

# LITIGATION WITH THE FEDERAL GOVERNMENT

Spring 2010

Professor Gregory Sisk

## Ground Rules

### Course Goals and Coverage

I welcome you to a continuing experiment in legal education that I think has been long overdue. This is the tenth time that I have taught this course (the course has also been taught with my casebook at Georgetown University, George Washington University, New York University, Catholic University, the University of Alabama, the University of Pittsburgh, and of course my former institution Drake, as well as other schools). This will be only the second time the course has been taught with the brand new second edition of the casebook, which is copyrighted 2008.

As everyone knows, during the last half century, the federal government has grown substantially in size and activity. At the same time, there also has been a proliferation of statutes waiving the sovereign immunity of the United States from suit and allowing various types of claims to be filed in court against the government.

It is impossible to be a general litigator, especially in the federal courts, without at some point having to consider whether to pursue a claim against the federal government and thereby encountering the special issues and unique problems that we will discuss in this course. When a lawyer makes professional judgments about such litigation, he or she should not make the mistake of assuming that the federal government is just like any other party in terms of its amenability to suit, its status in court proceedings, or its liability for alleged wrongdoing. Mistakes flowing from such a misunderstanding may prove devastating to clients who are in litigation against the federal government. Nor is the special status and role of the federal government of concern only to

lawyers who sue the federal government, as the unique position and unusual authority of lawyers in a federal government practice, particularly at the Department of Justice, suggest moral and ethical responsibilities beyond those that apply to counsel for private individuals and entities.

We also learn much about a system of government by examining when and how that government responds (or does not respond) to injuries that its agents or activities have caused to its citizens. Can the concept of sovereign immunity – that the government is immune from suit without its permission – be reconciled with democratic government? Or is this just an archaic remnant from the era of monarchy and the autocratic view that the king can do no wrong? Within this debate, we encounter as well the moral problem of accountability, that is, of justice to those who have been harmed (intentionally or accidentally), as well as difficult questions about how justice should be pursued, that is, whether legislative rather than judicial means may be better-suited or more consistent with democratic governance, especially when the nature of the government's conduct is suffused with political considerations. In this regard, we must also consider whether the government may be warranted in taking actions that cause injury or economic loss to citizens. Surely we all agree, to a greater or lesser extent, that the government has some legitimate authority, beyond that of a private actor, to act as a collective entity, regulating and imposing consequences upon its own people. Thus, are there not actions taken by the federal government which are proper, even if they would be wrongful if undertaken by private parties? The simple power of taxation, which would be constitute theft if exacted from us by a private party, suggests an affirmative answer.

Accordingly, for these and other reasons, I am surprised that a study of the unique area of litigation with the federal government has not long since been adopted as a part of every law school curriculum. For further insight on my goals for teaching this course, I published an article in the journal of the Association of American Law Schools. Gregory C. Sisk, *Teaching Litigation With the Federal Government*, 49 J. LEGAL EDUC. 275 (1999). I have already e-mailed to each of you a copy of this article in pdf format (let me know if you didn't receive it), not because this is yet another assignment, but for any interest some may have in seeing the "pedagogical goals" more fully articulated.

The general nature of this course and the purpose of our study also is set out in the preface to the casebook which you should read before the first class. The manner in which we approach the materials and the focus of our study will vary during the course of the semester. At most points, we will closely study individual cases as we would in other law school courses; at other points, we will discuss more generally the theories and principles underlying an area of law as illustrated by a series of cases and articles in my materials. Repeatedly and

regularly, we also will discuss the moral and policy implications raised by a topic, by certain types of government or attorney behavior, the suitability of the court system as the forum for types of grievances, etc.

The casebook is designed to serve both as the source of materials for class study and as a continuing resource for students interested in this area of the law. I suggest making frequent reference to the summary of the table of contents and the table of contents both to find the material being discussed on a particular day and to see and appreciate the structured organization of the material. Not incidentally, the summary of the table of contents may offer the beginning structure for a course outline.

Like any casebook, there is much more material than we can cover in a single semester. The breadth of the material will allow us to address certain basic matters and then to choose from a variety of other subjects for whatever time remains. Based upon experience, I anticipate that we will cover about 650-700 pages of material during the semester — which averages out to about 25 pages per class (obviously some assignments will be more and some will be less).

The book serves *both* as a casebook and as a statutory supplement for the course. In addition to my desire to save students from having to purchase a separate statutory supplement, I have placed the statutory excerpts directly at the pertinent points in the book so that you hopefully develop the lawyer's habit of looking first to the actual text of the statute before reading court decisions interpreting that language. In addition, the casebook contains substantial note material following most of the cases that should be helpful in deciphering and analyzing the decisions, as well as provide additional information about the area of law. Indeed, because these notes were written by the person teaching the course, they should give you a good indication of what I'll be looking for in analysis of the cases in class and what is important to understand for later examination at the end of the semester.

The bulk of the course will be devoted to a study of certain basic subjects which I view as essential parts of the background currency of information for any practitioner in the area of federal government litigation. Accordingly, I anticipate covering the following:

Chapter I (“The Federal Government as a Civil Litigator”);

Chapter II (“The Doctrine of Federal Sovereign Immunity”);

Chapter III (Part A on the Federal Tort Claims Act);

Chapter IV (most (but not all) of the material in Chapter IV on the Tucker Act, the Administrative Procedure Act, and the interrelationship between the two statutes); and

Chapter VII (selected excerpts from this chapter on attorney's fees, with a special focus on fee-shifting doctrine in general and against the federal government in particular).

Beyond these basics, and within the limitations of time, we might look at the Suits in Admiralty Act, Title VII of the Civil Rights Act, the Freedom of Information Act, or the Social Security Act. (I'm leaning at this point toward including the Suits in Admiralty Act, as the earliest tort-like statutory waivers of sovereign immunity.)

Because of the constraints of time, I expect that we are least likely to consider the material in Chapter V ("Suits Against Federal Officers"), Chapter VI ("Binding the Federal Government"); and Chapter VIII ("The United States as Plaintiff"). These materials will be available to you as a reference source in the future should these matters arise in your practice.

## **Class Attendance and Participation**

In addition to studying the materials in the casebook, classroom discussions are a vital part of the law school learning experience, especially in a smaller class such as this. For each class, I will prepare a lesson plan designed to further explain the subject, emphasize the important points, and supplement the reading materials with illustrations and additional comments. The contributions of your fellow students in class discussions and examination of questions asked in class will also enhance your understanding of the subject, as well as contribute to your ability to interact with other (future) lawyers, analyze questions on your feet, and advocate a position before a group. Moreover, you will be tested upon the material that is discussed in class, and material may be tested on the examination that is presented only in class. In sum, class attendance and class participation are important.

For these reasons, I hope and trust that each of you will determine that attending the two class periods each week is a worthwhile use of your time. In the end, this will be a matter of your individual responsibility. With the exception of those students assigned to lead the discussion on a particular day, I will not take attendance nor will adjustments be made to final grades based upon attendance and preparation.

If you do choose to attend class (as you should), I expect you to be prepared. The exchange between the professor and students and among students is one of the most valuable aspects of a good legal education, with benefits that extend well beyond the classroom and beyond the particular course. This purpose, however, cannot be achieved unless students are actively prepared to engage in that discussion. Especially in a class such as this, it will be more enjoyable for you and for me if you participate in the discussion, challenge me with comments and questions, and critique the reading materials.

As I have in the past for this particular course, I will end each class by designating three or more people to prepare the material for the upcoming class and to lead that day's discussion. Thus, I will tell you ahead of time when I will call upon you to present cases or material. During the course of the semester, every student will be assigned to lead the discussion at least a couple of times. If you miss class or are not prepared on a day for which you are assigned to lead discussion, without good excuse, your grade will be reduced one notch. Thus, for example, if you receive a grade of B on the final exam, but are absent or unprepared on your assignment day, your grade for the course will be a B-.

## **Web Site**

I will have set up a web page for this course (and indeed, chances are you are reading these ground rules on the web site):

<http://courseweb.stthomas.edu/gcsisk/litfedgov.html>

On the web page, I will post the assignment for each day, together with the students assigned for that material and with some questions (drawn largely from the note material in the casebook) to consider in reading the assigned material. The web page will also include other information and links to other pertinent web sites.

## **Class Materials**

For this course, you will need the following:

- GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS (Foundation Press, 2d ed., 2008).

As for additional study aids, I don't know that you need anything and certainly don't want to further impose on your student budget. If however, you

generously want to contribute more money to me and my other publisher, I have written a treatise on the subject: Gregory C. Sisk, *Litigation with the Federal Government* (ALI-ABA, 4th ed., 2006).

## **Final Examination**

The grade in this course will be based upon a three-and-a-half-hour final examination. The exam will consist of three essay questions, each of equal weight in grading, although not necessarily of equal difficulty. Each question will present a case problem in litigation with the federal government and ask you to write an essay suggesting how you would resolve the issues.

This will be an open book examination. You may bring with you the course materials, your notes from class, anything downloaded or printed from the web site, and any outline which you played a substantial role in creating. To ensure fairness and equal access among all students, if it is published before the semester ends and if anyone purchases it, the treatise mentioned above may not be used during the examination. In addition, although I encourage you to use them in preparation, you may not bring the sample exam and answers (that I will later put on reserve) to the examination with you.

## **Office Hours**

My office is located on the fourth floor corridor (Room 460). My office telephone number is 2-4923. I keep no regular office hours and instead attempt to maintain an open-door policy. (My door actually may be closed, but don't hesitate to knock, as I often will be in and available.) Please feel free to stop by my office at any time. If I am in and not busy with something else or class preparation, I will be happy to talk with you. If I can't see you immediately, I'll schedule time to see you as soon as possible.