DRAFT 10/24/2011

Committee on Judicial Review

Minutes

September 27, 2011

Members Attending

Lisa S. Bressman (Chair, via Skype video conference)	William H. Allen	Betty Jo Christian
Paul D. Kamenar	Ronald Levin (via phone)	Rebecca MacPherson
David Shonka (as an alternate for Williard Tom)	Alan B. Morrison	S. Jay Plager
David Michaels (via phone)	Mark Polston (via phone)	Allison M. Zieve

ACUS Staff Attending

Paul R. Verkuil *Chairman*	Jonathan R. Siegel *Director of Research & Policy, In-House Researcher*	Emily Schleicher Bremer *Attorney Advisor, In-House Researcher*
Reeve T. Bull *Attorney Advisor, Staff Counsel*	Funmi E. Olorunnipa *Attorney Advisor, Project Advisor*	

Members of the Public Attending

Steven Seiger (DOJ)	Martin Sussman (SSA)	Sarah Bardos

The meeting commenced at 1:30 p.m. in the Conference Room of the Administrative Conference of the United States (ACUS). Committee Chair Lisa Bressman opened up the meeting by welcoming everyone and asking the attendees to introduce themselves. Ms. Bressman then turned the meeting over to ACUS Director of Research & Policy Jonathan R. Siegel. Mr. Siegel discussed ACUS's Section 1500 Project, a project about 28 U.S.C. § 1500, a statute that creates a "procedural trap" for litigants and is part of an ongoing study of "procedural traps" that ACUS has undertaken.

Mr. Siegel stated that since last committee meeting on the Section 1500 Project, two major developments have occurred which relate to the project and need to be discussed. He noted that the two issues were that: (1) the United States Supreme Court issued a ruling in *United States v. Tohono O'odham Nation* in April and (2) Mr. Siegel and ACUS Attorney Advisor Emily Schleicher Bremer met with representatives from the Department of Justice ("DOJ"). Mr.

Siegel stated that, regarding the *Tohono* decision, the holding is very narrow and does not really affect the Section 1500 project. He stated that in *Tohono*, the Supreme Court did hint that it was displeased with the United States Federal Circuit's holding in *Tecon Engineers, Inc. v. United States*. Mr. Siegel explained that at the meeting with DOJ, representatives from the agency offered their informal views. The representatives stated that they felt that the law needs time to settle itself down following the *Tohono* decision and that if *Tecon Engineers* is changed by the courts, that would basically resolve the problem, insofar as Section 1500 would no longer pose a trap for the unwary. The representatives also indicated that they felt there is value in a rule that eliminates duplicative litigation. Mr. Siegel expressed that the ACUS staff's view is that overruling *Tecon Engineers* would make Section 1500 less illogical but more unfair. Mr. Siegel then turned to the supplemental memorandum which ACUS staff prepared and circulated to the Committee on Judicial Review members prior to the meeting. The memorandum addressed some points on which the committee sought additional research and included: (a) examples of viable duplicative claims; (b) technical legal questions; and (c) potential alternatives to repeal of Section 1500, such as a supplemental jurisdiction alternative (as recommended by Mr. Alan Morrison), staying one proceeding, and addressing preclusion issues.

Ms. Bressman stated that the committee should begin its discussion of Mr. Siegel's comments by disaggregating the issues of timing and substance of the project. She began the discussion by asking whether anyone had thoughts on DOJ's position that the committee should wait while the problem sorts its way out through case decisions issued after *Tohono*. Mr. Morrison noted that since cases involving Section 1500 and related issues often settle, it might be a while before court decisions on this topic are issued. Judge S. Jay Plager explained that, if *Tecon Engineers* is overturned, it is not clear when another case will be pending in the courts. Ms. Betty Jo Christian explained that she saw no reason to wait any further since the committee already waited for months to get an informal opinion from DOJ. Judge Plager agreed with Ms. Christian and noted that the question is whether the overruling of *Tecon Engineers* would eliminate ACUS's interest in the problem caused by Section 1500. Judge Plager noted that he thought the answer to the question he just posed is "no," based on past discussions of the committee, because the problem with Section 1500 is that the statute is fundamentally unfair. Mr. Ronald Levin stated that he agreed with Ms. Christian and Judge Plager and noted that case law cannot fix fundamental problems in the statute.

Ms. Bressman then turned the committee to discussing the substance of the project by referencing the supplemental memorandum and noting that it repeatedly says that the statute serves no discernible purpose. She expressed that the statute does not serve its *original* purpose, but it does limit duplicative litigation and effectuates only a limited waiver of sovereign immunity, which are not trivial concerns. Mr. Mark Polston stated that the purpose of Section 1500 is to force litigants to select a forum and a cause of action, and this obviously does not mean "duplicate recoveries," which everyone opposes, but rather to force people to elect a theory

of recovery. He stated that the sovereign can decide to force plaintiffs to election of claims, particularly as it has the inherent right not to waive sovereign immunity. Ms. Rebecca MacPherson agreed with Mr. Polston on the fundamental validity of the statute, but she stated that there is no reason to wait on the Federal Court's ruling in *Tecon Engineers* to play out. She stated that the statute deals with a limited waiver of sovereign immunity, which is completely valid and that the value of the statute is that it forces people to do research prior to filing a claim. Ms. Alison Zieve disagreed and noted that automatically dismissing cases is a poor way of dealing with duplicative litigation and that a more tailored approach to preventing people from wrongly splitting claims could be enacted.

Mr. Siegel then addressed Judge Plager's question of "what is duplicative litigation" by stating that it likely involves any case where fundamentally similar claims are litigated in two separate forums, particularly as related to double discovery, where people sometimes try to get "two bites at the apple" in discovery rulings. Mr. Siegel also explained that as to the sovereign immunity issue discussed earlier, it is appropriate for ACUS to call to Congress's attention the fact that its waiver here is confusing. Ms. Christian noted that a plaintiff often simply cannot bring all claims in one court, since the United States Court of Federal Claims (CFC) is limited to particular types of claims. Mr. Morrison additionally noted that it is unfair to force a plaintiff to election prior to any discovery. Ms. Bressman acknowledged this facial unfairness, but noted that perhaps it is intended to be structured that way and asked attendees if they had any thoughts on that point. Mr. Morrison suggested that the burden posed by Section 1500 is particularly unfair compared to the Administrative Procedure Act. Ms. Zieve suggested that ACUS recommend Congress repeal Section 1500 and then perhaps offer some alternatives such as supplemental jurisdiction, alternative stay, and others.

Ms. Bressman then led the committee into a discussion of possible alternatives by asking whether the committee should recommend any or all of these. Ms. MacPherson stated that she disliked the option of supplemental jurisdiction of the CFC and that the committee should not broaden the authority of a court designed to have limited expertise. Mr. Morrison asked whether it would it be better to give supplemental jurisdiction to the district courts and Ms. MacPherson said yes. Mr. Morrison responded by noting that he was not sure that he really favors one or the other. Ms. Zieve then noted that the committee could lay out pros and cons of each option. Mr. Paul Kamenar stated that he personally liked the idea of staying one case, but that the committee could simply leave this to Congress. Ms. Christian stated that it is better not to express a preference, but, rather, just lay out options, and perhaps give an overview of pros and cons of each option. Mr. Morrison added that it would be helpful to lay out pros and cons as neutrally as possible because there is no real value in designating a preference. Judge Plager disagreed and noted that Congress is more likely to do something if ACUS makes an affirmative recommendation. He stated that in his opinion supplemental jurisdiction and stays can create additional problems, whereas repealing Section 1500 is cleaner and simpler. Mr. Kamenar stated that the Judicial Conference thinks something needs to be done about supposed "duplicative

litigation," so it is probably better just to lay out a menu of options. Ms. Bremer added that a "middle course" might be to use the recommendation's preamble to lay out possibilities, and then commend one of the options. Mr. Morrison suggested that, based on the discussions during the meeting, everyone on the committee appears comfortable with recommending that Section 1500 be repealed and then laying out several alternative options. He noted that, while it is true that ACUS usually offers only a single solution, this is somewhat unique because the recommendation is to Congress, and so perhaps it would be better to lay out options.

Judge Plager noted that since the full ACUS project looks at traps more broadly, the committee should bear in mind that this is a model for subsequent projects in this area and accordingly, he favored a more simple solution. Judge Plager suggested integrating supplemental jurisdiction into the draft report. Ms. Bressman agreed that the report should be updated and that eliminating words like "duplicative litigation" and "no discernible purpose" from the report would be preferable. Mr. Siegel then stated that the staff would prepare a draft recommendation with a preamble encapsulating much of the meeting's discussion, lay out possible solutions in the recommendation, or consider other possibilities only in the preamble. He added that the staff would also update the report. Judge Plager again expressed his support for denoting a preferred option in the possible solutions contained in the draft recommendation. He also noted that the consultants should highlight the history of Section 1500 in the updated draft report.

Ms. Bressman then stated that the committee would now consider the Congressional Review Act (CRA) Project and she introduced the project's consultant, Morton Rosenberg. Mr. Rosenberg gave an overview of the project and the findings of his draft report. He noted that the CRA has not achieved what its framers intended, which is reflected by its being used only once successfully and the general failure to use it even when it would be the most relevant, such as in the case of striking down midnight rules. He noted that effective oversight is most successful when agencies feel obliged to honor requests placed upon them and that there should be penalties in place for failure to comply, as there currently are with respect to other aspects of Congressional oversight. Mr. Rosenberg noted that what is missing under the CRA is an enforcement mechanism. He stated that Congress does not obtain timely information about rules, there is no coordinated review mechanism, and there are no consequences that compel cooperation. Mr. Rosenberg recommended limiting review to only major rules; establishing a Congressional Office of Regulatory Analysis (CORA) to provide regulatory assignments; establishing expedited review in the House of Representatives; ensuring that judicial review is available against unreported rules; and ensuring that courts have the ability to take account of effects of disapproval.

Ms. Bressman then opened the floor up for discussion. Ms. Christian stated that she would like more detail on what CORA would do. Mr. Rosenberg stated that he conceives the CORA to be an *impartial* source of information on rules, as opposed to a biased source of

information, as the committees in Congress currently receive from lobbyists. He stated that congressional committee staff is not necessarily competent to address all of the issues raised in implicated rulemakings alone and that a CORA would be very similar to the Congressional Budget Office and would be staffed with experts in cost-benefit analysis, risk analysis and other related skills. Mr. Rosenberg also stated that the CORA could look at what was considered during the rulemaking process and could conduct its own cost-benefit analysis rather than just relying on the Office of Information and Regulatory Affairs' (OIRA) considerations (which would take longer but could add value).

Mr. Kamenar thought it would be a bad idea to limit the proposed recommendation only to major rules. Ms. Bressman then asked whether there is a problem with the CRA as presently constituted. Mr. Kamenar noted that it is very hard to determine whether rules have been submitted and that the problem is largely one of lack of information, which could be solved by improvements to the Government Accountability Office (GAO) database. He noted that he did not think there was a need to create an entirely new entity such as a CORA to do this. Ms. MacPherson noted that she sees the big problem as independent agencies not needing to submit things for review under the CRA. Ms. Zieve expressed that she did not believe the CRA was an appropriate project for ACUS to take one because it is extremely partisan and substantive in nature and because bills to address the CRA are among the most partisan pieces of legislation pending before Congress. Judge Plager stated that the question really is whether the CRA is carrying out its purpose, and Mr. Rosenberg's report makes clear that it is not.

Mr. Morrison then expressed that the whole premise of the CRA is flawed because Congress cannot practically look at every single rule, and that trying to make a "bad law less unworkable" is a waste of time. He also stated that the sensible, non-political suggestions in Mr. Rosenberg's report could all be easily adopted without any statements from ACUS, and everything else suggested in the report is overly political. He also stated that he thinks ACUS should just abandon the CRA project. Mr. Kamenar disagreed with Mr. Morrison's comment and stated that there is some lack of clarity regarding judicial review and that, at the very least, the project should aim at clarifying that. Judge Plager agreed with Mr. Morrison that the CRA is extremely controversial, and that it may not be worth wading into the issues regarding it.

Ms. Bressman asked for a vote regarding whether to end the CRA Project at the committee phase of the ACUS project process. Seven of the nine committee members present at the meeting voted to end the CRA Project. Following the vote, Mr. Morrison stated that the Chairman should be able to write a letter to Congress providing the CRA Project report's findings. Chairman Verkuil then stated that perhaps ACUS staff and Mr. Rosenberg could work more on the report and then transmit it to Congress from the Office of the ACUS Chairman and not as a product of the Assembly of the Administrative Conference. Several members of the committee indicated that they thought this was a good idea.

Mr. Siegel invited the members of the public in attendance to speak as they had been allowed speaking privileges by the Committee Chair, Ms. Bressman. No members of the public offered any comment. Mr. Siegel then announced that the next committee meeting would be on October 27 from 1:30 pm to 4:30 pm and Ms. Bressman adjourned the meeting.