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Although sovereignty can be described as an abstract attribute of a legal system,¹⁵⁴ pressure always exists to locate the "final power in the community...at some point within the institutional structure."¹⁵⁵ In its history and its justifications, official immunity has always been a means of creating "some visible wielder of sovereignty."¹⁵⁶ The special status of judges with respect to civil rights liability suggests that the judiciary, more than the other branches of government, now serves this function in American society.

The Court's omission of any reference to the idea of sovereignty in its recent decisions concerning judicial immunity is not surprising in light of the general decline in the acceptability of the idea itself. As Harold Laski argued:

If our King fails to suit us we behead or replace him; if our ministry loses its hold, the result is registered in the ballot boxes. But the categories of law have obstinately and needlessly resisted such transformation.... [The classic theory of sovereignty] is legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty...is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice.¹⁵⁷

Such arguments have prevailed, and the Supreme Court's decisions on executive and legislative immunity have contributed to the general decline of the idea of sovereignty. As the Court has itself emphasized: "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 officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it."¹⁵⁸ Given the extent to which the judiciary has come to expound and even to represent the rule of law, it would be surprising indeed if the Court were explicitly to justify its immunity on the basis of a doctrine tied so closely to the desirability of some ruler being above the law.¹⁵⁹

The special status of the judicial function is perversely and somewhat disturbingly understandable in light of the decline of the idea of sovereignty. The psychological promises of sovereignty are cohesion, finality and infallibility. The comfort that these can provide becomes increasingly irresistible as challenges to



authority become more pervasive. In the United States, it has often been the judiciary that has responded to, justified, and therefore elicited such challenges. The implication of the modern Court's insistent retention of the doctrine of absolute judicial immunity, then, is that while the judiciary attempts to prevent lawlessness in other institutions, it creates pressures for tolerating lawlessness in itself.

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Footnotes

¹⁵⁴. See, e.g., Pennock, *Law and Sovereignty*, 31 AM. POL. SCI. REV. 617 (1937).

¹⁵⁵. H. LASKI, FOUNDATIONS OF SOVEREIGNTY 12 (1931).

¹⁵⁶. *Id.*

¹⁵⁷. *Id.* at 136-37.

¹⁵⁸. *Butz v Economou*, 98 S. Ct. at 2910-12. See generally cited in note 3 *supra*.

¹⁵⁹. See note 152 *supra*.

