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Litigation with the Federal Government

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A book review by **Alex Kozinski,**
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It is by now old news that we are in the midst of a litigation explosion; those who do not live with it daily are frequently enough reminded of it by those who do. For reasons that are not entirely clear, people seem more willing than ever before to sue each other, their institutions, and their governments; governments for their part increasingly sue their citizens. The first edition of *Litigation with the Federal Government,* published in 1970, reported that the federal government was party to approximately 20,000 civil suits filed annually in the district courts. By 1981, the authors report in the current edition, the number of cases filed annually involving the federal government has more than tripled; the Government was defendant in over 35,000 and plaintiff in over 31,000 civil actions in the district courts.

The increase in the number of suits involving the Government has not, unfortunately, rendered such litigation any less complex or difficult. On the contrary, each new statute passed to liberalize access to the courts to sue the federal government seems to raise new questions and complexities. The simple truth is that litigating against the United States involves significant risks and hurdles that do not exist in suits between private parties. The need for expertise is great, yet experts in government litigation are few and far between. In the Claims Court, where the Government is always the defendant, one can regularly observe the practitioner who prosecutes an occasional suit against the Government on the naive assumption that he is facing an opponent like any other. Quite often, lawyer — and client — are in for a rude awakening when they learn one or more of the ways in which the United States differs from the typical party opponent; frequently, the discovery comes too late to avoid the consequences.

Part of the reason why the Government is such a formidable adversary is the ancient doctrine of sovereign immunity, still very much alive today. The doctrine prohibits suits against the Government except where explicit statutory consent has been given. While consent has been given in numerous statutes, the breadth and conditions of the consent turn upon the specific words, which are often vague. Consequently, much time and effort is spent litigating whether a particular jurisdictional provision waives sovereign immunity for a particular type of suit. Even the Supreme Court occasionally has some doubts, and changes its mind. *Compare United States v. Testan,* 424 U.S. 392, 398 (1976) *with United States v. Mitchell,* 103 S. Ct. 2961, 2967 (1983). Some other factors responsible for the unique characteristics of litigation against the Government include: the authority, organization, and chain of command of government agents and attorneys; the incentives, disincentives, and policies governing settlement of lawsuits; the existence of privileges, not available to other litigants, against the disclosure of information; and the special remedies for fraud available to the United States.

Litigation with the Federal Government is successful in bringing each of these subjects — and many more — into sharp focus. In fewer than 400 crisply written pages, the authors provide a virtual blueprint of the jurisdictional and procedural aspects of litigating against the United States. The work gives the attorney not accustomed to litigating against the Government a realistic feel for the process, the nature of his opponent, and the obstacles he is likely to face. The volume also offers much to the experienced private litigator and even to government counsel. Because it is so thorough, the book can serve as a ready checklist to ensure that important issues are not overlooked or forgotten.

Litigation with the Federal Government is also a useful reference work, with well organized chapter and section headings and a workable index. Generously sprinkled with citations to selected texts, monographs, and periodicals, some of them not well known, it is an excellent vehicle for further research on those topics that must, by the very nature of the work, be treated in an abbreviated fashion.

The first five chapters provide some of the most helpful and least readily available — information for the novice to federal government litigation. The first chapter explains the organization and chains of authority of government attorneys, principally within the Department of Justice. On a related topic, chapter II deals with the Government's procedures for settling cases, giving a frank assessment of both the applicable processes and the relevant incentives and disincentives, which, incidentally, differ significantly from those applicable to private litigants. To the attorney who hopes to resolve his claim short of trial, these two chapters provide invaluable guidance. Of equal interest is chapter III, which examines the availability of attorney's fees in government litigation. Chapters IV and V, dealing with contingent fees, lobbying, and conflict of interest, explain how to avoid many pitfalls that quickly get clients, and even their lawyers, into serious trouble when dealing with the federal government.

The next five chapters take up problems relating to the prosecution of nontort claims for money damages against the United States. Chapter VI offers a particularly timely discussion of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which reorganized the Court of Claims and the Court of Customs and Patent Appeals into two new courts, the United States Claims Court and the United States Court of Appeals for the Federal Circuit. History and precedent in the old courts is discussed, as are procedures and jurisdiction of the new courts. Succeeding chapters give a comprehensive introduction to the kaleidoscopic nuances of the Tucker Act, 28 U.S.C. § 1491(a), the principal jurisdictional statute for the Court of Claims and now for the Claims Court. Contract litigation gets a chapter of its own, Chapter IX. Chapter X, dealing with the very important — and often overlooked — function and authority of the Comptroller General and the General Accounting Office in resolving claims against the United States, rounds out this discussion. The Tucker Act's relation to tort claims is considered in Chapter XI. Chapter XII covers the law governing all dealings with the federal government, including the federal common law.

In Chapter XIII, the reader is introduced to another world, the Federal Tort Claims Act ("FTCA"). Like the Tucker Act, the FTCA has spawned an endless stream of questions that have delighted theoreticians but given litigants and their attorneys nothing but headaches. What, for example, constitutes a "discretionary" governmental function, for which the Government may not be liable under the FTCA, and how does it differ from the "operational level" or "ministerial" action, for which the Government is liable? Who is a servant of the Government and by what law is the relationship defined? What is the status of the government corporation with independent authority to sue and be sued? The authors raise each of these questions — and many more — and then give answers or point the reader to other sources where answers, or at least more questions, may be found.

Three important chapters, XIV, XV, and XVI, deal with some procedural matters that raise unique issues in government litigation. While third party practice and discovery are superficially similar in government litigation and in normal federal practice, there are, in fact, very significant differences of which the litigant must be aware. The discussion in Chapter XV of the relationship between discovery and the Freedom of Information Act, 5 U.S.C. § 5527, the state secrets privilege, the secrecy of grand jury minutes, the executive or deliberative privilege, and the privilege for government informants, provides a terse, yet complete, summary of the ways in which a claimant against the Government may be prevented from obtaining information from his opponent that would unquestionably be available in litigation between private parties.

The last two chapters, discussing the Government's remedies for fraud and the special characteristics of the federal government as a litigant, provide particularly useful information. Chapter XVII begins by noting that "[c]ivil fraud on the Government occupies a special place in government litigation." The reader is alerted that "[a]side from the action for fraud and the defense of fraud available to every litigant, the Government has several remedies for fraud, offensive and defensive, which are its alone." So it does, and parties dealing with the Government should be aware of the False Claims Act, 31 U.S.C. §§3729-3731; the Federal Property and Administrative Services Act, 40 U.S.C. § 489 (b); the provision that declares fraudulent claims forfeited, 28 U.S.C. § 2514; the new contract remedy provided by the Contract Disputes Act for claims fraudulently made, 41 U.S.C. §§ 601, 604; and, of course, criminal sanctions for fraud on the Government. 18 U.S.C. §§ 286, 287.

The final chapter outlines many significant advantages the Government enjoys in litigation, advantages that cause the defeat of numerous claims every year. For example, unlike other parties, the United States cannot be bound by the acts of its agents unless they are specifically authorized to act on its behalf. Similarly, estoppel does not normally run against the United States. Moreover, when sued, the Government may counterclaim without limitation, except for time limitations as to some claims. On the other hand, the ability to counterclaim against the Government is severely limited in a variety of ways. These and other similar doctrines are discussed in sufficient detail so the uninitiated reader can quickly become familiar with them.

Although there is no substitute for experience, *Litigation with the Federal Government* comes close. This is due, no doubt, to the remarkable makeup of the three men who authored the work. Among them, they have just short of a century of legal experience in government, private practice, and academia. Dean John M. Steadman, of the Georgetown University Law Center, is a former Air Force General Counsel who has served in the Department of Justice and in private practice. David Schwartz held a number of significant positions in the United States Department of Justice and then in private practice. Most recently, he served for 15 years as trial judge of the United States Court of Claims and is now a senior judge, not in active service, of the United States Claims Court, having returned to private practice. Sydney B. Jacoby is a professor emeritus of Case Western Reserve University Law School and has also served in the Department of Justice.

In their preface, the authors note that they have sought to "capture in a concise and readable volume the fundamental considerations involved in litigation with the Federal Government." They have succeeded. *Litigation with the Federal Government* will have a secure place as an introductory volume for lawyers new to government litigation, as a handy reference work for the more experienced practitioner, and as a desk book for at least one federal judge.