



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Judicial Review

Minutes

October 3, 2012

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Members Attending

Ron Levin (Chair)	Lisa Bressman (telephone)	Betty Jo Christian
Rebecca Fenneman (telephone)	Paul Kamenar	Peter Keisler
Harold Koh (telephone)	Rebecca MacPherson (telephone)	Jeff Minear
Alan Morrison	Judge S.J. Plager (telephone)	Willard Tom (phone)
Helgi Walker (telephone)	Allison Zieve	

ACUS Staff Attending

Paul Verkuil Chairman	Matthew Wiener Executive Director	Gretchen Jacobs Director of Research
Emily Bremer Attorney Advisor	Stephanie Tatham Attorney Advisor	Matt Bisanz Intern

Invited Guests Attending

Jonathan Siegel Special Counsel	Lee Beck Consultant	Jim Tozzi ACUS Member
Edmund Amorosi Smith Pachter	John Prairie Wiley Rein, on behalf of the ABA Section of Public Contract Law	Dan Syrdal (telephone) Attorney

Mr. Levin called the meeting to order at 2:08 pm. Ms. Jacobs welcomed the new members of the Committee. Attendees introduced themselves. The Committee consented to public participation in the meeting, time permitting.



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Mr. Levin submitted the October 27, 2011 minutes for approval and they were approved.

Chairman Verkuil welcomed Ms. Jacobs as the new Research Director and explained that the committee had taken some time since its last meeting on the Section 1500 project at the request of the Department of Justice (DOJ) and to allow for further information gathering by DOJ and Conference staff. He briefly addressed the Department of Justice's concerns regarding whether the Section 1500 project is within the scope of the Conference's jurisdiction by pointing to numerous past recommendations dealing with sovereign immunity and procedural impediments to judicial review. Chairman Levin reviewed the Committee's past activities on the Section 1500 project and expressed appreciation to the Department of Justice for sharing their views on the draft recommendation and providing further information to the Conference staff and project researchers.

Ms. Bremer explained that the researchers conducted additional research following the Supreme Court's decision in *Tohono*, including talking to DOJ and looking at how courts are handling cases post-*Tohono*. They found that more cases might be dismissed under Section 1500 in light of the Supreme Court's ruling than would have been dismissed under the Federal Circuit precedent reversed in *Tohono*. Additionally, they looked at duplicative cases that have been allowed under current law to see if it would be possible for litigants to pursue their claims in district court first and then at the CFC within the CFC's six-year statute of limitation. They generally found that the variability of the types of claims affected by Section 1500 makes it difficult to say with certainty that plaintiffs can sequentially litigate their claims. Ms. Bremer also indicated that she and Professor Siegel integrated the supplemental research memorandum relating to supplemental jurisdiction statutes and other issues, which was previously a separate document, into the report, and that they tightened the report's language. The researchers remain of the view that the best course of action is simply to repeal Section 1500.

Ms. Tatham explained how the draft recommendation had been modified to accommodate concerns regarding the burdens of simultaneous litigation, expressed by the Supreme Court in *Tohono*, by coupling repeal of Section 1500 with an unspecified stay or transfer mechanism. She noted that the stay and transfer mechanism is consistent with the Judicial Conference's last position on Section 1500, to not oppose its repeal if coupled with a stay or transfer mechanism. Ms. Tatham commented that the proposal also contained recommendations regarding additional steps courts could take to notify plaintiffs of Section 1500 and to encourage courts to reduce the burdens of simultaneous litigation in the absence of the repeal of Section 1500. She indicated that DOJ did express support for the portion of the recommendation encouraging the federal courts to notify plaintiffs of the possible effect of Section 1500 on their case.

Mr. Kamenar proposed technical changes to the draft recommendation preamble to which the Committee agreed.



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Professor Siegel and Ms. Bremer discussed the difference between their recommendation for simple repeal of Section 1500 and the staff recommendation, which would couple repeal of Section 1500 with a stay or transfer mechanism. Professor Siegel stated that he hoped the revised report makes it clear that the problem with Section 1500 is that it requires plaintiffs to elect among claims, an outcome at odds with the traditional notions of how claims are handled before the courts.

As to DOJ's informal position that the Conference should wait to adopt a recommendation on whether Section 1500 should be repealed until *Tohono* plays out, Professor Siegel did not agree because the uncertainties involved cannot be resolved to make the problem better. He felt that the uncertainty regarding the continuing validity of the order of filing rule can be resolved only by maintaining the status quo or by eliminating the rule and thus exposing more plaintiffs to Section 1500's unfairness. He explained that he sees no scenario in which *Tohono* will ameliorate the statute's core problem because Section 1500 will still bar plaintiffs from bringing potentially meritorious claims, regardless of how the courts react to the Supreme Court's dicta criticizing the order of filing rule. Also, because Section 1500 affects such a wide variety of claims, he does not believe a blanket rule of staying actions to be the best solution for all cases. He expressed the view that the decision to stay should be left to the judge based on the facts of the particular case and should not be mandated by Congress to apply in all cases.

Chairman Levin asked if anyone present wanted to maintain Section 1500. Betty Jo Christian indicated that half-way measures should not be attempted and that a simple repeal was most appropriate. Harold Koh raised concerns with the differing recommendations offered by the researchers and the staff. He was also concerned with the desire to go forward in spite of DOJ's urging to see how *Tohono* plays out. Lisa Bressman seconded Harold Koh's concerns and asked the Committee to consider the concerns raised by DOJ before moving forward.

Chairman Levin noted that both the staff and the researchers' recommendations urged repeal of Section 1500, and noted that both departed from DOJ's informal position.

Several committee members expressed support for simple repeal of Section 1500, as well as disagreement with DOJ's expressed concerns that repealing Section 1500 would impose significant burdens on the government by allowing simultaneous litigation.

Mr. Keisler commented that he was not certain he would support a simple repeal of Section 1500 without addressing DOJ's concerns with litigating in two forums at the same time. He stated that from his experience, he was unsure that judges would voluntarily stay cases to prevent duplicative litigation. Further discussion clarifying the problem and the proper solution ensued. Participants expressed that it was better for the government to have duplicative litigation than to leave in place a provision that prevents some people from ever litigating valid claims.



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Mr. Koh inquired as to how large the problem actually is and how certain the conclusions remain post-*Tohono*. Mr. Koh asked if some thought should be given to maintaining Section 1500 given the Supreme Court's views that it serves a valid statutory purpose.

Professor Siegel questioned whether sequential litigation, rather than simultaneous litigation, is less burdensome for parties or courts. He explained that he had considered whether costs could justify retaining Section 1500 and whether it was possible to quantify the effect of the statute's repeal, but such data was not available.

Judge Plager found it troubling that information about the government's experiences with Section 1500 relating to cost or delay was not provided. He did not think there was any evidence suggesting hardship on the government's part in dealing with Section 1500 cases. Ms. Tatham stated that the public comment from Dan Syrdal indicates that more cases, including his client's case, are potentially dismissible in the post-*Tohono* environment than in the pre-*Tohono* environment. She observed that this included cases brought by Native American tribes that were factually similar to *Tohono* and also noted that the Department of Justice indicated its intent to seek feedback on any draft recommendation from tribal interests.

Ms. Bremer explained that Section 1500 is a blunt instrument and that judicial tools have evolved since the Civil War, enabling courts to handle effectively any problems that might result from repealing Section 1500. Congress would not have to grant the courts any additional authority to facilitate efficient docket management, prevent duplicative recoveries, or preclude truly duplicative litigation.

Mr. Levin called for a vote on the question of adopting a recommendation targeting Section 1500, and invited public comment prior to the vote. Edmund Amorosi, a member of the public, explained his experience of being prevented from completing litigation of Congressionally authorized claims because of the post-*Tohono* operation of Section 1500 and indicated that he supported simple repeal of the statute. He said that in his client's case, there were two remedies available, quieting title or seeking compensation for the taking. The quiet title action was a necessary predicate to seeking compensation for the taking. Section 1500 was not an issue in the case until after *Tohono* was decided because different types of relief were sought before the CFC and district court. He did not feel that Section 1500 was designed to address situations like his clients', where an action in district court was necessary to establish a predicate for seeking compensation in the Court of Federal Claims.

Dan Syrdal, a member of the public, explained his client's experience with an APA suit in the Ninth Circuit and urged that any recommendation from the Conference for changing Section 1500 should apply retroactively. He explained that he had a claim involving denial of a permit that was appealed to the district court under the APA then to the 9<sup>th</sup> Circuit. This created a temporary takings claim that was brought to the CFC. DOJ moved for dismissal under Section 1500 because the 9<sup>th</sup> Circuit appeal was still pending. The case does not involve the same



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operative facts because the CFC action is based on the 9<sup>th</sup> Circuit decision, but under *Tohono*, it could result in a loss to his client. He thought that DOJ was attempting to limit the number of cases brought before it by aggressively arguing that any similarity of underlying facts constitutes similarity of operative facts.

Mr. Koh clarified the options before the Committee and indicated some support for addressing the problem now through repeal combined with an amendment targeted to the perceived problems with repeal but also some concerns with full repeal when less restrictive options are available.

Mr. Minear clarified, in his capacity as a liaison to the Administrative Conference, that the Judicial Conference's view on Section 1500 is 17 years old and may no longer represent the present view of the Judicial Conference. He suggested that the Administrative Conference go forward independently with its work. He stated that the last word of the Judicial Conference was the 1995 recommendation that it would not oppose repeal of Section 1500 if it such repeal was accompanied by stay or transfer mechanisms, but that this view should be treated with care. He thought the Administrative Conference was now closer to the matter than the Judicial Conference. He thought the Judicial Conference Committee would take into account both the Administrative Conference's recommendation and the Supreme Court's opinion on the useful purpose of Section 1500 as well as the DOJ's position in formulating any future position on Section 1500.

Mr. Morrison discussed how he had previously raised the issue of dealing with the Section 1500 problem through amendments to the supplemental jurisdiction provisions. He believed the Committee could do a more forceful job by laying out all of the options in the recommendation and leaving it to Congress to pick the best option.

The members debated the issues at length. A vote was called on the question: is it the sense of the committee that we should recommend some legislative change in Section 1500? The Committee supported with unanimous assent in a voice vote. Further discussion as to the logistics of the transfer or suspension of cases affected occurred. The Committee debated sending a two-part recommendation to Congress or sending a recommendation to repeal and then waiting to see how the courts handle it under the default rules. Ms. Bremer pointed out that the transfer statute would not be useful unless Section 1500 was repealed in light of the simultaneous filing rule. Alan Morrison noted the distinction of stays relative to transfers, and expressed support for a transfer mechanism.

Ms. Christian thought that Congress would not want to pick among options and that the Committee should give them an easy decision now, with the option for the Conference to revisit the matter in the future. The Committee discussed the idea and did not believe Congress would be willing to address the matter twice.



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Mr. Levin suggested a compromise position in which Section 1500 would be repealed and replaced with a presumption that courts should grant stays in duplicative cases. Mr. Levin thought such a presumption would be an intermediate position. Ms. Bremer noted Judge Plager's submission concerning the use of Section 1500 by DOJ to maintain multiple actions and that such a presumption should operate the same way for both the plaintiff and the government. Professor Siegel discussed alternative ways to present a recommendation that courts stay pending actions. He thought that the presumption could be a default rule that a specific court would issue the stay or could grant the plaintiff the choice of which court should issue a stay. Judge Plager thought a broader formulation granting discretion to the district courts to issue stays as they saw fit would be a better solution. Discussion ensued on which court should issue a stay. Chairman Verkuil noted that the Committee might consider asking the Judicial Conference to endorse its recommendation and therefore might tailor the recommendation accordingly. The Committee generally agreed it should presumptively be the second court to issue the stay, absent agreement of the parties.

The Committee then discussed the issue of the retroactivity as it related to cases pending and cases on appeal. Committee members noted that they had not seen prior recommendations with that level of detail and discussed the issue. Professor Siegel noted that the general presumption of the Supreme Court is that a newly enacted statute is not retroactive, but a statute which creates or repeals federal jurisdiction is presumed to be retroactive in the sense that it applies to cases pending at the time of the statute's enactment. He supported extending retroactivity to cases pending when the law is passed, but not to the re-opening final judgments. Mr. Levin suggested simply flagging it as an issue for Congress to consider and noting the problem with addressing retroactivity in the preamble.

The Committee returned to the issue of transfers. Judge Plager discussed that a statutory change would nullify the prior caselaw on Section 1500, and that such cases would be handled under the usual rules for transfers. Mr. Morrison suggested adding a flag for Congress to revisit the jurisdictional statutes to resolve the CFC's situation for handling transfers. Ms. Bremer and Professor Siegel commented that should transfers be considered, there was not sufficient research in their report for them to recommend changing the CFC's jurisdiction.

Mr. Levin indicated there was rough consensus on Part A of the recommendation and moved the discussion to Part B. Ms. Tatham explained that Part B would work in the absence of a repeal or amendment of Section 1500. The Committee was concerned that Congress would view Part B as an alternative to Part A and that it might be less likely to pursue Part A if Part B was included. The Committee discussed the part, but did not come to an agreement to move forward with Part B.

The Committee agreed to recommend the repeal of Section 1500 with a legislative enactment relating to stays.



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Regarding the Preamble, the Committee recommended minor changes. The Committee unanimously voted to endorse the recommendations as modified by the discussion.

The Committee then moved to discuss the Administrative Record Project. Lee Beck presented an overview of the project. He expressed a desire to set the proper project scope. He is hopeful the project will reveal best practices for agencies to follow in compiling the administrative record.

Mr. Tozzi expressed his thoughts on how agencies presently compile their records, including the problem of fragmentation of administrative records among multiple federal actors, and advised broadening the scope of the survey to include recommendations on how agencies manage record creation before court challenges. Chair Verkuil suggested a modification to the title to reflect this broader scope.

Ms. Christian explained her experiences with administrative recordkeeping in agencies, including record compilation at the stage of judicial review rather than decisionmaking, and how the process could benefit from improvement.

Mr. Tozzi suggested that eventually ACUS might address the question of a government-wide management function for administrative record creation in the future. Mr. Beck suggested that the Committee may want to maintain a narrow focus for the current project. Ms. Christian suggested the project might have a Phase Two to address the broader questions. Mr. Levin concluded the meeting by indicating there would be further discussion on this project at subsequent meetings.

The meeting was adjourned at 5:10 pm.