



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Memorandum

To: Committee on Judicial Review  
From: Stephanie Tatham, Staff Counsel  
Date: October 10, 2012  
Re: Section 1500 Project Further Revised Draft Recommendation

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The following draft recommendation is based on the revised report prepared by Emily S. Bremer and Jonathan R. Siegel, “The Need to Reform 28 U.S.C. § 1500” and informed by the discussions of the Committee, as well as by informal communications between the staff, the project consultants, and the Department of Justice. This draft is intended to facilitate the Committee’s discussion at its October 17, 2012 public meeting and not to preempt the Committee’s discussion and consideration of the recommendations proposed herein. In keeping with the Conference’s practice, a draft preamble has also been included. The aim of the preamble is to explain the problem the Recommendation is designed to address. The Committee should feel free to revise it as appropriate.

### Draft Preamble

The Administrative Conference of the United States has long had an interest in ensuring appropriate judicial review of Government actions, and in considering related questions regarding jurisdiction and forum. For example, one of the Conference’s seminal recommendations, Recommendation 69-1, “Statutory Reform of the Sovereign Immunity Doctrine,” urged amendment of the Administrative Procedure Act—subsequently enacted by Congress—to waive sovereign immunity and thereby permit citizens “to challenge in courts the legality of acts of governmental administrators.” 1 ACUS 23 (1969). Recommendation 68-7, “Elimination of Jurisdictional Amount Requirement in Judicial Review,” encouraged Congress to revise the general “federal question” provision in Title 28 of the U.S. Code in order to eliminate the jurisdictional-amount requirement for district court actions seeking review of federal administrative actions. 1 ACUS 22 (1968). The Conference has also recommended ways to improve procedures in suits involving the federal government.<sup>1</sup>

Building upon the principles underlying such Recommendations, the Conference addresses another bar to judicial review which deprives some litigants of their rights—28 U.S.C. § 1500 (Section 1500). Section 1500 prohibits consideration by the United States Court of Federal Claims of otherwise cognizable claims while the plaintiff has litigation against the

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<sup>1</sup> E.g., Administrative Conference of the United States, Recommendation 80-5, *Eliminating or Simplifying the “Race to the Courthouse” in Appeals From Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980); Administrative Conference of the United States, Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the United States*, 47 Fed. Reg. 30,706 (June 18, 1982).

United States “pending in any other court” and arising from substantially the same operative facts.<sup>2</sup>

With its origins in the Reconstruction era, the statutory predecessor to Section 1500 arose against the backdrop of a proliferating number of suits, in multiple fora, by residents of the Confederacy who sought compensation from the United States for property (typically, cotton) seized during the Civil War.<sup>3</sup> To curb this duplicative litigation, Congress enacted legislation divesting the Court of Claims (the trial court predecessor to the Court of Federal Claims) of jurisdiction when a plaintiff had a related action against the United States pending in another court. This legislation was reenacted several times, most recently in 1948 as Section 1500 of the Judicial Code, and the provision’s jurisdictional limitation has remained essentially unchanged.<sup>4</sup> Though the “cotton claimants” are long gone, Section 1500’s restrictions on the jurisdiction of the Court of Federal Claims remain.

Application of Section 1500 in the context of modern-day federal court jurisdiction and complex litigation, however, causes serious problems for courts and litigants alike. Plaintiffs confront difficult questions of forum selection and timing when the same set of operative facts arguably give rise to two or more claims against the United States—for which Congress has otherwise waived sovereign immunity—but the Court of Federal Claims has exclusive jurisdiction for one or more claims, and another federal court has exclusive jurisdiction over the other claims. Does a claim sound properly in contract (within the exclusive jurisdiction of the Court of Federal Claims) or in tort (within the exclusive jurisdiction of district courts)? Where the answer is not clear or could be both, the choice of any other court for an initial filing could result in dismissal of a claimant’s subsequent suit in the Court of Federal Claims under Section 1500. When a plaintiff prosecutes an Administrative Procedure Act based challenge to agency action in district court (which must necessarily precede pursuit of any monetary relief in the Court of Federal Claims) appellate proceedings on his or her APA litigation could well carry past the Court of Federal Claims’ six-year statute of limitations. Thus, Section 1500, in conjunction with the statute of limitations, forecloses full recovery in such circumstances and plaintiffs prosecuting meritorious claims in good faith run afoul of its jurisdictional bar.

Section 1500 affects a wide variety of plaintiffs with many different kinds of claims. Federal employees, property owners, businesses, local governments, and Indian tribes may be

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<sup>2</sup> Section 1500 of Title 28 of the United States Code reads in full:

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 when 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.

<sup>3</sup> *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 206 (1993).

<sup>4</sup> *Id.*

affected. Sophisticated litigants and *pro se* plaintiffs, alike, may be presented with intractable jurisdictional conundrums. Examples of the diverse parties and claims affected include:

- A federal employee’s claims under the Equal Pay Act were transferred to and dismissed by the Court of Federal Claims for lack of jurisdiction because the Title VII claims with which the action was filed in district court were considered “pending” under Section 1500, even though the district court already had entered summary judgment on all non-transferred claims.<sup>5</sup>
- Characterizing the result as “neither fair nor rational,” the Court of Federal Claims dismissed a Fifth Amendment-based takings claim filed *pro se* by property owners and that had been transferred from a district court tort action, despite finding that the uncertain legal distinction between tort and takings actions made plaintiffs’ confusion about the appropriate forum “understandable.”<sup>6</sup>
- A government contractor’s bid protest action was rejected by the Court of Federal Claims as jurisdictionally lacking because the plaintiff had previously sued in district court under the Administrative Procedure Act—even though the district court had already dismissed on the ground that the plaintiff’s exclusive remedy was in the Court of Federal Claims.<sup>7</sup>
- A local government sued by the United States over taxation of certain federal office buildings counterclaimed for the taxes it believed it was owed. The counterclaims were transferred to the Court of Federal Claims—and dismissed under Section 1500.<sup>8</sup>
- An Indian tribe suing in the Court of Federal Claims for breach of trust had its claims dismissed under Section 1500 because it had filed a related action in the district court on the same day.<sup>9</sup>

Because of the barrier it imposes on some plaintiffs pursuing cognizable claims against the United States, Section 1500 has been strongly criticized by litigants, courts, and legal scholars as overly harsh, anachronistic or unfair and in need of reform.<sup>10</sup>

On the other hand, some of the aims attributed to Section 1500 have modern relevance. In *United States v. Tohono O’dham Nation*, the Supreme Court held that Section 1500 applies to any claim filed in the CFC that shares substantially the same operative facts as a claim pending

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<sup>5</sup> Griffin v. United States, 590 F.3d 1291 (Fed. Cir. 2009).

<sup>6</sup> Vaizburd v. United States, 46 Fed. Cl. 309, 311-12 (Fed. Cl. 2000).

<sup>7</sup> Vero Technical Support v. United States, 94 Fed. Cl. 784 (Fed. Cl. 2010).

<sup>8</sup> United States v. County of Cook, 170 F.3d 1084, 1091-92 (Fed. Cir. 1994).

<sup>9</sup> Passamaquoddy Tribe v. United States, 82 Fed. Cl. 256 (Fed. Cl. 2008). Notably, if the plaintiff tribe had filed their district court action one day later, it would have been permitted to proceed simultaneously in both the CFC and district court under Federal Circuit precedent. See *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389 (Ct. Cl. 1965).

<sup>10</sup> Emily S. Bremer & Jonathan R. Siegel, *The Need to Reform 28 U.S.C. § 1500* (2012) (report to the Administrative Conference of the U.S.), available at [www.acus.gov](http://www.acus.gov) (collecting criticism of Section 1500).

in another court. The decision thus reversed Federal Circuit precedent that allowed the CFC to retain jurisdiction over a claim under Section 1500 if a plaintiff sought different relief in the CFC than it sought in another forum. This had the effect of expanding the range of cases to which Section 1500 could be found to apply. The Supreme Court faulted the Federal Circuit for saying that it “could not identify ‘any purpose that § 1500 serves today.’” The Court remarked that “the statute’s purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today.”<sup>11</sup>

In *Tohono*, the Supreme Court also observed that “[i]f indeed the statute leads to incomplete relief” or causes undue hardship for plaintiffs, citizens are “free to direct their complaints to Congress.” After careful consideration and consultation over a year and a half period with affected parties, including the Department of Justice, the Conference accepts the Court’s invitation to approach Congress. While Section 1500’s purpose as articulated in *Tohono* has legitimate aspects, the Conference’s research confirms that the statute is an undesirably blunt tool for reducing the duplicative costs of simultaneous litigation. Federal courts have both the authority and the competence to use measures such as stays, transfers, and doctrines of res judicata to prevent double recoveries and ease the burdens of duplicative litigation on the Government without unfairly depriving plaintiffs of the opportunity to pursue all potentially meritorious claims against the United States.<sup>12</sup> Replacing Section 1500 with a context-specific judicial management tool for simultaneous litigation in different fora would also better serve Congress’s various waivers of sovereign immunity and complex jurisdictional scheme.

Accordingly, the Administrative Conference urges Congress to repeal Section 1500 and replace it with a statute that targets the costs of duplicative litigation without causing plaintiffs undue hardship. More specifically, the Conference recommends that Congress amend the Judicial Code by replacing Section 1500’s jurisdictional bar against parallel litigation with a provision that permits plaintiffs to bring congressionally authorized suits arising from the same set of operative facts in the Court of Federal Claims and other federal courts at the same time, but also contains a presumptive stay mechanism to mitigate any burden to the courts or parties from simultaneous litigation.<sup>13</sup>

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<sup>11</sup> *United States v. Tohono O’ dham Nation*, 131 S. Ct. 1723, 1726 (2011).

<sup>12</sup> *E.g.*, 28 U.S.C. § 1631; *see also Court of Federal Claims Technical and Procedural Improvements Act, Hearing on S. 2521 Before the S. Comm. on the Judiciary*, 102nd Cong. 59 (Apr. 29, 1992) (statement of Hon. Loren Smith, Chief Judge, U.S. Claims Court) (observing that repeal of Section 1500 saves “wasteful litigation over non-merits issues” and that the “Court can stay duplicative litigation, if the matter is being addressed in another forum, or proceed with the case, if the matter appears to be stalled in the other forum”).

<sup>13</sup> This position is compatible with that of the Judicial Conference of the United States in 1995, which dropped its historical opposition to the repeal of Section 1500 so long as such repeal was “accompanied by a provision for stay or transfer of duplicative claims.” *Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States* 83 (Sept. 19, 1995).

### **Draft Recommendation**

Congress should repeal 28 U.S.C. § 1500 and replace it with a statutory provision directing courts to apply a default presumption that whenever a civil action is pending in the United States Court of Federal Claims, or on appeal from the Court of Federal Claims, and the plaintiff or his assignee also has pending in any other court a claim against the Government involving substantially the same operative facts, the later filed litigation should be stayed. The legislation should also specify that when such actions are filed on the same day, regardless of the time of day, the claim in the Court of Federal Claims is deemed to have been filed first. The presumption of a stay should apply unless: the parties otherwise agree, the second filed action is an appeal pending in an appellate court, or the stay is not in the interest of justice. Finally, Congress should specify that the legislation applies to all cases pending at the time of adoption.

### **Appendix**

28 U.S.C. Section 1500, amended in accordance with this recommendation, might read as follows:

**Section 1500. Presumption of Stay.** Whenever a civil action is pending in the United States Court of Federal Claims, or on appeal from the Court of Federal Claims, and the plaintiff or his assignee also has pending in any other court (as defined in section 610 of this title) any claim against the United States or an agency or officer thereof involving substantially the same operative facts, the court presiding over the later filed action shall stay the action, in whole or in part. If such actions or appeals were filed on the same day, regardless of the time of day, the United States Court of Federal Claims action shall be deemed to have been filed first. This provision shall not apply if the parties otherwise agree, when the second filed action is an appeal pending in an appellate court, or if the stay is not in the interest of justice. The presumption of a stay shall apply to all cases pending at the time this provision is adopted.