



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Government's License to Inflict Injustice

by James Bovard

Sovereign immunity is one of the most dangerous concepts to freedom. And the larger and more powerful governments become, the more sovereign immunity becomes a black hole where citizens' rights can vanish.

Justice Oliver Wendell Holmes declared in 1907, "A sovereign is exempt from suit [because] there can be no legal right as against the authority that makes the law on which the right depends." Federal court decisions in lawsuits against federal agencies routinely include the following boilerplate: "Where a suit has not been consented to by the United States, dismissal of the action is required." As a result of such immunity, "The Secretary of the Interior has an absolute privilege to include malicious defamation in a press release concerning official business, and the Secretary of the Treasury is not liable for 'arbitrary, wanton, capricious, illegal, malicious, oppressive, and contemptuous' action," as University of Chicago law professor Kenneth Davis observed.

Such judicial genuflection to government was not always the case. In 1793, in the first case involving a lawsuit against a state government, four of five Supreme Court justices ruled that governments could be sued regardless of whether they deigned to permit such suits. But in 1821, Chief Justice John Marshall, offering no evidence, rewrote the rule book:

The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.

A 1945 Supreme Court opinion declared that sovereign immunity is "embodied in the Constitution." However, neither law professors nor private citizens victimized by the government have ever been able to find precisely where in the Constitution this doctrine is "embodied." As Professor Jeremy Travis noted, "It is a magnificent historical irony that America, a republic whose

independence was declared in a document indicting the sovereign for treasonous acts, should adopt without serious examination the doctrine of sovereign immunity.”

Consequences of sovereign immunity

There are scores of thousands of government agencies and government-sponsored entities in the United States that enjoy some degree of legal immunity. The largest government-sponsored enterprise is the U.S. Postal Service, which has claimed immunity from lawsuits charging it with false advertising (regarding its deceptive claims for Priority Mail), trademark infringements of its competitors, or other unfair trade practices. Yet when the USPS sues its competitors, it claims that it is a private entity. A federal appeals court in 1998 thumped the agency’s efforts to evade legal responsibility: “The Postal Service has hastily elevated the shield of governmental privilege when accused of competitive wrongdoing.”

Sovereign immunity can provide a license to kill with impunity. On July 12, 1998, a squad of six Houston police smashed into the apartment of Pedro Oregon in the middle of the night. The 23-year-old Hispanic fled into his bedroom; police smashed down the door and, when they saw that Oregon had a handgun, unleashed a volley of 30 shots. Oregon died, shot 9 times *in the back*.

The police had no warrant for the search but claimed that a confidential informant said that he witnessed a drug deal occur at the address. (No drugs were found.) Harris County (Houston) District Attorney John Holmes observed that the police who killed Oregon might not be indicted: “I don’t know of any authority at this point that gave [the police] the right to be in that residence. But that doesn’t make the shooting a crime.” Holmes explained that the police “do not have to sit still for a citizen pointing a firearm at them, even if they entered unlawfully.” Thus, the mere possession of a weapon of self-defense in a person’s own bedroom is sufficient to justify killing him.

Congress sometimes invokes sovereign immunity to default on federal contracts. Instead of closing failing thrifts (whose accounts were covered by federal deposit insurance) in the 1980s, the government preferred to arrange to have them taken over by credit-worthy, solvent thrifts, thereby minimizing the cost to the government. Federal banking agencies signed written agreements promising specific benefits to institutions in return for their assistance in taking over failing thrifts.

But in 1989 Congress, as a cost-saving measure, nullified many of those contracts, forcing many otherwise solvent savings and loans into liquidation. Several savings and loans sued the

government for breach of contract, but lawyers for the U.S. government denied that previous agreements were still binding after Congress specifically declared that the agreements were not in the public interest. U.S. Claims Court Chief Judge Loren Smith ruled against the government, declaring, “On the government’s reasoning, any statute breaching a contract would be immune ... merely because its purpose was to breach the contract.”

Meaningless reforms

Congress has at various times enacted legislation supposedly intended to curb the injustices of sovereign immunity. Congress enacted the Federal Tort Claims Act (FTCA) in 1946 to permit lawsuits against the federal government. However, Congress specifically exempted 13 classes of tort claims from government liability. Citizens are not permitted to sue the federal government for “any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” In effect, the FTCA covered only “accidental” wrongs or abuses or injuries that were inflicted by government agencies or agents on citizens. If some government agent actually intended to shaft or oppress a private citizen, then the citizen is almost certainly out of luck.

The futility of this “remedy” was made stark in the 1987 Supreme Court decision in the case of James Stanley, an army sergeant who volunteered in the late 1950s for a program supposedly testing protective clothing. The Army covertly drugged Stanley and many other soldiers with LSD to study the drug’s effects. As Martin Schwartz noted in the *New York Law Journal*, “As a result of his exposure to LSD Stanley suffered from hallucinations, periods of incoherence and memory loss and, on occasion, engaged in violence against his wife and children. He was not informed of the administration of LSD until 1975.”

The Supreme Court, by a 5-4 margin, rejected Stanley’s claims against the government. Solicitor General Charles Fried hailed the court’s ruling as a triumph of “justice according to law.” Justice Sandra Day O’Connor dissented: “In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.” Justice William Brennan also dissented: “The Government of the United States treated thousands of its citizens as though they were laboratory animals, dosing them with this dangerous drug without their consent.” (This Supreme Court decision came at a time when the federal government was leading a crusade to make America “drug free” — except for drugs government covertly administered to people.)

In 1971, in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, the Supreme Court ruled for the first time that individual federal employees could be sued for civil damages for violating citizens' rights. Webster Bivens was an innocent Cleveland man who was roughed up, handcuffed, and dragged out of his house in front of his wife and children after an illegal search. In *Bivens*, the Court declared that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

However, subsequent Court decisions made it practically impossible for any citizen to gain a *Bivens*-type victory in court. In the first 17 years after the Supreme Court decision, 12,000 Americans filed *Bivens* suits against federal employees; only 30 of the "cases resulted in judgments on behalf of plaintiffs.... and only four judgments have actually been paid by the individual federal defendants."

And in recent years, it is even more difficult to win in court on a *Bivens* action. As law professor Sandra Bandes noted in 1995, "Less than twenty-five years later, in the wake of [subsequent Supreme Court decisions], there is little left of the *Bivens* principle." The fact that the Supreme Court has effectively gutted the *Bivens* remedy indicates either that the justices had a completely wrong-headed notion of civil liberty in 1971 — or perhaps that federal agents no longer violate citizens' rights.

The essence of sovereign immunity is that "the king can do no wrong." But as New York University law professor Jeremy Travis noted, "The oldest purported rationale for the immunity of the sovereign ... is a perversion of its historical intentment, which was that the king was privileged to do no wrong." As one English lawyer explained in the wake of James II's fall, "When a king ... does wrong, he thereby ceases to be king.... God and the law are above the king." But in the contemporary statist interpretation, a phrase intended to prevent kings from injuring subjects becomes a license for government abuses of the citizenry.

A two-tiered society

Sovereign immunity creates a two-tiered society: those above the law and those below it; those whom the law fails to bind and those whom the law fails to protect. Sovereign immunity presumes that the more evils government officials are permitted to commit, the more good they will achieve. Sovereign immunity presumes that in order to protect people, government must be permitted to destroy them: to crash into their cars, to break into their homes and businesses, and to drug them at its convenience.

Although doctrines of immunity might be carved out by legislators and judges when considering cases involving accidental injuries, such exemptions soon metastasize into a license to intentionally inflict harm. The fact that government can recklessly endanger people's lives with little or no financial responsibility for the resulting deaths means that the further government control extends, the more often citizens will be killed or injured.

The doctrine of "sovereign immunity" illustrates how power corrupts. If government officials did not already feel far superior to private citizens, they would not have the audacity to claim a right to injure them without compensation. That some government agents are punished on rare occasion merely shows that the power of contemporary governments is not absolute. Even tyrants occasionally find it in their interest to sacrifice one of their underlings to placate public wrath.

*James Bovard is author of **Lost Rights** (1994) and the forthcoming **Terrorism and Tyranny: How Bush's Crusade is Sabotaging Peace, Justice, and Freedom** (St. Martin's Press, September 2003) and serves as a policy advisor for The Future of Freedom Foundation.*

This article was originally published in the March 2003 edition of *Freedom Daily*.