Teaching Litigation with the Federal Government

Gregory C. Sisk

Although every lawyer, law teacher, and law student recognizes that the United States government obviously is involved in every federal criminal case, fewer appreciate that, over the past decade, the federal government has been a party, as plaintiff or defendant, to between one-fifth and one-third of all *civil* cases in the federal courts.[1] As Christopher J. W. Zorn has observed, because of its ubiquitous presence in federal litigation, "more than any other entity, the federal government plays a central role in the development of law and policy in the United States courts."[2] Moreover, the United States is hardly a typical litigant: it benefits from a plethora of special procedures, defenses, and limitations on liability not available to others. Indeed, the federal government may not be subjected to suit at all absent its own express consent—a concept of federal sovereign immunity that rests somewhat uneasily within the jurisprudence of a democratic society.

As one concrete indication of the importance of the subject, the Supreme Court continues to devote substantial attention to recurring questions of sovereign immunity, the distinctive jurisdictional statutes governing litigation with the United States, special forums for adjudication of particular types of governmental disputes, the limitations on governmental liability in tort and contract, and the availability of and standards for awards of attorney's fees

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1. See Urban A. Lester et al., Litigation with the Federal Government at ix (Philadelphia, 1989 Supp. to the 2d ed.); Christopher J. W. Zorn, U.S. Government Litigation Strategies in the Federal Appellate Courts 1 (published Ph.D. dissertation, Ohio State University) (Ann Arbor, 1998). In 1997, the most recent year for which complete data are reported by the Administrative Office of the United States Courts, the federal government was a plaintiff or defendant in 22 percent of civil cases commenced in the U.S. district courts. The Federal Judiciary Home Page, Judicial Business of the United States Courts 1997, Table C-2 (visited Aug. 24, 1999) <http://www.uscourts.gov/judicial_business/contents.html>. In certain specialized federal courts, most particularly the Court of Federal Claims and the Court of Veterans Appeals, the federal government is a party to every case on the docket.

2. Zorn, *supra* note 1, at 1.

against the government and its agencies. These topics have also occupied the attention of many authors in the law reviews in recent years—a robust literature that reveals the lively controversies surrounding the subject, lends scholarly depth to the field, and establishes a reliable source of further information and critical analysis.[3]

Accordingly, in terms of general education on federal litigation, particular instruction on the role of the United States as a party in civil litigation, and exploration of the concept of sovereign immunity, the study of the federal government in the courts deserves a secure place in the law school curriculum. The student of the federal judiciary cannot justifiably neglect a careful study of the impact of this unique party and the peculiar rules and procedures that apply to it.

And yet the present law school curriculum largely *does* ignore the subject. To be sure, the specific topic of court review of agency action, which certainly is an important category of federal government litigation, is covered in Administrative Law. But questions of federal sovereign immunity, as well as other categories of federal government litigation—such as tort, contract, and other money claims against the government; federal civilian and military claims; and attorney's fees claims—are relegated to the back pages of the typical administrative law casebook, rarely to be assigned in class.

Likewise, suits against federal officers, particularly the judicial implication of a *Bivens*[4] cause of action against federal officers for certain constitutional violations, may be addressed in a federal courts course. But while *state* sovereign immunity under the Eleventh Amendment is commonly studied in Federal Courts, the subject of *federal* sovereign immunity and the tapestry of statutes creating rights of action against the federal government usually are mentioned only in passing.

The federal government as a directly interested party may make cameo appearances in other courses, such as Employment Discrimination or Disability Law.[5] And there are courses specific to the federal government, such as courses on government contracts or national security matters, but they are offered only at a few law schools, are typically not focused on litigation, and are not designed to address larger questions about the federal sovereign as a party in civil litigation.

For these reasons, the subject of civil litigation with the federal government is largely an unexplored frontier within the law school curriculum. A compre-

3. A select bibliography of pertinent recent Supreme Court decisions and scholarship is availabie from the author on request.

4. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

5. In such areas of law as employment discrimination and labor law, the federal government obviously plays a crucial role as a public advocate on behalf of public interests, such as the initiation of antidiscrimination litigation against private defendants by the Equal Employment Opportunity Commission or the enforcement and defense of orders concerning labor-management relations by the National Labor Relations Board. In Litigation with the Federal Government, our primary concern by contrast is with the federal government as a party to litigation that directly involves the activities of the government or the conduct of its agents.

hensive course on this subject allows the student to see the *forest* of the federal government's unique status in litigation and to closely inspect the individual *trees* of the more significant statutory waivers of sovereign immunity in such fundamental areas as tort, contract, employment, and constitutional law, as well as for attorney's fees claims.

In addition to directing academic attention to a worthy and vital subject, Litigation with the Federal Government should provide practical advantages to students. The agencies and departments of the federal government offer a wide variety of employment opportunities for young lawyers. A student who can demonstrate an advanced understanding of the unique legal issues involved in governmental litigation should have a lead in the competition for federal government law jobs. Attorney supervisors and officials I worked with at the Department of Justice and other governmental agencies have responded with enthusiasm to law school instruction on this subject. Over the years, government attorneys in several offices have bemoaned to me the unfortunate fact that candidates for federal legal positions, in both trial and nonlitigation divisions, generally lack even minimal familiarity with the basic concepts underlying federal government civil litigation.[6]

Comprehension of the legal principles governing federal government litigation should also be helpful with respect to employment opportunities beyond the federal government itself. Students may seek employment with companies or law firms working on government contract issues. Law firms practicing in labor and employment law or personal injury litigation likely will encounter the federal government as an employer or a tort defendant. Employment with public interest organizations frequently will involve pursuing claims in court against government entities. Litigation with the Federal Government should be designed not only to provide the tools that future government lawyers may use to defend the government but also to examine the issues from the perspective of those seeking relief against the federal government.

Finally, the course should be of direct value to students who aspire to federal judicial clerkships. One need only pick up almost any volume of the Federal Reporter or the Federal Supplement to find new opinions interpreting and applying the various waivers of sovereign immunity authorizing suit against the federal government, its agencies, or its officers. And, of course, published opinions reflect only a small portion of the filed cases; civil litigation involving the federal government is regular grist for the federal court mill. A federal court law clerk with an understanding of the basic framework of statutes governing litigation with the federal government is likely to find ample occasion for application of that knowledge while serving in chambers.

The History and an Outline of the Course

Although I came to the subject of federal government litigation independently and have designed my own course of study, I since have discovered that

6. Even federal attorneys outside the Department of Justice who do not personally handle or direct litigation must anticipate the possibility that their work will become the subject of a lawsuit and thus must appreciate the special status of the federal government as a civil litigant.

I am not alone and indeed am a relative newcomer to the field.[7] The subject has a rich history in the legal academy and has been taught at several other law schools. David Schwartz and Sidney B. Jacoby, who worked together at the Department of Justice in the 1950s, produced a set of mimeographed materials for such a course. Their materials were cited by the Supreme Court in *Glidden Co. v. Zdanok*[8] and later served as the foundation for their ALI-ABA treatise on federal government litigation.[9] Jacoby subsequently taught a course on litigation with the federal government at Georgetown University (as part of the LL.M. program) and later at Case Western Reserve University and Cleveland State University. Schwartz also taught the course in the Georgetown LL.M. program and, as an adjunct professor, at New York University, Pennsylvania, and San Diego. These two pioneers in the field died within a year of each other in 1989 and 1990.

In recent years, the subject has enjoyed a small revival. Urban A. Lester and Michael F. Noone Jr., who have succeeded to the authorship of the ALI-ABA treatise, have regularly taught the course at Catholic University.[10] Jonathan Siegel has taught a seminar, Suing Government, at George Washington University. Loren Smith and Eric Bruggink, both judges of the U.S. Court of Federal Claims, have taught the course at Georgetown and Alabama respectively. Undoubtedly there are similar courses or seminars at other law schools of which I am unaware.

At Drake University I have now taught the course four times in alternate years. I have been encouraged by the strong student interest in the subject—and this at a small Midwestern law school (about 400 students) located rather far from the national capital and other large federal enclaves. My enrollment for this upper-level elective has averaged above twenty-five. Students' evaluations at the end of the semester have been effusive in praising the inclusion of the subject in the curriculum and anticipating the value, for their future work, of the knowledge and analytical skills they have gained in the course. Even more satisfying, several former students have gone on to positions in the federal government, including the Department of Justice, congressional staffs, and the Judge Advocate General Corps, where they have been able to put the course directly to work in legal practice.

I begin the course with an examination of the federal government as a civil litigator, looking at the roles of the attorney general and the solicitor general, ethical expectations of government lawyers, subject matter jurisdiction and

7. I have worked as a lawyer in all three branches of the federal government—as a legislative assistant to a U.S. senator, as law clerk to a judge on the U.S. Court of Appeals for the Ninth Circuit, and as an appellate attorney with the Civil Division of the U.S. Department of Justice, where I litigated cases touching upon almost all of the general topics that make up the substance of Litigation with the Federal Government. Since I began teaching, civil litigation with the federal government has been one of the primary focuses of my scholarly writing.

8. 370 U.S. 530, 557, 565, 573 (1962).

9. Litigation with the Federal Government (Philadelphia, 1970); John M. Steadman et al., Litigation with the Federal Government, 2d ed. (Philadelphia, 1983).

10. Litigation with the Federal Government, 3d ed. (Philadelphia, 1994).

venue for federal government cases, discovery in government cases, the availability of jury trials in suits against the government, settlement of government cases, and judgments against the federal government.[11]

I continue by raising the principle of sovereign immunity, which is the foundation for the rest of the course. We review the evolution of federal sovereign immunity in Supreme Court decisions, consider critical analysis by scholars of the concept of sovereign immunity, and examine modern judicial construction of waivers of sovereign immunity.

Through cases, statutes, and other materials, we next conduct a survey of certain specific statutory waivers of sovereign immunity, including the Federal Tort Claims Act[12] (its prerequisites, standards, exceptions, and limitations on damages and covered claimants), the Suits in Admiralty Act,[13] Title VII of the Civil Rights Act,[14] the Freedom of Information Act,[15] and the Social Security Act,[16] and we consider agencies with sue-and-be-sued clauses and government corporations. Because any single course can cover only so much, and because of the wide range of federal statutes that today permit prosecution of lawsuits against federal government entities, our survey is necessarily brief. We focus on those particular statutes that, in my judgment, are most important to a generalist understanding of the subject.

We continue the course by looking at the two more general statutory waivers of sovereign immunity: the Tucker Act[17] and the Administrative Procedure Act.[18] The Tucker Act governs various types of nontort monetary claims against the United States, while the APA authorizes claims against the government for relief other than money damages. With respect to the Tucker Act, we study jurisdiction over Tucker Act claims, monetary claims founded upon statutes and regulations, the Indian Tucker Act,[19] contract claims (including the Contract Disputes Act,[20] which supersedes most Tucker Act contract claims), and monetary claims founded upon the Constitution, including takings claims under the Fifth Amendment. Because the APA is covered in detail in Administrative Law, my course offers but a short overview of it. This is followed by a more detailed examination of the relationship and overlap between the Tucker Act and the APA and the consequent implications for choice of forum. (APA claims are brought in district court, while Tucker Act claims for more than $10,000 are reserved to the Court of Federal Claims.)

11. I will happily provide a set of the materials I have prepared for this course to anyone interested; indeed, I plan to publish the materials soon.
12. 28 U.S.C. §§ 2671–2680.
13. 46 U.S.C. App. §§ 741–743.
14. 42 U.S.C. § 2000e-16.
15. 5 U.S.C. § 552.
16. 42 U.S.C. § 405.
17. 28 U.S.C. §§ 1346(a)(2), 1491.
18. 5 U.S.C. §§ 701–706.
19. 28 U.S.C. § 1505.
20. 41 U.S.C. §§ 605–612.

As time allows, we may also consider suits brought against individual officers of the federal government, for both equitable relief and damages, including an examination of official immunity; the restrictive rules for binding the federal government, including such matters as equitable estoppel and collateral estoppel; and the United States as a plaintiff in civil litigation, including the power to sue, application of statutes of limitations to the federal government, and the availability of counterclaims in response to governmental lawsuits.

I typically conclude the course with the subject of attorney's fees. We briefly examine certain statutory limitations on the fees that a private attorney may charge a client who prevails against the government. In greater depth, we study statutes that permit the shifting of legal fees by an award of attorney's fees against the federal government, including Title VII of the Civil Rights Act,[21] the Freedom of Information Act,[22] and the Equal Access to Justice Act.[23]

Objectives for the Course

Equipping Students with Practical Knowledge and Skills

First, in Litigation with the Federal Government, students learn about the special role of the United States as a civil litigant, thereby being introduced to essential information and core concepts for federal government lawyers and those representing parties against the federal government. As the Supreme Court said fifty years ago, "It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability . . . ."[24] Yet, far too often, attorneys representing clients against the government fail to heed—or even recognize—this classic proverb of federal government litigation. As Justice Holmes admonished, "Men must turn square corners when they deal with the Government."[25] But it is impossible to turn squarely unless one learns where those corners are.

In my course, therefore, we give appropriate time and attention to the practical aspects of federal government civil litigation, such as the organization of the Department of Justice as the nation's litigator, including the delegation of litigation authority and the decision-making process within the department; discovery involving the federal government, including special governmental immunities and the availability and advisability of the Freedom of Information Act as an alternative to ordinary court-based discovery; the prerequisites to suit under such waivers of sovereign immunity as the Federal Tort Claims Act; and special judicial forums with exclusive jurisdiction over certain claims, such as that of the Court of Federal Claims over monetary claims above $10,000 against the federal government under the Tucker Act.

21. 42 U.S.C. § 2000e-5(k).

22. 5 U.S.C. § 552(a)(4)(E).

23. 28 U.S.C. § 2412.

24. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).

25. Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920).

As but one detailed example, we devote several days to study of the general centralization of litigation authority for the federal government within the Department of Justice. As Susan M. Olson explains, federal statutory law "makes the Justice Department the gatekeeper to the courts for federal officials and agencies."[26] In contrast with the ordinary attorney-client relationship, the Department of Justice not only represents agency clients in court but possesses independent authority to decline to file suit, to refuse to defend against an action, and to compromise claims. In this way, "the situation deviates from the private lawyer-client relationship because the agency is not free to fire the lawyer and hire another one who will present its views the way it wants them presented. The agencies are thus 'captive clients.'"[27] In class, we explore the public policy pros (including greater efficiency, uniformity of legal position within the federal government, priority setting, expertise, and objectivity) and cons (including unnecessary duplication of work performed by agency attorneys, greater substantive knowledge of regulatory law within the agency, and delays while cases are referred outside the agency for litigation) of centralizing litigating authority within the Department of Justice.

In addition, we explore in the context of actual cases the practical implications of reserving litigation decision-making power to the attorney general and her subordinate officials. I include the case of *United States v. Walcott*,[28] which illustrates how the failure of an attorney for a private client to appreciate the Department of Justice's control of litigation may harm the client. In *Walcott*, the United States filed suit against a woman who had guaranteed a Small Business Administration loan for her husband, who had defaulted on the loan and whom she subsequently divorced. While the litigation was pending, the woman's attorney reached a settlement agreement with representatives of the SBA and paid the agreed amount to the SBA. But the assistant U.S. attorney (as a member of the Department of Justice) handling the lawsuit was not informed of the purported settlement and (of course) did not sign off on it. So the United States asserted that the SBA representatives lacked authority to speak for the government and that the settlement agreement therefore was void.[29] The district court estopped the government from repudiating the settlement.[30] But the Court of Appeals for the Eleventh Circuit reversed, holding that, while the government may have treated the guarantor in a "shabby" fashion, the governing statutes explicitly vested exclusive authority to settle the suit in the attorney general.[31] The court quoted the Supreme Court for the proposition that anyone entering into an agreement with the govern-

26. Challenges to the Gatekeeper: The Debate over Federal Litigating Authority, 68 Judicature 71, 72 (1984).

27. *Id.* at 73.

28. 972 F.2d 323 (11th Cir. 1992).

29. *Id.* at 324–25.

30. *Id.* at 325.

31. *Id.* at 327–28.

ment "takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."[32]

After reading *Walcott*, students become pointedly aware why it is vitally important for those handling lawsuits involving the federal government to fully understand their opponent in litigation—the Department of Justice—and its authority in litigation and settlement. When they join the profession, they should not make the error of assuming that the federal government is just like any other litigant in terms of its amenability to suit, its status in court proceedings, or its liability for alleged wrongdoing.

As with any complex subject, the diligent student in Litigation with the Federal Government enjoys the satisfaction of gaining expertise, seeing the patterns and interrelationships among various discrete statutes, and understanding how these theories are made concrete in presenting and defending a federal government lawsuit. At the very least, I hope and believe that introducing students to the core concepts that are common currency among practitioners in this area of law will make it less likely that these students will repeat the attorney mistakes they have observed in the cases we study and thus will better represent their clients.

Exploring Sovereign Immunity in a Democratic Society

Second, as a theoretical objective related to the practical purpose I have discussed, we ask in this course *why* the federal government is treated differently in court from other litigants. By looking at the concept of sovereign immunity and the circumstances under which the federal government has consented to suit against itself, we explore and critique the legitimacy of governmental immunity in a democratic society and the proper role of courts in resolving policy implications raised in suits against the federal government. We learn much about a system of government by examining when and how that government responds (or fails to respond) to injuries inflicted by its agents or activities upon its own citizens.

The concept of sovereign immunity underlies and permeates the entire course. It lies in the background of every court decision we study and every statute we explore. Even when the government has waived sovereign immunity through legislation, the doctrine influences the manner in which the courts interpret and apply such statutes.

I devote one major segment of the course to the basic questions. May the sovereign government be sued without its consent? Why, or why not? What justification is there for holding the government immune from suit? Should the government be treated differently from any other, ordinary litigant in federal court? Is sovereign immunity an archaic remnant from the era of monarchy and the autocratic view that the king could do no wrong? Can the concept be defended in the context of a republican democracy? If yes, how? Are there any exceptions to immunity? What are they, and can they be justified? How should the doctrine of sovereign immunity influence the basic

32. *Id.* at 325–26 (quoting Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947)).

approach or attitude of courts toward a statute purportedly authorizing government liability in a particular context? Should it be construed in the same manner as any other statute, or interpreted strictly and narrowly?

In my course, students review the development of an American concept of federal sovereign immunity in a series of landmark Supreme Court decisions. Included in this series is the doctrinally important and historically interesting case of *United States v. Lee*,[33] which tells the story of the seizure of the Arlington estate of Confederate General Robert E. Lee by federal forces during the Civil War and the establishment of a military cemetery on the site. In a closely divided (5-4) decision, with sharp disagreement among the justices over the scope and the very legitimacy of sovereign immunity in a republic, the Court permitted the suit to go forward against the military officers occupying the land and ordered restoration of the property to Lee's son—although the United States subsequently purchased it (and, of course, it remains a national cemetery today).[34]

Next this segment of the course encourages students to critically analyze the concept of sovereign immunity through scholarly writings attacking and defending its place in the American legal system. As a taste of that debate, Kenneth Culp Davis characterizes the concept as a medieval holdover from the English monarchy and says that the "strongest support for sovereign immunity is provided by that four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia."[35] He contends that the doctrine of sovereign immunity is unnecessary as a "judicial tool," because we can trust the courts to refrain from interfering in crucial governmental activities, such as the execution of foreign affairs and military policies, by limiting themselves to matters appropriate for judicial determination and within the competence of the courts.[36] In response, Harold J. Krent contends: "Much of sovereign immunity . . . derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule."[37] He explains that, by making the sovereign amenable to suit only when it has consented by statute, society entrusts Congress as the representative of the people with determining the appropriate circumstances under which public concerns must bow to private complaints.[38]

Students discover the continuing vitality of sovereign immunity, because the doctrine influences the approach of the courts even on those occasions when Congress has consented to suit. Although the doctrine itself has not been questioned by any member of the Supreme Court in recent years,

33. 106 U.S. 196 (1882).

34. See generally Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 Colum. L. Rev. 1612, 1634–36 (1997); Enoch Aquila Chase, The Arlington Case, 15 Va. L. Rev. 207 (1929).

35. Sovereign Immunity Must Go, 22 Admin. L. Rev. 383, 384 (1970).

36. *Id.* at 395, 405.

37. Reconceptualizing Sovereign Immunity, 45 Vand. L. Rev. 1529, 1530 (1992).

38. *Id.* at 1529–33.

conflicting attitudes toward the concept are revealed by contrasting standards of statutory construction. For example, in *Library of Congress v. Shaw*, the Court strictly construed the amenability to suit of the United States under Title VII of the Civil Rights Act of 1964 and refused to hold the government responsible for prejudgment interest on attorney's fees—even though private defendants were so liable and Title VII defined the liability of the United States to be "the same as a private person."[39] Stating that waivers of sovereign immunity are to be strictly construed in favor of the sovereign, the Court demanded that Congress affirmatively and separately declare liability for interest before such will be held available against the federal government.[40] By contrast, in *Irwin v. Department of Veterans Affairs*, the Court held that the limitations period on claims against the United States arising under that same statute—Title VII—need not be strictly enforced; the Court held the Title VII limitations period is subject to equitable tolling, just as with claims against private parties.[41] A concurring opinion objected to equitable tolling against the federal government, citing long-standing precedents establishing that conditions on waivers of sovereign immunity—specifically including statutes of limitations—must be strictly observed.[42] The majority opinion simply responded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver."[43]

Thus, in *Shaw*, the Supreme Court held that the government was not liable for an award of interest (absent an express statutory provision) under a general waiver of sovereign immunity, even if a private person would be so liable. But then, in *Irwin*, the Court held that a limitations period was subject to equitable tolling (even in the absence of an express statutory provision), because equitable tolling would be available in cases involving private parties.

Students must consider whether these two decisions can be reconciled and must articulate the somewhat inconsistent canons of statutory construction that describe each result. This introduces a question that must be asked repeatedly throughout the course, and asked about every federal statute consenting to suit against the United States: When a statutory waiver of sovereign immunity does exist, how should the courts approach questions of the scope of the waiver or the breadth of exceptions to the waiver? In cases of doubt or ambiguity, does the government always win based upon a doctrine of strict construction of waivers of sovereign immunity? In sum, in every case

39. 478 U.S. 310, 314–20 (1986) (quoting 42 U.S.C. § 2000e-5(k)).

40. *Id.* at 317–19. Subsequently, in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 2000e-5(k)), Congress expressly waived the sovereign immunity of the federal government to allow awards of prejudgment interest in Title VII cases, thereby overruling *Library of Congress v. Shaw* in the limited context of that statutory cause of action. But the "no-interest" rule continues to preclude an award of prejudgment interest or other compensation for delay under other statutes.

41. 498 U.S. 89, 93–96 (1990).

42. *Id.* at 97–100 (White, J., concurring in part and concurring in the judgment).

43. *Id.* at 95.

involving a suit against the federal government, even when a statutory right of action has been enacted, the persistent concept of sovereign immunity always lingers in the background.

Embarking on an Expedition in Statutory Interpretation

Third, the entire course is an exercise in applied statutory interpretation. Precisely because the federal government may not be sued without its express stâtutory consent, every such suit turns upon the parameters of the particular statutory waiver. Students study statutory interpretation at both the microlevel (case by case, statute by statute) and the macrolevel (the interlocking and overlapping network of separate statutes governing federal government litigation).

Introduction to Theories of Statutory Interpretation

In the process of studying court decisions that parse the language and define the objectives of statutes authorizing suit against the United States, students are introduced to various theories of statutory interpretation—textualism, legislative intent, dynamic construction, and others—in action.

For example, students are assigned the case of *Pierce v. Underwood*,[44] perhaps the single most important Supreme Court decision on awards of attorney's fees against the United States. Beyond the substantive legal issues, the case has additional importance and value: William N. Eskridge Jr. has identified the majority opinion in *Underwood* as a "notable example of the new textualism" approach to statutory interpretation, under which the Supreme Court is more willing to find a statutory plain meaning and less willing to consider legislative history.[45] And *Underwood* presents opposing views through the contrasting words of leading antagonists in this theoretical debate—a majority opinion by Justice Scalia and a concurring opinion by Justice Brennan.

The heart of the Equal Access to Justice Act—the statute at issue in *Underwood*—is the provision for a mandatory award of attorney's fees unless the "position of the United States was substantially justified."[46] On the basis of a close textual analysis, reference to dictionary definitions, and the guidance provided by the meaning attached to similar language in other codified sources of law, Scalia concluded that the understanding "most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in the substance or in the main'—that is, justified to a degree that could satisfy a reasonable person."[47] At the same time, Scalia pointedly rejected a legislative committee report, which had endorsed a "more than mere reasonableness" test, as neither a legitimate interpretation of what the statute meant nor an authoritative expression of what the Congress intended.[48]

44. 487 U.S. 552 (1988).

45. The New Textualism, 37 UCLA L. Rev. 621, 657–58 (1990).

46. 28 U.S.C. § 2412(d)(1)(A).

47. *Pierce*, 487 U.S. at 565.

48. *Id.* at 565–67.

By contrast, Brennan in his concurrence argued that the "reasonable basis" test formulated by the majority "is inherently no more precise than the statutory language."[49] Significantly, he relied heavily on evidence from the legislative history to indicate that Congress intended a more exacting standard to be applied to the government's conduct. For these reasons, Brennan concluded that the majority's "journey from 'substantially justified' to 'reasonable basis both in law and fact' to 'the test of reasonableness'" was not true to Congress's intent.[50]

In sum, the *Underwood* case sharply delineates the ongoing debate about the objectivity and validity of a plain-meaning jurisprudence, as well as the value or legitimacy of legislative history in statutory interpretation.

In the course, students also encounter at least one case study of the recently formulated theory of "dynamic statutory interpretation," which is a description of or prescription for judicial construction of statutes in light of changing or unanticipated circumstances. As sketched by Eskridge, statutory interpretation is "dynamic" in practice because "the meaning of a statute is not fixed until it is applied to concrete circumstances" and because "the gaps and ambiguities" in a statute "proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute."[51] Moreover, Eskridge argues that a dynamic approach to establishing statutory meaning is justifiable and politically healthy, for it allows the interpreter to "reestablish the productivity of law" by conforming a statute to contemporary expectations, social practices, and public values and to pragmatically consider the consequences of different interpretive choices.[52]

In many respects, the Supreme Court's 1950 decision in *Feres v. United States*,[53] which restricts eligibility to seek relief under the Federal Tort Claims Act, fits that dynamic model. The FTCA by its own terms excludes no one—"natural or artificial, citizen or alien"—from obtaining redress for tortious wrongdoing by the United States.[54] Notwithstanding the breadth of the statute and the absence of any exclusionary language, the *Feres* Court was certain that Congress could not have intended to permit members of the armed forces, on active duty, to recover for injuries suffered incident to service: "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negli-

49. *Id.* at 576.

50. *Id.* at 578.

51. William N. Eskridge Jr., Dynamic Statutory Interpretation 9–10 (Cambridge, Mass., 1994); see also Guido Calabresi, A Common Law for the Age of Statutes 2 (Cambridge, Mass., 1982).

52. Eskridge, *supra* note 51, at 175–76, 201–02. John Copeland Nagle asserts that Eskridge largely defines dynamic statutory interpretation "not by what it is, but by what it is not." Newt Gingrich, Dynamic Statutory Interpreter, 143 U. Pa. L. Rev. 2209, 2215 (1995). Dynamic statutory interpretation is *not* "originalist" in nature and eschews textualism, intentionalism, and purposivism in ascribing meaning to statutes. *Id.*

53. 340 U.S. 135 (1950).

54. 1 Lester S. Jayson & Robert C. Longstreth, Handling Federal Tort Claims § 5.01, at 5-2 (New York, 1994).

gence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command."[55]

Speaking almost fifty years ago, the *Feres* Court was probably correct in divining the mood of the times, confirming the political and societal deference of that era toward military demands and the military command structure, and recognizing that Congress very likely would have excepted military personnel from the statute, at least in part and under at least some circumstances, had it anticipated the eventuality of such claims. As Lester Jayson and Robert Longstreth, authors of the leading treatise on the Federal Tort Claims Act, observe:

> Since the turn of the century, most tort remedies against employers for work-related injuries have been eliminated, with an administrative compensation scheme substituted in their place . . . . It would certainly be strange to conclude that Congress intended that servicemen, virtually alone among American workers, be given free rein to sue their employer.[56]

Nevertheless, in carving out a statutory exclusion by judicial implication and thereby displacing legislative deliberation, the Court fomented a continuing series of controversies concerning the reach and application, as well as the legitimacy, of the so-called *Feres* doctrine. As recently as 1987, in *United States v. Johnson*,[57] the Supreme Court was obliged to consider whether this judicially created exclusion barred military personnel from recovering under the FTCA for injuries caused by the negligence, not of those in the military hierarchy, but of civilian employees of the federal government. The majority of the Court answered yes, thereby substantially extending the scope of the *Feres* doctrine.[58] Yet Justice Scalia in dissent described the confusion, uncertainties, unfairness, and anomalous results wrought by the *Feres* doctrine—how other persons are permitted to recover under the FTCA for wronging by the military, while the serviceman is left without a remedy when injured under identical circumstances; how jointly responsible third parties can implead the United States for injuries to a private party or even a federal civilian employee, but not when a serviceman is injured, et cetera.[59]

While the Supreme Court has affirmed the continued validity of the *Feres* doctrine, its contours and underlying rationale remain in a state of confusion. In the end, however well the *Feres* Court may have identified the social and legal expectations of the period and however accurately it may have divined unstated congressional intent, one cannot help but wonder whether the problem of military service injuries would have been better suited to and its resolution more carefully calibrated by a legislative forum. The case invites students to consider both the legal and practical consequences of alternative institutions—particularly the judicial and the legislative branches—for resolving different types of problems.

55. *Feres*, 340 U.S. at 146.

56. 1 Jayson & Longstreth, *supra* note 54, § 5A.05, at 5A-49.

57. 481 U.S. 681 (1987).

58. *Id.* at 686–92.

59. *Id.* at 702.

Unfolding (and Unraveling) a Tapestry of Statutes

In addition to studying statutory interpretation in the context of discrete problems with particular statutes in individual cases, Litigation with the Federal Government allows students to see how dozens of different statutes separately enacted form an interlocking network occupying an entire field of law, even though the fit between statutes may sometimes be inexact, leaving gaps or confusing overlap. Statutory waivers of sovereign immunity enacted piecemeal by Congress over the course of more than a century nevertheless fit together into a reasonably well-integrated pattern of causes of action covering most subjects of dispute between the government and its citizens.

Congress often has contributed to this integration, intentionally or unintentionally, by limiting the sweep of one statute to avoid conflict with another. The Tucker Act authorizes money claims against the federal government for "cases not sounding in tort."[60] When the FTCA was subsequently enacted, it filled an empty niche, and it has operated independently from the Tucker Act in most circumstances. Similarly, by its terms, the Administrative Procedure Act excludes actions for "money damages,"[61] thereby directing most money claimants to frame an action under other statutes designed for money claims, such as the Tucker Act and the FTCA.

Unfortunately, that particular design has become somewhat disordered. In *Bowen v. Massachusetts*,[62] the Supreme Court confronted the problem of distinguishing between a proper claim under the APA for specific relief (routed to the federal district courts) and a Tucker Act claim for money damages (falling within the exclusive jurisdiction of the Court of Federal Claims). Because the plaintiff state in that case sought monetary reimbursement for participation in a federal welfare program, the United States contended that the state's complaint should be characterized as a statutory monetary claim under the Tucker Act. The government urged the Court to draw a bright line between money and nonmoney claims—and thus a clear jurisdictional line between the U.S. district court and the Court of Federal Claims. Section 702 of the APA does explicitly exclude actions seeking "money damages"; and the legislative history indicates that Congress intended to regularize the "patchwork" of doctrine in the area of sovereign immunity[63] and thereby establish the APA and the Tucker Act as complementary but separate, and not overlapping and conflicting, statutes.[64] Instead, the Court accepted the state's argument that, when money is "the very thing" to which a party is entitled, by statutory entitlement or otherwise, that money may be claimed in an action for specific relief and does not fall within the APA's exclusion of claims for compensatory "damages."[65]

60. 28 U.S.C. §§ 1346(a)(2), 1491a(1).

61. 5 U.S.C. § 702.

62. 487 U.S. 879 (1988).

63. Massachusetts v. Departmental Grants Appeals Bd., 815 F.2d 778, 782–83 & n.3 (1st Cir. 1987) (discussing the legislative history of the 1976 amendments to the APA).

64. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6131.

65. *Bowen*, 487 U.S. at 891–901.

In Litigation with the Federal Government, students come to appreciate the consequence of such a decision for unified treatment of money claims against the federal government and the opportunity for forum shopping afforded to litigants. Indeed, after a signal of distress from the lower courts about the breadth of this decision, the Supreme Court began just this year to trim back the sails on artful pleading of claims for money as requests for specific relief under the APA. In *Department of the Army v. Blue Fox, Inc.*,[66] a subcontractor on a federal project who had not been paid by the prime contractor attempted to impose an "equitable lien" upon funds held by the United States, asserting that the federal government had wrongly failed to ensure that the prime contractor posted a payment bond. The Supreme Court refused to sanction this clever attempt to dress an unauthorized bid for money damages in the clothing of an action under the APA for equitable relief, although it nonetheless reaffirmed *Bowen v. Massachusetts*.[67]

Of course, the existence of the problem flows from the very creation of specialized forums with exclusive jurisdiction over certain types of claims, an important issue in itself. Forum shopping is possible only when different forums are available. In the end, students are prompted to ask whether litigating about where to litigate, particularly when both forums are federal courts, advances the goals of efficiency or fairness.[68]

Introducing Students to Attorney's Fee Shifting

Fourth, as I teach it, Litigation with the Federal Government includes a study of attorney's fee awards in general and against the federal government in particular—a subject of vital importance in the practice of law today, but one not often covered elsewhere in the law school curriculum. "To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases."[69] Yet the majority of law students graduate with little exposure to attorney's fee shifting and minimal awareness that the so-called American Rule (that each party bears its own legal fees) has been eroded by a multitude of exceptions.

I begin this section of the course by introducing students to "the vast body of jurisprudence which has sprung up in the crowded vineyard where Congress has planted a proliferous array of fee-shifting statutes."[70] To fully understand the law of attorney's fee awards against the federal government, one first must understand the basic principles for awards of attorney's fees in general. So we start with fundamentals of fee shifting that have crossover application to nonfederal government cases.[71] Is there a statutory or common law *exception to*

66. 119 S. Ct. 687 (1999).

67. *Id.* at 692.

68. See *Bowen*, 487 U.S. at 930 (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law.").

69. Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).

70. United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 15 (1st Cir. 1988).

71. On the fundamentals of fee shifting, see generally Gregory C. Sisk, A Primer on Awards of Attorney's Fees Against the Federal Government, 25 Ariz. St. L.J. 733, 740–65, 768–69 (1993).

the American Rule that authorizes an award of fees? What are the *standards of eligibility* for fees, in terms of success in the litigation or the nature of the petitioner? If the fee claimant is eligible for a fee, is he, she, or it also *entitled* to a fee? That is, are there additional *standards for entitlement,* such as showing that there is a public benefit to the litigation or that the opposing party acted unreasonably? What is the *measure of an award* of attorney's fees? Hours spent multiplied by hourly rate (the "lodestar")? May an attorney obtain an enhancement of the basic lodestar fee based upon the quality of work, the contingent nature of the case, or a legal specialty? Should an award be adjusted to reflect the degree of success on the merits? How does a party apply for and obtain a fee award—what are the rules governing *timing and procedure* for making a fee application?

Then we turn to the specialized question of holding the sovereign liable for the fees of its opponents in litigation. Over the past twenty-five years, the federal government has gradually lowered the shield of sovereign immunity and made itself increasingly amenable to awards of attorney's fees to those who succeed in litigation against it. Congress began cautiously, waiving federal sovereign immunity for attorney's fees only in selected statutes designed to protect fundamental rights, as illustrated by the 1972 addition of language making the U.S. government subject to the fee-shifting provision in Title VII of the Civil Rights Act of 1964.[72] As time passed, Congress further enlarged the federal government's exposure to fee liability by extending fee-shifting provisions in other statutes to the United States, including other civil rights statutes and environmental statutes.[73] At the same time, Congress created statutory causes of action unique to the federal government, such as the Freedom of Information Act, that carried their own provisions for awards of attorney's fees.[74] The trend against immunity from fee awards reached its crescendo with the enactment of the Equal Access to Justice Act, which puts the government on equal footing with private defendants in terms of fee shifting and additionally imposes fee liability on the government whenever its position in the dispute was not substantially justified.

But because of the particular requirements of certain statutes and because even the broad waiver of immunity in the EAJA places special limitations on that new basis for fee shifting, the federal government cannot be regarded as just another litigant in this area of the law any more than elsewhere. Moreover, while Congress has exposed the government to liability under many circumstances, the doctrine of sovereign immunity lingers in the form of narrow rules of statutory construction that favor the government in the application of fee award provisions. Accordingly, the subject of awards of attorney's fees against the federal government continues to deserve special attention and separate treatment.

72. 42 U.S.C. § 2000e-5(k).

73. See, e.g., Fair Housing Act, 42 U.S.C. § 3613(c)(2); Clean Water Act, 33 U.S.C. §§ 1365(d), 1369(b)(3); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f).

74. 5 U.S.C. § 552(a)(4)(E).

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Because it is the quintessential repeat player in federal litigation, and because its litigation strategy generally is coordinated by the Department of Justice across the entire range of government cases, the federal government exerts a powerful influence on the federal courts. Moreover, "court cases involving the United States typically involve the most consequential issues for people's lives"[75]—through claims involving personal injury; civil rights; welfare; Social Security; health, safety, and environmental regulation; immigration; governmental expropriation of property; and contractual obligations. David Schwartz and Sidney B. Jacoby, the pioneers in this field, wrote almost forty years ago:

> Those who deal with the Government can do so capably only with some knowledge of the available remedies both by and against the Government, and with some understanding of the possible untoward consequences if the parties fall out and require the intervention of courts to settle their differences .... Moreover, litigation with the Government, whether studied or practiced, soon leads to the realization that the degree to which a state provides that justice be done in the settlement of the civil and even the petty commercial disputes between citizen and government is one of the indicia of the ethical character of that government.[76]

Accordingly, any student of federal litigation or of our system of government should develop a critical understanding of the unique principles and statutes that govern when the federal sovereign becomes a party to a civil action.

75. Zorn, *supra* note 1, at 2.

76. Government Litigation: Cases and Notes (Fairfax, 1963), *quoted in* Lester & Noone, *supra* note 10, at ix–x.