

## DEPARTMENT OF JUSTICE

### Motion No. 2 Re: Reform of 28 U.S.C. Section 1500, Committee on Judicial Review Proposed Recommendation

As noted in the accompanying narrative statement, the Department of Justice cannot support the Proposed Recommendation for Reform of 28 U.S.C. Section 1500 at this time and has moved to table it. If the Assembly does not adopt the Department's motion to table, it should revise the Recommendation as presently formulated—particularly the text of the proposed statute that would replace the current section 1500. Most significantly, the proposed statutory text would not accomplish the dual aims of the Committee on Judicial Review: (1) to ensure that plaintiffs can have their day in court while (2) shielding Federal courts and agencies from burdens of duplicative litigation. The flaws in the proposed statute include the following:

- Despite being entitled “Presumption of Stay,” new subsection (a) fails to establish a true presumption and provides essentially no protection from the unnecessary burden imposed by simultaneous litigation of suits based on substantially the same operative facts.
- Subsection (b) would exempt actions in the courts of appeals, including petitions for review of agency action, from the inadequate stay provision in subsection (a) for no adequate reason.
- The statute as drafted fails to contemplate the possibility that a plaintiff may have more than two suits based on substantially the same operative facts pending against the United States.
- The statute fails to account for the doctrine of constitutional avoidance.
- The statute would codify the effective date, which could cause interpretive confusion if the statute were later amended.

### **Motion**

The Department of Justice moves to amend the proposed recommendation to substitute the following text for the text currently appearing at page 7 lines 122-139; if adopted, further conforming changes to the preamble of the Proposed Recommendation will also be required:

**Congress should enact the following amendment of 28 U.S.C. Section 1500:**

(a) AMENDMENT—Section 1500 of title 28, United States Code, is amended to read as follows:

**“(a) Automatic Stay.** Except as otherwise provided by law, 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 any claim against the United States or an agency or officer thereof involving substantially the same operative facts—

(1) The action in the Court of Federal Claims shall be stayed until all actions originating in any other court, including any appeals thereof, are no longer pending, if the Court of Federal Claims action was filed after an action in any other court involving substantially the same operative facts.

(2) The action or actions in any other court shall be stayed until the action originating in the Court of Federal Claims, including any appeal thereof, is no longer pending, if the action or actions in any other court were filed after the action in the Court of Federal Claims involving substantially the same operative facts.

(3) If a Court of Federal Claims action is filed on the same day, regardless of the time of day, as an action or actions in any other court involving substantially the same operative facts, the Court of Federal Claims action shall be treated as having been filed last.

(4) Notwithstanding paragraphs (1)-(3), if an action described in this subsection seeks relief pursuant to the United States Constitution, that action shall be stayed until any other action involving substantially the same operative facts that does not seek such relief is no longer pending, including any appeal.

**(b) Limited Authorization for Relief from Automatic Stay.** A court may terminate or modify a stay entered pursuant to subsection (a) either upon stipulation of the parties or in exceptional circumstances if the court finds, upon the motion of any party, that termination or modification of the stay is necessary to preserve material evidence or to prevent irreparable prejudice to that party.

**(c) Interlocutory Appeal as of Right.** The United States Court of Appeals for the Federal Circuit shall have jurisdiction of an appeal from an interlocutory order terminating or modifying a stay under subsection (b).”

(b) EFFECTIVE DATE—This Act shall apply to all claims pending on or after the date of its enactment. No claim in a case pending on or after the date of enactment of this Act shall be subject to the jurisdictional bar imposed by Section 1500 of Title 28, United States Code prior to the enactment of this Act.