

# Litigation With the Federal Government

Professor Gregory Sisk

## Learning Objectives and Assessment

### Learning Objectives for Litigation With the Federal Government

By the end of this semester, you should be able to:

- Demonstrate an appreciation of the moral, political, and policy questions underlying the concept of sovereign immunity, including understanding the debate about whether sovereign immunity can be reconciled with or may even reinforce democratic and constitutional governance.
- Recognize and be able to identify many of the leading examples of the tapestry of statutes waiving federal sovereign immunity, while also recognizing the gaps and sometimes confusing overlap in this imperfect network of statutes.
- Have a basic understanding of the primary theories of statutory interpretation, including textualism, legislative intent, and dynamic construction.
- Understand the federal government as a litigator, in which litigation authority ordinarily is centralized in the Department of Justice, including:
  - appreciating the unique position and unusual authority of Department of Justice lawyers in relationship with agency clients

- recognizing how federal government litigating authority affects those suing the government both in terms of procedure and strategy
- appreciating the special political, public interest, and ethical questions facing lawyers who represent the government
- Be able to identify and address the special rules governing those who make litigation claims against the federal government, including:
  - limitations on discovery
  - special governmental privileges
  - the general unavailability of jury trials
  - special requirements for settlement
- Understand the basics of the Federal Tort Claims Act, including:
  - how to satisfy prerequisites for suit
  - identifying the legal standards, including state law premises, private person analogies, and scope-of-employment disputes
  - recognizing the various exceptions
  - understand the basic principles for damages
  - identify claimants excluded from FTCA coverage and how those exclusions are applied.
- Understand the basics of the Tucker Act, including:
  - special court jurisdiction in the Court of Federal Claims and the Federal Circuit
  - the general limitation on monetary relief
  - the money-mandating requirement for statutory claims
  - employment claims
  - Indian money claims
  - contract claims and the Contract Disputes Act

- constitutional claims
- the exclusion of money claims from the Administrative Procedure Act and the debates about how this applies to injunctive claims that seek payment of money
- Understand the basics of attorney’s fee shifting both in general and with special application to the federal government, including:
  - the special strategies and incentives created by fee-shifting opportunities
  - exceptions to the American rule
  - statutory waivers of sovereign immunity for fees
  - measurement of fees, including the lodestar standard
  - prominent fee-shifting statutes, such as Title VII
  - the Equal Access to Justice Act which both expands fee-shifting against the federal government and imposes special requirements such as showing lack of substantial justification and applying fee caps

These course specific learning outcomes most directly address the following law school learning outcomes (as set out in Part III.1.A of the Academic Policy Manual): Learning Outcome 1 (by addressing professional and ethical responsibilities, especially for those developing rules for federal government litigation and lawyers representing the federal government); Learning Outcome 2 (by teaching basic concepts, underlying theories, statutory standards, and policy implications for litigation involving the federal government); and Learning Outcome 3 (by guiding students in strategies for formulating and litigating claims against the federal government. These course specific learning outcomes also address, but less directly, Learning Outcome 4 (by encouraging students to speak in class), Learning Outcome 5 (by evaluating the legal authorities on federal government litigation), and Learning Outcome 6 (by addressing the differing impacts of procedural choices on those who are disadvantaged or inexperienced).

## **Formative Assessment**

Formative assessment provides opportunities for students to evaluate their knowledge, check their understanding, and practice applying what they are learning and then receive feedback from your professor — before the entire semester’s grade is on the line. During the course of the semester, you will receive my feedback on your work in two primary ways:

Daily Classroom Exchange: First, a limited form of formative assessment will occur on a daily basis in class as I ask questions of students who are called on and the class as a whole, thereby giving one of you at a time a chance to participate directly. Through our exchange, those who are participating will get the immediate feedback of seeing whether their contributions are moving the discussion forward or not. Thus, one more reason to volunteer in class is the opportunity to gain that immediate feedback.

Multiple Choice Questions With Clickers: Second, on a nearly daily basis, both to present materials in a hypothetical problem setting and to review materials, I will present multiple choice questions and each of you will be able to record (anonymously) your selection of an answer through the electronic clickers we’ll use in class. The multiple choice questions are designed to be instructive and to provide a review of material that may later be test on the Final Exam. After students have selected answers, we’ll then identify the right and wrong answers in class discussion with my guidance — including of course why those are the right and wrong answers.

## **Graded Assessment**

The grade in this course will be based on a Final Exam.

The Final Exam will be three-hours-and-thirty-minutes at the end of the semester. 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, the Sisk treatise may be used during studying but 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 have put on reserve) to the examination with you. You may not bring any other materials, such as purchased outlines, treatises, or examinations and model answers from previous years. Everyone then will be on the same even playing field for these exams in terms of materials. Your compliance with these requirements will be assumed under the honor code.