Early in 2011, ACUS's Committee on Judicial Review made 28 U.S.C. § 1500 the first subject of a project to identify "purposeless procedural traps" that "could be easily and non-controversially eliminated or fixed." In the midst of the Committee staff's study of the statute, the Supreme Court decided *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), which (1) recognized section 1500's important purpose in protecting the government from the burden of duplicative litigation, (2) helped clarify the scope and meaning of the statute, and (3) cast doubt on Federal Circuit precedent that interpreted section 1500 in a way that created some procedural complexities. While the Department of Justice would question the Committee's pursuit of the section 1500 project even under ordinary circumstances,[1] the Department has very serious concerns about any effort to recommend the repeal or amendment of section 1500 when the impact of *Tohono* is not yet clear, and the basis for many if not all of the prior complaints about the statute may therefore cease to exist.[2]

The Supreme Court in *Tohono* recognized that section 1500 serves a "significant" and "clear" purpose: "to save the Government from burdens of redundant litigation." *Tohono*, 131 S. Ct. at 1730. Especially in a time of burgeoning court dockets and fiscal restraint, there is no dispute that the cost of duplicative litigation is a burden on the government and a real concern. *See* Further Revised Consultants' Report to ACUS Committee on Judicial Review dated Sept. 19, 2012 ("Committee Report") at 19 ("The costs of such duplicative litigation are a legitimate concern."). Allowing two or more cases based on substantially the same facts to proceed at the same time can result in multiple and conflicting orders governing matters such as the scope of discovery and the availability of privilege, all while doubling the attorney time needed to complete basic case-management tasks and risking the even larger unnecessary expense of multiple trials in different courts. Section 1500 is intended to shield the courts, the Department, and other Executive Branch agencies from these problematic consequences.

In addition to recognizing that section 1500 is not purposeless, *Tohono* fundamentally altered the understanding of how section 1500 operates. The Federal Circuit had previously held that section 1500 permitted two suits based on substantially the same operative facts to proceed simultaneously so long as they sought different relief. The Supreme Court in *Tohono* held to the contrary, explaining that section 1500 bars jurisdiction over a suit in the Court of Federal Claims (CFC), if a suit filed in another court is "based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono*, 131 S. Ct. at 1731. In addition, *Tohono* criticized the judge-made rule first announced in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), which permits a CFC lawsuit to proceed even if the plaintiff has filed a duplicative suit in another court, so long as the CFC suit was filed first. *Tohono*, 131 S. Ct. at 1729–30 (opining that the *Tecon* order-of-filing rule deprives the statute of "meaningful force").

Just a year after the *Tohono* decision, lower courts are only beginning to really focus on what qualifies as "substantially the same operative facts," and further litigation will be necessary

[1] The proposal in Part A of the ACUS Committee Recommendation Memo to effectively repeal section 1500 exceeds—or at a minimum, pushes the limits of—ACUS's statutory mandate. Section 1500 governs the subject-matter jurisdiction of the Court of Federal Claims and does not concern regulation, rulemaking, APA litigation, or other administrative processes. *See* 5 U.S.C. § 591.

[2] The Department intends to seek the views of federally recognized Indian tribes on the proposal to repeal or amend section 1500. Our consideration of any such views could affect the position we articulate if the Committee advances a proposal for consideration by the full membership of ACUS.

to clarify how narrowly (or broadly) the statute actually sweeps. Additionally, the Supreme Court's criticism of the *Tecon* order-of-filing rule suggests that the rule's days are numbered and that its attendant procedural complexities—which the Committee Report cites as a major justification for reform, *see, e.g.*, Committee Report at 20–26—may soon be eliminated. With the existence and extent of any remaining perceived problems with section 1500 still to be determined, it is unwise to proceed with a recommendation to repeal or dramatically rework a statute that has been in force for well over 100 years.

To make the point more concretely, there are four categories of cases that could be affected by section 1500. Only in the final category might section 1500 arguably produce an unfair result by preventing a plaintiff from litigating all of his or her claims against the government to completion.[3] However, this final category now exists only in theory, and even if it did later materialize, it would likely involve only a vanishingly small number of cases.

In the first category are cases where a plaintiff has only one valid claim against the government, but is uncertain how to characterize his or her claim and that characterization is determinative of the court in which the plaintiff should file suit (*e.g.*, a tort in district court versus a taking in the CFC). Even if we take it as true that some plaintiffs might struggle to determine where to file suit, it is not section 1500 but rather Congress's decision to create the CFC—a specialized court with limited jurisdiction—that is responsible for this jurisdictional quandary. The Committee Report concludes that an ACUS recommendation directed at the true source of the perceived problem—the CFC jurisdictional scheme created by Congress—is unlikely to be adopted. Committee Report at 40. For that reason, the report proposes instead to repeal section 1500, thereby freeing plaintiffs from the need to make a determination of where to properly file suit by allowing them to simultaneously file duplicative suits in both the CFC and a district court. *Id*. at 43. But there is no persuasive justification for allowing a plaintiff to impose unnecessary costs on the Federal government (in the form of duplicative suits) so that the plaintiff can avoid having to make a determination about where a suit should properly be filed.

In the second category are instances in which a plaintiff (a) has multiple claims against the government, (b) some of those claims must be filed in the district court and some in the CFC, and (c) under section 1500 as construed by *Tohono*, the two suits with separate claims can proceed simultaneously. *Tohono* held that section 1500 prohibits simultaneous litigation when two claims are based on "substantially the same operative facts." The courts are just beginning to focus on the meaning of that phrase. *See, e.g., Trusted Integration, Inc. v. United States*, 659 F.3d 1159 (Fed. Cir. 2011); *Stockton East Water District v. United States*, 101 Fed. Cl. 352 (2011). Only with additional time will the lower courts have an opportunity to construe and apply the *Tohono* standard, thereby delineating section 1500's scope and making clear the size of this category of cases, which will proceed without being subject to a section 1500 dismissal.

In the third category are cases in which a plaintiff (a) has distinct claims that are viable in both the district court and the CFC, (b) the lawsuits in each court cannot be litigated

[3] The Department believes section 1500 would not operate unfairly even in these circumstances because Congress is entitled to define the scope of the United States' waiver of sovereign immunity. *Tohono*, 131 S. Ct. at 1731 (damages claims against the government "available by grace and not by right"). The premise of the Committee Report and the Recommendation Memo, that plaintiffs should generally be able to pursue all claims they have against the government, turns the doctrine of sovereign immunity on its head.

simultaneously under *Tohono*, but (c) the suits *can* be litigated *sequentially* by a diligent plaintiff acting within the generous six-year statute of limitations. At this point, the Department has no reason to believe that sequential litigation of claims will be impractical in the mine run of cases brought by a diligent plaintiff. Others may disagree and believe that sequential litigation of claims in two courts will for some reason be impossible. But only additional time to monitor post-*Tohono* developments will reveal whether our practice-based expectation, or the view of others, is in fact correct. (No one can be absolutely sure about the viability of sequential litigation until—as seems likely—the *Tecon* order-of-filing rule is discarded. That is so because only if *Tecon* were no longer good law would plaintiffs have every incentive to litigate two separate cases expeditiously because they would have to litigate them sequentially.)

The fourth and final category is only hypothetical at this point. It is identical to category three except that we suppose the two lawsuits, one in the district court and one in the CFC, *cannot* for some reason be litigated sequentially within the six-year statute of limitations. As noted, because the *Tecon* rule does not require plaintiffs to litigate such cases expeditiously, we will only be able to tell whether there are in fact any instances that fall within this category if and when *Tecon* is overruled.

Against this backdrop of dissipating procedural complexity and speculative substantive complaints, it is unjustifiable to proceed now with a recommendation to repeal section 1500 outright or replace it with the ill-defined substitute described in Part A of the Recommendation Memo. The perceived issues with section 1500 simply do not warrant such a drastic recommendation; indeed, our independent review of the cases relied on by the ACUS consultants to define for the Committee the scope of the "problem" with section 1500 indicates that the statute's impact on plaintiffs has been significantly overstated. To be sure, the proposal in Part A does include a vague reference to the desirability of incorporating "appropriate mechanisms (such as stay or transfer)" when effectively repealing section 1500, which is presumably intended to mitigate the cost of allowing duplicative suits in different courts. But stays of proceedings would be an inadequate substitute for the clear line that is now drawn by section 1500. The Department would have to engage in otherwise unnecessary litigation to seek such stays, and our experience suggests that courts will not always grant stays requested to avoid duplicative litigation. Moreover, even when granted, stays may undermine the purpose of statutes of limitations, allowing litigation to occur upon a stale factual record and effectively enlarging the scope of Congress's waiver of sovereign immunity.

That is not to say, however, that the Department objects to *any* near-term efforts to reduce the need for section 1500 dismissals. The penultimate version of the Committee Report acknowledged that section 1500 "rarely ensnares more sophisticated plaintiffs" and is instead a problem primarily for "pro se plaintiffs and plaintiffs represented by counsel unfamiliar" with the statute. Revised Consultants' Report to ACUS Committee on Judicial Review dated Sept. 16, 2011 at 37. That being the case, the Department believes that the proposal in Part B.2 of the Recommendation Memo to improve awareness of section 1500 within the bar and among plaintiffs has merit. In fact, it may be sufficient by itself to address any concerns with section 1500, and it is the only recommendation (if any) that the Committee could justifiably adopt until the effect of *Tohono* on the operation of section 1500 is more certainly known.