Memorandum

To: Committee on Judicial Review
From: Reeve Bull (Staff Counsel)
Date: March 22, 2011
Re: Draft Recommendation

The following draft recommendation is based on the report prepared by Emily F. Schleicher and Jonathan R. Siegel, "28 U.S.C. § 1500: A Trap for the Unwary." This draft is intended to facilitate the Committee's discussion at its March 28, 2011 public meeting, and not to preempt the Committee's discussion and consideration of the proposed recommendations. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Draft Preamble

28 U.S.C § 1500 divests the United States Court of Federal Claims of subject matter jurisdiction over any "claim" a plaintiff "has pending in any other court." Originally enacted in 1868 as a substitute for the doctrine of res judicata, because a judgment in a suit against the United States then had no preclusive effect in a suit involving the same or a related claim against a federal official, or vice versa, the statute has long outlived its purpose. Today, preclusion principles are susceptible of application in such circumstances with respect to both claims and issues. Due to a tortured history of judicial interpretation, Section 1500 imposes a series of highly technical rules that frequently operate to deny plaintiffs access to an appropriate forum in which to litigate claims against the United States. Indeed, the statute's application typically results in dismissals that are wholly unrelated to the merits of the underlying claims and serve no valid public or procedural purpose.

Section 1500 has been consistently criticized by litigants, courts, legislators, and academics as a purposeless procedural trap. Having concluded that these criticisms are just, and that the statute's alleged purpose of reducing the costs of duplicative litigation could be better served by established legal doctrines, including but not limited to preclusion and the inherent judicial power to manage the docket, the Conference hereby adopts this recommendation.

Draft Recommendation

1. Congress should repeal Section 1500.

2. Until Congress repeals Section 1500, or in the event it does not repeal Section 1500, the Federal Circuit should reverse the simultaneous filing rules announced in *United States v. County of Cook*, 170 F.3d 1084 (Fed. Cir. 1999).

3. If Congress repeals Section 1500, courts should reduce the costs associated with any resulting duplicative litigation by:

    a. Using their inherent power to manage their docket, e.g, by staying duplicative actions; and

    b. Applying legal doctrines, e.g., res judicata, as appropriate.

4. If Congress repeals Section 1500, the Department of Justice should take steps to reduce the costs of any resulting duplicative litigation by:

    a. Using electronic docketing to identify duplicative litigation;

    b. Seeking discretionary stays as necessary to prevent such duplicative litigation; and

    c. Urging courts to use preclusion principles as appropriate.