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A TIMELY DEBATE

*Eric G. Bruggink**

There is a constant tension between, on the one hand, the desire to make the government legally accountable in the same manner as other entities and, on the other hand, the need to permit the government a free range of operation in performing sovereign tasks. It is thus virtually inevitable that conflict develops along that fault line between government action and the interest of individuals. With respect to government impact on property rights, the line runs primarily through the Takings Clause of the Fifth Amendment: "[N]or shall private property be taken for public use without just compensation."¹ In addition, however, the debate rages in the area of enforcing contracts with the government. What types of defenses are unique to the government? What are the full implications of the principle of sovereign immunity? The importance of this subject matter is undeniable. Not just in terms of dollars, which can be enormous; the above questions go to the heart of the on-going competition between the proper role of the government and the retained rights of the individual.

Two devices have evolved in an attempt to mediate between

* Judge, United States Court of Federal Claims. The views in this Article are personal and do not purport to represent those of the court.

1. U.S. CONST. amend. V.

individuals and the federal government in both its sovereign and non-sovereign capacity. The first is the jurisprudence which has evolved around § 1331, federal question jurisdiction,² overlaid with the presumptive accountability of the federal government to answer in court for administrative action through the Administrative Procedures Act ("APA").³ The primary trial fora are the district courts, and the primary remedies are equitable in nature.⁴

The other model is embodied in the Tucker Act, which represents the limited waiver of sovereign immunity that exposes the federal government to money damages.⁵ Unlike the jurisprudence which has evolved in the context of § 1331 and the APA, when litigating under the Tucker Act, it is assumed that no liability can attach absent a specific waiver.⁶ The primary trial forum for hearing such monetary claims against the federal government is the Court of Federal Claims.⁷

It is apparent that the Supreme Court is not going to provide a road map to what the Tucker Act means. The Court also has not clearly defined the parameters of the constitutional or even pre-constitutional considerations that inform Tucker Act jurisprudence. These considerations include: sovereign immunity, the unmistakability doctrine, the sovereign acts defense, what constitutes property or use under the Fifth Amendment,⁸ and when contract rights vest. The Court has not given much guidance in sorting out the overlapping jurisdictions of the Court of Federal Claims ("CFC") and the district courts either. When the Supreme Court deals with the Tucker Act—an infrequent event—the results are often "problematic," in that they are rarely a unified expression of a coherent theory.

The *United States v. Winstar*⁹ opinion and, indirectly, the

2. 28 U.S.C. § 1331 (1994).

3. 5 U.S.C. § 702 (1994).

4. *Id.*

5. 28 U.S.C. § 1491 (1994).

6. *Id.* § 1491(a)(1).

7. *Id.* But see 28 U.S.C. § 1358 (1994) (giving district courts original jurisdiction for proceedings to condemn real estate for the use of the U.S. government or its agents).

8. U.S. CONST. amend. V.

9. 518 U.S. 839 (1996).

*Eastern Enterprises v. Apfel*¹⁰ case are examples of this problematic guidance.¹¹ *Eastern Enterprises* can be loosely classified as a "takings" case.¹² *Winstar* involves a contract.¹³ They both, however, deal with the question of Congress' power to affect vested rights through "retroactive" legislation.¹⁴ They both thus explore the line between Congress' power to regulate under the Commerce Clause and the government's liability for breaches of contract rights or for the failure to compensate takings under the Fifth Amendment.¹⁵ Finally, they share common issues of jurisdiction and remedy, i.e., the scope of the Tucker Act, the type of remedies it affords, and the related question of which court or courts are the proper fora for resolving disputes.¹⁶ In part, what these cases highlight is the growing mismatch between, on the one hand, the reality of how disputes arise, in terms of types of causes of action and remedies, and, on the other hand, the structure Congress has put in place to resolve such disputes.

What follows in the succeeding pages are fourteen articles which were initially presented at the annual spring symposium of the United States Court of Federal Claims in April 1999. The purpose of the symposium was to explore the meaning and implications of these two recent decisions. The title of the program was, "When Does Retroactivity Cross the Line? *Winstar*, *Eastern Enterprises* and Beyond." Together, these articles form a written dialogue among leading academicians and practitioners.

We were fortunate to have as presenters a group of people who are well qualified to speak on the interplay between retroactivity, the Tucker Act, contracts and takings. The presenters are loosely grouped around two issues: the effect of *Eastern Enterprises* on takings jurisprudence and the effect of *Winstar* on contract jurisprudence. The articles produced a number of provocative new ideas, including some novel efforts at a comprehensive theory of takings law. They were exchanged prior to

10. 524 U.S. 498 (1998).

11. Another is *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

12. *Eastern Enters.*, 524 U.S. at 498.

13. *Winstar*, 518 U.S. at 839.

14. See *supra* notes 11 & 12.

15. See *id.*

16. See *id.*

the symposium. This lead to some lively debate, some of which has been introduced after the fact into these articles.