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STATEMENT REGARDING COMMITTEE ON JUDICIAL REVIEW PROPOSED RECOMMENDATION FOR REFORM OF 28 U.S.C. SECTION 1500

Summary

The Administrative Conference of the United States' Committee on Judicial Review (the Committee) began its study of 28 U.S.C. § 1500 as part of an initiative to identify “purposeless procedural traps” that “could be easily and non-controversially eliminated or fixed.” See ACUS Website, “Weeding Out Purposeless Procedural Traps,” *available at*: <http://www.acus.gov/research/the-conference-current-projects/weeding-out-purposeless-procedural-traps/>. The Proposed Recommendation for Reform of 28 U.S.C. Section 1500 (the Proposed Recommendation) that is now before the Assembly, however, satisfies neither criterion. It would—quite controversially—recommend that Congress repeal and replace a statute that for over 100 years has served an important and salutary purpose: protecting the Federal government from the burdens of redundant litigation. To its credit, the Committee recognized the importance of this purpose and advanced the recommendation to reform section 1500 believing that it would continue to guard against the cost of redundant litigation while also making it easier for plaintiffs to file lawsuits raising claims against the Federal government. However, after careful review (including seeking the views of federally recognized Indian tribes), the Justice Department cannot support the Proposed Recommendation.¹

As we explain below, the analysis of section 1500 that was prepared for the Committee appears to have overstated the extent of any problems with the statute. But even conceding that some past complaints about unfairness resulting from section 1500 may be well taken, the Supreme Court issued a watershed decision in the midst of the section 1500 reform project—a decision whose impact is not yet certain but is likely to eliminate the basis for many if not all of the prior complaints. A radical overhaul of section 1500 of the type proposed risks inviting unnecessarily duplicative litigation, and the Department believes that this risk counsels strongly in favor of tabling the Proposed Recommendation until the nature and extent of any remaining problems with section 1500 are more certainly known.

If, however, the Assembly nevertheless opts to press forward now, it should carefully consider the text of the Proposed Recommendation—in particular, the language drafted for the statute that would replace the current section 1500—which unfortunately suffers from serious flaws that prevent it from accomplishing what the Committee in fact intended. Although the Committee sought to guarantee plaintiffs their day in court by allowing two redundant lawsuits while at the same time establishing a presumptive stay mechanism to protect Federal courts and

¹ The Justice Department's position could not be harmonized with that of the tribes who provided input.

agencies from the unnecessary burden of simultaneous, duplicative lawsuits, the draft statutory language would not accomplish the latter goal. In light of this and other flaws, and the undisputed harm of permitting redundant litigation, the Department would have grave concerns if the Assembly were to adopt the Proposed Recommendation as formulated—as should any Federal agency that faces or may face litigation in the Court of Federal Claims.

The Department accordingly intends to make at the December 6-7 plenary session the two motions accompanying this narrative statement. The first motion seeks to table the Proposed Recommendation until the winter 2013 plenary session, at which time the Assembly can again consider whether a legislative change to section 1500 is warranted. The additional time will permit further assessment of the impact of the recent Supreme Court decision on section 1500 litigation and allow the Committee to further consider and refine the text of the Proposed Recommendation in light of the problems we have identified. If the first motion is not approved, the Department will move to amend the text of the Proposed Recommendation. The Committee staff did not solicit the Department's comments when drafting the text of the recommendation and its proposed statutory language, and we have attempted in the limited time available to propose revisions to address the formulation problems we have discovered. We emphasize, however, that the amendments we propose are intended only to better effectuate *the Committee's* aims. While preferable to outright repeal of the current statute, we are uncertain whether, even as revised, the recommendation would provide sufficient safeguards against redundant litigation, and our effort to suggest improvements should not be taken as an endorsement of reform that would be appropriate at this time.

Now Is Not the Time To Tinker with Section 1500, a Bulwark That Protects Federal Agencies and Courts from the Burdens of Redundant Litigation

Several months after the Committee staff began work on the section 1500 project, the Supreme Court decided a blockbuster section 1500 case: *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011). Most fundamentally, the Court recognized that section 1500 continues to serve a "clear" and "significant" purpose: to protect the Government from the burden of redundant litigation. *Id.* at 1730 ("[T]he statute's purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today.") (emphasis added). Indeed, in current times of burgeoning court dockets and fiscal restraint, there can be no dispute that redundant or duplicative litigation is a significant burden on the government and a real concern. *See* Final Consultants' Report to ACUS Committee on Judicial Review dated Sept. 19, 2012 ("Committee Report") at 19 ("The costs of such duplicative litigation are a legitimate concern."); *see also* Proposed Recommendation at 6 & n.18 (noting that the Judicial Conference of the United States previously opposed repeal of section 1500 unless adequate provision were made for stay or transfer of duplicative claims).

Allowing two or more cases based on substantially the same facts to proceed at the same time can result in multiple and conflicting orders governing matters such as the scope of discovery and the availability of privilege, all while doubling the attorney time needed to complete basic case-management tasks and risking the even larger unnecessary expense of multiple trials in different courts. Moreover, while the burden of redundant litigation falls

heavily on the Department and the courts, it frequently falls hardest on other Federal agencies that must comply with discovery demands.

We emphasize that the hardship imposed by redundant litigation is not merely theoretical. To take just one example, during the 1980s and early 1990s, asbestos product manufacturers sought to shift their massive tort liability to taxpayers. The manufacturers made a conscious decision to sue the United States across the nation in both district courts and the Court of Federal Claims, believing that the United States would settle rather than face the overwhelming burden of duplicative litigation. In *Keene Corporation v. United States*, 508 U.S. 200 (1993), the Supreme Court held that section 1500 prevented such duplicative suits, thereby protecting the United States and its taxpayers from substantial costs.

In addition to recognizing that section 1500 is not purposeless, *Tohono* fundamentally altered the understanding of how section 1500 operates. The Federal Circuit had previously held that section 1500 permitted two suits based on substantially the same operative facts to proceed simultaneously so long as they sought different relief. The Supreme Court in *Tohono* held to the contrary, explaining that section 1500 bars jurisdiction over a suit in the Court of Federal Claims if a suit filed in another court is “based on substantially the same operative facts, regardless of the relief sought in each suit.” *Tohono*, 131 S. Ct. at 1731. In addition, *Tohono* criticized the judge-made rule first announced in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), which permits a Court of Federal Claims lawsuit to proceed even if the plaintiff has filed a duplicative suit in another court, so long as the Court of Federal Claims suit was filed first. *Tohono*, 131 S. Ct. at 1729–30 (opining that the *Tecon* order-of-filing rule deprives the statute of “meaningful force”).

Just a year after *Tohono*, lower courts are only beginning to really focus on what qualifies as “substantially the same operative facts,” and further litigation will be necessary to clarify how narrowly (or broadly) the statute actually sweeps. Additionally, the Supreme Court’s criticism of the *Tecon* order-of-filing rule suggests that the rule’s days are numbered and that its attendant procedural complexities may soon be eliminated. Only if and when the *Tecon* rule is eliminated will we know for certain whether, as we expect, a diligent plaintiff will be able to litigate suits with separate claims *sequentially* within the statute of limitations, and thereby avoid any unfairness. (Hard data on the viability of sequential litigation will not be available until—as seems likely—the *Tecon* order-of-filing rule is discarded; only if *Tecon* were no longer good law would plaintiffs have every incentive to litigate two separate cases expeditiously because they would have to litigate them sequentially rather than simultaneously.) With the existence and extent of any remaining problems with section 1500 still to be determined, it is unwise to proceed with a recommendation to dramatically rework a statute that has been in force for well over 100 years and shields the courts and Executive Branch agencies from the type of problematic scenarios identified above.

Furthermore, the case for deferring action on the Proposed Recommendation is reinforced by a closer review of the information presented to the Committee to define the scope of any problems with the statute and to justify the recommended reforms. In short, the Committee was presented with an overstated accounting of any prejudice to plaintiffs caused by the statute.

A report prepared by consultants retained by the Committee contended that “over the past five years [2006-10], Section 1500 has resulted in an average of at least 5.4 dismissals per year.” Committee Report at 30 (citing Appendix A). Even on its own terms, that 5.4-per-year average actually amounts to less than 0.4 percent of the Court of Federal Claims’ 1,376 non-vaccine cases that were pending as of October 1, 2010. *See* Administrative Office of the U.S. Courts, *Judicial Business 2011*, Table G-2A.² But the report highlights a timeframe that has the effect of inflating the number of section 1500 dismissals. The report identifies 38 cases that were dismissed under section 1500 during the 11 years from 2000 to 2010. Committee Report at 30. That amounts to an average of 3.45 dismissals per year over the period surveyed. Only by focusing on the shorter five-year timeframe from 2006-10 does the report increase the average number of dismissals to the still-small 5.4 per year.

More importantly, the report wrongly assumes that any dismissal in a case subject to section 1500 necessarily resulted in “unfairness” attributable to the statute, *i.e.*, the inability to bring a claim against the government that could otherwise have gone forward. But a closer review demonstrates that such an assumption is unwarranted in at least 14, and perhaps more, of the 27 cases cited in the report. Among other things, the report included some cases where there existed another independent basis for dismissal, and it included other cases where the plaintiffs unquestionably had ample time to refile their claims in the correct court. Indeed, even *Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784 (2010)—one of the cases highlighted as an example of unfairness in the Proposed Recommendation itself—in fact involved no unfair prejudice. *See id.* at 796 (plaintiff did not lose the ability to litigate a dismissed claim because it had ample time to refile); *see generally* Addendum to DOJ Statement, attached hereto. With the 14 cases excluded from the calculation, as they should be, the dismissal rate drops to only 2.6 per year, or less than two-tenths of one percent of the Court of Federal Claims’ non-vaccine cases pending as of October 1, 2010.

Against this backdrop of overstated substantive complaints and dissipating procedural complexity, there is no justification for adopting the proposal to recommend that Congress replace section 1500 with the statute put forward in the Proposed Recommendation. Of course, that is not to say that the Department believes the Assembly can do *nothing* now to attempt to reduce the need for section 1500 dismissals. There are any number of meritorious efforts, short of a dramatic statutory overhaul, that might be undertaken to improve awareness of section 1500 within the bar and among plaintiffs, and to educate counsel on the proper means to pursue multiple claims against the government in the current statutory framework.³ Such measures may in fact prove to be sufficient by themselves to address any concerns with section 1500, and the Assembly could appropriately recommend such a course now and leave consideration of more

² The Court of Federal Claims has jurisdiction over petitions for compensation for vaccine-related injury or death. *See* 42 U.S.C. § 300aa-12. There were 5,562 vaccine compensation claims pending in the Court of Federal Claims on October 1, 2010. Because these specialized cases rarely implicate section 1500 and take up a large share of the court’s docket, they have not been included in the calculation here.

³ There was some sentiment during the Committee deliberations that offering alternative recommendations for more modest reforms short of statutory changes might lessen the chance that Congress would adopt the sweeping changes proposed in the Proposed Recommendation. *See* Committee Minutes of October 3, 2012 Meeting at 6 (“The Committee was concerned that Congress would view Part B [a recommendation for measures to improve awareness of section 1500] as an alternative to Part A [a recommendation to amend the statute] and that it might be less likely to pursue Part A if Part B was included.”).

drastic reforms of the type proposed in the recommendation for later when the effect of *Tohono* on the operation of section 1500 is more certainly known.

**If the Assembly Nevertheless Opts To Recommend that Congress Amend Section 1500
Now, It Should Fix the Serious Flaws in the Proposed Recommendation Text**

As noted, over the course of two meetings in October of this year, the Committee approved in concept a recommendation for reform of section 1500 that would replace the current statute with one that would permit plaintiffs to file multiple lawsuits involving substantially the same operative facts in different courts while establishing a presumptive stay that would halt court proceedings in the additional suits until litigation in the first-filed suit was complete. In this way, the Committee believed that its proposal would guarantee (a) that no plaintiff would lose the ability to litigate an otherwise valid claim that was mistakenly filed in the wrong court or at the wrong time, and (b) that Federal agency defendants and courts would not be saddled with the unnecessary cost imposed by simultaneous litigation of overlapping suits.

The Proposed Recommendation's preamble emphasizes efforts made to consult with the Department, but that consultation effectively ended after the Committee meetings in October; the Department was not involved in the formulation of the Proposed Recommendation text. After the text was made available to us, we found that the language for the statute that Congress would be encouraged to enact in place of the current section 1500 fails to accomplish what we believe the Committee in fact intended. Most significantly, it does not adequately establish a stay provision that would protect the courts and Executive Branch agencies from redundant litigation. Below, we elaborate on this problem and summarize additional problems that we identified.

Presumption of Stay: Despite being entitled "Presumption of Stay," new subsection (a) does not in fact create such a presumption. Rather, it expressly states that its stay provision does not apply any time that a stay "is not or ceases to be in the interests of justice." This language effectively requires a court to assess (*sua sponte*) in every case whether a stay is in the interests of justice before entering such a stay. Indeed, because there is no indication of who bears the burden of meeting the interests of justice standard, the provision might even require a party seeking a stay to affirmatively move for a stay and then litigate whether it is in the interests of justice. Because subsection (a) as drafted does not mandate the automatic entry of a stay that can only be overcome upon a sufficient showing made by a party seeking to lift it, it cannot be said to create a presumption. In fact, proposed subsection (a) is equivalent to current law if section 1500 were repealed outright: it would operate such that a party might be able to obtain a stay, but only if it convinces a judge that such a stay is warranted. Compounding the problem is the quite malleable "interests of justice" standard that is rarely used as a test for when a stay should be lifted and that provides little guidance to a judge attempting to reconcile whether her case should be stayed or move forward at the same time as a case in another court. The standard in subsection (a) therefore provides essentially no protection from simultaneous litigation of duplicative suits—a result contrary to the intent to establish a presumptive stay mechanism that would avoid the burden such litigation imposes on parties and the courts.

Conflict with Tax Code Provisions: New subsection (a) is inconsistent with existing jurisdictional provisions of the Internal Revenue Code. A significant portion of the Court of

Federal Claims' jurisdiction extends to federal tax cases, primarily suits for refund of tax. The court is divested of jurisdiction, however, in circumstances governed by 26 U.S.C. §§ 6226(b) (requiring dismissal of an earlier-filed Court of Federal Claims case in favor of a later-filed Tax Court case) or 7422(e) (divesting Court of Federal Claims of jurisdiction to the extent that the United States Tax Court, in a later-filed case, acquires jurisdiction over the same subject matter).

Applicability to Pending Cases: The first sentence of new subsection (b) would exempt from the purported presumption of stay any later-filed action pending in a court of appeals or the Supreme Court at the time the statute is enacted. This rule again undermines the Committee's aim to avoid imposing the burden of duplicative litigation on courts and parties. Under this rule, for instance, a petition for review of agency action that is properly filed in the court of appeals in the first instance would be exempt from a presumptive stay for no apparent reason. Similarly, actions pending in the courts of appeals at the time of enactment on relatively preliminary matters, like motions to dismiss, would not be subject to a presumptive stay even though they could be remanded to the trial court for substantial discovery and trial. In both of these instances, the rule would burden the courts and parties with redundant litigation despite the Committee's interest in avoiding such burdens.

Additional Formulation Problems: The draft statutory text also suffers from at least four drafting issues that make its operation problematic or uncertain:

- (1) *More than Two Suits:* The statute as drafted appears to contemplate that at most two suits based on substantially the same operative facts could be pending at the same time in the Court of Federal Claims and another court. Although two parallel suits may be the most common scenario, there may be situations—as the earlier-cited example involving asbestos litigation shows—where there are three or more suits based on substantially the same operative facts that are simultaneously pending. The draft statutory language does not clearly address how courts should handle such a scenario, for instance, where a party files an action in district court A, then an action in the Court of Federal Claims, then an action in district court B. Any legislative change must address the possibility of three or more suits based on substantially the same operative facts.
- (2) *Constitutional Avoidance:* The draft statutory language does not contemplate the doctrine of constitutional avoidance, which dictates that courts should consider constitutional claims only if necessary after resolving non-constitutional claims. In the context of multiple suits based on the same operative facts, due respect for the principle of constitutional avoidance would counsel in favor of a rule that ordinarily requires a court facing constitutional claims to stay its proceedings while another court facing only non-constitutional claims proceeds. The statute should account for the doctrine of constitutional avoidance.
- (3) *Effective Date:* Subsection (b), the effective date provision, should not be part of the statutory text that is codified in the United States Code. Otherwise, if section 1500 were later amended, the time “this statute is enacted” would be uncertain. As is the case in other statutes, the effective date provision should appear only in the Public Law.
- (4) *Cross-reference to 28 U.S.C. § 610:* Subsection (a) compares actions pending in the Court of Federal Claims to actions pending in any other court as defined in 28 U.S.C. §

610. But section 610 defines “court” to include the Court of Federal Claims. This partially circular definition could be confusing and run the risk that the new statute would be applied to two claims pending in the Court of Federal Claims.

If the Assembly is inclined to recommend amending the existing section 1500 notwithstanding the Department’s view that now is not the time to do so, the statutory text should at least be revised to address these problems and better accomplish the Committee’s interrelated aims of preventing the loss of otherwise cognizable claims while mitigating the burden of simultaneous, duplicative litigation. We have accordingly suggested revisions to implement a true presumptive stay framework along the lines considered by the Committee, but we again emphasize that such a framework still may prove to be insufficient protection against the risk of redundant litigation.



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ADDENDUM TO DOJ NARRATIVE STATEMENT

Summary of 14 Cases in which Section 1500 Dismissal Did Not Result in Unfairness¹

- In five cases, there was an independent basis for dismissal, such that the cases would have been dismissed even if section 1500 did not exist. *See Schmitt v. United States*, 373 Fed. App'x 66 (Fed. Cir. 2009) (res judicata); *Jachetta v. United States*, 94 Fed. Cl. 277 (2010) (statute of limitations); *Fiebelkorn v. United States*, 76 Fed. Cl. 438 (2007) (Court of Federal Claims lacks jurisdiction over a state defendant; South Dakota not an agent of the United States); *Schrader v. United States*, 75 Fed. Cl. 242 (2007) (res judicata); *Chapman Law Firm Co. v. United States*, 72 Fed. Cl. 14 (2006) (same).
- In two cases, plaintiffs obtained relief through a settlement with the United States in either the Court of Federal Claims action or the parallel district court action. *See Ramah Navajo Sch. Bd., Inc. v. United States*, 83 Fed. Cl. 786 (2008) (settlement reached April 1, 2011, in *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 02-2413 (D.D.C.)); *Hall v. United States*, 74 Fed. Cl. 391 (2006) (settlement reached March 28, 2007).
- In two cases, it was clear that the plaintiffs would have time to refile suit in the Court of Federal Claims before the statute of limitations expired. *See Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784, 796 (2010) (“there appears to be no impending statute of limitations running against Vero, should the Eleventh Circuit affirm the District Court,” which dismissed a parallel claim; the Eleventh Circuit did so-affirm); *Low v. United States*, 90 Fed. Cl. 447 (2009) (event underlying the claim occurred in 2007, giving plaintiff until 2013 to refile; mandate from parallel Tenth Circuit appeal issued October 17, 2011, *Low v. Chu*, No. 09-398 (N.D. Okla.)).
- In one case, the Federal Circuit permitted two parallel actions to proceed because they did not arise from “substantially the same operative facts.” *See Trusted Integration Inc. v. United States*, 659 F.3d 1159 (Fed. Cir. 2011). In the wake of the Federal Circuit decision, a breach of license claim remains pending in the Court of Federal Claims while a Lanham Act claim remains pending in the District Court for the District of Columbia.
- In four cases, Indian tribes brought claims alleging mismanagement of trust funds and seeking an accounting in the district court and damages in the Court of Federal Claims. *See Tohono O’odham Nation v. United States*, 131 S. Ct. 1723 (2011); *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225 (2008); *E. Shawnee Tribe v. United States*, 82 Fed. Cl. 322 (2008) (subsequent history omitted); *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256 (2008). But these tribes could have received complete relief—damages and an accounting incident to the calculation of those damages—through a single suit in the Court of Federal

¹ The analysis included here is the product of a conservative approach, excluding only the 14 cases where there was a clear justification for doing so. The remaining 13 dismissals are more difficult to characterize, but it is not the case that they necessarily do provide examples of section 1500 producing unfair results. *See, e.g., Woodson v. United States*, 89 Fed. Cl. 640 (2009) (one of the remaining 13 cases in which a court dismissed a meritless prisoner lawsuit alleging numerous causes of action for wrongful incarceration and seeking immediate release and damages in excess of \$7 billion).

Claims. *See E. Shawnee Tribe v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009), *granted, vacated, and remanded on other grounds, United States v. E. Shawnee Tribe*, 131 S. Ct. 2872 (2011). Moreover, the tribes may not run the risk of an expiring statute of limitations because, as the Supreme Court recognized in *Tohono*, “Congress has provided in every appropriations Act for the Department of Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting.” *Tohono*, 131 S. Ct. at 1731.