Memorandum

To: Committee on Judicial Review
From: Stephanie J. Tatham, Staff Counsel
Date: September 20, 2012
Re: Section 1500 Project Revised Draft Recommendation

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 3, 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.[1]

Building upon the principles underlying such Recommendations, the Conference now 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

[1] *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).

Federal Claims of otherwise cognizable claims while the plaintiff has litigation against the United States "pending in any other court" arising from the same factual predicate.[2]

Tracing its origins to 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.[3] 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. Over the ensuing 100 years 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.[4] Though the "cotton claimants" are long gone, Section 1500's restrictions on Court of Federal Claims' jurisdiction remain.

Application of Section 1500 in the context of modern-day federal court jurisdiction and complex litigation, however, has caused serious problems for courts and litigants alike. Plaintiffs confront difficult questions of forum selection and timing when a single factual predicate arguably gives rise to two 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 another court for an initial filing could result in dismissal of a claimant's subsequent suit in the Court of Federal Claims under Section 1500. What should a plaintiff prosecuting 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) do if appellate proceedings on his or her APA litigation will carry past the Court of Federal Claims' six-year statute of limitation? Section 1500, in conjunction with the statute of limitations, could foreclose full recovery in such circumstances. Plaintiffs prosecuting meritorious claims in good faith may run afoul of Section 1500's 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 affected; sophisticated litigants and *pro se* plaintiffs, as well, may be presented with intractable

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[2] Section 1500 of Title 28 of the United States Code reads in full:

> The [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 another other court any suit or process against the United States or any person who, at the time when the cause of action alleged in this suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

[3] *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 206 (1993).

[4] *Id.*

jurisdictional conundrums under Section 1500. 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 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 district court already had entered summary judgment on all non-transferred claims.[5]
- 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."[6]
- 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.[7]
- 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.[8]
- 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.[9]

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.[10] On the other hand, Section 1500 continues to have modern application. In its 2011 decision in *United States v. Tohono O'dham Nation*, the Supreme Court rebuked the Court of Appeals for the Federal Circuit for finding that it "could not identify 'any purpose that § 1500 serves today.'" The Court held that "the statute's purpose is clear from its origins with the cotton claimants—the need to save

[5] Griffin v. United States, 590 F.3d 1291 (Fed. Cir. 2009).

[6] Vaizburd v. United States, 46 Fed. Cl. 309, 311-12 (Ct. Fed. Cl. 2000).

[7] Vero Technical Support v. United States, 94 Fed. Cl. 784 (Ct. Fed. Cl. 2010).

[8] United States v. County of Cook, 170 F.3d 1084, 1091-92 (Fed. Cir. 1994).

[9] Passamaquoddy Tribe v. United States, 82 Fed. Cl. 256 (Ct. Fed. Cl. 2008). Notably, if the plaintiff tribe had filed their district court action one day later, they would be 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 (1965).

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

the Government from burdens of redundant litigation—and that purpose is no less significant today."[11] After further analysis, however, the Conference believes that the interest of citizens in pursuing the merits of all congressionally authorized actions against the Government outweighs the benefits of Section 1500's jurisdictional impediment. This is particularly true given the authority of courts to employ measures, such as stays, to ease the burdens of duplicative litigation on the Government.[12]

Having accepted the criticisms of Section 1500, the Conference supports its amendment. The Conference recommends that Congress amend the Judicial Code by replacing Section 1500's jurisdictional bar against parallel litigation with a provision that permits prosecution of 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, and also contains a mechanism to mitigate any burden to the court or parties from simultaneous litigation.[13] Pending congressional action, we recommend to the Judiciary such interim actions as set forth in the following recommendation to improve the present situation for plaintiffs and the Government. [14]

Draft Recommendation

Part A. Recommendation to Congress

1. Congress should amend 28 U.S.C. § 1500 by replacing its current text, which prohibits the United States Court of Federal Claims from considering claims arising from the same factual predicate as a suit against the United States pending in another forum, with a provision that permits jurisdiction over such related suits in all congressionally authorized venues, but includes appropriate mechanisms (such as stay or transfer) to alleviate any burden on the court or parties from simultaneous litigation.

[11] United States v. Tohono O'dham Nation, 131 S. Ct. 1723, 1726 (2011).

[12] *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").

[13] This position is compatible with that of the Judicial Conference of the United States which, in 1995, 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).

[14] For example, the Conference recommends notifying plaintiffs of Section 1500's potential bar to litigation. The Court of Federal Claims recently amended its pleading rules with the intent of highlighting the application of Section 1500 and the Supreme Court's decision in *Tohono*. Court of Federal Claims Rule 9(p).

Part B. Recommendation to the Judiciary

2. In the absence of legislation amending 28 U.S.C. § 1500, the Judicial Conference should encourage federal courts to notify plaintiffs, as a part of the filing process, of the potential jurisdictional barrier posed by the technical particularities of Section 1500 time-of-filing precedent.

3. In the absence of legislation amending 28 U.S.C. § 1500, the Judicial Conference should examine ways to ensure that federal courts stay or transfer litigation pending in multiple fora on related claims to reduce the burden on the Government of litigating simultaneous proceedings not barred by Section 1500.