# I'M FROM THE GOVERNMENT AND I'M HERE TO KILL YOU

*THE TRUE HUMAN COST OF OFFICIAL NEGLIGENCE*

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INTRODUCTION

# "THE KING CAN DO NO WRONG"

The United States was established by the Declaration of Independence, a document whose central theme was the official wrongdoing of the King of England and his servants. The leaders of the colonies declared that Americans had rights to "life, liberty, and the pursuit of happiness" and accused King George of "repeated injuries and usurpations" that made him "unfit to be the ruler of a free people." The Declaration itemized King George's "long train of abuses and usurpations," including that he had "sent hither swarms of officers to harass our people and eat out their substance," had "obstructed the administration of justice," and had "plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people."

The proposition that a king, a government, *can* do wrong is central to the Declaration, America's foundational document. So how did America get to a situation where government employees, "public servants," can kill by sheer sloppiness and walk away? Where an agency can level a town and kill six hundred citizens and escape all responsibility? Where a federal agency can run guns to Mexican drug cartels, causing hundreds of deaths on both sides of the border, and wash its hands of the matter? Where veterans can die awaiting doctors' appointments, and the hospital administrators can collect their bonuses and walk away?

Answering these questions requires a brief look at legal history. English common law developed the concept of "sovereign immunity," commonly expressed as "the King can do no wrong." But common-law sovereign immunity was actually a narrow concept. A subject could not sue or prosecute the king, but could take legal action against anyone carrying out the king's orders. Americans could better hold their government accountable when they were ruled by George III than they can today!

As the great English jurist William Blackstone expressed the concept two centuries ago, drawing a line between the king and the government:

> The King can do no wrong. Which ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things: First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to the people. . . . And secondly, it means that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people and therefore cannot be exerted to their prejudice . . .[1]

Therefore, in English law, the government and its employees *can* do wrong; it is only the *king* who cannot. Blackstone continued, "The King, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing." Since the king cannot even *think* of doing wrong, a government official could not plead, "I was just following orders." The courts would not let a royal employee claim that the king gave an illegal or wrongful order, so the full blame must fall upon those lower officials who harmed his subjects. Thus, after the Boston Massacre, the Massachusetts colonists had no trouble prosecuting redcoats for homicide; thus, their English hero, John Wilkes, successfully sued Lord Halifax for illegal arrest—*even though George III had personally ordered Halifax to have Wilkes arrested.* As one American colonist put it, "If the King can do no wrong, his ministers may; and when they do wrong, they should be hanged."[2]

How strongly our ancestors, and their opponents, felt about this can be gauged from their reactions to the prosecutions of soldiers after the Boston Massacre, when Massachusetts charged nine redcoats with murder and convicted two of manslaughter. Even George III and his Parliament did not feel they could go so far as to forbid such local prosecutions. They did pass the Administration of Justice Act, which allowed Massachusetts's colonial governor to transfer a prosecution of a Crown servant to another colony, or to England, if he felt the servant could not get a fair trial in Massachusetts.

A colony could still prosecute royal officials for murder, but the idea that the officials could get a change of venue so outraged the colonists that they labeled this law one of the "Intolerable Acts" and condemned it in the

Declaration of Independence: King George III had protected his soldiers "by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States."

## The American Experience: Our Own Courts Create Broad Sovereign Immunity

One might have thought the premise "the King can do no wrong" would have no application in a nation with no king, but that is not how things turned out. Indeed, by the time our courts finished, they had immunized government officials high and low from liability for any wrongful injuries they inflicted upon the citizens who paid their salaries.

In the early U.S. courts, the issue of sovereign immunity rarely arose, probably because the main civilian federal functions—running post offices, issuing land grants, and handling military pensions—would seldom generate lawsuits for damages. In an 1834 Supreme Court case, Chief Justice John Marshall noted (with no citation of legal authority) that "the United States are not suable of common right," but allowed the suit since Congress had consented to it.[3] Not until 1868 was sovereign immunity actually used to block a lawsuit, with the Supreme Court stating that "the public service would be hindered, and the public safety endangered," if the government could be sued for injuring its citizens.[4]

Sovereign immunity briefly came under question in 1882, when the Supreme Court allowed the heirs of Robert E. Lee to sue over the wartime confiscation of his Arlington, Virginia, estate, where the Arlington National Cemetery is now located. In *United States v. Lee*[5] the Court, by a narrow 5–4 vote, concluded that governmental immunity had little place in the American system of government: we had no king, and the idea that government would be burdened or inconvenienced by lawsuits was undermined by the fact that the government itself sued its citizens whenever it wanted to. Writing for the majority, Justice Samuel Miller argued, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[6]

This understanding did not last. Fourteen years later, the Court's composition had changed: of the five Justices who had ruled for the Lee family,

only one was still on the Court. Now the Court had no hesitation proclaiming, as "an axiom of our jurisprudence," that "the government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."[7] The ruling in *United States v. Lee* was simply ignored. (The Court would ultimately dispose of *United States v. Lee* by using its favored tool in dealing with undesired precedent: limiting it to its facts and refusing to apply its principles more broadly. The Court held that *United States v. Lee* would only apply where the government had violated the Fifth Amendment by "taking" property without just compensation and not in any other context.)[8]

In parallel with civil immunity, the Supreme Court gave federal officials blanket immunity with regard to criminal matters. In 1890, the Court ruled that California could not prosecute a Deputy U.S. Marshal who, while guarding a Supreme Court Justice, fatally shot an unarmed man. The person shot was attorney David Terry, former Chief Justice of the California Supreme Court. He had been angered by Justice Stephen Field's ruling in a case involving Terry's wife. Both jurists were early pioneers and no strangers to violence; indeed, Field had jailed Terry for contempt, after Terry punched out a Marshal and drew a bowie knife in Field's courtroom. Encountering Field in a train station restaurant, Terry slapped him in the face, and Marshal David Neagle shot Terry down. Neagle claimed that Terry had put his hand into his coat and he feared that Terry was drawing a bowie knife.[9] Terry turned out to be unarmed, and California authorities apparently doubted the Marshal's story. Both Neagle and Justice Field were arrested on murder charges, although Field's prosecution was later quietly dropped.

The Supreme Court (with Justice Terry abstaining, of course) ruled that Neagle could not be prosecuted by state authorities for what he had done in the line of federal duty: "in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction."[10]

Both the cases establishing civil sovereign immunity and those creating its criminal law equivalent remain good law to this day (*Neagle* was in fact cited repeatedly in the 2001–2003 "torture papers," which sought to justify use of torture on terrorism suspects in Iraq. If federal employees could

kill a citizen, the reasoning went, they surely must be able to waterboard a noncitizen).[11] Except where the government consents, federal employees can neither be sued nor prosecuted for their official actions.

## Government Kills with Immunity

Governing without responsibility was convenient for the governing class, if sometimes fatal for the governed.

During the Prohibition Era, it was still permissible to sell denatured alcohol for industrial use. Manufacturers initially denatured grain alcohol by adding chemicals that ruined the taste or emetics that nauseated the drinker. But bootleggers found ways to purify the denatured alcohol and make it drinkable.

The government responded by ordering manufacturers to add poisons to their product—methyl alcohol, which attacks the optic nerve; mercury salts, which damage the brain, kidneys, and lungs; and benzene, which attacks the bone marrow.

In the first two years, New York City alone experienced a thousand deaths from the new brew, with thousands more left blind. Professor Deborah Blum notes, "By the time Prohibition ended in 1933 the federal poisoning program by some estimates had killed at least 10,000 people."[12] New York City's Medical Examiner announced, "The United States government must be charged with the moral responsibility for the deaths that poisoned liquor causes, although it cannot be held legally responsible."[13] Precisely. The national government could not be sued, even when it *intentionally* poisoned its citizens.

> Decades later, it became possible to sue the federal government in a *Bivens* suit, named after the 1971 Supreme Court case that established the right to sue.[14] But *Bivens* only applies if (1) the government agents' conduct was intentional, not negligent; (2) their conduct not only harmed a person but also violated his or her constitutional rights; and (3) those rights were already "clearly established," that is, so well established as to be "beyond debate."[15] Further, not every constitutional right qualifies, and some officials, such as prosecutors, have absolute immunity and cannot be sued even if they intentionally violate clearly established rights.

## The Federal Tort Claims Act

With legal remedies generally nonexistent, the only remedy an injured citizen had was to ask Congress for a "private bill" awarding compensation. To obtain this relief, the injured person had to persuade their Congressman to introduce a bill awarding them a certain amount for their damages, the Committee on Appropriations had to give it a hearing and approve it, the entire House had to pass it, and then the process had to be repeated on the Senate side, following which the President would have to sign it into law. It was a cumbersome process, and many claims were passed over simply because the injured person, or their legislators, lacked political clout.

As the government grew, so did the number of private bills. By the 1940s, more than one thousand private bills were introduced annually, with three to four hundred of them debated and enacted. Congress tired of the process, and where morality had not forced the government to change, tedium and inconvenience did. In 1946, Congress enacted the Federal Tort Claims Act, or FTCA, which *generally* allowed citizens to sue the United States for wrongful acts that harm persons or property. "Generally" merits emphasis because the FTCA also had a long list of exceptions where the United States emphatically did *not* consent to being sued. Prominent among these was what came to be called the "discretionary function exception." The United States refused to be sued for a claim that was "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[16]

So the United States could not be sued over its officials performing a "discretionary function." But what was a "discretionary function"? Congress gave almost no guidance. Did the phrase cover only matters like promulgating regulations, and not operational decisions in running government programs? Did it cover only high-level policy decisions (for example, creating a National Park), or did it encompass low-level decisions (such as operating the park)? Did it protect only bureaucrats who considered public safety and made bad decisions, or did it also protect bureaucrats who entirely ignored safety considerations?

The discretionary function exception is not the only exception in the FTCA. Congress also refused to consent to lawsuits against the government that arose from assault and battery (unless committed by a law enforcement officer), fraud, libel, slander, or interference with contract rights.[17]

These were not just interesting legal questions to be mulled over with a glass of wine in some law school faculty meeting. They were concrete issues whose resolution would exact a sizeable toll in human life as the government sought to protect itself from liability for negligence and the bad decisions that inevitably come with ever-larger bureaucracies.

Throughout the second half of the twentieth century, the federal courts strongly backed federal agencies and federal officials. The discretionary function exception came to be interpreted so broadly that, unless the agency had imposed clear safety standards that its officials had violated, almost every decision that involved a policy choice (or just *could have* involved a policy choice) was protected against lawsuit. Federal officials have, as we shall see, blown up hundreds of people, spread radioactive waste over enormous areas, and ordered their subordinates to commit murder, all with legal impunity. When the government's misdeeds were challenged in court, attorneys from the U.S. Department of Justice did not hesitate to conduct cover-ups, defraud the courts, and intimidate witnesses—all without worries about disbarment or other discipline. (In this book's concluding chapter, we'll examine how we can deal with these problems.)

When federal civilian employment was small, the risk of being injured by a negligent governmental employee was trifling. Today, there are over two million federal civilian employees, a workforce that dwarfs those of our largest corporations. This enormous workforce has almost complete legal immunity, no matter how lethal its transgressions.

Speaking of lethal transgressions, let us begin with the Texas City explosion . . .