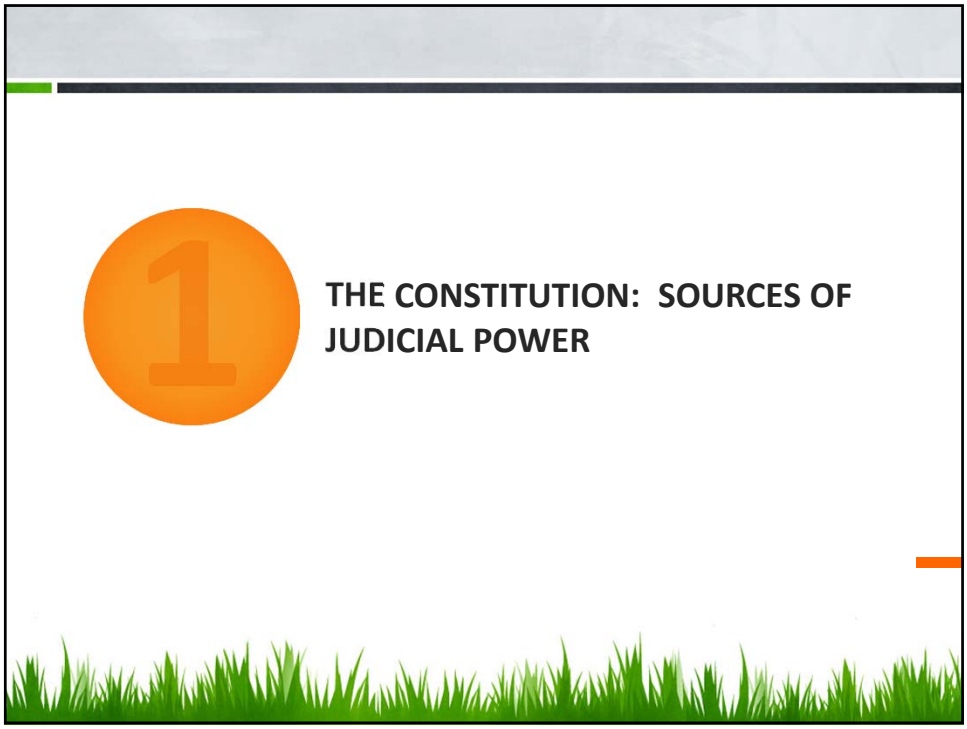
Judge Francis M. Allegra
United States Court of Federal Claims
Washington, D.C.

Taking on the Feds:
Issues, Cases and Defenses in Proceedings Against the United States

Our Agenda

1. Specialty Courts
2. Sovereign Immunity
3. Some Critical Statutes

Question session at the end – focusing on practice issues.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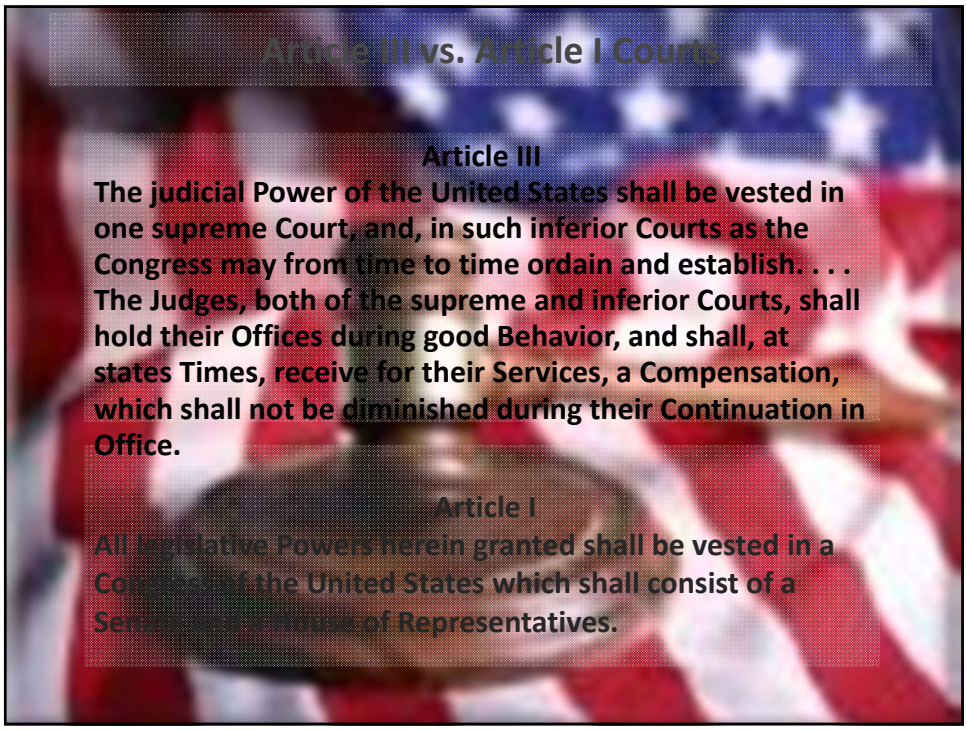
THE CONSTITUTION: SOURCES OF JUDICIAL POWER


Article III vs. Article I Courts
Article III
The judicial Power of the United States shall be vested in one supreme Court, and, in such inferior Courts as the Congress may from time to time ordain and establish. . . . The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at states Times, receive for their Services, a Compensation, which shall not be diminished during their Continuation in Office.
Article I
All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives.

Northern Pipeline Construction Co. v. Marathon Pipeline, 458 U.S. 50 (1982).

- Chapter 11 reorganization – suit by Northern Pipeline against Marathon (private dispute).
- Marathon claims that the Bankruptcy Reform Act of 1978 is unconstitutional because it conferred Article III judicial powers on judges who lack Article III protections.
- Bankruptcy judges could do most anything under the Bankruptcy Reform Act.

Marathon Pipeline

- Bankruptcy judges did not have the protections associated with Article III judges.
- Did this type of action need to be adjudicated by an Article III judge?
- Thee situations in which legislative courts may be employed:
  - Territorial courts
  - Courts-martial
  - Cases involving public rights

Characteristics of Article I Courts

- Creatures entirely of statute.
- With the exception of territorial courts, generally limited to lawsuits against Federal Government – public rights doctrine.
- Tend to be specialized.
- Can present opportunities in terms of litigating tactics – forum considerations

2 Sovereign Immunity

The concept, waivers of sovereign immunity, waiver statutes . . . .

Definition of Sovereign Immunity

Sovereign Immunity: "The Immunity of the Government from Suit Without its Express Consent"

Murray's Lessee v. Hoboken Land and Improvement Co. (1856)

- Ejectment action in which both parties claim title under Samuel Swartwout.
- "It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just."
- "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . But which congress may or may not bring with the cognizance of the courts of the United States, as it may deem proper."

United States v. Lee (1882)

- Dispute over property seized by the United States from the from the Lee family.
- Plaintiffs sued the government officers who were custodians of property, not the United States.
- Concept of sovereign immunity is too well established to disturb.
- But, sovereign immunity did not extend to officers of the United States.

Malone v. Bowdoin (1962)

- Ejectment action brought against Forest Service Officer to recover land.
- Supreme Court explicitly overrules *Lee* to the extent it provides for waiver of sovereign immunity.
- Douglas dissents – last time a Supreme Court justice has questioned sovereign immunity.
- Recognizes that sovereign immunity does not apply:
  - Where agent is acting *ultra vires.*
  - Where agent is acting in an unconstitutional fashion.

Library of Congress v. Shaw (1986)

- Availability of interest on award of attorney's fees against United States in Title VII action.
- "In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, and not enlarge the waiver beyond what the language requires."
- When in doubt, it's out.

3 SOME CRITICAL STATUTES

Big and Little Tucker Acts, 28 U.S.C. 1500, 28 USC 1295, APA v. Tucker Act

Big and Little Tucker Acts

- 28 U.S.C. 1491(a)(1): Big: "The United States Court of Federal Claims shall have jurisdiction to render judgment against any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, . . . in cases not sounding in tort."
- 28 U.S.C. 1346(a)(2): Little: Concurrent jurisdiction between Court of Federal Claims and district courts over claims not exceeding $10,000.

A Little History

1855 -- Founding

1866 -- Judgment Authority

1887 - Tucker Act

1982 — Federal Courts Improvement Act of 1982

Court of Federal Claims

- Article I Court.
- 16 judges, each appointed by the President and confirmed by the Senate.
- Based in Washington, D.C., but, by statute, obliged to conduct trial proceedings throughout the United States.
- Rules of the Court of Federal Claims closely track the Federal Rules of Civil Procedure.
- Technologically advanced.

28 U.S.C. 1500 – The "Federal Malpractice Statute"

- "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time of the cause of action, alleged in such suit or process arose was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

Section 1500

- Easy case – file a complaint in the district court on Monday and then file the same complaint in the CFC on Tuesday.
- But, what if the district court action seeks injunctive relief and the CFC action seeks only monetary relief?
  - *Tohono O'Odham v. United States* (2011) – same claim if same operative facts, even if no overlap in remedy.

Section 1500

- But, what if the action is filed in the CFC first and then filed later in the district court? Pending?
- *Tecon Engineers, Inc. v. United States* (1965) – later-filed district court action does not prime the CFC of jurisdiction – "order-of-filing rule"
- Holding in *Tecon* is under assault – but the Federal Circuit has refused to reconsider that ruling.
- So why is this the "Federal malpractice statute"?

Federal Circuit: Appellate Jurisdiction

- 28 U.S.C. 1295(a)(2)-(3)
  - (a)(2) – district court cases involving Little Tucker Act
  - (a)(3) – final decisions of the CFC
- 28 U.S.C. 1292(d)(2) – certification – interlocutory
- 28 U.S.C. 1292(d)(4) – special rule involving transfer under 28 U.S.C. 1631.

28 USC 1631 and the Federal Circuit

- 28 USC 1631: "Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."
- 28 USC 1292(d)(4)(A) – Federal Circuit has jurisdiction over an appeal from an interlocutory order of a district court granting or denying a motion to transfer an action to the CFC.

The Tucker Act

- "Claim" -- must be founded upon the Constitution, a statute or regulation or an express or implied contract.
- Tucker Act – both jurisdictional statute and a waiver of sovereign immunity.
- How do we know that a claim is "founded upon" an appropriate source of law?

Eastport Steamship v. United States (1967)

- Twin claims involving sale of refurbished ship
- Two types of claims under the Tucker Act:
  - Money-mandating – claim based on "money-mandating" provision.
  - Illegal exaction – "The Government has the citizen's money in its pocket."
- "Money-mandating" – "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."

Claims under the Tucker Act

- Constitutional Claims
  - Illegal exaction
  - Money-mandating
  - Physical and regulatory takings actions
- Statutory Claims
  - Military and civil pay cases
  - Tribal trust/treaty cases
- Contract Claims

Contract Claims

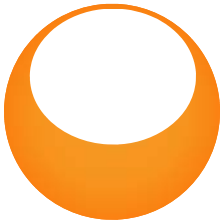
- Tucker Act contract claims – programmatic claims exclusive jurisdiction if claim is over $10,000.
- Government procurement –
  - Contract formation – bid protests – 28 USC 1491(b).
  - Contract administration – Contract Disputes Act – 28 USC 1491(a)(2).

Other Statutes Conferring Jurisdiction on the CFC

- Patent cases where the United States is the alleged infringer – 28 USC 1498
- Vaccine Act – 42 USC 300aa-1 et seq.
- Congressional Reference Cases – 28 USC 1492.
- Cases over which the CFC does not have jurisdiction:
  - Federal Tort Claims Act.
  - Social security/disability disputes.
  - Tax collection-related matters.

Large, Dollar-Intensive Cases

- **Legislative Breach Contract Cases**
- **Spent Nuclear Fuel Cases**
- **Tribal Trust Cases**
- **Thimerosal Vaccine Litigation**
- **Bid Protest -- GSA Computer**



INTERACTION BETWEEN TUCKER ACT AND OTHER FEDERAL JURISDICTIONAL STATUTES

When to invoke the Tucker Act and when to invoke the APA and when to invoke both.

Relationship Between the APA and the Tucker Act

- Why is this important? The Tucker Act shuffle: the wetlands example.
- APA – another general waiver of sovereign immunity – often used with 28 USC 1331.
- APA requirements:
  - 5 USC 702 – does not allow for the recovery of "money damages".
  - 5 USC 704 – no review under the APA where there is another adequate remedy in court.

Bowen v. Massachusetts (1988)

- Facts – dispute involving expense incurred by state under the Medicaid program.
- Massachusetts files complaint in district court under APA and 1331 seeking an injunction requiring the Secretary of HHS to provide reimbursement.
- Supreme Court holds that district court had jurisdiction over this type of suit – and creates major confusion in the process.

Bowen v. Massachusetts (1988)

- Section 702
  - Majority: "Money damages" is a term of art to be distinguished from specific relief that involves the recovery of money.
  - Dissent: Specific relief for payment of money is an oxymoron.
- Section 704
  - Majority: No adequate remedy because the CFC does not have injunctive authority.
  - Dissent: Money judgment provides adequate remedy; collateral estoppel provides prospective relief.

Bowen v. Massachusetts: Planning Potential

- Why go to the district court?
  - Avoid adverse precedent.
  - Relief dominated by need for injunction.
  - Create intercircuit conflict?
- Scalia dissent – only the judgment of the court, not its rationale will survive.
  - 28 USC 1631 and the Federal Circuit.
  - Suburban Mortgage – monetary judgment is adequate.
  - *Great-West Life & Annuity Corp. v. Knudson* (2002).