

ADOPTED

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to repeal and replace
2 28 U.S.C. § 1500 in accordance with the recommendation of the Administrative
3 Conference of the United States to eliminate unnecessary procedural obstacles to the fair
4 and efficient review of claims against the United States in the U.S. Court of Federal
5 Claims.

Pursuant to §45.5 of the House Rules of Procedure, this late resolution will be considered by the House of Delegates, if the Committee on Rules and Calendar recommends a waiver of the time requirement and that resolution is approved by a two-thirds vote of the delegates voting.

AMERICAN BAR ASSOCIATION

SECTION OF PUBLIC CONTRACT LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges Congress to repeal and replace
2 28 U.S.C. § 1500 in accordance with the recommendation of the Administrative
3 Conference of the United States to eliminate unnecessary procedural obstacles to the fair
4 and efficient review of claims against the United States in the U.S. Court of Federal
5 Claims.

REPORT

I. Purpose

The American Bar Association should support the repeal and replacement of 28 U.S.C. § 1500 as proposed by the Administrative Conference of the United States ("ACUS") at its 57th Plenary Session on December 6, 2012. Section 1500 creates unnecessary procedural obstacles to the fair and efficient review of claims against the United States in the U.S. Court of Federal Claims ("CFC").

II. Summary

Section 1500 is an antiquated statute first enacted by Congress in 1868 to address a specific problem concerning property claims by residents of the former Confederacy that has long since run its course. For decades now, this tattered remnant of the Civil War has served to create mischief for litigants and headaches for the courts. Section 1500 is one of several statutes governing the jurisdiction of the CFC, a specialized court for claims against the United States. The CFC has exclusive jurisdiction of contract claims and most other claims against the United States for monetary relief based on statute or the Constitution. *See* 28 U.S.C. § 1491. Section 1500, however, deprives the CFC of jurisdiction of a claim that arises from substantially the same operative facts as a claim pending in another court, regardless of relief sought. *See United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011); *Keene Corp. v. United States*, 508 U.S. 200 (1993). Section 1500 states:

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 by a 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.

Although most claims for money damages against the United States must be filed in the CFC, other claims against the government, including tort claims and claims for equitable relief, must be brought in district court. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (granting district courts exclusive jurisdiction over tort claims against the United States). As a result, a plaintiff with multiple claims arising out of a single incident (a contract claim and a tort claim, for example) must often file those claims in different courts. If the plaintiff brings each claim in the proper court (*e.g.*, the contract claim to the CFC and the tort claim to district court), Section 1500 may require the CFC to dismiss the contract claim. The statute may therefore force a plaintiff to elect among claims: If the six-year statute of limitations for claims before the CFC expires before the district court action has concluded, plaintiffs may be foreclosed from prosecuting meritorious claims against the federal government. *See Tohono O'odham Nation*, 131 S. Ct. at 1738 (Sotomayor, J., concurring) ("Under the Court's construction of § 1500, plaintiffs whom Congress has forced to file parallel actions in the CFC and a district court to obtain complete

relief must now choose either to forgo relief in the district court or to file first in the district court and risk the expiration of the statute of limitations on their claims in the CFC.”).

It is not uncommon for Section 1500 to deprive the CFC of jurisdiction of claims relating to federal government contracts. For example, in *Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784 (2010), the CFC rejected as jurisdictionally defective a government contractor's bid protest action challenging an agency's decision to "insource" work because the plaintiff had sued in federal district court under the Administrative Procedure Act. Even though the district court had dismissed the previously-filed action on the ground that the plaintiff's exclusive remedy was in the CFC, the CFC dismissed the case because the prior action was still "pending" within the meaning of the statute governing pendency of claims in other courts, since the time for the contractor to appeal the district court's decision had not yet expired. *Id.* at 795.

In *Lan-Dale Co. v. United States*, 85 Fed. Cl. 431 (2009), the CFC dismissed an action against the United States seeking specific performance of a settlement agreement for lack of jurisdiction because the plaintiff had simultaneously filed a parallel action in district court requesting essentially the same relief. Noting that the case "presents yet another example of a potentially meritorious action negated by the workings of 28 U.S.C. § 1500," the Court explained that "this statute was never intended to be applied in a way that leaves Lan-Dale with no forum that will hear its claims." *Id.* at 433. Nevertheless, in light of Supreme Court and Federal Circuit precedent, the Court "grudgingly" dismissed the action, "hoping that 28 U.S.C. § 1500 might be restored to its original intent in the near future." *Id.* at 435.

Section 1500 has adversely affected many kinds of claims against the United States, including those of federal employees, property owners, businesses, local governments and Indian tribes. ACUS identified the following examples:

- A federal employee who sued the government in district court under both the Equal Pay Act and Title VII of the Civil Rights Act of 1964. Her Equal Pay Act claim was transferred to the CFC and was dismissed under Section 1500.¹
- Property owners who sued in the CFC, claiming the government had taken their property without just compensation. Their claim was dismissed because they had previously sued in district court on a tort theory.²
- A local government, sued by the United States over taxation of certain federal office buildings, that counterclaimed for the taxes it believed it was owed. The counterclaims were transferred to the CFC and dismissed under Section 1500.³

¹ *Griffin v. United States*, 590 F.3d 1291 (Fed. Cir. 2009).

² *Vaizburd v. United States*, 46 Fed. Cl. 309 (2000).

³ *United States v. Cnty. of Cook*, 170 F.3d 1084 (Fed. Cir. 1999).

- An Indian tribe that sued in the CFC for breach of trust. Its claims were dismissed because it sued on similar claims in district court on the same day.⁴

These unfair and wasteful results run counter to basic goals and objectives of the American Bar Association, which include promoting "a fair legal process" and "assur[ing] meaningful access to justice for all persons."⁵ Plaintiffs should be permitted to pursue all claims against a single defendant without being placed in the position of potentially having to "elect" among claims. In some cases, however, Section 1500 may force plaintiffs to choose among potentially valid claims and abandon some claims as the price of pursuing others. Alternatively, plaintiffs may be forced to wait several years for a claim to run its course in one court before filing another claim arising out of the same incident in the CFC, at the risk of ending up on the wrong side of the six-year statute of limitations. For these reasons and others, ACUS has recommended that Congress repeal Section 1500.

ACUS proposes that Section 1500 be repealed and replaced with a statutory provision directing courts to apply a presumption that whenever claims against the government by the same plaintiff that arise from the same operative facts are pending in both the CFC and another court, the later filed litigation should be stayed. ACUS further proposes that the presumption of a stay should apply unless, *inter alia*, the parties otherwise agree or the stay is not in the interest of justice. This would provide discretion for the courts to address a range of circumstances.

The ACUS recommendation states:

1. Congress should repeal 28 U.S.C. § 1500 (2012).
2. Congress should enact a new statute as follows:

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

⁴ *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256 (2008).

⁵ http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Dec. 7, 2012).

(b) Application to Claims Pending at Time of Enactment.

Subsection (a) shall apply to all claims pending at the time this statute is enacted, unless the later-filed action is pending in a court of appeals or the Supreme Court. No claim in a case pending at the time this statute is enacted shall be subject to the jurisdictional bar previously imposed by former Section 1500.

ACUS's proposed repeal, which was supported in floor debate by Senior Circuit Judge S. Jay Plager of the United States Court of Appeals for the Federal Circuit and Senior Judge (and former Chief Judge) of the CFC Loren A. Smith, advances the interest of justice and the efficient administration of the courts in three principal respects:

- The presumptive stay provides a mechanism to protect the United States from potentially duplicative litigation without divesting a claimant of the opportunity to pursue a merits decision.
- Plaintiffs can determine which of their claims will be stayed, knowing the first-filed claim will be litigated first. Accordingly, plaintiffs that seek money damages at the CFC but also emergency injunctive relief from a federal district court can ensure that their equitable claim is resolved first by filing first in district court.
- In circumstances where the Government consents to both claims proceeding simultaneously, or where a stay would be contrary to the interests of justice, the stay would not apply.

III. History of Section 1500

In *Keene v. United States*, 508 U.S. 200 (1993), the Supreme Court summarized the "lineage" of Section 1500 as follows:

[Section 1500] runs back more than a century to the aftermath of the Civil War when residents of the Confederacy who had involuntarily parted with property (usually cotton) during the war sued the United States for compensation in the Court of Claims, under the Abandoned Property Collection Act. When these cotton claimants had difficulty meeting the statutory condition that they must have given no aid or comfort to participants in the rebellion, they resorted to separate suits in other courts seeking compensation not from the Government as such but from federal officials, and not under the statutory cause of action but on tort theories such as conversion. It was these duplicative lawsuits that induced Congress to prohibit anyone from filing or prosecuting in the Court of Claims "any claim . . . for or in respect to which he . . . shall have commenced and has pending" an action in any other court against an officer or agent of the United States. The statute has long outlived the cotton claimants.

Id. at 206.

As recounted in *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1017–21 (Fed. Cir. 1992), Congress responded to the "cotton claimants" by enacting Section 8 of the Abandoned Property Act in 1868, stating that "no person shall file or prosecute any claim or suit in the court of claims, or appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court" against any agent of the United States. A few years later, Section 8 was incorporated into the Revised Statutes of 1874 and renumbered as Section 1067 with a slight change in wording. In the Judicial Code of 1911, Section 1067 – wording unaltered – became Section 154.

In 1948, Congress re-codified the jurisdictional provision as 28 U.S.C. § 1500 as part of the Judicial Code of 1948. Section 1500 was rephrased as a jurisdictional limitation, divesting the Court of Claims of jurisdiction when the plaintiff had pending a duplicate claim or suit in any other court. The new Section 1500 also clarified that the jurisdictional bar applied to claims against both the United States and its agents. Congress included an explanatory note stating that the changes were only in phraseology, not meaning.

IV. Concerns with Section 1500

Section 1500 has been the subject of long-standing and widespread criticism.⁶ Leading jurists have argued that the statute has long outlived its original purpose.⁷ The statute has been criticized as barring claimants from obtaining complete or partial relief due to procedural obstacles, and forcing an unfair election of remedies or a dismissal of claims.⁸ Courts and commentators have long called for repeal.⁹ The following excerpts are illustrative:

⁶ See Emily Schleicher Bremer & Jonathan R. Siegel, Admin. Conf. of the U.S., "The Need to Reform 28 U.S.C. §1500" (2012).

⁷ *Keene v. United States*, 508 U.S. 200, 248 (1993) (Stevens, J., dissenting) ("Admittedly, this is a badly drafted statute. Viewed against a legal landscape that has changed dramatically since the days of the cotton claimants, it does not lend itself easily to sensible construction. Moreover, the Court's interpretation of § 1500 today may have the salutary effect of hastening its repeal or amendment.").

⁸ *Tohono O'odham Nation*, 131 S. Ct. at 1738 (Sotomayor, J., concurring) ("Judges and commentators have long called for congressional attention to this statute. Today's decision . . . renders such attention all the more pressing. Under the Court's construction of § 1500, plaintiffs whom Congress has forced to file parallel actions in the CFC and a district court to obtain complete relief must now choose either to forgo relief in the district court or to file first in the district court and risk the expiration of the statute of limitations on their claims in the CFC." (internal citations omitted)).

⁹ See *Low v. United States*, 90 Fed. 447, 455 (2009) (summarizing criticism of the statute in various cases and articles).

- "Mister Bumble might have made his judgment – that the law is an ass – less conditional if the operation of Title 28, Section 1500 had been explained to him." *Vaizburd v. United States*, 46 Fed. Cl. 309, 309 (2000) (citing Charles Dickens' *Oliver Twist*).
- "Section 1500 is an anachronism. It was first enacted in 1868, and over the years has been encrusted with numerous shadings and tortured constructions." *A.C. Seeman v. United States*, 5 Cl. Ct. 386, 389 (1984).
- "Section 1500 is the modern incarnation of Congress' response to a post-Civil War exigency, namely, duplicative suits commenced by residents of the former Confederacy (the so-called "cotton claimants") seeking compensation for lost property under different theories of liability..... The cotton claimants are gone, but the statute designed to thwart them remains, substantially unchanged.... § 1500 can create hardships for plaintiffs, especially by denying them an opportunity for complete relief.... Although § 1500 may be an anachronism depriving litigants of a fair opportunity to assert their rights, 'the 'proper theater' for such arguments ... 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" *Lower Brule Sioux Tribe v. United States*, 06-922 L, 2011 WL 6062269, *3 n.4 (Fed. Cl., Dec. 1, 2011).

Thus, courts have repeatedly informed litigants that the language of Section 1500 leaves no room to accommodate unfairness or hardship, cautioning that the proper forum for those arguments is Congress. In *Keene*, the Supreme Court stated:

It may well be, as Keene argues, that § 1500 operates in some circumstances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them "under the complex legal and jurisdictional scheme that governs claims against the Government." Brief for Petitioner 15. The trial judge in this case was not the first to call this statute anachronistic, *see* 12 Cl. Ct. at 205; *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984), and there is a good argument that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor, *see* Schwartz, 55 Geo.L.J. at 579. But the 'proper theater' for such arguments, 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.' *Smoot's Case*, 15 Wall. 36, 45, 21 L.Ed. 107 (1873). We enjoy no 'liberty to add an exception ... to remove apparent hardship.' *Corona Coal*, 263 U.S. at 540, 44 S.Ct. at 156, and therefore enforce the statute.

508 U.S. at 517–18.

V. Basis for Repeal of Section 1500

Section 1500 forces plaintiffs to elect a remedy or face dismissal of their case in the CFC. The statute also interferes with the efficient and orderly administration of justice, resulting in non-merits dismissals of valid claims. Concerns about duplicate litigation against the United

States can be addressed through less drastic means than forfeiture of claims, such as stay, transfer, and modern doctrines of res judicata.

A. Section 1500 Unfairly Forces an Election of Remedies or Dismissal of Claims

Congress has established a complex jurisdictional scheme for asserting claims against the United States. Actions against the United States under the Federal Tort Claims Act must be brought in federal district court. *See* 28 U.S.C. § 1346(b)(1). Contract actions against the United States must be brought in the CFC. *See* 28 U.S.C. § 1491(a)(1). Actions to quiet title between private property owners and the United States must be filed in federal district court. *See* 28 U.S.C. § 2409a. Fifth Amendment takings claims for just compensation relating to title disputes must be filed in the CFC. *See* 28 U.S.C. § 1491(a)(1). Judicial challenges to federal government contract awards must be brought in the CFC. *See* 28 U.S.C. § 1491(b)(1).

Because of this complex scheme in which money judgments can only be obtained in the CFC, Section 1500 sometimes bars plaintiffs with multiple types of damages from obtaining complete or even partial monetary relief. If a plaintiff's claims arise from a single incident and could be asserted in both federal district court and the CFC, Section 1500 requires the plaintiff to forgo its remedy in federal district court to pursue its remedy in the CFC. If the plaintiff pursues both cases, it risks dismissal of the monetary claim filed in the CFC.

As stated in *UNR Industries, Inc.*, Section 1500 was intended to "ameliorate[] the consequences of the unavailability of the defense of res judicata from cases against a federal officer in cases against the government itself, and vice versa." 962 F.2d at 1018. More recent cases such as *Tohono* have stated that Section 1500's purpose is to "save the Government from burdens of redundant litigation . . ." *Tohono O'odham Nation*, 131 S. Ct. at 1730.

Both purposes ascribed to Section 1500 can be effectively achieved by adopting the ACUS recommendation without the drastic sanction of dismissal on procedural bases unrelated to the merits of the case.

B. Section 1500 Interferes with the Efficient Administration of Claims Against the United States by the Federal Courts and Burdens Litigants and Courts

Over the years, the federal courts have interpreted Section 1500 to permit several exceptions to its jurisdictional bar. These exceptions have either been overruled or are being challenged by the United States. As a result, plaintiffs and the government engage in extended procedural motions practice over non-merits issues.¹⁰ In addition, Section 1500 frustrates the

¹⁰ Emily Schleicher Bremer & Jonathan R. Siegel, Admin. Conf. of the U.S., "The Need to Reform 28 U.S.C. § 1500" (2012). Bremer & Siegel reviewed 56 cases in the CFC in which motions to dismiss were filed based on § 1500 from 2000-2010. Of those cases, 38 (68%) were dismissed. *See* Appendix A at 8.

purpose of transfer statutes available to the federal courts and leads to arbitrary, non-merits results when the transfer authority is invoked.

In *Casman v. United States*, 135 Ct. Cl. 647 (1956), the Court of Claims allowed a duplicative claim where the pending suit in district court sought a different remedy. The *Casman* exception limited the adverse impact of Section 1500 for many years. However, in *Tohono O'odham Nation*, the Supreme Court overruled the *Casman* exception, holding that the CFC does not have jurisdiction to hear the case if two claims share the same nucleus of operative facts and are filed in district court and the CFC, regardless of whether the relief sought by the plaintiff in the two suits is different. 131 S. Ct. 1723 (2011).

In *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), the Court of Claims established an "order of filing" rule, holding that a complaint filed in district court *after* a complaint is filed in the CFC did not fall within Section 1500 as it was not "pending" at the time the CFC suit was filed. The U.S. Department of Justice maintains in current litigation that *Tohono* questioned the viability of the "order of filing" rule.¹¹ See *United Keetoowah Band of Cherokee Indians in Okla. v. United States*, 104 Fed. Cl. 180 (2012). Regardless of whether *Tecon* properly interprets the awkward wording of Section 1500, the "order-of-filing" rule fails to achieve the objective of avoiding duplicative litigation and potential double recovery. Litigants can circumvent the purported basis for the statute by filing first in the CFC.

Thus, *Tecon* leads to arbitrary results depending on the skill of plaintiff's counsel. As stated by the Third Circuit, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Weston v. Commonwealth*, 251 F.3d 420 (3rd Cir. 2001) (cited in 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, Civil 3d § 1202 at 92-99 (2004 & 2010 Supp)).

Moreover, as noted above, the United States presently takes the position that *Tecon* is not good law after *Tohono*. Thus, a plaintiff who chooses to follow *Tecon* risks dismissal if the position of the United States should prevail in its current effort.

In addition, bizarre outcomes occur in determining whether a case is "pending" in the district court when the CFC case was filed. For example, the "simultaneous filing rule" addresses the situation where the district court and CFC cases were filed on the same day. See *United States v. Cnty. of Cook*, 170 F.3d 1084, 1090-91 (Fed. Cir. 1991) (requiring dismissal of claims filed in the district court and the CFC simultaneously); Compare *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 270-71 (2008) (holding that cases filed on the same day are deemed to be simultaneously filed) with *United Keetoowah Band of Cherokee Indians v. United*

¹¹ Courts have thus far rejected the Justice Department's argument that *Tohono* overruled *Tecon*. *United Keetoowah Band*, 104 Fed. Cl. 180, 188 (2012) (finding that ambiguous dicta from *Tohono* does not override longstanding Federal Circuit precedent from *Tecon*); *Kaw Nation of Okla. v. United States*, 103 Fed. Cl. 613 (Feb. 29, 2012) (same); *Nez Perce Tribe v. United States*, 101 Fed. Cl. 139 (Sept. 27, 2011) (same).

States, 86 Fed. Cl. 183, 190 (2012) (holding that the court should investigate the exact time the two cases were filed on the same day). In some cases, the exact time of filing in the clerk's office on the same day determines which case was filed first. See *United Keetowah Band*, 86 Fed. Cl. at 190 (denying motion to dismiss as CFC case was filed four hours before the case filed in district court).

Section 1500 also frustrates the transfer mechanism established by Congress when plaintiffs file claims in the wrong court. Under 28 U.S.C. § 1631, federal courts have the authority to transfer cases to the CFC when a claim seeking money damages against the United States has been erroneously filed in the district court. The purpose of the transfer statute is to permit courts to administer cases in an efficient manner and to provide litigants with an opportunity for judicial review of their claim.

Nevertheless, a claim transferred to the CFC under Section 1631 is subject to dismissal under Section 1500 if less than all of the claims asserted in district court are transferred; in that case, the district court case is deemed "pending" for Section 1500 purposes. See *United States v. Cnty. of Cook*, 170 F.3d 1084, 1090-91 (Fed. Cir. 1991); *Griffin v. United States*, 590 F.3d 1291, 1293-95 (Fed. Cir. 2009) (explaining § 1500 case law against § 1631's purpose of facilitating transfer of wrongly filed claims); *Vaizburd v. United States*, 46 Fed. Cl. 309, 311 (2009) (describing dismissal of transferred case due to Section 1500 as "neither fair nor rational."). Thus, a district court's transfer of a case to the CFC may result in the unintended and unfair dismissal of plaintiff's case. The outcome is different if the entire case is transferred. *Cnty. of Cook*, 170 F.3d at 1909, n.8. This fragmented approach leads to arbitrary results that are inconsistent with the purpose underlying the transfer statute.

VI. Support for Reforming Section 1500 Is Broad

Public comments submitted to ACUS during its recent consideration of Section 1500 have all endorsed the statute's revision, with the exception of the U.S. Department of Justice.¹²

Support for revision is especially strong among Native American tribes as Section 1500 acts as a bar to judicial review of many of their claims. For example, the National Congress of American Indians adopted Resolution #SAC-12-061 at its 2012 annual convention, endorsing a complete repeal of Section 1500, and stating:

NOW THEREFORE BE IT RESOLVED, that the NCAI supports the reform or repeal of 28 U.S.C. § 1500 in a manner that would protect the ability of tribal plaintiffs to pursue claims involving substantially the same

¹² See *Reform of 28 U.S.C. § 1500*, Admin. Conf. of the U.S., (<http://www.acus.gov/research/the-conference-current-projects/weeding-out-purposeless-procedural-traps/section1500/>) (last visited Nov. 21, 2012).

operative facts against the United States in both the Court of Federal Claims and in other federal courts;

Id.

The Navaho Nation also submitted public comments dated November 6, 2012 to ACUS in support of a full repeal of § 1500, stating: "The Nation supports complete repeal of 28 U.S.C. § 1500. Section 1500 has been a jurisdictional stumbling block for the unwary for many years. Unfortunately, even wary plaintiffs too often find themselves unable to avoid falling victim to the injustice inherent to this antiquated and obsolete statute." *Id.*

The Quapaw Tribe also submitted public comments to ACUS in support of a full repeal of § 1500, stating:

The Quapaw Tribe supports full and immediate repeal of 28 U.S.C. § 1500 for all pending and future cases in the Court of Federal Claims. Section 1500 is antiquated and unnecessary, and unwarranted unique protection that no other defendant in any court enjoys, and is increasingly used by the federal government as a sword to force plaintiffs to relinquish legitimate claims.

Although Section 1500 may have served a legitimate purpose when it was enacted in 1868 and the federal government faced defending identical cotton claims in different courts, Section 1500's legitimacy has long since been superseded by an array of procedural devices that protect all parties against duplicative lawsuits and allow courts to take steps to promote judicial efficiency.

Section 1500's original purpose was to serve as a shield but today it is used as a sword to dismiss lawsuits simply because there is pending another lawsuit with similar facts, and to wear down and waste the resources of private litigants for no legitimate reason.

Id.

Testifying on behalf of the Court of Federal Claims in 1995, former Chief Judge Loren A. Smith stated that "the court believes that the section of the bill repealing 28 U.S.C. § 1500 will significantly improve the administration of justice at the court."¹³ In 1992, Judge Smith urged that Section 1500 be repealed, stating that it would avoid "wasteful litigation over non-merits issues" and that the "Court can stay duplicative litigation, if the matter is being addressed

¹³ Hearing on S.605 Before the S. Comm. on the Judiciary, 104th Cong. 53 (1995).

in another forum or proceed with the case, if the matter appears to be stalled in the other forum."¹⁴

The Department of Justice has expressed opposition to ACUS' recommendation and has offered two variations: (1) to defer consideration of the recommendation indefinitely and (2) adopt a substitute recommendation implementing an automatic stay, among other things. The ACUS membership, composed of government and public members, voted against both proposals during its consideration of this issue on December 6, 2012.

VII. Conclusion

Section 1500 interferes with the sound and efficient administration of justice and creates a trap for unwary plaintiffs. The statute forces plaintiffs with meritorious claims against the United States to choose either to forgo relief in federal district court to file their claims in the CFC, or to file first in the district court and risk expiration of the statute of limitations on their claims in the CFC. Section 1500 may therefore cause plaintiffs to lose meritorious claims against the federal government due to procedural, non-merits based grounds.

The repeal of Section 1500 proposed by ACUS would eliminate these wasteful obstacles and inefficiencies. The presumptive stay provision would provide judges flexibility to manage potentially duplicative litigation against the United States in a manner that is consistent with modern practice.

Respectfully Submitted,

Mark D. Colley
Chair, Section of Public Contract Law
February 2013

¹⁴ Hearing on S. 2521, Court of Federal Claims Technical and Procedural Improvements Act, Before the S. Comm. on the Judiciary, 102nd Cong. 59 (1992) (statement of Hon. Loren Smith, Chief Judge, U.S. Claims Court).

GENERAL INFORMATION FORM

Submitting Entity: Section of Public Contract Law

Submitted By: John S. Pachter

1. Summary of Resolution

The House of Delegates is urged to support the repeal and replacement of 28 U.S.C. § 1500 as it unnecessarily deprives plaintiffs of the right to pursue complete relief on claims against the United States.

2. Approval by Submitting Entity

Approved by the Council of the Section of Public Contract Law on December 14, 2012.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The goals and objectives of the American Bar Association include promoting "a fair legal process" and "assur[ing] meaningful access to justice for all persons."¹⁵ Plaintiffs are generally permitted to pursue all claims against a single defendant without being placed in the position of potentially having to "elect" among claims. Thus, this Recommendation would further support the goals and objectives of the ABA.

5. What urgency exists which requires action at this meeting of the House?

The Administrative Conference of the United States adopted a recommendation to repeal Section 1500 and replace it with a presumptive stay on December 6, 2012. The ACUS recommendation is likely to prompt renewed attention in Congress to address this issue, including the introduction of legislation. An ABA resolution in favor of repealing Section 1500 is timely given the ACUS recommendation and will provide further impetus for Congress to repeal this statute.

6. Status of Legislation. (If applicable.)

¹⁵ http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited Dec. 7, 2012).

Legislative proposals may be introduced following ACUS' adoption of a Recommendation to Repeal 28 U.S.C. §1500, and by the ABA's issuance of a similar recommendation.

- 7. Cost to the Association. (Both direct and indirect costs.)

None

- 8. Disclosure of Interest. (If applicable)

The signatories and their law firms represent parties in claims against the federal government that may be subject to motions to dismiss under Section 1500.

- 9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Referred to all Section and Division Chairs, Delegates, and Directors on December 14, 2012.

- 10. Contact Person. (Prior to meeting. Please include name, address, telephone number and email address.)

John S. Pachter
SMITH PACTER MCWHORTER PLC
8000 Towers Crescent Drive, Suite 900
Vienna, Virginia 22182
Tel: 703-847-6260
Email: jpachter@smithpachter.com

- 11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

John S. Pachter
SMITH PACTER MCWHORTER PLC
8000 Towers Crescent Drive, Suite 900
Vienna, Virginia 22182
Cell: 571-215-4955
Email: jpachter@smithpachter.com

EXECUTIVE SUMMARY

1. Summary of Recommendation

The ABA urges Congress to repeal 28 U.S.C. § 1500 and replace it with a presumptive stay as recommended by ACUS. Section 1500 creates an unnecessary procedural barrier to judicial review of claims against the United States in the U.S. Court of Federal Claims. Access to justice is a cornerstone of the ABA's mission. 28 U.S.C. § 1500 is an antiquated bar to effective judicial review of monetary claims against the United States.

2. Summary of the Issue that the Resolution Addresses

Section 1500 precludes a plaintiff from asserting claims against the United States for monetary relief if the claims arise from the same operative facts and require filing in both the federal district court and U.S. Court of Federal Claims. Many examples of claims rely on the same operative facts but could be pursued on multiple legal theories but are prevented by the operation of Section 1500. The statute creates an obstacle to judicial review for claims as Congress has divided jurisdiction for claims against the United States between the district courts and the CFC. The statute places plaintiffs in the position of potentially having to elect among remedies or face dismissal of their case in the CFC if they already have pending a district court action based on the same operative facts. The statute interferes with the efficient and orderly administration of justice by the federal courts, resulting in non-merits dismissals of valid claims. Concerns about duplicative litigation against the United States can be addressed through the use of the stay, transfer, or modern doctrine of res judicata.

3. Please Explain How the Proposed Policy Position Will Address this Issue

Section 1500 may deprive a wide variety of plaintiffs, including Native Americans, Federal employees, local governments, property owners, government contractors, and many others, with many different types of claims, from obtaining relief on all of their meritorious claims against the United States. An ABA resolution in favor of repealing 28 U.S.C. § 1500 as proposed by ACUS will promote access to judicial review of all claims that a plaintiff may have against the United States and eliminate procedural obstacles that result in non-merits dismissals.