unconstitutional and declares it to be void in whole or in part. This is what's deemed judicial review and it's the role of the third branch of government and obviously, part of our republic's system of checks and balances.

Now, assuming that a state or federal court did rule that a law violates either the California or United States Constitutions, is there any recourse or a second action against either or both branches of government? In other words, can the Legislature and/or the Governor be held, if you will, accountable for having enacted an unconstitutional state law? Now, does it matter whether they were informed, say by the Legislative Counsel or opponents of the bill that the proposed law might be unconstitutional?

I think the short answer is no. It's not the role of the legislative or executive branches of government to determine whether or not a proposed statute is constitutional or not. Rather, that role is reserved to our third branch of government, the judicial branch.

Now recall from your high school civics class teacher who explained generally that the legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Now generally member of the Legislature and the executive branch, the Governor, enjoy some level of qualified immunity when they're acting in their official capacity as opposed to perhaps something they have done in their personal capacity.

In addition, the courts generally presume that all statutes that are enacted are valid unless a statute's actually declared to be invalid. Now this general rule is based upon a presumption of lawfulness that protects the official actions of those elected officials.

Note that under federal law, there is a civil private action for damages that may be brought against a public officer who acts under an unconstitutional statute. There are so-called Section 1983 Actions. And Section 1983 was enacted after the Civil War to hold a state

official accountable for violating a federal law. But these laws generally apply to executive branch officials who are acting pursuant to a law. They don't, on the other hand, apply to those elected officials who enact a law that's later declared invalid.

Now, of similar note, judges also enjoy some limited immunity for performing their official job duties. In all of these instances the rule generally is that government officials will not incur any personal civil liability for violating federal laws as long as they don't violate clearly established laws. In all of these instances, the court decisions deal, however, with whether the official action under the statute allowed a private citizen to sue that elected official.

For example, in a 1967 US Supreme Court decision entitled *Pearson v. Ray*, the Court determined that officials who commit constitutional or statutory violations in good faith raise the defense of qualified immunity. In these circumstances, there really are not cases dealing directly with potential civil liability for an elected official who created an unconstitutional statute.

Now this legal doctrine of official immunity has existed since the common law. Generally, the courts look to whether the officials conducted themselves in good faith and in a lawful manner. Without it, well-intentioned public officials could somehow be held personally liable for their official acts.

While sometimes in the legislative process elected officials push the proverbial envelope on public policy issues, it certainly doesn't mean that our elected officials should or can be held liable for enacting unconstitutional state statutes.

So, in the end, the courts serve as a check on legislative enactments. As do the voters with the referendum process. In other words, citizens can challenge bills that are enacted into law by bringing a civil lawsuit in a state or federal court, and the judiciary will decide whether those statutes comport with the state and/or federal constitutions.

And our elected officials and their actions are ultimately answerable to the state's electorate come election time. If the citizens believe that unconstitutional laws are being enacted, then they can seek to recall the elected officials, or they can simply vote them out of office at the next ballot.

Thanks for joining this podcast.