The Federal Courthouse Door

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A Federal Jurisdiction Guide

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Carolina Academic Press
Durham, North Carolina

ISBN 0-89089-222-9
LCCN 2001092054

Carolina Academic Press

700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919)493-5668
www.cap-press.com

Printed in the United States of America

To Julie, Jenny, Kristina and James

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Foreword

So many litigants and their lawyers have discovered, sometimes too late, what this book amply shows. The "door to the federal courthouse" is jealously guarded. If you seek to enter without knowing and fulfilling the constittuional and statutory requirements, the door will slam in your face. You will then go down the street to state court, where you should have gone to begin with.

The door swings both ways, however. Once in federal court, you and your lawsuit can be ejected back onto the pavement from whence you came. Whatever you might have gained in that federal forum will be worthless to you. As the Fifth Circuit said in *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981), "Where a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."

In this book, Professor George has given you a thorough, well-researched and clear guide to how the courthouse door works. Other books will tell you what to do when you are safely inside, and how the federal court exercises its supreme but limited power.

This duality — supremacy and limitation — undergirds federal court subject matter jurisdiction. The Framers of the constitution stepped beyond the old Articles of Confederation to create a strong national government. The constitution they gave us begins "We the People" and not "We the States." The people were establishing a central government, and the constitution's command is absolute:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be

> bound thereby, and Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

That is the "supremacy clause." However, in Article III, the Framers told us that the "judicial power" would extend only to certain types of "cases" and "controversies." The federal courts were not to trespass on powers assigned to other branches, nor upon those reserved to the states and the people.

These Article III limitations by no means insulated official misconduct from judicial review. Madison made that clear in Federalist No. 45, referring to the "impious doctrine of the old world, that the people were made for kings, not kings for the people." He said that the new constitution would provide ample checks on official action.

The Court's decision in *Marbury v. Madison*, 1 Cranch 137 (1803), is a magnificent example of the supremacy/limitation duality in action. Marbury brought a mandamus proceeding against Madison, seeking to get his judicial commission. President Adams had signed a number of such commissions in the closing days of his administration, appointing loyal Federalists to the bench. These "midnight judges" were one means to forestall the invasion of Jeffersonian Republicans into positions of power.

Chief Justice Marshall was himself an Adams appointee, and was named in part to head off Jefferson's expressed desire to see his friend Spencer Roane become Chief Justice. This may be why Marshall went out of his way to say that Marbury was entitled to have his commission delivered to him—or at any rate that is what President Jefferson thought Marshall was doing.

But despite Marshall's view of the merits, he held that the Supreme Court could not issue a mandamus, because the constitution forbade it from doing so. The Congressional statute that purported to give such power was unconstitutional, and the Court had the power and duty to strike it down.

The supremacy clause gave plenary power to turn back a Congressional enactment. The vice of that enactment was that it tried to slip the bonds that tied federal courts to their limited Article III powers. Supremacy validates limitation.

From *Marbury* on, Chief Justice Marshall's leadership built the structure of federal judicial power. But that structure had major faults, principally its failure to recognize and enforce individual federal rights. In

the Civil War's wake, Congress greatly expanded federal court responsibility for defending rights, and particularly the newly minted rights in the 13th, 14th and 15th amendments. This legislative effort highlights the importance of statutes in the federal jurisdictional scheme. To continue with Professor George's apt metaphor, you might read Article III of the constitution and think you can get in the courthouse door. You cannot, however, unless Congress legislated to confer the power that Article III authorizes. Article III itself recognizes that Congress has the power to create the lower federal courts. Of course, there are constitutional limits on Congress's power to control the decisionmaking of federal courts, and you will find that lore in this book as well.

In the 20th Century, largely by Supreme Court decision though with Congressional enactment as well, we have seen more important work on this courthouse door. The Court has refined and expanded concepts such as mootness, ripeness, political question, and standing as limits on federal judicial action. These concepts are rooted in the constitutional limitation to "cases" and "controversies," but the courts are also applying them in a discretionary way as "prudential" limits. See, e.g., Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970), reprinted in THE VIETNAM WAR AND INTERNATIONAL LAW, Vol. 3 (Princeton Univ. Press, R. Falk, ed. 1972).

The Supreme Court often speaks of these rules as "threshold" requirements. The metaphor of the door becomes more complicated. Not only might this door slam shut or fail to open, but once it is open the litigant and her lawyer must jump high enough to get over the "threshold."

Also in the 20th Century, the Court and Congress have analyzed and applied rules about ejecting litigants who have wrongly gained entry, or whose cases turn out to be better suited for consideration elsewhere. An example or two of each kind of case will make the point clear.

In *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the wife of a worker who was killed on the job sued the corporate wrongdoer in federal court, alleging that she was a citizen of Iowa and the corporation's principal place of business was in Nebraska. The corporation admitted in its answer that it was a citizen of Nebraska. After three days of trial, the corporation "discovered"and "revealed"—the

quotations are mine—that it was indeed a citizen of Iowa. Therefore, there was no diversity of citizenship. The Supreme Court held that the case should have been tossed out then and there. All the later proceedings were void.

The same result obtained in *Howery v. Allstate Insurance Co.*, 2001 WL 203072 (5th Cir. 2001). Mr. Howery, an Allstate policyholder, sued in state court, alleging that Allstate wrongfully refused to pay his fire insurance claim. Howery's tenth amended complaint alleged that Allstate's destruction of some records related to the claim violated Federal Trade Commission regulations. Although the case was nearing trial and had been pending in state court for two years, Allstate removed it to federal court. In that court, Allstate won on its claim of arson.

The Fifth Circuit held that Allstate had no basis for asserting federal question jurisdiction, and had presented no evidence that it was of diverse citizenship from Howery. The court therefore vacated the judgment and sent the case back for remand to state court.

In *Owen Equipment* and *Allstate*, a belated finding that the case should not have been let through the door resulted in an order that put the litigants back on the sidewalk.

The second kind of case arises from the Supreme Court's expansion of federal court power to hear entire "cases" when state law claims are entwined with the federal law claims that give the federal court its basic jurisdiction. In discussing this "pendent jurisdiction," the Supreme Court held in *United MineWorkers v. Gibbs*, 383 U.S. 715 (1966), that the federal court could try and enter judgment upon state law claims even when the federal claims had been dismissed or settled. However, the Court stressed that the federal court has the option of dismissing the case. That is, although the case was properly in federal court, events after filing might permit the judge to open that door and toss the litigants out. When Congress codified pendent jurisdiction, in 28 U.S.C. §1367, it retained the federal court's discretionary power. The same fate might await those whose case becomes moot during the litigation process.

In short, watch out for that door, paying particular attentions to its threshold, hinges and latch. Once you are safely inside, there is a richness of constitutional power that when properly wielded is the envy of the world. The theme and theory of that power provides one of the

most effective mechanisms yet devised for protection of rights and redress of wrongs.

But first, as Professor George will show you, you have to get in the door and stay inside.

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April 2001

Acknowledgments

A number of people had roles in creating this book. Law librarians Susan Phillips, Anna Teller, Tom DeGuzman and Wendy Law made this book possible by their unfailing ability to respond to my endless requests. Huge contributions also came from student assistants Gail Lane, Tylene DiSciullo, Richard Kilgore, Stephanie Marshall, Kevin Herd, Kim Sampson, Andrea Scurry, Sharon Johnson, Tommy Johnson, Tracye McGaughy, and Carl Mangine. Valuable readings and feedback came from colleagues Stephen Alton, Rachel Arnow-Richman, Susan Ayers, and Frank Elliott, along with outside help from United States District Judge Terry Means, United States Magistrate Judge Charles Bleil and attorneys Syd Beckman, Robert Clary, Don Herrmann, Scott McDonald and Brian Stagner. Thanks also go to Larry Cotten and Francisco Hernandez for the opportunity to advise foreign sovereigns, and to Randall Schmidt for experience in the Court of Federal Claims. Faculty secretaries Arlene Lewis and Joy Gallagher oversaw the copying and distribution to readers and publishers. At the crucial manuscript distribution stage, I benefitted from advice and encouragement from Jon Olson at West Group, Michael Tigar at American University, Glen Weissenberger at the University of Cincinnati, Dean Richard Gershon at Texas Wesleyan, and John Oakley at Cal-Davis (whose important work on the ALI's federal jurisdiction project will require revisions here). The manuscript then benefitted from the expert editorial and design work of Kasia Krzysztoforska and other people at Carolina Academic Press.

Special mention is appropriate for my three earliest mentors in federal jurisdiction: Professor Orley Lilly, Bob Santee, and Judge Dale Cook. Their instruction gave me a framework for continued learning.

All these people did a wonderful job. Because no amount of scrutiny will find every mistake, any lingering errors are mine.

How To Use This Book

This book is an introduction, checklist, and quick reference for initiating federal litigation, or for defendants, ending it early. In the broadest sense, it attempts to outline federal jurisdiction in every aspect and at every level. It states a concise rule where possible, citing both statutory and case authority. Where concise rules are not possible, it provides a brief explanation of ambiguities and opposing views, again with statutory and case authority. It answers many immediate questions about getting into federal court, such as particulars about pleading a federal question or alleging the basis for diversity jurisdiction.

This book is not for federal litigation in general. It does not, for example, address the procedure that accompanies these jurisdictional principles, such as guidance for filing an application for writ of habeas corpus challenging a state conviction, or seeking judicial review of an administrative agency order. Nor does it address litigation once you're inside the door, at least not until the next level of jurisdiction for appeal. But it does provide quick and indexed answers for many basic jurisdictional questions, as well as textual discussion for the thornier issues of federal jurisdiction that lack quick answers.

The format is meant to be the simplest possible for an extremely complicated area. The first four chapters identify the basic layers of federal jurisdiction — the Constitution, federal district courts, federal circuit courts, and the Supreme Court. The fifth and sixth chapters address the sometimes confusing categories of sovereign immunity and refraining (or abstaining) from jurisdiction. Within each category, the outline attempts to identify and briefly address all pertinent topics. This layered format results in slight repetition, necessary to categorizing all issues within each jurisdictional section and subsection. These repeated topics are cross-referenced to their respective primary discussions.

Appendices provide additional material, including a federal venue section that seemed better left out of the primary discussion.

A. The Advocate's Approach to Federal Jurisdiction

Litigating in federal court—or avoiding it—requires a threshold understanding of federal jurisdiction. In particular, you must know:

- How to establish jurisdiction
- How to attack jurisdiction, and
- How to defend an attack on jurisdiction

To do this, you must know:

- **What controls jurisdiction:** There are two primary components—Article III and the jurisdictional statutes implementing Article III's basic provisions (see Chapter One).
- **Who controls jurisdiction:** That is, within that constitutional framework, who decides Article III's application? There are two answers:
    - Congress, and its power to amend the jurisdictional statutes (see Chapter One, Section III); and
    - Federal courts, and their power to interpret and review three distinct issues:
        - the Constitution and its guidelines for federal jurisdiction (see "Justiciability," Chapter One, Section IV);
        - what Congress meant in a specific jurisdictional statute (discussed throughout this text), and
        - whether Congress acted constitutionally with that jurisdictional statute (also *passim*)
- **The four categories of federal jurisdiction** (Chapter Two)
    - Federal question
    - Diversity of citizenship
    - Supplemental claims, and
    - Removal from state court
- **Original and appellate jurisdiction** of the circuit courts of appeals and the Supreme Court (Chapters Three and Four)
- **Exceptions to federal jurisdiction**, such as
    - Sovereign immunities that nullify jurisdiction (Chapter Five); and

- Grounds for declining otherwise valid jurisdiction (Chapter Six).

B. Basic Concepts

1. Jurisdiction

Jurisdiction in this text means subject matter jurisdiction — the court's competence to hear and decide a case. In particular, it means *federal* subject matter jurisdiction, that is, the federal court's authority to hear a particular case under the grants of power from the Constitution and Congress. This meaning is distinguished from many other meanings of jurisdiction, such as *personal* jurisdiction (the right of a state or nation to exercise judicial power over a defendant, an involuntary plaintiff, or class member). The discussion focuses on the traditional subject matter elements of categories of cases and amount in controversy, as well as the notion of federalism that is essential to federal jurisdiction in the United States. This text does not consider federal jurisdiction at large, which would include legislative and executive jurisdiction

2. Federalism

Federalism is the concept of a limited federal government uniting separate semi-sovereign States. It includes two distinct balances of power:

a. **The balance between the three federal branches**, that is, the legislative, the judicial, and the executive. Each branch has powers expressly provided in the Constitution, which also sets up a system of checks and balances to prevent any one branch from dominating.

b. **The balance between the State and Federal systems** that serves as a limit on the power of both systems. This concept has three components:

(1) ***Limited federal power in general:*** The three federal branches each have finite powers enumerated in or inferable from the Constitution; they may not exceed those powers.

(2) ***The Supremacy Clause***, which provides that federal law is the supreme law of the land. This applies to laws emanating from the legislature, by executive order, or as declared by the federal courts.

(3) ***The Tenth Amendment***, which provides that all powers not expressly given to the federal government in the Constitution are reserved to the States or the people.

Although the Constitution provides the initial statement of federalism, there is an ongoing need to refine and adjust the balance. This task falls to the Supreme Court, and is seen for Article III purposes in such cases as *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

3. The Concept of Limited Jurisdiction

Because the United States is a federal system of defined and limited powers (with unspecified powers retained by the people and the member states), the federal court system necessarily has limited power, and thus limited jurisdiction. These limits are stated in two sources—Article III of the Constitution, and in federal statutes. Understanding the range of federal jurisdiction requires an understanding of the complex relationship between Article III's jurisdictional categories and Congress's power to manipulate those categories by statute. This in turn is modified by the federal courts' power to interpret both Article III and the jurisdictional statutes.

4. Four Principles of Our Federal Judicial System

Along with the basic concepts of federalism and limited jurisdiction, there are four other elementary points for federal subject matter jurisdiction:

a. **The presumption against jurisdiction:** Federal courts presumptively lack subject matter jurisdiction, *Turner v. Bank of North America*, 4 U.S. [4 Dall.] 8, 10 (1799), *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646 (5th Cir. 1988), which gives plaintiff (or the removing defendant) the burden of pleading jurisdictional facts. *Bingham v. Cabot*, 3 U.S. [3 Dall.] 382 (1798); *Conlon v. Heckler,* 719 F.2d 788 (5th Cir. 1983).

b. **Jurisdiction to determine jurisdiction:** A federal court has, as presumably all courts do, inherent power to determine its own jurisdiction. Thus, the court has the power at the outset of the case to decide whether it may hear the case. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

c. **The priority of subject matter jurisdiction:** Because a court should not act where it has no power (and because such actions are subsequently void), courts are inclined to decide challenges to subject matter jurisdiction before addressing other issues in the case, especially before addressing the merits. But are federal courts *required* to resolve subject

matter jurisdiction questions first? The answer remains unclear, even with two recent cases facing that question head on. In *Steel Co. v. Citizens for a Better Environment*, Justice Scalia acknowledged that a court may (1) sometimes resolve a merits question before resolving a question of statutory standing, and (2) may decide a statutory standing question before resolving an Article III standing question, but could not address a merits question before an Article III standing question. 523 U.S. 83, 93-102 (1998) (especially p. 97, n. 2).[1] *Steel* thus refutes the practice of "hypothetical jurisdiction," in which a court faced with an easy dismissal on the merits and a difficult challenge to subject matter jurisdiction will "assume" jurisdiction to resolve the easy question—dismissing the case on the merits. Although the doctrine of hypothetical jurisdiction is limited to cases where the outcome was unaffected, that is, where the dismissal on the merits was clear and favored the same party as the jurisdictional challenge, *Steel* soundly rejected the practice, equating it to an advisory opinion. Id. at 101.

Steel's firm statement on the priority of subject matter jurisdiction lost ground in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), which reversed the Fifth Circuit's holding that subject matter jurisdiction must be decided before personal jurisdiction in a removed case, 145 F.3d 211 (5th Cir. 1998) (9–7 en banc opinion). The Supreme Court held that although a federal court will customarily resolve questions of subject matter jurisdiction first, it has discretion when faced with a difficult question of subject matter jurisdiction to resolve a comparatively straightforward question of personal jurisdiction that would cause the case to be dismissed. Although *Ruhrgas* does not counter *Steel* (since personal jurisdiction is not a dismissal on the merits), the ruling is certainly inconsistent with *Steel*'s rhetoric favoring the resolution of subject matter jurisdiction questions as a foundation of the court's power to act.

d. No waiver: Subject matter jurisdiction is non-waivable. Not only may the defendant object at any time (although not repeatedly on the same alleged jurisdictional deficiencies), there is a *duty* imposed on all parties and the court to raise the question if it becomes apparent that the court lacks jurisdiction. Rule 12(h)(3). *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). Judgments from a court lacking

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1. For those bothered by this syllogistic flaw, Scalia states that it is "no more illogical than many other 'broken circles' that appear in life and the law." 523 U.S. at 97, n. 2.

subject matter are void. *New York Life Insurance Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996). The parties may not confer subject matter jurisdiction by agreement, *Sosna v. Iowa*, 419 U.S. 393 (1975); by failing to challenge, *Mitchell v. Maurer*, 293 U.S. 237 (1934); or by failing to pursue an interlocutory appeal, *Caterpillar Inc. v. Lewis*, 519 U.S.61, 74 & n.11 (1996); cf. *Able v. Upjohn Co.*, 829 F.2d 1330, 1333-34 (4th Cir. 1987). In *Caterpillar*, however, the Court seemingly defied this principle (that jurisdiction may not be conferred by failing to pursue an interlocutory appeal) by holding that where diversity did not exist at removal but did at trial, the case need not be remanded. See also *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) and *Grubbs v. General Electric Credit Corp*, 405 U.S. 699 (1972). See infra Chapter Two, Section II.A.5 for additional discussion of *Caterpillar*. In another possible deviation, the Seventh Circuit enforced a consent decree over the objections of some class members' attorneys who questioned subject matter jurisdiction in their challenge to the attorney fees award. The court held that even if Article III requirements were not met, "it is unlikely that the settlement could be set aside at this late date." *In re Factor VIII or IX Concentrate Blood Products Litigation*, 159 F.3d 1016, 1018 (7th Cir. 1998).

5. Three Jurisdictional Contrasts

Three jurisdictional opposites must be borne in mind when defining and analyzing subject matter jurisdiction:

a. ***Original* vs. *Appellate* Jurisdiction:** The case must begin in a court or other forum (including nonjudicial tribunals) with original jurisdiction. Cases are reviewed for legal correctness in courts or forums with appellate jurisdiction. State and federal district courts are, for the most part, courts of original jurisdiction, although they have appellate jurisdiction to review (or in some situations, re-litigate) matters from lower forums. State and federal appellate courts and the United States Supreme Court are, for the most part, courts of appellate jurisdiction, although they have original jurisdiction to hear certain cases. For example, state and federal appellate courts may hear mandamus petitions against judges in lower courts. The Supreme Court has original jurisdiction over matters noted in Article III, and as further discussed below.

b. ***Limited* vs. *General* Jurisdiction:** *General* subject matter jurisdiction is the power for a court to hear a broad range of categories of cases; limited subject matter jurisdiction is the converse—with the court's subject matter jurisdiction limited to specific categories of cases.

In the United States, the only courts of general jurisdiction are the states' highest level trial courts and the state appellate courts above them. In most states, the general jurisdiction trial courts are known as *district* courts, although New York calls them "supreme courts" and other states (e.g. California, New Jersey) call them "superior courts." States also have courts of limited jurisdiction, such as probate courts and small claims courts. The important point is that jurisdiction for *all* federal courts (trial and appellate) is *limited* to the nine categories listed in Article III, section 2, as modified by Congress in the Judiciary Act (Title 28, United States Code).

c. ***Concurrent* vs. *Exclusive* Jurisdiction:** Jurisdiction is exclusive when limited to one type of court for a given case; it is concurrent when it shares subject matter jurisdiction with another type of court. This distinction is found:

(1) ***Within the state system***, where the state district court may have exclusive jurisdiction over divorce cases, and concurrent jurisdiction with county courts over commercial cases that fall within an overlapping dollar amount,

(2) ***Within the federal system***, where Congress has authorized exclusive original jurisdiction for the United States Supreme Court over certain matters such as disputes between two or more states, and concurrent original jurisdiction between federal district courts and the Supreme Court over matters such as suits against ambassadors. Federal law also provides for exclusive jurisdiction for certain matters in specific federal courts such as the Court of International Trade, see 28 U.S.C. § 1581.

(3) ***Between the state and federal systems***, where Congress has authorized concurrent jurisdiction for state and federal courts over most federal matters,[2] and exclusive jurisdiction for federal courts over matters such as patent and antitrust disputes.[3] States presump-

2. E.g. *International Association of Entrepreneurs of American v. Angoff*, 58 F.3d 1266 (8th Cir. 1995) (ERISA claims); *Cuervo Resources, Inc. v. Claydesta National Bank*, 876 F.2d 436 (5th Cir. 1989) (Bank Holding Company Act, 12 U.S.C. §§ 1972 et seq.); *Flores v. Edinburg Consolidated Indep. School Dist.*, 741 F.2d 773 (5th Cir. 1984) rehearing denied 747 F.2d 1465 (civil rights claims under 42 U.S.C. § 1983); *Guetersloh v. State*, 930 S.W.2d 284 (Tex. App.-Austin 1996, writ denied) cert. denied 522 U.S. 1110 (1998).

3. E.g. *Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996) (antitrust exclusive in federal court).

tively have concurrent jurisdiction over federal law claims unless Congress explicitly or impliedly designates exclusive jurisdiction in federal courts. *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473 (1981); *Chair King, Inc., v. Houston Cellular Corp*., 131 F.3d 507 (5th Cir. 1997). For a list of current areas within exclusive federal court jurisdiction, see 13 Wright Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE 2d (West 1984) § 3527 nn. 5-22.

(4) ***Concurrent jurisdiction implies two categorically different courts:*** When used in the sense discussed here (that is, Article III subject matter jurisdiction), the term "concurrent jurisdiction" does not refer to shared jurisdiction between two identical courts. Two federal district courts — one in Texas, one in Oklahoma — have the same subject matter jurisdiction under Article III and federal law. Their only distinction is geographic, which raises concerns of personal jurisdiction and venue, but not of subject matter jurisdiction. Thus, when the same dispute is being litigated simultaneously in two federal district courts, there is no concurrent jurisdiction, at least not in the Article III sense. Nonetheless, the term "concurrent jurisdiction" is used to describe duplicative litigation in two federal courts, e.g. *Rutlin v. United States*, 849F. Supp. 34 (E.D. Wis. 1994), but only in the sense that both courts have control over the dispute. (Of course, this begs the question, since Article III is the basis for both courts' control over the dispute.)