



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Reform of 28 U.S.C. Section 1500

Committee on Judicial Review

Proposed Recommendation | December 6-7, 2012

1 The Administrative Conference of the United States has long had an interest in ensuring
2 appropriate judicial review of Government actions and in considering related questions
3 regarding jurisdiction and forum. For example, the Conference’s seminal Recommendation 69-
4 1 recommended amendment of the Administrative Procedure Act—subsequently enacted by
5 Congress—to waive sovereign immunity and thereby permit citizens “to challenge in courts the
6 legality of acts of governmental administrators.”¹ Recommendation 68-7 encouraged Congress
7 to revise the general “federal question” provision in Title 28 of the U.S. Code in order to
8 eliminate the jurisdictional-amount requirement for district court actions seeking review of
9 federal administrative actions.² The Conference has also recommended ways to improve
10 procedures in suits involving the federal government.³

11 Building upon the principles underlying such Recommendations, the Conference
12 addresses another bar to judicial review which deprives some litigants of their rights—28 U.S.C.
13 § 1500 (Section 1500). Section 1500 prohibits consideration by the United States Court of
14 Federal Claims of otherwise cognizable claims while the plaintiff has litigation against the

¹ Administrative Conference of the United States, Recommendation 69-1, “Statutory Reform of the Sovereign Immunity Doctrine,” 1 ACUS 23 (1969).

² Administrative Conference of the United States, Recommendation 68-7, “Elimination of Jurisdictional Amount Requirement in Judicial Review,” 1 ACUS 22 (1968).

³ *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).

15 United States or an officer thereof “pending in any other court” and arising from substantially
16 the same operative facts.⁴

17 With its origins in the Reconstruction era, the statutory predecessor to Section 1500
18 arose against the backdrop of a proliferating number of suits, in multiple fora, by residents of
19 the Confederacy who sought compensation from the United States for property (typically,
20 cotton) seized during the Civil War.⁵ To curb this duplicative litigation, Congress enacted
21 legislation divesting the Court of Claims (the trial court predecessor to the Court of Federal
22 Claims) of jurisdiction when a plaintiff had a related action against the United States or an
23 officer thereof pending in another court. This legislation was reenacted several times, most
24 recently in 1948 as Section 1500 of the Judicial Code, and the provision’s jurisdictional
25 limitation has remained essentially unchanged.⁶ Though the “cotton claimants” are long gone,
26 Section 1500’s restrictions on the jurisdiction of the Court of Federal Claims remain.

27 Application of Section 1500 in the context of modern-day federal court jurisdiction and
28 complex litigation, however, causes serious problems for courts and litigants alike. Plaintiffs
29 confront difficult questions of forum selection and timing when the same set of operative facts
30 arguably gives rise to two or more claims against the United States—for which Congress has
31 otherwise waived sovereign immunity—but the Court of Federal Claims has exclusive
32 jurisdiction over one or more claims, and another federal court has exclusive jurisdiction over

⁴ 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.

28 U.S.C. § 1500 (2012). *See also* United States v. Tohono O’odham Nation, 131 S. Ct. 1723, 1731 (2011) (“Two suits are for or in respect to the same claim, precluding jurisdiction in the [Court of Federal Claims], if they are based on substantially the same operative facts, regardless of the relief sought in each suit.”).

⁵ *See, e.g.*, Keene Corp. v. United States, 508 U.S. 200, 206 (1993).

⁶ *Id.*

33 the other claims. Does a claim sound properly in contract (within the exclusive jurisdiction of
34 the Court of Federal Claims) or in tort (within the exclusive jurisdiction of district courts)?
35 Where the answer is not clear or could be both, the choice of any other court for an initial filing
36 could result in dismissal of a claimant’s subsequent suit in the Court of Federal Claims under
37 Section 1500. When a plaintiff prosecutes a challenge to agency action in district court based
38 on the Administrative Procedure Act (which may necessarily precede pursuit of any monetary
39 relief for the same claim in the Court of Federal Claims) appellate proceedings on his or her
40 Administrative Procedure Act litigation could well carry past the Court of Federal Claims’ six-
41 year statute of limitations. Thus, in conjunction with the statute of limitations, Section 1500
42 may foreclose full recovery for plaintiffs prosecuting meritorious claims in good faith.

43 Section 1500 affects a wide variety of plaintiffs with many different kinds of claims.
44 Federal employees, property owners, businesses, local governments, and Indian tribes may be
45 affected. The statute may present intractable jurisdictional conundrums for sophisticated
46 litigants and *pro se* plaintiffs alike. Examples of the diverse parties and claims affected include:

47 ● A federal employee’s claims under the Equal Pay Act were
48 transferred to and dismissed by the Court of Federal Claims for lack of
49 jurisdiction because the Title VII claims with which the action was filed in district
50 court were considered “pending” under Section 1500, even though the district
51 court already had entered summary judgment on all non-transferred claims.⁷

52 ● Characterizing the result as “neither fair nor rational,” the Court
53 of Federal Claims dismissed a Fifth Amendment-based takings claim filed *pro se*
54 by property owners and that had been transferred from a district court tort
55 action, despite finding that the uncertain legal distinction between tort and
56 takings actions made plaintiffs’ confusion about the appropriate forum
57 “understandable.”⁸

⁷ Griffin v. United States, 590 F.3d 1291 (Fed. Cir. 2009).

⁸ Vaizburd v. United States, 46 Fed. Cl. 309, 311-12 (Fed. Cl. 2000).

58 ● A government contractor’s bid protest action was rejected by the
59 Court of Federal Claims as jurisdictionally lacking because the plaintiff had
60 previously sued in district court under the Administrative Procedure Act—even
61 though the district court had already dismissed on the ground that the plaintiff’s
62 exclusive remedy was in the Court of Federal Claims.⁹

63 ● A local government sued by the United States over taxation of
64 certain federal office buildings counterclaimed for the taxes it believed it was
65 owed. The counterclaims were transferred to the Court of Federal Claims—and
66 dismissed under Section 1500.¹⁰

67 ● An Indian tribe suing in the Court of Federal Claims for breach of
68 trust had its claims dismissed under Section 1500 because it had filed a related
69 action in the district court on the same day.¹¹

70 Because of the barrier it imposes on some plaintiffs pursuing cognizable claims against
71 the United States, Section 1500 has been strongly criticized by litigants, courts, and legal
72 scholars as overly harsh, anachronistic, unfair, and in need of reform.¹²

73 On the other hand, some of the aims attributed to Section 1500 have modern relevance.
74 In *United States v. Tohono O’odham Nation*, the Supreme Court held that Section 1500 applies
75 to any claim filed in the Court of Federal Claims that shares substantially the same operative
76 facts as a claim pending in another court.¹³ The decision thus reversed Federal Circuit

⁹ *Vero Technical Support v. United States*, 94 Fed. Cl. 784 (Fed. Cl. 2010).

¹⁰ *United States v. County of Cook*, 170 F.3d 1084, 1091-92 (Fed. Cir. 1994).

¹¹ *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256 (Fed. Cl. 2008). Notably, if the plaintiff tribe had filed its district court action one day later, it would have been permitted to proceed simultaneously in both the Court of Federal Claims and district court under Federal Circuit precedent. See *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389 (Ct. Cl. 1965).

¹² 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.) (collecting criticism of Section 1500), available at www.acus.gov.

¹³ *Tohono*, 131 S. Ct. at 1731.

77 precedent that allowed the Court of Federal Claims to retain jurisdiction over a claim under
78 Section 1500 if a plaintiff sought different relief in the Court of Federal Claims than it sought in
79 another forum. This had the effect of expanding the range of cases to which Section 1500 could
80 be found to apply. The Supreme Court faulted the Federal Circuit for saying that it “could not
81 identify ‘any purpose that § 1500 serves today.’”¹⁴ The Court remarked that “the statute’s
82 purpose is clear from its origins with the cotton claimants—the need to save the Government
83 from burdens of redundant litigation—and that purpose is no less significant today.”¹⁵

84 In *Tohono*, the Supreme Court also observed that “[i]f indeed the statute leads to
85 incomplete relief” or causes undue hardship for plaintiffs, citizens are “free to direct their
86 complaints to Congress.”¹⁶ After careful consideration and consultation with affected parties
87 over eighteen months, including the Department of Justice, the Conference accepts the Court’s
88 invitation to approach Congress. While Section 1500’s purpose as articulated in *Tohono* has
89 legitimate aspects, the Conference’s research reveals that the statute is an undesirably blunt
90 tool for reducing the duplicative burdens that may arise from simultaneous litigation. Federal
91 courts have both the authority and the competence to use measures such as stays, transfers,
92 and the doctrine of preclusion to prevent double recoveries and ease the burdens of
93 simultaneous litigation on the Government without unfairly depriving plaintiffs of the
94 opportunity to pursue all potentially meritorious claims against the United States.¹⁷ Replacing
95 Section 1500 with a context-specific judicial management tool for simultaneous litigation in
96 different fora would also better serve Congress’s various waivers of sovereign immunity.

¹⁴ *Id.* at 1729.

¹⁵ *Id.* at 1730.

¹⁶ *Id.* at 1731.

¹⁷ *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 would save “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”).

97 Accordingly, the Administrative Conference recommends that Congress repeal Section
98 1500. The Conference further recommends that Congress replace Section 1500 with a
99 provision that permits plaintiffs to bring congressionally authorized suits arising from the same
100 set of operative facts in the Court of Federal Claims and other federal courts at the same time,
101 but also contains a presumptive stay mechanism to mitigate any burden on the courts or
102 parties from simultaneous litigation.¹⁸ As a general rule, the later-filed action should be the
103 subject of the presumptive stay. Nonetheless, the Administrative Conference recognizes that a
104 stay presumption may not be appropriate in all situations. In the absence of other compelling
105 considerations, the presumption of a stay should not apply where the parties agree that the
106 later-filed action should proceed.

107 In various situations, the interests of justice may override the presumption favoring a
108 stay in the later-filed action. Such a situation might exist, for example, where a decision in the
109 first-filed action is dependent on the outcome of a later-filed action, or where the later-filed
110 action requires factual discovery from witnesses who might not be available in the future.
111 Alternatively, a plaintiff might have a strong interest in obtaining prompt resolution in the Court
112 of Federal Claims of a claim for just compensation stemming from an agency decision, even
113 though the ultimate validity of the decision remains at issue in an earlier-filed district court
114 action. These examples are not intended to be exhaustive.

115 The Administrative Conference also recommends that repeal of the current Section
116 1500 apply to claims pending at the time the Recommendation is enacted.¹⁹ Elimination of
117 Section 1500's jurisdictional bar for current litigants would directly serve their fairness
118 interests, without substantially impairing the Government's reliance interests or disrupting the

¹⁸ This position comports 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).

¹⁹ Application of new procedural legislation to pending cases is not uncommon in the law. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.")

119 orderly progress of any pending litigation. A specific pronouncement by Congress on this
120 important issue would also avoid unnecessary litigation over the application of the repeal
121 legislation.

RECOMMENDATION

122 1. Congress should repeal 28 U.S.C. § 1500 (2012).

123 2. Congress should enact a new statute as follows:

124 **28 U.S.C. Section 1500.**

125 **(a) Presumption of Stay.** Whenever a civil action is pending in the United States Court
126 of Federal Claims, or on appeal from the Court of Federal Claims, and the plaintiff or his
127 assignee also has pending in any other court (as defined in section 610 of this title) any
128 claim against the United States or an agency or officer thereof involving substantially
129 the same operative facts, the court presiding over the later-filed action shall stay the
130 action, in whole or in part, until the first action is no longer pending. If such actions or
131 appeals were filed on the same day, regardless of the time of day, the United States
132 Court of Federal Claims action shall be treated as having been filed first. This provision
133 shall not apply if the parties otherwise agree or if the stay is not or ceases to be in the
134 interest of justice.

135 **(b) Application to Claims Pending at Time of Enactment.** Subsection (a) shall apply to
136 all claims pending at the time this statute is enacted, unless the later-filed action is
137 pending in a court of appeals or the Supreme Court. No claim in a case pending at the
138 time this statute is enacted shall be subject to the jurisdictional bar previously imposed
139 by former Section 1500.