



Committee on Judicial Review

Minutes

March 28, 2011

Members Attending

Lisa S. Bressman (Chair)

Paul D. Kamenar

Jeffrey P. Minear

Mark Polston

William H. Allen

Ronald Levin (by phone)

Alan B. Morrison

Jill Sayenga

Betty Jo Christian

Rebecca MacPherson

S. Jay Plager

Allison M. Zieve

ACUS Staff Attending

Paul R. Verkuil

Chairman

Jonathan R. Siegel

Director of Research & Policy,

In-House Researcher

Emily F. Schleicher

Attorney Advisor, In-House

Researcher

Reeve T. Bull

Attorney Advisor, Staff

Counsel

Invited Guests Attending

Pamela Harris (DOJ)

The meeting commenced at 2:00 p.m. in the Conference Room of the Administrative Conference of the United States (“ACUS”). The attendees introduced themselves, and Committee Chair Lisa Bressman invited ACUS Chairman Paul R. Verkuil to offer introductory remarks. Chairman Verkuil described the ACUS recommendation process and thanked ACUS Director of Research & Policy Jonathan R. Siegel and Attorney Advisor Emily F. Schleicher for their work on the report. Mr. Siegel covered certain administrative matters, including the requirement of the Federal Advisory Committee Act that all meetings be public. Ms. Bressman noted that the topic of discussion, 28 U.S.C. § 1500, is a statute that creates a “procedural trap” for litigants and is part of an ongoing study of “procedural traps” that ACUS has undertaken. Ms. Bressman then turned the discussion over to Mr. Siegel and Ms. Schleicher for a description of their report.

Mr. Siegel stated that ACUS has a long history of improving civil procedure in suits involving agencies and that this project dovetails nicely with that traditional focus. Ms. Schleicher gave an overview of the findings of the report, concluding that § 1500 is a statute that no longer serves any legitimate purpose and improperly forces plaintiffs to elect amongst claims against the government and should therefore be repealed. She also noted that courts’ interpretations of § 1500 have created a morass of confusing rules that pose a trap for unwary



litigants. For instance, a plaintiff who files duplicative claims first in the Court of Federal Claims (“CFC”) and then in federal district court can pursue both suits simultaneously, but a plaintiff who files first in district court will have his or her duplicative claims dismissed by the CFC by operation of § 1500 (hereinafter referred to as “order-of-filing rule”). Mr. Siegel noted that the Department of Justice’s (“DOJ”) views on § 1500 would be relevant and welcome, but that DOJ has declined to discuss the case while a Supreme Court case implicating § 1500, *United States v. Tohono O’odham Nation*, is pending. As such, the Committee will need to decide whether to proceed with the recommendation or wait until *Tohono* is decided so as to receive the views of DOJ. He noted that, though the *Tohono* decision might clarify the doctrine, and has limited potential to eliminate the order-of-filing rule, it would not resolve the fundamental issue of § 1500’s unfairness in forcing an election between viable claims against the government.

Ms. Bressman asked the Committee to first consider whether they agree with the conclusion of the report that § 1500 no longer serves any legitimate purpose. Mr. Allen asked how firmly settled the order-of-filing rule was, to which Mr. Siegel and Ms. Schleicher responded that it was very firmly settled in Federal Circuit precedent. Mr. Polston suggested that *Tohono* may resolve the “trap” if it eliminates the order-of-filing rule. Mr. Siegel noted that *Tohono* could indeed eliminate the illogical order-of-filing rule, but this would actually force litigants to elect which of several potentially legitimate claims to pursue in *all* cases rather than allowing sophisticated litigants to pursue all claims by filing first in the CFC, as under the present regime.

Judge Plager stated that the fundamental problem with § 1500 is its forcing litigants to ascertain the nature of their claims very early in the litigation process or face claim dismissal for lack of jurisdiction. This is particularly problematic for relatively unsophisticated litigants and those outside of Washington, DC, whose first instinct is typically to file in the local district court (and who are therefore likely to fall victim to the order-of-filing rule). The Federal Circuit created the order-of-filing rule largely to mitigate the harshness of § 1500: by interpreting the statute literally to require dismissal only when the litigant files first in district court, the court could allow at least sophisticated litigants to pursue all of their possible claims.

Mr. Levin expressed fundamental agreement with the report’s recommendation that § 1500 be repealed, but he suggested that *res judicata* may not always be sufficient to eliminate duplicative litigation in the absence of the statute. Specifically, he noted that, under the “jurisdictional competency” exception to *res judicata*, a similar claim need not be dismissed in a later suit if it could not have been pursued before the original forum. Though collateral estoppel may take care of some duplication by precluding re-litigation of issues already decided, it may not work perfectly. Ms. Schleicher indicated that ACUS staff would research this issue prior to the next meeting.

Ms. Christian asked Judge Plager whether he supports the other recommendations in the report (besides repeal of § 1500). Judge Plager indicated that he agreed with those



recommendations, particularly the recommendation that the Federal Circuit's *County of Cook* decision be repealed, since it defeats the purpose of the transfer statute by deeming claims transferred to the CFC to be simultaneously filed with claims that were not transferred and thereby requiring such transferred claims to be immediately dismissed. Mr. Morrison suggested that the problems identified in the report might be more efficiently solved by revising supplemental jurisdiction to allow either the CFC or district court to decide all of the plaintiff's claims (rather than requiring tort claims to be filed in district court and other claims to be filed in the CFC). Ms. Schleicher noted that ACUS staff chose not to recommend this approach in the report because it would comprise a fairly fundamental alteration to the present system of jurisdiction and would potentially cause unintended effects.

Ms. Zieve inquired as to how an advocate of § 1500 might defend it. Mr. Siegel stated that such an advocate would likely argue that § 1500 precludes duplicative litigation but noted that such duplicative litigation is largely an inevitable result of Congress's decision to assign some types of claims to the CFC and others to district courts. Judge Plager asserted that allowing some duplicative litigation is more than justified by ensuring that legitimate claims are not extinguished. Mr. Polston suggested that the number of legitimate claims being dismissed is potentially very small: litigants should presumably know, for instance, whether their potential claims sound in contract or tort, and any mischaracterized claims would likely be subject to a motion to dismiss anyhow. Ms. MacPherson noted that the perceived absurdity in the existing regime arises largely from the case law interpreting § 1500 rather than the statute itself; though forcing litigants to elect claims may be unfair, Congress has the right to do so in enacting a limited waiver of sovereign immunity.

Mr. Morrison stated that the Committee might want to look more closely at using supplemental jurisdiction to avoid duplicative litigation, which would perhaps be more effective than relying on *res judicata* due to the potential gaps in that doctrine Mr. Levin identified. Judge Plager suggested that such interstices in the doctrine of *res judicata* may be rather minimal: he has never encountered evidence suggesting that duplicative litigation would be an issue without § 1500. Mr. Siegel noted that amending supplemental jurisdiction to allow either the CFC or district court to hear all claims would be a more significant change to the current regime than would repealing § 1500 and might incentivize forum shopping.

Ms. Zieve asked Ms. Harris whether DOJ would be willing to discuss its perspective following the Supreme Court's decision in the *Tohono* case. Ms. Harris indicated that DOJ would be willing to do so. Ms. Harris also noted that DOJ views § 1500 through the lens of sovereign immunity: Congress has only chosen to allow certain claims against the United States, and, though requiring a plaintiff to elect amongst claims may seem unfair, it is Congress's prerogative to put a plaintiff to that election. Mr. Polston, Judge Plager, and Ms. Christian suggested that receiving DOJ's formal views would be beneficial to the Committee's work. Ms. Bressman also noted that it would be useful to receive DOJ's views on the report's



recommendation that they take certain steps to prevent duplicative litigation. Mr. Kamenar asked about the outcome of past legislation aimed at repealing § 1500. Ms. Schleicher indicated that the legislation passed in the House but failed in the Senate, likely because of more controversial modifications it would have made to the CFC's jurisdiction in takings cases, rather than its proposed repeal of § 1500.

Ms. Bressman proposed performing an informal poll of Committee members to determine which of the report's recommendations they favored and whether they would prefer an alternative approach. Beginning this process, Ms. Bressman stated that she would favor repeal of § 1500 absent any strong objections from DOJ and would support reversal of *County of Cook*. Mr. Polston stated that he opposed repeal of § 1500 and was unsure of whether he would favor reversal of *County of Cook*. Ms. Zieve stated that she favored repeal of § 1500 and was unsure on whether to support reversal of *County of Cook*. Ms. MacPherson stated that she was undecided on whether to repeal § 1500 but that she favors resolving the procedural morass created by the case law, including reversing *County of Cook*. Judge Plager stated that he favored repeal of § 1500 and reversal of *County of Cook*. Ms. Sayenga stated that she was bound by the United States' Judicial Conference's previous stance, which opposed repeal of § 1500 unless if it were accompanied by some means to transfer duplicative claims. Mr. Minear concurred with Ms. Sayenga and suggested that ACUS might coordinate with the Judicial Conference prior to finalizing its recommendation. Mr. Kamenar stated that he favored repeal of § 1500 and revisiting *County of Cook*. Mr. Allen stated that he favored repeal of § 1500 and reversal of *County of Cook*; he also stated that he would support a provision to require transfer of duplicative claims as proposed by the Judicial Conference. Ms. Christian stated that she favors repeal of § 1500, likely supports reversal of *County of Cook* but cannot firmly commit without thoroughly reviewing the case, and thinks that coordination with the Judicial Conference would be quite beneficial. Mr. Morrison stated that he favored repeal of § 1500; he feels that *County of Cook* is wrongly decided but does not feel that the Conference should opine on the correctness of individual cases. Mr. Levin stated that he favors repeal of § 1500.

Ms. Bressman noted that ACUS staff will conduct additional research and will plan to meet with DOJ and the Judicial Conference following issuance of the *Tohono* decision. Mr. Siegel noted that the areas for further research included whether amending supplemental jurisdiction might be a better solution than repealing § 1500, the extent to which current doctrines of *res judicata* would not prevent duplicative litigation in the absence of § 1500, and when a plaintiff's theory of recovery might not easily place the case exclusively before either the CFC or district court. Ms. Bressman then adjourned the meeting.