

**JUSTICE JOHN PAUL STEVENS (Ret.)**

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**Henry IV Comes to America**

Under the common law in 1400 when Henry IV was the King of England the sovereign could not be sued without his consent. That rule of law - known as the doctrine of sovereign immunity - was supported by two reasons, first, a belief that the King could do no wrong, and second, the fact that the architect of a legal system has the power to decide whether judges should entertain such suits. Neither of those reasons provides any support for an American judge-made rule giving states an immunity from suits in federal court based on violations of federal law. Indeed, that rule might well have inspired this famous comment by Justice Holmes:

"It is revolting to have no better reason for a rule of law than that it was so laid down in the time

of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."<sup>i</sup>

Few if any areas of constitutional law have generated as many five-to-four opinions of the Supreme Court as the doctrine of sovereign immunity. The intensity of the debate among the justices probably reached its peak on June 23, 1999 when the majority applied the doctrine to protect the state of Maine from a suit by its employees alleging violations of the Fair Labor Standards Act; on that date the majority also invalidated two federal statutes enacted in 1992 to clarify and confirm Congress' intent to authorize suits against states for patent infringement and trade mark infringement.

Both of those statutes had been approved by unanimous votes in both houses of Congress; the Report of the Senate Judiciary Committee recommending their enactment, explained that they were patterned after a

statute enacted in 1989 to clarify Congress' intent to authorize suits against States for copyright infringement.

The Senate committee report on the Copyright Remedy Clarification Act explained that it was enacted in response to the Court's decision in the *Atascadero* case in 1985 announcing a requirement that Congressional abrogation of state sovereign immunity must be unambiguously stated in the text of the statute itself in order to be effective. The Report explained that legislative history made it "absolutely clear that in 1976 Congress intended to make States fully liable for copyright infringement", and that the Copyright Office remains convinced "that copyright proprietors have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court." Thus, Congress provided a reasonable explanation for its decisions in 1976 and again in 1989 to authorize suits against sovereign states for copyright infringement.

The Senate Report on the patent and trademark statutes that the Court invalidated in 1999 similarly explained that they were enacted in response to the Court's 1985 clear statement requirement. That report confirmed that Congress not only thought that the States should be liable for patent infringement and trade mark infringement in 1999, but also that earlier congresses had reached the same conclusion when they included a cause of action for infringement in the 1952 revision of the patent laws and in the Lanham Trademark Act in 1946. Thus Congress has made essentially the same decision with respect to the liability of States for violating federal laws protecting intellectual property on at least five different occasions.

Significantly, there is no support in the legislative history of any of those five statutes for the notion that States should be treated differently than any other infringers. No legislator and no witness identified any reason for providing States with a defense not available to private defendants.

The Congressional rejection of the sovereign immunity defense was consistently endorsed by the Executive Branch of the government. Not only did the President sign the bills that had bi-partisan support, but it is also significant that in each of the cases in which the Court extended the doctrine of sovereign immunity, the Solicitor General endorsed the position of the four dissenting justices rather than the majority. I also find it interesting that the committee reports explaining the legislative decisions contain lucid explanations of why it makes sense to apply the same rules to state defendants and private defendants whereas in their judicial opinions the majority seldom discusses anything other than highly debatable history.

I conclude with two brief comments on those discussions of history. They include an unstated assumption that the Framers' intent to preserve a common law rule that was laid down in the time of Henry IV - a rule that ordinarily could be repealed by a

legislature - is tantamount to a decision to supplement the text of the constitution. And they reflect a belief that the authors of the opinions announced in June of 1999 have a better understanding of the "plan of the convention" than the four justices who were in the majority in 1793 in *Chisholm v. Georgia*.

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<sup>1</sup> Oliver Wendell Holmes, *The Path of the Law* 10 Harv. L. Rev. 457, 469 (1897).