

THE NEED TO REFORM 28 U.S.C. § 1500
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“It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”
 — President Abraham Lincoln¹

“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.”
 — Honorable Eric G. Bruggink²

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¹ Cong. Globe, 37th Cong., 2d Sess., App. 2 (1861). This statement, which was included in President Lincoln’s remarks to Congress advocating for the Court of Claims to have the power to render final judgments, *see infra* at note 66 and accompanying text, is engraved on the wall at the entrance to the building shared by the Federal Circuit and the Court of Federal Claims.

² *Vaizburd v. United States*, 46 Fed. Cl. 309, 309 (2000) (citing Charles Dickens, “Oliver Twist,” chapter 51).

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Introduction

This Report examines 28 U.S.C. § 1500, a statute that restricts the jurisdiction of the United States Court of Federal Claims (CFC).³ Section 1500 is unfair to plaintiffs suing the United States. The statute leads to dismissal of cases for reasons unrelated to their merits, while serving little valid purpose. Contrary to the general rule that applies to other kinds of plaintiffs,⁴ Section 1500 may require plaintiffs suing the United States to elect among claims, and it may cause them to lose potentially meritorious claims. The statute has been strongly criticized by judges, lawyers, and academics. It causes results that are unjust and irrational. It should be repealed.

Section 1500 is part of the group of statutes that govern the jurisdiction of the CFC. The CFC is a specialized court for private claims against the federal government. It has exclusive jurisdiction over contract claims and most other claims against the United States for monetary relief based on a statute or the Constitution.⁵ In contrast, Congress has provided that other types

³ The CFC has taken several forms over the course of its history. From 1855 to 1982, it was the United States Court of Claims; from 1982 to 1992, it was the United States Claims Court; and since 1982, it has been the United States Court of Federal Claims. For purposes of simplicity, this Report will use the court’s current name, the CFC, even when discussing activities or decisions undertaken during a time when the court went by a different name.

⁴ See Fed. R. Civ. P. 18(a) (permitting plaintiffs to join as many claims as they have against a defendant).

⁵ See 28 U.S.C § 1491(a)(1) (vesting jurisdiction in the CFC to hear claims against the United States founded upon the Constitution, acts of Congress, regulations of executive departments, or implied or express contracts). *But see id.* § 1346(a)(2) (granting district court concurrent jurisdiction to hear contract claims against the United States for up to \$10,000).

of claims against the government, including tort claims and claims for equitable relief, must be brought in district court.⁶

This division of jurisdiction may pose a problem when a plaintiff has a claim that may be characterized in more than one way⁷ or has multiple claims against the United States arising out of a single incident. For example, a plaintiff may believe the government's conduct constitutes a tort, a breach of contract, and a violation of statute, or may believe it is one of the three without being sure of which. For such plaintiffs, figuring out where to file each claim can be difficult.

Section 1500 causes significant problems for such plaintiffs. The statute divests the CFC of subject matter jurisdiction over any "claim" that a plaintiff "has pending in any other court."⁸ The full text of the statute currently provides that:

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 any 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.⁹

The courts have interpreted "claim" for purposes of Section 1500 by reference to the operative facts underlying the claim and not by the plaintiff's legal theory.¹⁰ Thus, Section 1500 may prevent a plaintiff from bringing a claim in the CFC if the plaintiff has a claim based on the same facts pending in another court, even if in that other court the plaintiff relies on a different legal theory. The statute would, for example, prohibit the CFC from hearing a contract claim against the United States if, at the time he filed the claim, the plaintiff had a tort claim against the United States pending in district court based on the same facts.

Section 1500 causes confusion and injustice because a plaintiff may have multiple claims against the United States arising out of a single incident and may be required to bring these claims to different courts. If such a plaintiff simply brings each such claim to the court in which

⁶ See 28 U.S.C. § 1346(b)(1) (granting district courts exclusive jurisdiction over tort claims against the United States); *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) ("[W]e have stated categorically that 'the Court of Claims has no power to grant equitable relief.'" (quoting *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam))).

⁷ See, e.g., *Bowen*, 487 U.S. at 898-901 (holding that district courts may hear certain claims against the United States for monetary relief, provided the monetary relief does not constitute "money damages").

⁸ 28 U.S.C. § 1500.

⁹ *Id.*

¹⁰ *United States v. Tohono O'odham Nation*, 563 U.S. ____ (2011), slip op. at 5; *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

it is cognizable, section 1500 may require the CFC to dismiss the claims presented to it. The statute may, therefore, require a plaintiff to elect among claims and may cause a plaintiff to lose potentially meritorious claims against the federal government.

Even more confusingly, under current law, there are “work-arounds” that permit a plaintiff to pursue all such claims successfully, but only if the plaintiff correctly determines which claims belong in which court and carefully brings the claims in the right order. Under existing law, if a plaintiff files a claim against the United States in the CFC and later files a claim based on the same facts in district court, both cases may proceed,¹¹ but if the plaintiff does the reverse—files first in district court and then later in the CFC—the CFC case must be dismissed.¹² Further complications arise if the plaintiff files both claims on the same day,¹³ or if the plaintiff files all the claims in district court and some get transferred to the CFC.¹⁴

These highly technical rules lead to the illogical result that the validity of claims may turn on the order in which they are filed. The rules make Section 1500 into a trap for unwary plaintiffs. Under current law, sophisticated counsel who are familiar with the intricacies of Section 1500 can use the “order-of-filing” work-around to protect their clients’ claims from dismissal in the CFC, but parties who have less knowledgeable counsel or who appear pro se can easily fall into Section 1500’s traps.¹⁵

Section 1500 affects a wide variety of plaintiffs with many different kinds of claims. Federal employees, property owners, businesses, local governments, and Indian tribes are affected; sophisticated litigants and *pro se* plaintiffs have fallen into Section 1500’s traps. Examples of the diverse parties and claims affected include:

¹¹ Hardwick Bros. Co. II v. U.S., 72 F.3d 883, 886 (Fed. Cir. 1995).

¹² *Keene*, 508 U.S. at 209.

¹³ Claims filed simultaneously are dismissed, *see* *United States v. Cnty. of Cook*, 170 F.3d 1084, 1090-91 (Fed. Cir. 1999), but there is an intra-CFC split as to whether claims filed on the same day are necessarily simultaneous. *Compare* *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 270-71 (2008) (holding that cases filed the same day are deemed to be filed simultaneously) *with* *United Keetoowah Band of Cherokee Indians v. United States*, 86 Fed. Cl. 183, 190 (2009) (holding that a court must investigate the exact time of filing).

¹⁴ Claims transferred to the CFC are deemed to have been filed simultaneously with the claims filed in district court and therefore may be dismissed. *Cnty. of Cook*, 170 F.3d at 1090-91; *Griffin v. United States*, 590 F.3d 1291, 1293-95 (Fed. Cir. 2009).

¹⁵ A recent Supreme Court decision called the order-of-filing work-around into question and suggested that it may be judicially eliminated. *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011). As this report discusses, such a change would make the law of Section 1500 less illogical, but more unfair. It would eliminate the illogical rule under which the validity of claims depends on the order of filing, but only by unfairly dismissing more claims.

- 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 1500.¹⁶
- 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.¹⁷
- A government contractor that filed a bid protest in the CFC. The case was dismissed because the plaintiff had previously sued in district court under the Administrative Procedure Act—even though the district court had already dismissed on the ground that the plaintiff’s exclusive remedy was in the CFC.¹⁸
- 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 1500.¹⁹
- 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.²⁰

Results such as these are often unforeseeable and unfair—and they run contrary to fundamental principles of modern civil procedure. Plaintiffs are generally permitted to pursue all claims they may have against a single defendant and are not required to “elect” among claims.²¹ Moreover, Congress designed the transfer statute to protect plaintiffs from losing their rights by filing in the wrong court. These principles should apply against the United States as they do against any other defendant. Plaintiffs should not be required to choose among potentially valid claims and abandon some claims as the price of pursuing others. They should not lose their day in court simply because they mistakenly characterize their claims or file in the wrong court.²²

¹⁶ *Griffin*, 590 F.3d 1295.

¹⁷ *Vaizburd v. United States*, 46 Fed. Cl. 309 (2000). These plaintiffs ultimately recovered by suing in the CFC again after their district court proceedings had concluded, *Vaizburd v. United States*, 67 Fed. Cl. 257 (2005), which highlights how pointless the original dismissal was.

¹⁸ *Vero Technical Support v. United States*, 94 Fed. Cl. 784 (2010). *See also Keene*, 508 U.S. 200 (manufacturer’s contractual and takings claims against the United States dismissed because the company had also sued the government in district court on tort theories).

¹⁹ *Cnty. of Cook*, 170 F.3d at 1091-92.

²⁰ *Passamaquoddy Tribe*, 82 Fed. Cl. 256.

²¹ *See* Fed. R. Civ. P. 18(a).

²² *Cf. Elgin v. Dep’t of Treasury*, 567 U.S. ____ (2012), slip op. at 11 (declining to interpret a jurisdictional statute in a manner that would only permit plaintiffs “to pursue constitutional claims in district court at the cost of forgoing other, potentially meritorious claims” in another forum and would deprive plaintiffs and courts “of clear guidance about the proper forum for the [plaintiff’s] claims at the outset of the case”).

Nor should the order in which a plaintiff files his claims determine whether he will get a hearing on their merits.

Section 1500's unfair results are particularly troubling because they serve no good purpose. The statute is a vestige of the Civil War, first passed in 1868 to prevent plaintiffs from seeking two chances to recover by suing an individual federal official, usually in tort, in one court, and suing the United States on the same facts in the CFC. Under the law of preclusion as it then existed, a judgment in the case against the government officer would not have preclusive effect in the CFC case.²³ This rule is no more: modern preclusion doctrine holds that a judgment in a suit against a federal officer is preclusive in a related, subsequent case against the government itself, and vice versa. Section 1500 is further rendered unnecessary in modern times because most tort actions against government officials are forbidden,²⁴ and plaintiffs usually sue the government directly. Indeed, in nearly all cases applying Section 1500, the plaintiff's two cases are against the government.

Section 1500 has long been subject to widespread criticism. Federal judges have characterized the statute as a "trap for the unwary"²⁵ that has "outlived its purpose."²⁶ They have characterized the dismissals Section 1500 compels as "neither fair nor rational"²⁷ and have critiqued "the injustice that often results in the application of this outdated and ill-conceived statute."²⁸ They have referred to Section 1500's "awkward formulation,"²⁹ called it "a badly drafted statute," and suggested that it would be "salutary" to repeal or amend it.³⁰ They have criticized the government for using the statute to lay traps for unsuspecting plaintiffs.³¹ One judge even remarked that the statute would justify the famous conclusion that "the law is an

²³ See *Matson Nav. Co. v. United States*, 284 U.S. 352, 355-56 (1932); *Conn. Dep't of Children and Youth Servs. v. United States*, 16 Cl. Ct. 102, 104 (1989); David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 578 (1967).

²⁴ See 28 U.S.C. § 2679.

²⁵ *Griffin v. United States*, 621 F.3d 1363, 1364 (Fed. Cir. 2010) (Plager, J., dissenting); *Berry v. United States*, 86 Fed. Cl. 24, 29 (2009) (Block, J.); *Lan-Dale Co. v. United States*, 85 Fed. Cl. 431, 433 (2009) (calling the statute a "monumental" trap for the unwary) (Wheeler, J.); *Griffin v. United States*, 85 Fed. Cl. 179, 181 (2008) (Allegra, J.), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009); *Passamaquoddy Tribe*, 82 Fed. Cl. at 262 (Bush, J.); *d'Abrera v. United States*, 78 Fed. Cl. 51, 56 n.10 (2007) (Lettow, J.); *Vaizburd*, 46 Fed. Cl. at 310 (Bruggink, J.).

²⁶ *Griffin*, 621 F.3d at 1364 (Plager, J., dissenting); see also *Low v. United States*, 90 Fed. Cl. 447, 455 (2009); *Griffin*, 85 Fed. Cl. at 181 & n.1; *Passamaquoddy Tribe*, 82 Fed. Cl. at 262; *A.C. Seaman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984).

²⁷ *Vaizburd*, 46 Fed. Cl. at 311.

²⁸ *Low*, 90 Fed. Cl. at 455.

²⁹ *Keene*, 508 U.S. at 210.

³⁰ *Id.* at 222 (Stevens, J., dissenting); see also *United States v. Tohono O'odham Nation*, 563 U.S. ____ (2011) (Sotomayor, J., concurring in the judgment), slip op. at 11 (calling for "congressional attention to the statute").

³¹ *Vaizburd*, 46 Fed. Cl. at 309-10 ("The untutored might suspect that the United States government would not rely on traps for the unwary to avoid having to respond to its citizens. Not so.").

ass.”³² Scholars have been equally critical of Section 1500, and have called for its repeal or reform since as early as 1967.³³ And some members of Congress have tried to repeal the statute.³⁴ These efforts apparently failed only because the repeal proposal was bundled with more controversial changes to the CFC’s jurisdiction.³⁵

This Report considers possible ways to reform Section 1500 and concludes that the best solution is for Congress to repeal the statute. Repeal would leave plaintiffs free, as they should be, to pursue all the claims they may have against the United States arising out of a given incident. It would eliminate the risk that legitimate claims might get dismissed because of the interaction between Congress’s complicated jurisdictional scheme and the pointless technicalities of Section 1500. The interest Section 1500 was originally intended to serve—preventing duplicative suits on the same facts with no preclusion—would be better vindicated by modern preclusion doctrines. And even though repealing Section 1500 would permit some duplicative litigation, (a) current law already permits such duplication, provided the plaintiff files his claims in the right order; (b) plaintiffs, who would likely prefer to litigate all related claims in one proceeding, should not be punished for duplication resulting from Congress’s decision to create separate forums with exclusive jurisdiction over different kinds of claims against the United States; and (c) courts can mitigate the costs of such duplication using familiar preclusion doctrines and the inherent judicial power to manage the docket by, for example, staying one case while a related case proceeds.

This Report proceeds in six parts. Part I explains the Conference’s ongoing project of identifying and eliminating purposeless procedural obstacles that arise in lawsuits involving the government. Part II details how Section 1500 fits within this broader context and operates as a purposeless procedural trap. Part III details further problems posed by Section 1500, as interpreted and applied by the courts. Part IV argues that Section 1500 is in need of reform, while Part V analyzes several ways in which the goal of reform could be accomplished. Finally, Part VI concludes by summarizing the Report’s recommendations for how best to reform Section 1500.

³² *Id.* at 309 (“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.”) (citing CHARLES DICKENS, *OLIVER TWIST*).

³³ See Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301 (1997); Payson R. Peabody, Thomas K. Gump, and Michael S. Weinstein, *A Confederate Ghost That Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4 FED. CIR. B.J. 95 (1994); Schwartz, *supra* note 23.

³⁴ See *supra* note 251 and accompanying text.

³⁵ See Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1172 (2000).

I. Background: Procedural Obstacles in Suits Involving the Government

Before we consider the problems Section 1500 poses for plaintiffs, we briefly explain how the statute fits within a larger context of a general problem of procedural difficulties arising in lawsuits involving the government.

A. *Parties Seeking Relief Against the United States Face Special Difficulties*

The path to relief for those injured by wrongful conduct of the United States is often strewn with obstacles resulting from intricate procedural requirements. In addition to the normal procedural requirements any plaintiff faces, a plaintiff seeking relief from the United States may have to navigate administrative exhaustion requirements,³⁶ the distribution of jurisdiction among different courts based on the nature of the claim,³⁷ the numerous exceptions to the various waivers of the government's sovereign immunity,³⁸ and other complex, technical requirements. A misstep can cost a plaintiff her rights.³⁹

Congress has intentionally designed some of these special procedural requirements. For example, Congress deliberately requires plaintiffs with different types of claims against the United States to go to different courts—generally speaking, contract claims must go to the CFC; tort claims must go to the district courts.⁴⁰ Similarly, Congress deliberately requires a plaintiff with a tort claim against the United States to present that claim to the appropriate federal agency administratively before proceeding in court.⁴¹

Plaintiffs face other procedural difficulties, however, that have arisen unintentionally. These procedural requirements can result from a slip of the pen by Congress, a strict judicial

³⁶ See, e.g., 28 U.S.C. § 2675(a) (requiring the presentation of an administrative claim as a prerequisite to suit under the Federal Tort Claims Act); § 2401(b) (requiring such administrative claim to be filed within two years after the action accrues).

³⁷ See 28 U.S.C. § 1346(b)(1) (vesting jurisdiction in the district courts to consider tort claims against the United States), § 1491(a)(1) (vesting jurisdiction in the Court of Federal Claims to hear claims against the United States founded upon the Constitution, acts of Congress, regulations of executive departments, or implied or express contracts).

³⁸ See, e.g., 28 U.S.C. § 2680 (listing exceptions to the waiver of sovereign immunity provided by the Federal Tort Claims Act); § 1491(c) (excepting cases against the Tennessee Valley Authority from the jurisdiction of the court of Federal Claims).

³⁹ See, e.g., 28 U.S.C. § 2401(b) (tort claims against the United States are “forever barred” if not administratively presented within two years after they accrue).

⁴⁰ 28 U.S.C. §§ 1346(b)(1), 1491(a)(1). This system is sometimes criticized, see, e.g., Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 714 (2003), but there is no doubt that Congress chose it.

⁴¹ 28 U.S.C. § 2675(a). This rule reflects Congress' judgment that administrative exhaustion will ease court congestion, avoid unnecessary litigation, and promote fair and expeditious settlement of tort claims against the United States. See S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966).

interpretation, or the unforeseen interaction among requirements imposed by different statutes or rules. Such procedural requirements may be difficult to discern at the start of litigation and may serve no particular social or policy goal. But they may nonetheless cost a plaintiff her rights.

An example illustrates how unfair and purposeless these unintentional procedural hurdles can be. Consider a federal employee who believes he has been subject to unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964. Such an employee must first seek administrative relief and, if relief is denied, may then file a lawsuit in federal court.⁴² In the lawsuit, the named defendant must be “the *head* of the [plaintiff’s employing] department, agency, or unit.”⁴³ This requirement is easy enough to satisfy, but some plaintiffs incorrectly name their employing agency, and not its head, as the defendant. For example, a plaintiff might sue the Postal Service instead of the Postmaster General,⁴⁴ or the Department of Veterans Affairs instead of the Secretary of Veterans Affairs.⁴⁵

No social purpose or policy is served by requiring a federal employee who allegedly suffered employment discrimination to sue the head of his employing agency rather than the agency itself. The claim’s merits are unrelated to whether the complaint’s caption is “Jones v. Postmaster General” or “Jones v. Postal Service.” And yet, prior to 1991, failing to properly caption the case could cost a federal employee his day in court. Courts strictly interpreted the requirement that the only proper defendant was the head of the employing agency, and by the time the plaintiff discovered he had named the wrong defendant, the short statute of limitations (only 30 days at that time) would typically have run. The error could be fatal because some courts held that an amendment to the complaint to name the proper defendant did not relate back to the date of filing.⁴⁶

The example above also shows that purposeless procedural traps can be fixed. Indeed, this particular trap was fixed in 1991, when Rule 15 of the Federal Rule of Civil Procedure was modified to allow more generous relation back of amendments adding the United States, or an

⁴² 42 U.S.C. § 2000e-16(c).

⁴³ *Id.* (emphasis added).

⁴⁴ *E.g.*, *Rys v. U.S. Postal Service*, 886 F.2d 443 (1st Cir. 1989).

⁴⁵ *E.g.*, *Bell v. Veterans Admin. Hosp.*, 826 F.2d 357 (5th Cir. 1987) (the Veterans Administration was the predecessor of the Department of Veterans Affairs, and its Administrator was the predecessor of the Secretary of Veterans Affairs).

⁴⁶ *E.g.*, *Rys*, 886 F.2d at 445-48; *Bell*, 826 F.2d at 360-61. There was a circuit split on this issue. Some circuits permitted relation back of an amendment naming the proper defendant. *E.g.*, *Warren v. Dep’t of Army*, 867 F.2d 1156 (8th Cir. 1989).

officer or agency thereof, as a defendant in a lawsuit.⁴⁷ The Administrative Conference seeks to find purposeless procedural traps and recommend similarly straightforward ways to fix them.

B. The Reason Such Difficulties Arise and Persist

Why do procedural difficulties like the one explained above arise? And when they arise, why are they not swiftly remedied? Writing on this topic nearly fifty years ago, the distinguished administrative law scholar and treatise writer Kenneth Culp Davis attributed the problem to two factors: lack of central planning and the government's tactical advantage as a repeat player in the system.

In Davis's day, procedural difficulties in suits against the government were far worse than they are now. He was writing before the Administrative Procedure Act was amended in 1976 to waive the government's sovereign immunity in suits seeking relief other than money damages.⁴⁸ During that time, many plaintiffs seeking relief against allegedly unlawful government action were forced to use the clumsy device of fictitiously naming a government officer as the defendant.⁴⁹ This artificial device—now largely forgotten as to federal officials⁵⁰—avoided the sovereign immunity barrier, but created innumerable procedural difficulties. Courts faced knotty questions, including whether relief could be obtained against a local official rather than a national official (which implicated proper venue), or what happened if the nominal defendant died or resigned from office (some courts held that the action abated and refused to continue it against the defendant's official successor).⁵¹

Davis observed that no public policy justified these procedural difficulties. The reason they existed, he said, was “not that someone on behalf of the Government has made a malevolent decision against convenience and in favor of inconvenience,” but rather “that the system we have evolved has been planned by no one.”⁵² Davis also attributed procedural difficulties in government litigation to the imbalance in the representation of the parties. The government has an advantage because “Government lawyers can and do give sustained attention to contriving technical ways to defeat plaintiffs,” whereas “[r]epresentatives of plaintiffs . . . typically have

⁴⁷ See Fed. R. Civ. P. 15(c)(2); Advisory Committee Notes to 1991 Amendments to Fed. R. Civ. P. 15. In the same year, the period for a federal employee to bring suit in court after receiving an unfavorable disposition of an administrative Title VII claim was extended to 90 days. See 42 U.S.C. § 2000e-16.

⁴⁸ See 5 U.S.C. § 702.

⁴⁹ See Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962).

⁵⁰ Plaintiffs must still use the officer suit fiction to evade the barrier of sovereign immunity with respect to state governments. See *Ex parte Young*, 209 U.S. 123 (1908); *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 378 n.14 (2006) (referring to the doctrine as an “expedient fiction”) (internal quotation omitted).

⁵¹ See *id.*; Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1622-65 (1997).

⁵² Davis, *supra* note 49, at 439-40.

only occasional litigation against the Government” and “are often baffled by the technical complexities.”⁵³ That is, government counsel, driven by a lawyer’s natural desire to win cases,⁵⁴ persuade courts to create and maintain technical complexities, which they then use to win more cases.

Davis noted that government lawyers can, and sometimes do, further their larger obligation to pursue justice rather than to win a particular case. They sometimes forego the opportunity to win on a procedural technicality and argue instead that the plaintiff should be permitted to proceed to the merits.⁵⁵ On the whole, however, Davis suggested that “[n]either the lawyers nor the judges normally have occasion to look at the perspectives of the system. If they were to do so, they would see the absurdity of most of the technicalities.”⁵⁶

Although the 1976 amendments to the Administrative Procedure Act considerably ameliorated the problems that Professor Davis described, his fundamental point remains valid. Purposeless procedural obstacles arise without design in actions involving the United States, and they persist because there is normally no force within the system dedicated to correcting them.

C. The Role of the Administrative Conference

The Administrative Conference of the United States is well positioned to act as a force for eliminating purposeless procedural obstacles in suits involving government. Most procedural obstacles exist for a reason, and some cases must be dismissed to serve the larger policy goal of a procedural rule. But it is important that there be such a larger policy goal. Dismissing a case because of a procedural rule that serves no purpose or causes more harm than good is an injustice. Purposeless procedural obstacles should be identified and eliminated—and this task fits within the Conference’s statutory mission. This mission includes making recommendations “to the end that private rights may be fully protected.”⁵⁷ As a public-private partnership,⁵⁸ the Conference’s perspective permits it to promote solutions appropriate for both the government and private parties.

The Conference has historically played an important role in resolving procedural difficulties that arise in lawsuits involving the government. For example, the important 1976 amendments to the APA mentioned above, which waived sovereign immunity for claims seeking

⁵³ *Id.* at 440.

⁵⁴ *Id.* at 441.

⁵⁵ *Id.*; *see also*, e.g., *Stevens v. Dep’t of Treasury*, 500 U.S. 1, 9-10 (1991) (explaining government concession that a federal employee who brings an administrative complaint of age discrimination need not wait for the proceeding to conclude before suing in court).

⁵⁶ Davis, *supra* note 49, at 440.

⁵⁷ 5 U.S.C. § 591(1).

⁵⁸ *See* 5 U.S.C. § 593(b) (describing the composition of the Administrative Conference).

other than money damages, grew out of a Conference recommendation.⁵⁹ The Conference has also recommended other ways to simplify procedures in suits involving the federal government.⁶⁰

In keeping with its mission and history, the Conference has taken up an ongoing project of identifying and recommending elimination of purposeless procedural obstacles in litigation involving the government. As the rest of this Report discusses, 28 U.S.C. § 1500 is the first candidate for this project.

II. The Core Problem: Section 1500 Unfairly Forces Election Among Potentially Meritorious Claims

Section 1500's core problem is that it unfairly causes plaintiffs to lose their right to bring potentially meritorious claims against the federal government. The statute as applied exacerbates the difficulty of determining the proper forum for a claim against government and significantly increases the potential costs of a plaintiff's jurisdictional misstep. Several factors contribute to this problem: different kinds of claims against the United States must go to different courts; multiple claims may arise out of the same incident; claims may be difficult to characterize; and Section 1500, as interpreted by the courts, imposes unpredictable, highly technical rules.

A. *Jurisdiction Over Claims Against the Government*

The first factor that contributes to Section 1500's core problem is that plaintiffs with claims against the United States are required to take different kinds of claims to different courts. Generally, tort claims and claims for equitable relief must go to district court,⁶¹ and contract claims and most other claims for monetary relief based on a statute or the Constitution must go to the CFC.⁶²

⁵⁹ See ACUS Recommendation 69-1, Statutory Reform of the Sovereign Immunity Doctrine. The legislative history of the 1976 amendments notes the role played by the Administrative Conference in their adoption. See H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1-10 (1976).

⁶⁰ See, e.g., ACUS Recommendation 82-3, Federal Venue Provisions Applicable to Suits Against the Government; ACUS Recommendation 80-5, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action; ACUS Recommendation 68-7, Elimination of Jurisdictional Amount Requirement in Judicial Review.

⁶¹ See 28 U.S.C. § 1346(b)(1) (granting district courts exclusive jurisdiction over tort claims against the United States); *Bowen*, 487 U.S. 879, 905 (1988) ("[W]e have stated categorically that 'the Court of Claims has no power to grant equitable relief.'" (quoting *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam))).

⁶² See 28 U.S.C. § 1491(a)(1) (vesting jurisdiction in the CFC to hear claims against the United States founded upon the Constitution, acts of Congress, regulations of executive departments, or implied or express contracts); *but see id.* § 1346(a)(2) (granting district court concurrent jurisdiction to hear contract claims against the United States for up to \$10,000).

The first predecessor to the CFC, the Court of Claims,⁶³ was created in 1855 to relieve pressure on Congress because “the only recourse available to private claimants was to petition Congress for relief.”⁶⁴ Initially, the CFC was empowered only to review private claims and recommend to Congress how to resolve them.⁶⁵ But in 1863, acting on President Lincoln’s recommendation, Congress granted the CFC authority to issue final judgments.⁶⁶ The CFC’s institutional role was further entrenched in 1887, when Congress comprehensively reformed the CFC’s jurisdiction and procedures⁶⁷ “to ‘give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances.’”⁶⁸ Since then, Congress has enacted a number of statutes that have cemented the CFC’s role as a specialized court for claims against government.

Today, the CFC remains a court of limited—but important and complex—jurisdiction. Under the Tucker Act, the CFC has jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”⁶⁹ The Indian Tucker Act grants the CFC jurisdiction over similar types of claims brought by “any tribe, band, or other identifiable group of American Indians.”⁷⁰ The picture becomes more complex with the “Little Tucker Act,” which grants district courts concurrent jurisdiction with the CFC over monetary claims against the government for \$10,000 or less.⁷¹ Gaps in the CFC’s jurisdiction lend further complexity. For

⁶³ As explained above, the CFC has taken several forms, and gone by several different names, over the course of its history, but this Report refers to it exclusively as the “CFC” to avoid confusion. *See supra* note 3.

⁶⁴ *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also Glidden*, 370 U.S. at 552 (“The Court of Claims was created . . . primarily to relieve the pressure on Congress caused by the volume of private bills.”).

⁶⁵ *See Glidden*, 370 U.S. at 553.

⁶⁶ *Mitchell*, 463 U.S. at 213; *see also* Cong. Globe, 37th Cong., 2d Sess., App. 2 (1861) (“[W]hile the [C]ourt [of Claims] has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final. . . . I commend to your careful consideration whether this power of making judgments final may not properly be given to the court.”). The “purpose to liberate the Court of Claims from [Congress] and the Executive” was further demonstrated in 1863, when Congress, in response to a Supreme Court case refusing to exercise judicial review, repealed a provision granting the Secretary of State revisory authority over Court of Claims judgments. *Glidden*, 370 U.S. at 554.

⁶⁷ *Mitchell*, 463 U.S. at 213.

⁶⁸ *Id.* at 213-14 (quoting 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne)); *see also* Act of Mar. 3, 1887, 24 Stat. 505 (permitting “the bringing of suits against the Government of the United States”).

⁶⁹ 28 U.S.C. § 1491(a)(1).

⁷⁰ 28 U.S.C. § 1505. The Indian Tucker Act grants the CFC jurisdiction “whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims

⁷¹ *See* 28 U.S.C. § 1346(a)(2). If the amount of a claim against the government is more than \$10,000, the CFC retains exclusive jurisdiction. *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1332-33 (Fed. Cir. 2004).

example, the CFC generally lacks jurisdiction to grant equitable relief,⁷² hear tort claims,⁷³ and consider “claims based on contracts implied in law, as opposed to those implied in fact.”⁷⁴ Even these omissions, however, are not absolute. From time to time, Congress has legislated to permit the CFC to exercise jurisdiction over certain actions or claims, sometimes in equity, where the court’s lack of jurisdiction has proven to cause injustice.⁷⁵ These individual legislative fixes, though well-intentioned and beneficial for particular claimants, have contributed to a statutory scheme that is, from a broad, systemic perspective, extremely complex.

The statutory scheme governing this important court’s jurisdiction thus turns out to be quite complicated.⁷⁶ The intricacies of the system frequently cause plaintiffs to legitimately doubt whether a claim belongs in district court or the CFC.⁷⁷ Even the basic rule that tort claims go to district court and contract claims go to the CFC is not always so easy to apply, because whether a particular claim is best characterized as a tort claim or a contract claim can be a tough call.⁷⁸ Thus, even before we get to the special problem of Section 1500, the division of jurisdiction between district court and the CFC poses significant challenges for plaintiffs.

B. The History, Purposes, and Operation of Section 1500

Particularly for a plaintiff with multiple claims against government arising out of the same incident, Section 1500 transforms the difficult task of navigating the division of jurisdiction between the district courts and the CFC into a truly daunting endeavor. For these plaintiffs, a seemingly minor error may prove fatal to one or more claims. Consider the plaintiff who believes the government’s conduct in a single incident constitutes a tort, a breach of contract, and a violation of statute—or believes it is one of the three without being sure of which. Such a plaintiff may naturally want to pursue all potential claims in the proper court, and thus bring

⁷² *E.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (“[W]e have stated categorically that ‘the Court of Claims has no power to grant equitable relief.’” (quoting *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam))); *see also* *Smoot’s Case*, 82 U.S. (15 Wall.) 36, 45 (1872) (stating that litigant’s “appeals to . . . magnanimity and generosity, to abstract ideas of equity . . . are addressed in vain to this court,” because “[t]heir proper theatre is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied”).

⁷³ *See* 28 U.S.C. § 1491(a)(1).

⁷⁴ *Mitchell*, 463 U.S. at 218 (citing *Merritt v. United States*, 267 U.S. 338, 341 (1925)).

⁷⁵ *See, e.g.*, 28 U.S.C. § 1491(a)(2).

⁷⁶ *See generally* Kirgis, *supra* note 33, at 312-20.

⁷⁷ *See, e.g., Bowen*, 487 U.S. at 898-901 (holding that district courts may hear certain claims against the United States for monetary relief, provided the monetary relief does not constitute “money damages”).

⁷⁸ *See, e.g., U.S. Marine, Inc. v. United States*, 2012 WL 2052953 (5th Cir. 2012); *Union Pacific R. Co. v. United States ex rel. U.S. Army Corps of Engineers*, 591 F.3d 1311 (10th Cir. 2010). In each case, the district court awarded damages to the plaintiff on a tort claim against the United States, but the court of appeals reversed on the ground that the claim was really a contract claim within the exclusive jurisdiction of the CFC. *See* 2012 WL 2052953 at *1; 591 F.3d at 1313.

some claims in district court, and others in the CFC. If he mischaracterizes his claims, misunderstands the jurisdictional division between the courts, files his claims in the wrong order, or simply experiences an unexpected and unforeseeable series of events before one court or the other, Section 1500 may require the CFC to dismiss his claims. At best, he must then go through the hassle and expense of re-litigation; at worst, he will find himself with no forum that will hear his claim(s).

Section 1500 prevents the CFC from hearing a “claim” that a plaintiff also “has pending in any other court.”⁷⁹ The Supreme Court has directed lower courts to interpret “claim” for purposes of Section 1500 in reference to “operative facts” underlying the claim, and not by the legal theory of the claim.⁸⁰ As the Federal Circuit has explained, “[f]or the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts.”⁸¹

Section 1500’s earliest predecessor was enacted in the wake of the Civil War to address a particular *res judicata* problem arising out of a high volume of claims for restitution for property, mostly cotton, seized by the government during the war.⁸² The Captured and Abandoned Property Collection Act⁸³ “authorized the Federal Government to seize and confiscate private property in the rebel states” so that the property could be sold to fund the war effort.⁸⁴ The Act further provided that property owners, often referred to as “cotton claimants,” could seek restitution in the CFC. To succeed on such a claim, however, the owner had to “prove that the property was not used to aid the Confederacy.”⁸⁵ Those who had difficulty fulfilling this statutory requirement often “resorted to separate suits in other courts seeking compensation not from the Government as such but from federal officials . . . on tort theories such as conversion.”⁸⁶ That is, in addition to suing the government itself under the Act, these claimants sued an individual federal officer in tort.

⁷⁹ 28 U.S.C. § 1500.

⁸⁰ *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011), slip op. at 5. In *Tohono*, the Supreme Court retreated from its previous holding that “claim” was defined in relation to both the operative facts alleged and the relief requested. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

⁸¹ *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994); *see also United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011), slip op. at 5 (holding that Section 1500 applies where there is factual overlap, even if there is no remedial overlap).

⁸² *See generally, e.g., Peabody, supra note 33, at 98-102.*

⁸³ *Keene*, 508 U.S. at 206 (citing Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863)); *Harbuck*, 378 F.3d at 1328; *United Keetoowah Band*, 86 Fed. Cl. at 188; *see generally Schwartz, supra note 23, at 574-580* (examining the historical context in which the statute originated).

⁸⁴ *Peabody, supra note 33, at 98.*

⁸⁵ *Id.*

⁸⁶ *Keene*, 508 U.S. at 206 (citing *Schwartz, supra note 23, at 574-580*)

The practice of many cotton claimants to seek restitution in both the CFC *and* the district court was troubling because, at that time, a judgment against the individual federal officer in district court would have no preclusive effect in the CFC action against the United States, and vice versa.⁸⁷ Thus, a cotton claimant could sue a government officer in tort, lose, and then start over again in the Court of Claims, without being bound by the judgment in the first action. This practice of duplicative litigation also raised the possibility of a double recovery,⁸⁸ and provided a way for claimants to evade the requirement that they prove in the CFC action that their property had not been used to aid the rebellion.⁸⁹

Congress enacted Section 1500 to address this problem. By forcing the cotton claimants to make an election between the two independent options for seeking restitution, the statute filled the apparent gap in *res judicata*. The only legislative history, the remarks of the bill's author, Vermont Senator Edmunds, explains:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.⁹⁰

Although some modern cases have suggested that Section 1500's purpose is simply to prevent duplicative litigation,⁹¹ the statute appears to have been "designed only to provide a substitute for

⁸⁷ See *Matson*, 284 U.S. at 355-56; *Conn. Dep't of Children and Youth Servs. v. United States*, 16 Cl. Ct. 102, 104 (Cl. Ct. 1989); Schwartz, *supra* note 23 at 578.

⁸⁸ See Peabody, *supra* note 33, at 101.

⁸⁹ *Keene*, 508 U.S. at 206.

⁹⁰ 81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868), quoted in *UNR Indus., Inc. v. United States*, 962 F.3d 1013, 1018 (1992) (en banc), *aff'd sub nom. Keene*, 508 U.S. 200; see also *Matson*, 284 U.S. at 355-56.

⁹¹ E.g., *United States v. Tohono O'odham Nation*, 563 U.S. ____ (2011), slip op. at 7; *U.S. Home Corp. v. United States*, 92 Fed. Cl. 401, 410 (2010).

the absent rule of res judicata in successive suits against a government officer and against the Government.”⁹²

C. Section 1500’s Core Problem: It Deprives Plaintiffs of Their Day in Court for No Good Purpose

Section 1500’s core problem is that it often prevents plaintiffs from pursuing all their claims against the government, and it does so for no valid reason. If a plaintiff has multiple potential claims against the United States arising out of a single incident, and tries to pursue them by simply bringing each to the court in which it is apparently cognizable, the plaintiff may be surprised to learn that Section 1500 requires the CFC to dismiss the claims presented to it. As noted above, claims arising out of the same facts are considered the same “claim” for purposes of Section 1500. Thus, if, for example, a plaintiff had a tort claim and a contract claim against the United States arising out of a single incident, and the plaintiff simply filed the tort claim in district court, and then filed the contract claim in the CFC, section 1500 would require the CFC to dismiss.

Plaintiffs are more likely to have multiple claims against government that are cognizable in different courts today than when Section 1500 was originally enacted. As the Supreme Court recently explained, when Section 1500 was originally enacted, “the CFC had a more limited jurisdiction than it does now,” and the district courts were not empowered to adjudicate claims against the government in any circumstances.⁹³ Section 1500 has not changed much “even as changes in the structure of the courts made suits on the same facts more likely to arise.”⁹⁴

The effects of Section 1500 are particularly troubling given that the res judicata problem Section 1500 was initially designed to solve no longer exists. Evolution in preclusion doctrine, combined with the inherent judicial power to manage the docket by staying or dismissing duplicative suits, renders Section 1500 unnecessary. The considerable jurisdictional litigation Section 1500 engenders—and the dismissals it requires—thus serve no good purpose.

Section 1500’s original purpose—“to provide a substitute for the principle of res judicata, believed to be absent in successive suits against a government officer and the Government,”⁹⁵—has been rendered obsolete by evolution in the doctrine of res judicata.⁹⁶ Res judicata, “[a]

⁹² Schwartz, *supra* note 23, at 578; *see also* Matson, 284 U.S. at 355-56 (“[T]he declared purpose of the section . . . was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the . . . Court of Claims.”).

⁹³ United States v. Tohono O’odham Nation, 563 U.S. ____ (2011), slip op. at 6.

⁹⁴ *Id.*

⁹⁵ Schwartz, *supra* note 23, at 599; *see* Matson Nav. Co. v. United States, 284 U.S. 352, 355-56 (1932).

⁹⁶ Compare Schwartz, *supra* note 23, at 600 (explaining, in 1967, that “[t]he law is tending toward [a] rule of res judicata” that would operate “as a replacement for Section 1500”), with Peabody, *supra* note 33, at 109

fundamental precept of common-law adjudications,” provides that “a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.”⁹⁷ This core manifestation of the doctrine is often referred to as “claim preclusion.” A related doctrine, “issue preclusion,” also known as “collateral estoppel,” is not dependent on an identity of claims, but provides more broadly that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.”⁹⁸ Both variants of *res judicata* “preclude parties from contesting matters that they have had a full and fair opportunity to litigate,” and thereby protect against the “expense and vexation” of duplicative litigation, “conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions.”⁹⁹

Today, it is well established that a government and its officers, at least in their official capacities, are in privity for purposes of *res judicata*.¹⁰⁰ Thus, a judgment in a suit against a federal officer in his official capacity will bind the United States government, and vice versa.¹⁰¹ This principle, which has emerged in approximately the last half-century, fulfills the primary purpose of Section 1500: where a claimant files the same claim against the government in the CFC and a government official in a district court, the judgment in one court will have preclusive effect in the other.¹⁰²

Where claim preclusion is inapplicable because all the claims brought in the CFC and the district court are not identical, but overlap or are intimately related, the modern doctrine of issue preclusion would step in to serve any remaining, legitimate purpose of Section 1500. This may be a relatively common occurrence because, as discussed previously, Congress’ scheme for dividing subject matter jurisdiction between the CFC and the district courts often leaves claimants in the position of having multiple claims, some of which are within the exclusive jurisdiction of the CFC, and some of which are within the exclusive jurisdiction of the district

(observing, in 1994, that “[t]he doctrine of *res judicata* already works to prevent re-litigation of the same claim against the United States”).

⁹⁷ *Montana v. United States*, 440 U.S. 147, 153 (1979).

⁹⁸ *Id.*; see also *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (explaining issue preclusion as providing that “once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation”).

⁹⁹ *Montana*, 440 U.S. at 153-54.

¹⁰⁰ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940); see generally 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 131.40(3)(e)(ii)(A) (“A government official sued in his or her official capacity is considered to be in privity with the government.”).

¹⁰¹ See, e.g., *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir. 1988) (explaining that government officials sued in their official capacity “may invoke a [prior] judgment in favor of the governmental entity as may that body itself”).

¹⁰² Another statute, Section 2519 of the Judicial Code, helpfully provides that “[a] final judgment of the [CFC] against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.” 28 U.S.C. § 2519.

court. Issue preclusion, which has radically evolved since Section 1500 was enacted, is a “judicially-developed doctrine” that extends the effects of preclusion beyond claims to issues necessarily decided in previous litigation.¹⁰³ Like claim preclusion, issue preclusion may be used offensively, “when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully,” or defensively, “when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully.”¹⁰⁴ Either way, it is a flexible tool courts can use to vindicate precisely the interests typically cited as justifying Section 1500.

Section 1500 has, therefore, outlived its original purpose. The kind of situation Senator Edmunds worried about in 1868 rarely arises today. Today, the incentive to sue a federal officer in tort in district court, while simultaneously suing the government in contract in the CFC, is significantly reduced because most tort actions against government officers are forbidden.¹⁰⁵ Indeed, in most cases where Section 1500 applies, the plaintiff has not separately sued the government and a government officer, but has brought two suits in different courts against the government itself. Here, ordinary principles of preclusion apply. In addition, because of the developments in the law of preclusion, a judgment in a suit against a federal officer would have appropriate preclusive effect in a related, subsequent case against the government itself.

To dismiss claims under Section 1500 when it no longer serves its purpose is unjust. A basic principle of modern civil procedure is that plaintiffs are permitted to pursue all the claims that they may have against a single defendant and are not required to “elect” among claims.¹⁰⁶ This rule should be as valid against the United States as against any other defendant. By depriving plaintiffs of potentially meritorious claims on the ground that they have filed related claims elsewhere, Section 1500 works an injustice.

In its recent decision in *Tohono*, the Supreme Court focused on a different purpose Section 1500 may today serve (even if it was not the statute’s original purpose), namely, the need “to save the Government from burdens of redundant litigation.”¹⁰⁷ It is true that, in the absence of Section 1500, plaintiffs could simultaneously bring separate lawsuits against the government, one in district court and one in the CFC, on claims arising from the same facts. The costs of such duplicative litigation are a legitimate concern. But Section 1500’s remedy of dismissing the CFC lawsuit is too harsh. As explained in more detail later in this Report, fairer options are available.

¹⁰³ *Mendoza*, 464 U.S. at 158; *see also* *Thomas v. Gen. Servs. Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986) (explaining that issue preclusion applies where “(i) the issue previously adjudicated is identical . . . , (ii) that issue was ‘actually litigated’ in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action”).

¹⁰⁴ *Mendoza*, 464 U.S. at 159 n.4.

¹⁰⁵ *See* 28 U.S.C. § 2679.

¹⁰⁶ *See* Fed. R. Civ. P. 18(a).

¹⁰⁷ *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011), slip op. at 7.

For example, one of the courts can stay its proceedings until the other is finished. This and similar options would mitigate costs of duplicative litigation without unjustly depriving a plaintiff of the ability to pursue potentially legitimate claims.¹⁰⁸ Indeed, it is unfair to punish a plaintiff for bringing suit against the United States in two different courts when the plaintiff is simply doing what is required by Congress' jurisdictional scheme.¹⁰⁹

Thus, Section 1500 unfairly causes plaintiffs with multiple claims against the United States to lose potentially meritorious claims. It is no longer needed to serve its original purpose of filling a gap in the doctrine of res judicata. And it is an unfairly harsh and overbroad method of reducing the costs of duplicative lawsuits that are only required because of the division of jurisdiction between the CFC and the district courts.

III. Further Problems: Section 1500's Procedural Traps

The previous section described the core problem with Section 1500: it may cause plaintiffs who have multiple claims against the United States arising from a single incident to lose meritorious claims simply by bringing each claim to the court in which it is cognizable. But Section 1500 causes other problems, too. Combined with its torturous history of judicial interpretation, the statute causes a series of complexities that exacerbate the basic problem. As this section shows, Section 1500, as applied to the various permutations of cases that can arise, yields results that are bizarre and unfair.

A. *The Determinative Role of Timing in Section 1500's Application*

As noted above, Section 1500 may oust the CFC of jurisdiction if a plaintiff files claims arising out of a single incident in multiple courts. But, curiously, current law permits a “work-around,” which enables plaintiffs with multiple claims against the United States to pursue all such claims, provided they file them in the right order. The availability of this work-around—to those able to find it—makes Section 1500's application all the more illogical.

Under current law, Section 1500's application is determined as of the time the plaintiff files his complaint in the CFC.¹¹⁰ Under this “time-of-filing” rule,¹¹¹ which originated in *Tecon*

¹⁰⁸ See Part V.A.1, *infra*.

¹⁰⁹ See *id*.

¹¹⁰ See *Keene*, 508 U.S. at 209. Early decisions were to the contrary: a later-filed district court action was held to divest the CFC of jurisdiction. See *Corona Coal Co. v. United States*, 263 U.S. 537, 539-40 (1924); *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924); see also *Kirgis*, *supra* note 33, at 321 n.122 (explaining the history of “uncertainty as to timing” of suits in the application of Section 1500). The tide turned in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), a decision that may have been driven by the Federal Circuit's disapproval of a plaintiff who was blatantly attempting to manipulate the court's jurisdiction by filing a district court action and then using the filing to get out of its earlier filed CFC action, see *id.* at 944, 949.

¹¹¹ E.g., *Nez Perce Tribe*, 83 Fed. Cl. at 190 (“After *Keene* was decided, the Federal Circuit has accepted that Section 1500 incorporates a *time-of-filing* requirement.”).

Engineers, Inc. v. United States,¹¹² Section 1500 bars a plaintiff’s claim if it was pending in district court at the time of filing in the CFC, even if the district court dismisses the action before the CFC adjudicates a motion to dismiss under Section 1500. On the other hand, “a later filed district court action d[oes] not oust the [CFC] of jurisdiction under § 1500.”¹¹³

The resulting rule provides that if a plaintiff “[f]ile[s] a lawsuit in [the CFC] on Monday and another involving the same claims in the U.S. district court on Tuesday, . . . all is jurisdictionally well.”¹¹⁴ But if the plaintiff does the reverse—files a lawsuit in district court on Monday and another suit involving the same claims in the CFC on Tuesday—the CFC must dismiss. The order of filing determines the outcome.

A sophisticated (or lucky) plaintiff can thus avoid Section 1500 simply by filing in the right order.¹¹⁵ The rule emphasizes that Section 1500 serves no valid purpose. Indeed, the rule often operates as a trap for the unwary, resulting in the dismissal of suits filed by a plaintiff (or counsel) who was ignorant of the rule or made a simple filing mistake.¹¹⁶ This is unfair. And it “makes no sense” in light of any plausible purpose served by Section 1500,¹¹⁷ because “[w]hether a suit on the same claim is filed before or after an action in the [CFC], the Government’s defense of it involves duplicative effort.”¹¹⁸

It should be noted that this rule was discussed in a case recently decided by the Supreme Court, *Tohono O’odham Nation v. United States*.¹¹⁹ This case presented questions regarding the role of the plaintiff’s requested relief in interpreting “claim” as used in Section 1500. But the government also asked the Supreme Court to take the opportunity to resolve the order of filing anomaly by interpreting Section 1500 to require dismissal in the CFC whenever related claims

¹¹² 170 Ct. Cl. 389 (1965).

¹¹³ *Hardwick Bros. Co. II v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995). This rule originated in *Tecon Engineers*, was briefly overruled by *UNR*, and ultimately resurrected in *Loveladies*. *See id.* at 885-86.

¹¹⁴ *Griffin v. United States*, 85 Fed. Cl. 179, 182 (2008); *see also Breneman*, 57 Fed. Cl. at 577 n.11 (“Cases in this court that have involved later-filed district court actions have not been dismissed for lack of jurisdiction under § 1500 even if both claims were the same.”).

¹¹⁵ *E.g., Low*, 90 Fed. Cl. at 456 (“Had Plaintiff merely filed suit in this Court first, § 1500 would not have been a concern.”).

¹¹⁶ *See, e.g., Lan-Dale Co. v. United States*, No. 03-1956C, 2009 U.S. Claims LEXIS 16, *10-11 (Jan. 29, 2009) (explaining what led plaintiff’s “former counsel” to “ma[k]e ‘a disastrous procedural error’ in filing the two lawsuits simultaneously in different courts, in apparent ignorance of 28 U.S.C. § 1500” (internal footnote omitted)).

¹¹⁷ *Keene Corp. v. United States*, 12 Cl. Ct. 197, 215 (1987).

¹¹⁸ *Id.*; *see also Low*, 90 Fed. Cl. at 455 (“Unfortunately, due to a series of judicial decisions . . . , § 1500 in practice often fails to produce its intended result. Rather than preventing a plaintiff from filing two actions seeking the same relief for the same claims, § 1500 ‘merely requires that the plaintiff file its action ‘in the Court of Federal Claims before it files its district court complaint.’” (quoting *Tohono O’odham*, 559 F.3d at 1291)); *Vaizburd*, 46 Fed. Cl. at 311 n.4 (citing *Tecon*, 343 F.2d at 949) (“A later-filed claim in the district court, even though it raises the same theoretical concerns, does not implicate Section 1500.”).

¹¹⁹ 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3687 (Apr. 19, 2010) (No. 09-846).

are pending in district court, regardless of the order of filing. The Court declined this invitation, noting that the rule was “not presented . . . because the CFC action [in *Tohono*] was filed after the District Court suit.”¹²⁰ The Court nonetheless criticized the order of filing rule as having “left the statute without meaningful force,”¹²¹ stating that the Federal Circuit “was wrong to allow its precedent to suppress the statute’s aims.”¹²² This criticism could lead the Federal Circuit or the Supreme Court to abolish the time-of-filing rule. But, at least for now, the rule remains.

B. The Simultaneous Filing Rule

The unfairness of Section 1500 is further exacerbated by the Federal Circuit’s rule that the statute applies not only if a plaintiff files a claim first in district court and then in the CFC, but also if the plaintiff files in both courts simultaneously.¹²³ This rule, announced in *United States v. County of Cook*, is based on a “view of appropriate policy” that some judges on the Federal Circuit have criticized as “mistaken.”¹²⁴ In *County of Cook*, the court “endeavor[ed] to further the established policies of Section 1500,” which the court identified as forcing plaintiffs to choose between courts and protecting the government from duplicative suits.¹²⁵ The court did not conclude these policies were actually furthered by interpreting “pending” to encompass simultaneously filed claims.¹²⁶ Rather, the court concluded merely that “nothing suggests that these policies would not . . . be promoted by precluding jurisdiction in the simultaneous filing context.”¹²⁷ Thus, not only is it unclear that the result was required by the policy considerations the court identified, but “those policy considerations are arguable at best.”¹²⁸

C. Application of the Simultaneous Filing Rule to Transferred Claims

A particularly unfortunate detail of the “simultaneous filing” rule announced in *County of Cook* is how it applies to claims transferred from district court to the CFC. A party with multiple claims against the United States may erroneously file all such claims in district court, even though some of the claims belong in the CFC. In such a case, the district court may invoke

¹²⁰ United States v. Tohono O’odham Nation, 563 U.S. ____ (2011), slip op. at 7.

¹²¹ *Id.*, slip op. at 6.

¹²² *Id.*, slip op. at 7.

¹²³ See *Cnty. of Cook*, 170 F.3d at 1087; *Vaizburd*, 46 Fed. Cl. at 311.

¹²⁴ *Griffin v. United States*, 621 F.3d 1363, 1365 (Fed. Cir. 2010) (Plager, J., dissenting from denial of panel rehearing and rehearing en banc).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1091.

¹²⁷ *Id.*

¹²⁸ *d’Abrera*, 78 Fed. Cl. at 56 n.10.

the transfer statute, 28 U.S.C. § 1631, which is designed to save plaintiffs who file claims in the wrong court.¹²⁹ Section 1500, however, may rob plaintiffs of the benefits of Section 1631.

The difficulty is that Section 1631 requires the transferee court to treat transferred claims as though they had been filed in the transferee court on the date that they were actually filed in the court from which they are transferred.¹³⁰ If a plaintiff files multiple claims against the government in district court, but the district court determines that some (but not all) of those claims are within the CFC’s jurisdiction, the district court may invoke Section 1631 to transfer the claims to the CFC. But the CFC must treat the transferred claims as having been filed in the CFC on the date they were filed in district court. That is, it must treat the transferred claims as if they were simultaneously filed with the claims that remained in the district court. *County of Cook* then requires the CFC to dismiss the transferred claims, provided they are the same “claims” that remained in the district court.¹³¹ Dismissal results despite the fact that the claims were transferred to the CFC precisely because it was the proper court to hear them.¹³²

On the other hand, Section “1500 is not implicated when *all* of the claims in an action are transferred to the” CFC.¹³³ This is “[p]resumably because . . . the district court proceeding is . . . deemed never to have been filed.”¹³⁴

This application of Section 1500 to transferred claims “creates a significant trap for the unwary,”¹³⁵ and undermines the purposes of the transfer statute, which was “enacted to *cure* jurisdictional defects.”¹³⁶ The trap becomes apparent from a summary of the complicated rules that have emerged from the interaction between Sections 1500 and 1631. These rules provide:

- Where a plaintiff files in district court, and the district court subsequently transfers *all* claims to the CFC, Section 1500 does not apply.¹³⁷

¹²⁹ See *Cnty. of Cook*, 170 F.3d at 1089 (interpreting the transfer statute to “permit the transfer of less than all of the claims in an action”).

¹³⁰ See 28 U.S.C. § 1631 (providing that “the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred”).

¹³¹ See *Cnty. of Cook*, 170 F.3d at 1090, 1091 & n.8.

¹³² *Id.* at 1090.

¹³³ *Id.* at 1091 n.8.

¹³⁴ *Vaizburd*, 46 Fed. Cl. at 311.

¹³⁵ *d’Abrera*, 78 Fed. Cl. at 56 n.10.

¹³⁶ *Id.* at 56 n.10; see also *Griffin*, 621 F.3d at 1364 (explaining how the Federal Circuit’s Section 1500 jurisprudence can defeat Section 1631’s purpose of permitting the transfer of claims filed in the wrong court because of counsel’s “unfamiliar[ity] with the intricacies and complexities of federal jurisdiction”).

¹³⁷ *d’Abrera*, 78 Fed. Cl. at 57.

- Where a plaintiff files in district court, the district court dismisses all claims, and the plaintiff subsequently files the same claim in the CFC, Section 1500 does not apply.¹³⁸
- Where a plaintiff files in district court, and the district court transfers only a subset of the claims to the CFC, the claims are deemed simultaneously filed by operation of section 1631, and Section 1500 applies.¹³⁹
- This holds true even if the district court dismisses the remainder of the plaintiff's claims *after* having made the transfer to the CFC, because under *Keene*, the CFC is required to assess its jurisdiction at the time of filing.¹⁴⁰

These complex rules are difficult to navigate and likely to result in the dismissal of claims filed by unsophisticated litigants or litigants who honestly but erroneously thought the district court had jurisdiction over their action.

The consequence is that, for a plaintiff who has multiple claims arising out of the same operative facts, over which “jurisdiction might be split between a district court and” the CFC, “the only safe alternative is . . . to file first in [the CFC], and thereafter to file in district court.”¹⁴¹ Broadly speaking, then, *County of Cook* punishes unwary litigants by dismissing their claims despite the purpose of Section 1631, while rewarding sophisticated litigants who file duplicative suits despite the purported purposes of Section 1500.

D. Intra-CFC Split: Are Claims Filed on the Same Day Per Se “Simultaneous”?

The harm wrought by the Federal Circuit’s simultaneous filing rule includes an intra-CFC split over whether same-day filings should be treated as *per se* simultaneous, such that Section 1500 bars jurisdiction under *County of Cook*.¹⁴² Presumably, a sophisticated plaintiff will avoid the problem entirely by filing his claims in the proper order, on different days. Less sophisticated plaintiffs, however, are likely to have their claims dismissed under the complicated simultaneous filing rules. This disparity in the treatment of claims based on the plaintiff’s level of sophistication is arbitrary.

¹³⁸ *Id.* at 56 n.10; *Vaizburd*, 46 Fed. Cl. at 311.

¹³⁹ *Vaizburd*, 46 Fed. Cl. at 311.

¹⁴⁰ *Id.* at 311.

¹⁴¹ *d’Abrera*, 78 Fed. Cl. at 56 n.10.

¹⁴² *See, e.g.*, *United Keetoowah Band of Cherokee Indians v. United States*, 86 Fed. Cl. 183, 190 (2009) (“The lack of clarity in case law surrounding the meaning of ‘pending’ under Section 1500 has left the [CFC] divided [into] two camps” regarding whether to “adopt[] a per se rule that a district court complaint filed the same day is pending regardless of time of filing.” (internal citations omitted)).

A minority of CFC judges have adhered to the ancient maxim that the law knows no fractions of a day, holding “that a District Court complaint filed the same day [as the complaint filed in the CFC] is pending regardless of time of filing.”¹⁴³ *Passamaquoddy Tribe v. United States*,¹⁴⁴ which exemplifies the minority rule, explained that some courts do not time stamp complaints,¹⁴⁵ and that “construing § 1500 to require the taking of live testimony from paralegals and filing clerks [to determine the precise timing of two filings] borders on the absurd.”¹⁴⁶ To engage in “[s]uch an inquiry frustrates all notions of judicial economy,” particularly in response to “[d]uplicative suits filed on the same day” and contrary to the purposes of Section 1500.¹⁴⁷

The majority view, however, “recognizes as dispositive the sequence of the two complaints’ filing.”¹⁴⁸ These judges have concluded that where two complaints are “separately carried to [the CFC] and to the district court by a delivery service . . . on the same day, as a factual matter the sequence of filing should be determinable.”¹⁴⁹ That making this determination may “require ‘extra’ work by the parties and the court” is of no moment for those judges who read the statute to require the inquiry.¹⁵⁰

Even the majority approach, however, can result in seemingly arbitrary dismissals. For example, in *Nez Perce Tribe*, a clerk testified that the time of filing in her court depends on whether a “case manager is . . . at lunch or on the telephone or handling another project.”¹⁵¹ An unwary plaintiff may thus find herself the victim of both a confusing and fractured jurisprudence and the vagaries of the clerk’s schedule on the day of filing. A knowledgeable plaintiff, however, can avoid this fate by filing her complaints in the proper order on different days.

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Id.

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82 Fed. Cl. 256 (2008).

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Id. at 272.

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Id.

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Id. “Nonetheless, because precedent is disputed on this issue, the court proceed[ed] to examine the evidence of the sequence of the court filings,” *id.* at 272, concluding that the CFC action was later-filed and, therefore, barred by Section 1500, *id.* at 280.

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United Keetoowah Band, 86 Fed. Cl. at 190; *see Nez Perce*, 83 Fed. Cl. at 191; *Ak-Chin Indian Cmty. v. United States*, 80 Fed. Cl. 305 (2008); *Salt River Pima-Maricopa Indian Cmty. v. United States*, No. 06-943L, 2008 WL 1883170 (Fed. Cl. Apr. 24, 2008); *Breneman v. United States*, 57 Fed. Cl. 571, 577 (2003); *cf. Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 75 F.3d 648, 653 n.2 (Fed. Cir. 1996) (explicitly not reaching the same-day filing question, but suggesting that the precise time of day of each filing would determine whether Section 1500 applied).

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Nez Perce Tribe, 83 Fed. Cl. at 191.

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Id. at 193.

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Id. at 193 (internal quotation marks omitted).

E. Intra-CFC Split: Is an Action “Pending” When Time Remains to Appeal?

A case is “pending” for purposes of Section 1500 if it is pending in a court of appeals,¹⁵² and the CFC must therefore dismiss a claim if a claim based on the same facts, previously filed by the plaintiff in district court, is still on appeal. CFC judges have, however, split over whether an earlier-filed district court action is still “pending” after it has been dismissed on jurisdictional grounds, but before the time to appeal the dismissal has expired.¹⁵³ The issue hasn’t come up often, but could be outcome determinative if the statute of limitations will run on a plaintiff’s CFC claim before the time for appealing the district court’s dismissal has expired. In such a case, an honest plaintiff could be punished for his reasonable belief that the district court, and not the CFC, has jurisdiction over his claims.¹⁵⁴ The CFC has suggested this result could be avoided if the plaintiff “renounced” his right to appeal the district court decision before filing in the CFC.¹⁵⁵ But this might not be an equitable solution because it would require the plaintiff to forgo his right to appeal a decision depriving him of one forum for his claim in order to pursue his claim in a forum he believes lacks jurisdiction. Regardless of what the right rule is, however, a plaintiff caught in this quandary today faces an uncertain outcome.

F. Defining “Claim”: A Case Study in Jurisprudential Volatility

Another problem with Section 1500, exemplified in the history of the interpretation of “claim,” is that the courts have created a highly unstable jurisprudence surrounding the statute. Much of the problem with Section 1500 stems from the definition of the fundamental statutory term, “claim.” As explained above, it is crucial to the problem posed by the statute that a “claim” is defined by its underlying facts, and not by the legal theory attached to the claim. The courts have vacillated among different interpretations, and have had such difficulty explaining the terms of the statute that it seems unfair to expect plaintiffs to know what they are supposed to do. This tumultuous judicial history strongly suggests that the statute is out-of-date, poorly written, and insusceptible of rational judicial construction.

The first case to interpret “claim,” *British American Tobacco Company, Ltd. v. United States*,¹⁵⁶ suggested that the test should focus exclusively on whether the operative facts

¹⁵² *Coeur d’Alene Tribe v. United States*, 102 Fed. Cl. 17, 25 (2011).

¹⁵³ *Compare Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784, 795 (2010) (holding that an earlier filed district court action that is dismissed is still “pending” until the time to file a motion for reconsideration or notice of appeal has run); *Jachetta v. United States*, 94 Fed. Cl. 277, 283 (2010) (same), *with Young v. United States*, 60 Fed. Cl. 418, 425 (2004) (holding that “once a claim is dismissed or denied, it is no longer pending in another court, for purposes of Section 1500, until a motion for reconsideration or notice of appeal is filed”).

¹⁵⁴ *See Vero Technical Support*, 94 Fed. Cl. at 795 n.2.

¹⁵⁵ *Id.* at 795.

¹⁵⁶ 89 Ct. Cl. 438 (1939).

underlying the plaintiff's claims are the same.¹⁵⁷ This seemed straightforward, but a later decision, *Casman v. United States*,¹⁵⁸ injected uncertainty into the doctrine.¹⁵⁹ *Casman* held that Section 1500 was simply “inapplicable”¹⁶⁰ where a plaintiff filed two suits based on the same operative facts, but in each court sought “entirely different” relief that *only* that court was empowered to grant.¹⁶¹ In such cases, the court reasoned, “the plaintiff obviously had no right to elect between courts.”¹⁶² *Casman* precipitated years of uncertainty about what kind of election would render Section 1500 inapplicable—was it an election between legal theories (e.g., contract versus tort) or an election between types of relief (e.g., monetary versus equitable)?¹⁶³ Some cases suggested the former;¹⁶⁴ others suggested the latter.¹⁶⁵

The Federal Circuit first attempted to eliminate the confusion wrought by *Casman* in 1988, in *Johns-Manville Corporation v. United States*.¹⁶⁶ Here, several defendants in mass tort litigation sought indemnification from the government “for injuries to shipyard workers exposed to asbestos during World War II.”¹⁶⁷ The same defendants had previously filed indemnification claims sounding in tort against the government in district court.¹⁶⁸ Because the claims filed in both courts were based on the same operative facts and sought monetary relief—albeit under different legal theories—the CFC dismissed the action under Section 1500.¹⁶⁹ In the course of affirming that dismissal, the Federal Circuit undertook a comprehensive examination of the text, legislative history, and judicial interpretations of Section 1500. While not overruling any of the cases its decision appeared to undermine, the Federal Circuit “construe[d] the term ‘claim’ in 28 U.S.C. § 1500 to be defined by the operative facts alleged, not the legal theories raised.”¹⁷⁰ The court further held that because the purpose of Section 1500 was to “force an election [of forum]

¹⁵⁷ *Id.*; see also *L.A. Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. 648 (1957).

¹⁵⁸ 135 Ct. Cl. 647 (1956).

¹⁵⁹ See Kirgis, *supra* note 33, at 323-326.

¹⁶⁰ *Casman*, 135 Ct. Cl. at 650.

¹⁶¹ *Id.* at 649-50.

¹⁶² *Id.* at 650.

¹⁶³ Kirgis, *supra* note 33, at 323; see Peabody, *supra* note 33, at 104.

¹⁶⁴ See *Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Prillman v. United States*, 220 Ct. Cl. 677 (1981); *Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976).

¹⁶⁵ See *City of Santa Clara v. United States*, 215 Ct. Cl. 890 (1977).

¹⁶⁶ 855 F.2d 1556 (Fed. Cir. 1988).

¹⁶⁷ *Id.* at 1558.

¹⁶⁸ See *id.*

¹⁶⁹ See Kirgis, *supra* note 33, at 326-27 (citing *Keene Corp. v. United States*, 12 Cl. Ct. 197, 216-17 (1987), *aff'd sub nom. Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560 (Fed. Cir. 1988)).

¹⁷⁰ *Johns-Manville*, 855 F.2d at 1563.

where both forums could grant the same relief,”¹⁷¹ the *Casman* exception remained good law “where a different type of relief” was sought in each of two forums.¹⁷²

Less than four years after *Johns-Manville*, sitting en banc in *UNR Industries, Inc. v. United States*,¹⁷³ the Federal Circuit, over a vigorous dissent,¹⁷⁴ undertook a sweeping reform of its Section 1500 jurisprudence.¹⁷⁵ The case appeared to raise just two, relatively narrow questions that available precedent was sufficient to answer. But the court’s analysis went much further, beginning with a comprehensive examination of Section 1500’s text and legislative history,¹⁷⁶ and including a thorough review of the “judicial development” of the doctrine, which the majority described as “erratic.”¹⁷⁷ Of the mind that Section 1500 “is now so riddled with unsupportable loopholes that it has lost its predictability” and “no longer serves its purposes,”¹⁷⁸ the court explicitly overruled *five* cases it viewed as creating unsupportable judicial exceptions to Section 1500.¹⁷⁹

The *UNR* revolution was short-lived—much of the precedent it overruled was good law again in just over two years. The Supreme Court delivered the first blow when it reviewed *UNR* in *Keene v. United States*.¹⁸⁰ Though affirming the Federal Circuit’s decision, the Court found “it unnecessary to consider, much less repudiate” all the same Section 1500 precedents.¹⁸¹ Following *Keene*, the Federal Circuit, in another *en banc* decision, *Loveladies Harbor*,¹⁸² explicitly reaffirmed the validity of three of the five cases overruled in *UNR*.¹⁸³ *Loveladies* brought some measure of certainty to Section 1500—since then the rule has been that “[f]or the

¹⁷¹ *Id.* at 1564.

¹⁷² *See id.* at 1566; *see also* Bos. Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137, 139 (1988) (citing *Johns-Manville* as upholding the continued validity of the *Casman* exception for duplicative suits seeking different relief).

¹⁷³ 962 F.2d 1013 (Fed. Cir. 1992).

¹⁷⁴ *See id.* at 1026-30 (Plager J., dissenting).

¹⁷⁵ Kirgis, *supra* note 33, at 332; *see also* Peabody, *supra* note 33, at 105 (“For whatever reason, the Federal Circuit, sitting *en banc*, also took the opportunity in *UNR* to revisit five precedents that it viewed as judicially created – and therefore illegitimate – exceptions to Section 1500’s textual meaning.”).

¹⁷⁶ *See UNR*, 962 F.2d at 1017-19.

¹⁷⁷ *Id.* at 1019.

¹⁷⁸ *Id.* at 1021.

¹⁷⁹ Peabody, *supra* note 33, at 105 & n.43.

¹⁸⁰ 508 U.S. 200 (1993).

¹⁸¹ *Keene*, 508 U.S. at 216 (quoting *UNR*, 962 F.2d at 1021). On the other hand, two of the cases overruled in *UNR* “[d]id not survive [the] ruling [in *Keene*], for they ignored the time-of-filing rule.” *Keene*, 508 U.S. at 217.

¹⁸² 27 F.3d 1545 (Fed. Cir. 1994).

¹⁸³ *Id.* at 1549 (stating that “anything [the Federal Circuit] said in *UNR* regarding the legal import of cases whose factual bases were not properly before [it] was mere dictum, and therefore [refused to] accord it stare decisis effect”).

[CFC] to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief.”¹⁸⁴

The doctrinal instability underlying the *UNR-Keene-Loveladies* debacle continued to percolate for years, culminating in *Tohono O’odham Nation v. United States*, a case recently decided by the Supreme Court.¹⁸⁵ This case once again raised the question of the proper role of relief in the application of Section 1500. The Court’s decision clarifies and simplifies the inquiry by holding that “[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit.”¹⁸⁶

IV. The Need to Reform Section 1500

Having explained the operation of Section 1500, this report now details the harms that the statute causes. This part of the report surveys the kinds of plaintiffs Section 1500 has affected, provides statistics on the number of cases dismissed under Section 1500, shows that Section 1500 can lead to the dismissal of otherwise potentially meritorious claims, and collects prior judicial and scholarly criticism of Section 1500.

A. *Identity and Measure of the Parties and Claims Affected by Section 1500*

Who is affected by Section 1500? Potentially, anybody. One might imagine the impact of the statute would fall primarily on unsophisticated litigants, particularly pro se parties. In fact, sophisticated businesses and pro se parties alike have fallen into the Section 1500 trap. The statute has affected federal employees, property owners, businesses, local governments, and Indian tribes. The following examples, previously set forth in the introduction to this Report, show the broad array of parties who have had claims dismissed under Section 1500:

- 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—where it was dismissed under Section 1500.¹⁸⁷
- Property owners who claimed in the CFC that the government had taken their property without just compensation. Their claim was dismissed because they had previously sued in district court based on a tort theory.¹⁸⁸

¹⁸⁴ *Id.* at 1551.

¹⁸⁵ 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3687 (Apr. 19, 2010) (No. 09-846).

¹⁸⁶ *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011), slip op. at 9.

¹⁸⁷ *Griffin*, 590 F.3d 1291.

- A government contractor that filed a bid protest claim in the CFC. The case was dismissed because the plaintiff had previously sued in district court under the Administrative Procedure Act—even though the district court had already dismissed on the ground that the plaintiff’s exclusive remedy was in the CFC.¹⁸⁹
- 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 then dismissed under Section 1500.¹⁹⁰
- 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.¹⁹¹

These examples show that Section 1500 impacts many different kinds of parties, and that many different constituencies would benefit from Section 1500’s reform.

Statistics can also help measure the impact of Section 1500. Our search for cases involving Section 1500 dismissals showed that, over the past five years, Section 1500 has resulted in an average of at least 5.4 dismissals per year.¹⁹² This number is likely an underestimate because our search included only those cases available in Lexis and Westlaw. Other Section 1500 dismissals may not appear in these databases because they were summarily dismissed, dismissed via unpublished orders not included in the databases, or voluntarily dismissed or otherwise settled when the plaintiff discovered the jurisdictional defect.¹⁹³

We located a total of 56 cases from the decade spanning from 2000 to 2010 in which the CFC adjudicated a motion to dismiss under Section 1500. Of these, 38, or approximately 68% were dismissed. In only nine of the 56 cases, or approximately 16%, did a claimant survive a motion to dismiss under Section 1500 based on the court’s finding that the claim pending in the district court was not the same claim, because of differences in the operative facts and/or the relief sought in each forum. In another nine cases, or 16% of the total, claims survived a motion to dismiss solely because the claimant was sophisticated (or lucky) enough to file his claims in

¹⁸⁸ *Vaizburd*, 46 Fed. Cl. 309. These plaintiffs ultimately recovered by suing in the CFC again after their district court proceedings had concluded, *Vaizburd v. United States*, 67 Fed. Cl. 257 (2005), which highlights how pointless the original dismissal was.

¹⁸⁹ *Vero Technical Support*, 94 Fed. Cl. 784; *see also Keene*, 508 U.S. 200 (1993) (manufacturer’s contractual and takings claims against the United States dismissed because the company had also sued the government in district court on tort theories).

¹⁹⁰ *Cnty. of Cook*, 170 F.3d 1084.

¹⁹¹ *Passamaquoddy Tribe*, 82 Fed. Cl. 256.

¹⁹² *See Appendix A.*

¹⁹³ In our research, we identified four cases in which the Federal Circuit affirmed a CFC decision dismissing under Section 1500 that was not available on Lexis. *See Appendix A* at 2, 7.

the right order, i.e., by filing *first* in the district court and *then* in the CFC.¹⁹⁴ Finally, of only six cases that were transferred to the CFC because the district court found the CFC was the proper forum to hear the claims presented, four, or two-thirds, were subsequently dismissed by the CFC under Section 1500. From these statistics it is clear that Section 1500 affects many plaintiffs, often in ways that seem unfair. Section 1500 is likely to affect still more plaintiffs in the wake of *Tohono*, which eliminated the CFC's ability to retain jurisdiction over a claim that has the same operative facts as a claim pending in district court based on differences in the relief sought in each forum. If this *Tohono* rule had been in place, three additional cases would have been dismissed, raising the total dismissal rate from 68% to 73%.¹⁹⁵ This effect is already observable in the CFC. In one case, the rule announced in *Tohono* has worked particular hardship, requiring the CFC to dismiss a case in which the plaintiffs had prevailed in a takings claims following 13 years of litigation, had been awarded an over \$1.6 million judgment, and were just completing the litigation by briefing a motion for attorney's fees and costs.¹⁹⁶ The plaintiffs could not file a new claim following the dismissal because the statute of limitations had long since run.¹⁹⁷

B. Examples of Viable Duplicative Claims

The dilemma Section 1500 poses for plaintiffs is genuine. The statute's burdens do not fall only on plaintiffs who take a "kitchen sink" approach to litigation and bring every possible claim against the government, regardless of merit. Rather, a plaintiff may have a reasonable desire to file multiple claims against the government arising out a single incident and may be unable to bring them all in a single court. Section 1500 may compel such plaintiffs to elect among potentially meritorious claims.

There are two kinds of situations in which plaintiffs may reasonably wish to file duplicative cases (i.e., two cases based on the same facts) against the government. First, plaintiffs may have a viable claim against the government, but be in genuine, reasonable doubt about how to characterize that claim. Characterized one way, the claim may belong in the CFC; characterized a different way, the claim may belong in district court. Filing in both courts ensures that the plaintiff will not lose his claim due to a reasonable characterization error. Second, in some cases, plaintiffs may have two claims that are viable because Congress has allowed them, but which cannot be joined in a single action because of the jurisdictional scheme created by Congress. Section 1500 forces an unfair election between such viable claims.

A review of the Section 1500 cases listed in Appendix A to the Report reveals that plaintiffs may have reasonable grounds for filing duplicative litigation against the government with respect to numerous kinds of claims, including:

¹⁹⁴ See *infra* Section III.A.

¹⁹⁵ See Appendix A.

¹⁹⁶ See *Central Pines Land Co. v. United States*, 99 Fed. Cl. 394 (2011).

¹⁹⁷ See *id.* at 407.

- Federal employees' employment claims.¹⁹⁸ Despite Congress's attempt to statutorily ensure that such claims can be joined in a single action before the CFC, certain statutory employment claims are today within the exclusive jurisdiction of the federal district courts.
- Property claims that may be characterized as either takings or tort claims.¹⁹⁹
- Claims that may be characterized as either tort or contract claims.²⁰⁰
- Challenges to agency action that may arise under the Administrative Procedure Act, be characterized as a bid protest, or both.²⁰¹
- Claims against a government agency arising out of conduct that may constitute a breach of contract (cognizable only in the CFC), and also violate the Lanham Act and Federal Tort Claims Act (FTCA) (cognizable only in district court).²⁰²
- Claims for monetary and injunctive (including specific performance) relief arising out of the government's violation of a settlement agreement.²⁰³

These difficulties in forum selection are not theoretical. Some specific examples will illustrate the kinds of genuine problems Section 1500 causes for plaintiffs. First, a pair of cases captioned *Hansen v. United States*²⁰⁴ provides an excellent example of a plaintiff in genuine and reasonable doubt about how to characterize—and thus determine the proper forum for—his claims. These cases arose out of the Forest Service's contamination of the plaintiff's property, a ranch in South Dakota, with a dangerous pesticide called ethylene dibromide (EDB). Twenty years after using the chemical to kill beetles in the Black Hills National Forest, Forest Service employees buried cans of it on federal property adjacent to Hansen's ranch, thereby contaminating the ranch's groundwater.²⁰⁵ In January 2002, Hansen filed a takings claim in the CFC. Approximately ten months later, after exhausting administrative remedies, he filed in district court under the Federal Tort Claims Act (FTCA).²⁰⁶ Because the CFC action was filed

¹⁹⁸ See, e.g., *Griffin v. United States*, 590 F.3d 1295 (Fed. Cir. 2009); *Cooke v. United States*, No. 1:06-cv-00748-TCW (Fed. Cl.); *Cooke v. Rosenker*, No. 1:06-cv-01928-JDB (D.D.C).

¹⁹⁹ See, e.g., *Hansen v. United States*, 65 Fed. Cl. 76, 83 (2005); *Vaizburd v. United States*, 46 Fed. Cl. 309 (2000).

²⁰⁰ See note 78, *supra*.

²⁰¹ See, e.g., *Vero Technical Support v. United States*, 94 Fed. Cl. 784 (2010).

²⁰² See, e.g., *Trusted Integration, Inc. v. United States*, 93 Fed. Cl. 94 (2010).

²⁰³ See, e.g., *Lan-Dale Co. v. United States*, 2009 U.S. Claims LEXIS 16 (2009).

²⁰⁴ The CFC case is *Hansen v. United States*, No. 1:02-cv-00021-LB (Fed. Cl.), and the district court case is *Hansen v. United States*, No. 5:02-cv-05101-KES (D.S.D.)

²⁰⁵ *Hansen*, 65 Fed. Cl. at 83.

²⁰⁶ *Id.* at 93.

first, it was not barred by Section 1500,²⁰⁷ and the district court stayed its proceedings pending resolution of the CFC action.²⁰⁸

The CFC’s treatment of Hansen’s claims in the ensuing proceedings attests to the genuine difficulty of determining the proper forum. The government moved to dismiss the CFC action, arguing the court had no jurisdiction to consider what was properly characterized as a tort claim, not a taking. In a lengthy opinion rejecting this argument, the CFC explained that “[o]ne issue that has over the decades divided this court is the distinction between torts and takings under the Takings Clause of the Fifth Amendment.”²⁰⁹ The court described the CFC and Federal Circuit’s takings doctrine as a “Serbonian Bog” rife with disagreement and uncertainty regarding the distinction between the two types of claims.²¹⁰ Hansen’s decision to file in both courts thus appears to be a reasonable reaction to genuine confusion—even among judges—regarding whether certain kinds of claims are properly characterized as tort or takings claims. Although the Federal Circuit provided some further guidance on the distinction between tort and takings claims after *Hansen*,²¹¹ the distinction continues to be a source of disagreement and legitimate doubt.²¹²

The characterization problem can also be seen in cases where the choice is between a tort claim and a contract claim. In some cases, plaintiffs have sued the United States in tort and have actually received an award in district court, only to learn on appeal that their claims were properly characterized as contract claims that were within the exclusive jurisdiction of the CFC.²¹³ Given that the courts themselves are thus in disagreement on the proper characterization of certain claims, plaintiffs could legitimately be in doubt as to the proper characterization.

Another pair of cases, captioned *Trusted Integration, Inc. v. United States*,²¹⁴ demonstrate that plaintiffs may have viable duplicative claims against the government. The Department of

²⁰⁷ *Id.* at 93 n. 27.

²⁰⁸ *Id.* at 93.

²⁰⁹ *Id.* at 79.

²¹⁰ *Id.* at 80.

²¹¹ *Moden v. United States*, 404 F.3d 1335 (Fed. Cir. 2005) (holding that, in an inverse condemnation action, it is not sufficient that government action was the likely cause of harm to plaintiff’s property; harm to plaintiff’s property must be the “direct, natural, or probable result” of the government action).

²¹² *See, e.g., Arkansas Game & Fish Comm’n v. United States*, 648 F.3d 1377 (Fed. Cir. 2011) (denying rehearing en banc in a case in which plaintiff’s claim was determined to be for a tort, not a taking, but with four judges dissenting), *cert. granted*, 132 S. Ct. 1856 (2012); *Placer Min. Co., Inc. v. United States*, 98 Fed. Cl. 681, 687 (2011) (“Distinguishing between torts and takings can be a difficult exercise”); *Mildenberger v. United States*, 91 Fed. Cl. 217, 262 (2010) (“Without further development of the evidentiary record, the court cannot determine whether the alleged invasion of plaintiffs’ upland parcels by odors is properly characterized as a taking or a tort.”)

²¹³ *See cases cited in note 78, supra.*

²¹⁴ *Trusted Integration, Inc. v. United States*, 93 Fed. Cl. 94 (2010); *Trusted Integration, Inc. v. United States*, No. 1:09-cv-00898-RLW (D.D.C.).

Justice (DOJ) entered into a license agreement with Trusted Integration, a company that provides a Federal Information Security Management Act (FISMA) compliance solution called “TrustedAgent.” Several years into the license, DOJ and Trusted Integration entered into an agreement allowing DOJ to include TrustedAgent as a component of a larger FISMA compliance solution. DOJ planned to submit this solution to OMB for designation as a “Center of Excellence” (COE), which would require all agencies to purchase DOJ’s FISMA compliance solution. Before submitting its solution to OMB, DOJ allegedly replaced the TrustedAgent component with an alternative created by DOJ and based on TrustedAgent, without the knowledge or consent of Trusted Integration. DOJ was selected as one of two COEs.²¹⁵

Section 1500, as interpreted by the courts and combined with the statute of limitations, prevented Trusted Integration from litigating its multiple, seemingly viable, claims against DOJ. In May 2009, Trusted Integration filed FTCA and Lanham Act claims in district court. In November 2009, the company sued in the CFC, seeking monetary damages for breach of an oral and implied-in-fact contract, breach of the original license agreement, and breach of the duty of good faith and fair dealing.²¹⁶ The CFC dismissed based on Section 1500,²¹⁷ and the plaintiff was ultimately deprived of any opportunity to litigate what appeared to be viable contract claims against DOJ.²¹⁸

C. Criticism of Section 1500

Section 1500 has been subject to widespread criticism. “[A] long line of plaintiffs [have] critiqu[ed] the injustice that often results in the application of this outdated and ill-conceived statute.”²¹⁹ Justices of the Supreme Court and judges on the Federal Circuit and the CFC have criticized Section 1500 as an anachronistic²²⁰ and “badly drafted statute”²²¹ that often operates as a “trap for the unwary”²²² and results in dismissals that are “neither fair nor rational.”²²³ These

²¹⁵ *Id.* at 95-96.

²¹⁶ *Id.* at 96.

²¹⁷ *Id.* at 104.

²¹⁸ *See Trusted Integration*, No. 1:09-cv-00898-RLW (D.D.C.).

²¹⁹ *Low v. United States*, 90 Fed. Cl. 447, 455 (2009) (summarizing criticism of Section 1500 and collecting authorities).

²²⁰ *See, e.g., Keene*, 508 U.S. at 222 (Stevens, J., dissenting) (“Viewed against a legal landscape that has changed dramatically since the days of these cotton claimants, [Section 1500] does not lend itself easily to sensible construction.” (internal citation omitted)).

²²¹ *Id.* at 222 (Stevens, J., dissenting).

²²² *Griffin*, 621 F.3d at 1364 (Plager, J., dissenting from denial); *see also Low*, 90 Fed. Cl. at 455-56 (explaining how plaintiff and her counsel’s “ignorance of the long line of cases discussing the application of § 1500” caused her to “los[e] the opportunity to have th[e] Court [of Federal Claims] review the potential merits of her breach of contract claims”); *Lan-Dale Co. v. United States*, 85 Fed. Cl. 431, 433 (2009) (calling the statute a “monumental” trap for the unwary); *d’Abrera v. United States*, 78 Fed. Cl. 51, 56 n.10 (2007) (describing Section 1500 as “a trap for the unwary”); *Vaizburd v. United States*, 46 Fed. Cl. 309, 309-10 (2000) (“The untutored might

judges agree the statute has “outlived its purpose.”²²⁴ They have referred to Section 1500’s “awkward formulation,”²²⁵ suggesting it would be “salutary” to repeal or amend it.²²⁶ They have criticized the government for using the statute to lay traps for unsuspecting plaintiffs.²²⁷ One judge even remarked that the statute would justify the famous conclusion that “the law is an ass.”²²⁸

Scholars have uniformly criticized the statute, urging it be repealed or judicially reformed.²²⁹ Previous attempts to repeal Section 1500 during the 1990s²³⁰—one of which succeeded in the House but failed in the Senate for reasons unrelated to Section 1500²³¹—suggest that the general antipathy toward Section 1500 can be found even in the halls of Congress.

In the recent *Tohono* decision, more Supreme Court Justices joined in the chorus of those who have criticized the statute. They noted that “[j]udges and commentators have long called for congressional attention to the statute”²³² and observed that *Tohono*, by broadening Section 1500’s effects, “renders such attention all the more pressing.”²³³ Even the Supreme Court itself remarked that “[i]f . . . the statute leads to incomplete relief, and if plaintiffs . . . are dissatisfied, they are free to direct their complaints to Congress.”²³⁴ And so they should.

suspect that the United States government would not rely on traps for the unwary [such as Section 1500] to avoid having to respond to its citizens. Not so.”)

²²³ *Vaizburd*, 46 Fed. Cl. at 311.

²²⁴ *Griffin*, 621 F.3d at 1364 (Plager, J., dissenting); *see also* *Low v. United States*, 90 Fed. Cl. 447, 455 (2009); *Griffin*, 85 Fed. Cl. at 181 & n.1; *Passamaquoddy Tribe*, 82 Fed. Cl. at 262; *A.C. Seaman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984).

²²⁵ *Keene*, 508 U.S. at 210

²²⁶ *Id.* at 222 (Stevens, J., dissenting).

²²⁷ *Vaizburd*, 46 Fed. Cl. at 309-10 (“The untutored might suspect that the United States government would not rely on traps for the unwary to avoid having to respond to its citizens. Not so.”).

²²⁸ *Id.* at 309.

²²⁹ *See supra* note 33 (collecting articles critical of Section 1500).

²³⁰ *See* S. 2521, 102d Cong. § 10(c) (1992); S. 1355, 103d Cong. § 1(a) (1993); S. 135, 104th Cong. § 6(c)(2)(A) (1995); H.R. 489, 104th Cong. § 6(c)(2)(A) (1995); S. 371, 104th Cong. § 8(b)(1) (1995); S. 605, 104th Cong. § 205(d)(2)(A) (1995); S. 343, 104th Cong. § 5(b)(2) (1995); S. 781, 105th Cong. § 205(d)(2)(A) (1997); S. 1256, 105th Cong. § 8(a)(2)(A) (1997); H.R. 992, 105th Cong. § 3(a) (as passed by House, Mar. 12, 1998); S. 2271, 105th Cong. § 6(a)(2)(A) (1998); S. 1028, 106th Cong. § 6(a)(2)(A) (1999).

²³¹ *See Meltz, supra* note 35, at 1172.

²³² *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011) (Sotomayor, J., concurring in the judgment), slip op. at 12.

²³³ *Id.*

²³⁴ *United States v. Tohono O’odham Nation*, 563 U.S. ____ (2011), slip op. at 9.

V. Reforming Section 1500

Section 1500 should be reformed. In this section, we first consider the characteristics of an appropriate solution, and then evaluate several potential ways to reform the statute.

A. *Policies Reform of Section 1500 Should Further*

Before examining possible solutions to the problems posed by Section 1500, it is important to lay out the principles that a solution should serve. This section suggests that plaintiffs suing the United States should, like all other plaintiffs, be permitted to pursue multiple claims, and should enjoy the benefits of the transfer statute.²³⁵ In examining these two overarching principles, this section further suggests that, in the interests of the government, plaintiffs, and courts, wasteful litigation over where to litigate should be minimized, duplicative litigation should be discouraged, and the possibility of double recovery should be eliminated.

1. *Plaintiffs Suing the United States Should Be Permitted to Pursue Multiple Claims*

To determine how best to reform Section 1500, we must first ask whether a plaintiff with multiple claims against the United States arising out of a single incident should be permitted to pursue all such claims. The answer is yes. This is consistent with fundamental principles of our legal system and is just. Moreover, vindicating the principle in the Section 1500 context would reduce wasteful litigation over threshold questions of jurisdiction, and allow preclusion principles and docket management to operate normally, which would reduce costs for the government, plaintiffs, and the courts.

A fundamental principle of our system of civil litigation is that plaintiffs may pursue multiple claims. In general, a plaintiff is permitted to aggregate all claims he may have against a particular defendant and is not required to “elect” among claims. Federal Rule of Civil Procedure 18 embodies this basic principle by providing that “[a] party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party.”²³⁶ If a plaintiff believes that a single wrongful action by a defendant might constitute a tort, a breach of contract, or a violation of a statute, the plaintiff is free to plead and pursue all three claims at once. Of course, a plaintiff is limited to a single recovery—even a plaintiff who prevails on multiple theories cannot recover more than his or her total damages.²³⁷ But the plaintiff may pursue all his claims simultaneously.

²³⁵ See 28 U.S.C. § 1631.

²³⁶ Fed. R. Civ. P. 18(a). Indeed, plaintiffs may even simultaneously pursue inconsistent claims, Fed. R. Civ. P. 8(d)(3), or multiple claims some of which are contingent on the success of others, Fed. R. Civ. P. 18(b).

²³⁷ E.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (“It goes without saying that the courts can and should preclude double recovery by an individual.” (internal quotation omitted)).

This principle is particularly important in cases where the law leaves unclear exactly which claim is the right one to bring. A set of facts may give rise to multiple potential theories of recovery, and a plaintiff may legitimately doubt exactly which theory a court might accept. The federal procedural system, by allowing a plaintiff to proceed on multiple claims simultaneously, protects plaintiffs against losing legitimate claims simply by mischaracterizing them.

The federal system of pleading and procedure is thus designed to protect plaintiffs against the hazard of mischaracterizing their claims. Plaintiffs should win or lose cases on their merits and should not be bounced out of court simply because of a pleading mistake. Allowing plaintiffs to pursue multiple claims simultaneously is necessary to ensure justice.

Discussions of Section 1500 occasionally suggest it is appropriate to require a plaintiff to “carefully assess his claims before filing” and choose among them.²³⁸ It is true that Section 1500 was originally intended to require plaintiffs to make an election,²³⁹ but only as a substitute for a missing rule of *res judicata*.²⁴⁰ Today, other developments have solved the *res judicata* problem, and our system of litigation embraces the principle that it is unfair and inappropriate to require plaintiffs to elect among potentially meritorious claims. So, suggestions that there is “no harm”²⁴¹ in requiring plaintiff to elect among claims are incorrect.

Indeed, such suggestions are akin to reviving, in a narrow but important context, the long-discredited common law system of the “forms of action.” Under the forms of action, plaintiffs could not simply bring a generalized “civil action,”²⁴² but were required to choose a particular “form of action” from among the highly complex and technical forms available.²⁴³ Plaintiffs could not pursue multiple claims, but had to make their best guess as to which one form of action would work for them, and a plaintiff who mistakenly sued in “trespass” instead of “trespass on the case” would lose even if his claim was otherwise meritorious.

This archaic and unjust system of procedure has long been reformed. Section 1500, however, imposes a similar requirement to choose among potentially valid claims, and it imposes a penalty on plaintiffs who, for example, mistakenly believe they have a tort claim instead of a takings claim. The suggestion that plaintiffs suing the United States, unlike all other plaintiffs, should be made to choose among potentially valid claims, is unjust.

²³⁸ *UNR*, 962 F.2d at 1021.

²³⁹ *E.g.*, *Matson*, 284 U.S. at 355-56 (explaining that “the declared purpose” of Section 1500 was “to require an election” between two avenues to relief); Kirgis, *supra* note 33, at 323 (“[T]he purpose of the statute: to force an election between suit in the [CFC] and suit in another court.”).

²⁴⁰ *See supra* notes 90 - 92 and accompanying text.

²⁴¹ *UNR*, 962 F.2d at 1021.

²⁴² *See* Fed. R. Civ. P. 2 (providing for just one form of action, the “civil action”).

²⁴³ F.W. Maitland, *The Forms of Action at Common Law* (1909).

The only possible justification for treating plaintiffs suing the United States differently from all other kinds of plaintiffs is that the United States is different from other defendants in that different kinds of claims against the United States must go to different courts. The rule permitting most plaintiffs to bring multiple claims in a single action serves judicial convenience and economy. But permitting a plaintiff suing the United States to pursue multiple claims may lead to duplicative litigation, because the plaintiff may be compelled to bring some claims in district court and others in the CFC.

The cost of any duplicative litigation that may result from this unique jurisdictional circumstance is a legitimate concern. But there are three reasons why a plaintiff suing the United States should be permitted to pursue multiple claims despite any cost of required duplicative litigation. And, in examining these reasons, we shall see that the costs may not be so high.

First, duplication in litigation against the United States is not the plaintiff's fault. Most likely, the plaintiff would prefer to aggregate all of his or her claims in a single action, so as to avoid duplication costs. Duplication results from Congress's decision to authorize different kinds of claims against the United States in different courts. It is not fair to insist the plaintiff bring tort claims in one court and contract claims in another, and then complain of duplication when the plaintiff does so.

Second, current law already permits duplication. As previously noted, plaintiffs may pursue all their claims against the United States, provided they correctly characterize those claims and file them in the right courts, in the right order. This rule is unfair because it lays a trap for plaintiffs who mischaracterize their claims or who file them in the wrong court or in the wrong order. If a plaintiff, harmed by the United States in a single incident, brings to the CFC all the claims arising out of the incident that belong there, and then, the next day, files in district court all claims that belong there, the plaintiff may proceed in both courts. The system is thus currently tolerating duplication costs. Moreover, the rule that permits this duplication—Section 1500—is inefficient. The parties and the court spend time and resources litigating how to characterize claims and determine the precise order of filings. This process is itself quite costly.

Third, the courts are well equipped to mitigate the costs of duplicative litigation. If a plaintiff files a tort claim in district court and a contract claim in the CFC arising out of the same facts, the courts may mitigate the costs of pursuing duplicate discovery and trial by, for example, having one court stay its action while the other proceeds. Such a procedure is common in other instances where related cases are simultaneously pending in different courts. And unlike the inquiries required under Section 1500, this procedure is explicitly designed to reduce costs and promote judicial economy.

2. *Plaintiffs Suing the United States Should Enjoy the Benefits of the Transfer Statute*

Plaintiffs suing the United States should also enjoy the benefit of the transfer statute, Section 1631. The transfer statute reflects Congress' judgment that a plaintiff, where possible, should not lose a legitimate claim simply for filing it in the wrong court. Nothing in the statute suggests that Congress intended this important principle to apply differently in suits involving the government than it does in other suits. Again, plaintiffs should win or lose cases on the merits, not on the basis of procedural missteps. Plaintiffs suing the United States should enjoy the benefit of this important principle as much as any other plaintiff.

B. *Potential Solutions*

We consider seven potential solutions to the purposeless procedural trap caused by Section 1500: (1) comprehensively reform the legal regime regulating the division of jurisdiction between the CFC and the district courts (including the possibility of extending supplemental jurisdiction to the CFC and/or the district courts); (2) repeal Section 1500; (3) replace Section 1500 with an alternative statute; (4) eliminate the order-of-filing work-around; (5) amend Section 1500 to create a rule that better vindicates the statute's policy goals; (6) judicially reform Section 1500 to ameliorate its bad effects; and (7) reform certain practices of the Department of Justice to ameliorate Section 1500's harms.

In the end, our recommended solution is for Congress simply to repeal Section 1500. That solution would yield the benefit of fair treatment for plaintiffs suing the United States. It would also entail the cost that the United States would be exposed to some duplicative litigation, but the courts would be able to mitigate that cost in appropriate cases by, for example, staying one of two duplicative suits while the other proceeds. We do not recommend a statutory *requirement* that courts take such mitigative steps in all cases, because we believe that no statutory formula can sufficiently capture all the different circumstances that may arise in litigation. We therefore recommend leaving the matter to the sound discretion of the courts involved. However, although repeal of Section 1500 is our recommended solution, we propose statutory language that might implement other potential solutions, so that the Committee and the Conference can have those options available.

1. *Comprehensive Jurisdictional Reform*

Perhaps the broadest solution to the problems caused by Section 1500 would be comprehensive reform of the jurisdictional divide between the CFC and the district courts to permit a plaintiff with multiple claims against the United States to bring all such claims in a single case. This solution may be intuitively appealing because the jurisdictional divide looms so large in Section 1500's problems. Such reform could be achieved in several ways. Congress might expand the jurisdiction of the CFC to include all kinds of claims against the United States;

it might eliminate the CFC and give its jurisdiction to the district courts; or it might allow either a district court or the CFC, when properly presented with a claim against the United States, to exercise pendent jurisdiction over related claims that it would not normally be competent to hear. Any of these solutions would eliminate the problem caused by Section 1500, while potentially solving other problems as well. It might benefit plaintiffs by eliminating uncertainty about where to sue the United States, benefit the government by eliminating duplicative litigation, and benefit the judicial system by providing a simpler and more efficient way to litigate multiple claims against the United States.

This Report neither closely examines nor recommends comprehensive jurisdictional reform. Section 1500 is only one small piece of a much larger, complex jurisdictional puzzle. The division of jurisdiction over different kinds of claims against the United States is of extremely long standing. Fundamentally reforming the entire system for bringing claims against the United States would be a tremendous undertaking, and more than is necessary to solve the problems posed by Section 1500. Such fundamental reform would likely meet considerable opposition and be difficult, if not impossible, to achieve.

A related, but more modest, potential solution to the Section 1500 quandary might include extending supplemental jurisdiction to district courts, the CFC, or both. It is clear that such an alternative would require legislation. One scholar critical of section 1500 has suggested that the courts could ameliorate the statute's harsh effects without new statutory authorization,²⁴⁴ by using the existing supplemental jurisdiction statute, 28 U.S.C. § 1367, which, in relevant part, provides that:

Except . . . as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.²⁴⁵

However, as the Ninth Circuit has observed, the statute “makes itself clear that its provisions do not apply where another federal statute ‘expressly provide[s] otherwise.’”²⁴⁶ The Tucker Act is

²⁴⁴ See Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of federal Government Litigation*, 47 AM. U. L. REV. 301, 344-49 (1997).

²⁴⁵ 28 U.S.C. § 1367(a).

²⁴⁶ *United States v. Park Place Assocs.*, 563 F.3d 907, 934 (9th Cir. 2009).

such a statute. Courts have consistently held that Section 1367 does not override the Tucker Act's grant of exclusive jurisdiction to the CFC.²⁴⁷

Supplemental jurisdiction could be granted only with respect to certain, particularly problematic types of claims. Indeed, Congress has occasionally enacted targeted reforms granting the CFC supplemental jurisdiction over particular types of claims where the lack of such jurisdiction created recurrent problems. A good example of this arises in the employment context. At one time, a federal employee with a grievance against his employer had to file two suits in order to obtain full relief because only the CFC could order backpay, and only the district court could issue equitable relief such as an order of reinstatement.²⁴⁸ In 1972, Congress amended the Tucker Act to enable the CFC “as an incident of and collateral to [a] judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records” in order “[t]o provide an entire remedy and to complete the relief afforded by [a] judgment” against government.²⁴⁹

Such targeted grants of supplemental jurisdiction may not, however, provide complete relief, even as to the class of affected litigants. For example, a federal employee can, by virtue of the 1972 amendment to the Tucker Act, seek back pay and reinstatement in the CFC. But today, such a plaintiff may have a viable statutory claim of employment retaliation that can only be litigated in district court.²⁵⁰ Targeted reforms such as the 1972 amendment are, by their very nature, designed to address particular jurisdictional difficulties that come to Congress' attention only after they have ensnared a number of litigants. Moreover, such reforms may not be sufficient to prevent related jurisdictional difficulties that crop up later. Thus, while targeted supplemental jurisdiction reforms can incrementally improve matters, they do not address the broader problem of injustice created by the interaction between Congress's jurisdictional scheme and Section 1500.

The alternative, a broad grant of supplemental jurisdiction—to the district courts, the CFC, or both—would be a significant departure from the existing jurisdictional scheme. Our

²⁴⁷ *E.g., id.* (“The circuits that have considered the issue have . . . rejected the argument . . . that the exclusive jurisdiction granted to the Court of Federal Claims by the Tucker Act may be overridden by the general grant set forth in § 1367.”); *Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp. v. United States*, 22 F.3d 741, 744 (7th Cir. 1994) (citing “several cases from other circuits which found that an express limitation embodied in the Tucker Act cannot be overcome by supplemental jurisdiction”); *Dia Navigation Co., Ltd. v. Pomeroy*, 34 F.3d 1255 (3d Cir. 1994) (rejecting an argument “that the Claims Court’s exclusive jurisdiction is overridden by the Supplemental Jurisdiction Act . . . in light of the Tucker Act’s explicit jurisdictional bar” (internal citation omitted)).

²⁴⁸ *See, e.g., Casman v. United States*, 135 Ct. Cl. 647 (1956); *In re Prillman*, 220 Ct. Cl. 677 (1979).

²⁴⁹ 28 U.S.C. § 1367(a)(2); *see also Polos v. United States*, 556 F.2d 903, 906 (8th Cir. 1977) (explaining the effect of the 1972 amendment to the Tucker Act).

²⁵⁰ *See Cooke v. United States*, No. 1:06-cv-00748-TCW (Fed. Cl.); *Cooke v. Rosenker*, No. 1:06-cv-01928-JDB (D.D.C).

research suggests that such a fundamental modification of the existing jurisdictional scheme would likely meet with substantial resistance. Indeed, previous attempts to repeal Section 1500 have failed precisely because they were coupled with more controversial modifications to the CFC's jurisdiction.²⁵¹

We do not recommend the supplemental jurisdiction option but, in case the Committee disagrees, we offer draft statutes, modeled after 28 U.S.C. § 1367, as potential starting points:

Possibility A (grant supplemental jurisdiction to the CFC):

In any civil action of which the United States Court of Federal Claims has original jurisdiction, the United States Court of Federal Claims shall have supplemental jurisdiction over all other claims against the United States that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that would otherwise be within the exclusive jurisdiction of the district courts.

Possibility B (grant supplemental jurisdiction to district courts):

(a) Except as provided in subsection (b), in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that (i) are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution and (ii) would be within the original jurisdiction of the United States Court of Federal Claims. Such supplemental jurisdiction shall include claims that would otherwise be within the exclusive jurisdiction of the United States Court of Federal Claims.

(b) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the district court has dismissed all claims over which it has original jurisdiction,

²⁵¹ See Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1172 (2000).

(2) the claim over which the district court has original jurisdiction appears to the district court to be insubstantial, or

(3) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(c) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed.

2. *Repeal Section 1500*

The best solution—and one that has drawn substantial, albeit not universal, support over the years—is to repeal Section 1500. This solution would eliminate the difficulties created by Section 1500 and prevent plaintiffs from losing legitimate claims for reasons unrelated to their merits. It would allow plaintiffs suing the United States, like plaintiffs suing any other defendant, to pursue all potential claims that they might have. It would eliminate the anomaly of having the CFC’s ability to hear claims depend on the order of filing. And it would permit plaintiffs suing the United States to enjoy the benefits of the transfer statute.

Repealing Section 1500 would reap a variety of benefits. Most fundamentally, it would eliminate the need for plaintiffs suing the United States to elect among potentially viable claims. It would also eliminate a major source of confusion and unfairness for litigants and help clarify the CFC’s jurisdiction.²⁵² It would prevent a significant amount of wasteful litigation over jurisdiction,²⁵³ while protecting plaintiffs from losing their day in court as a result of a simple filing error.²⁵⁴ Repealing the statute would also level the playing field along two dimensions. First, it would prevent pro se plaintiffs and plaintiffs represented by counsel unfamiliar with the intricacies of Section 1500 from getting caught in its traps. Second, it would level the playing field between the government—the ultimate repeat player before the CFC—and all plaintiffs. This equalization, accomplished via the simplification of procedural rules that appear to serve little purpose, would be consistent with the purpose of the CFC, *i.e.*, providing a specialized forum for the adjudication of monetary claims against the government.

²⁵² See S. Rep. No. 104–90, at 114–15 (1995).

²⁵³ See Appendix A; see also *Bowen*, 487 U.S. at 930 (Scalia, J., dissenting) (“Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law.”).

²⁵⁴ See 141 Cong. Rec. S2334 (daily ed. Feb. 8, 1995) (statement of Sen. Howell Heflin).

As previously explained, litigants, scholars, judges, and legislators have repeatedly suggested or urged that Congress should repeal Section 1500.²⁵⁵ In the 1990's, there were several unsuccessful legislative efforts to act on this suggestion. In introducing S. 781 in 1997, Senator Hatch pointed out that Section 1500 is so poorly drafted and has led to so many hardships that Justice Stevens has called for its repeal in *Keene*.²⁵⁶ Some may object to repealing Section 1500 because it is generally reasonable to prevent litigants from pursuing the same claim in two different courts²⁵⁷ or manipulating federal court jurisdiction.²⁵⁸ But, as the discussion above demonstrates, Section 1500 does not serve these goals efficiently or fairly. Moreover, the law has evolved considerably since Section 1500 was first enacted. In the statute's absence, other judicial doctrines, such as issue preclusion, and docket management tactics, including stays of proceedings and statutorily authorized transfers, would better serve the purported purposes of Section 1500.

The doctrines of res judicata provide flexible tools judges could use to fulfill the purposes of Section 1500 in a more precise, fair way. Section 1500 was crafted as a crude substitute for res judicata in a time when that principle was not thought to apply to prevent duplicative litigation against a government official in one court, and the government itself in another. Time has proven the statute to be a blunt and unjust instrument that poorly and inconsistently serves its original purposes. In their modern forms, the doctrines of claim preclusion and issue preclusion provide a far superior alternative—one that is both flexible and explicitly defined by reference to sound judicial policy. “Although neither judges, the parties, nor the adversary system performs perfectly in all cases,”²⁵⁹ repealing Section 1500 and allowing the sophisticated doctrines of claim preclusion and issue preclusion to take its place would better vindicate the purported policy goals of that statute, while eliminating the substantial unfairness and waste that has been wreaked by the statute's blunt, anachronistic rule.

In applying preclusion principles in the absence of Section 1500 courts would, of course, have to take care to give judgments of other courts the preclusive effect that they should have, and no more. For example, if, in a world without Section 1500, a plaintiff sued the government in tort (in district court) and in contract (in the CFC), on claims arising out of the same facts, and the district court dismissed on the ground that the facts alleged by the plaintiff did not make out a tort claim, the plaintiff should be free to continue in the CFC on a contract theory. On the other hand, if the district court tries the tort claim and the plaintiff loses because the court determines

²⁵⁵ See *supra* Section II.C.

²⁵⁶ 143 Cong. Rec. S5005 (daily ed. May 22, 1997) (statement of Sen. Orrin Hatch).

²⁵⁷ *The Tucker Act Shuffle Relief Act of 1997 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Professor Echeverria of Georgetown University Law Center).

²⁵⁸ *The Tucker Act Shuffle Relief Act of 1997 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Assistant Attorney General Eleanor Acheson).

²⁵⁹ *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971).

that the plaintiff's facts are wholly invented and the plaintiff never suffered any loss at all, the plaintiff would be barred from proceeding in the CFC.²⁶⁰

Moreover, if the plaintiff were to win in both courts, the courts would permit the plaintiff to enforce only a single judgment. Our review of existing duplicative litigation suggests there is minimal likelihood that a plaintiff can obtain a double recovery against the government by suing in two courts for different claims arising out of the same facts. None of the duplicative cases reviewed resulted in a double recovery for the plaintiff. As explained above, courts are typically aware that the case before them has a duplicate counterpart in another court. And sometimes, though not always, counsel for the government is the same in each case. As the Report previously noted, courts generally adjust awards to ensure that a plaintiff does not recover twice.²⁶¹ As long as they are aware of the related cases—and it appears they typically are—there is no reason to believe courts will allow double recoveries to flow from duplicative litigation.

Courts also have other tools they can use to reduce or eliminate any potential practical problems associated with repealing Section 1500, including the danger of inconsistent judgments, increased costs and burden on the government, and threats to judicial economy.²⁶² A court could use its inherent power to manage its docket to stay an action pending conclusion of litigation of the same or related claim in the other forum.²⁶³ Indeed, the CFC has stayed

²⁶⁰ The “jurisdictional competency” exception to preclusion would not prevent the second court from giving appropriate preclusive effect to the judgment in the first case. While a second court may decline to give *claim* preclusive effect to the judgment of a first court that would have lacked jurisdiction to consider the claim being presented to the second court, the first court’s lack of jurisdiction over that claim would not prevent the second court from giving the first case appropriate *issue* preclusive effect. *Compare, e.g.,* Golden Pacific Bancorp v. United States, 15 F.3d 1066 (Fed. Cir. 1994) (declining to apply claim preclusion to a takings claim that was not within the jurisdiction of the court hearing a previous case arising out of the same facts) *with* Martin v. United States, 30 Fed. Cl. 542, 546, 551 (1994) (giving issue preclusive effect, in a takings case, to a previous judgment by a district court); *see also* Bailey v. United States, 94 Fed. Appx. 828, 831-33 (Fed. Cir. 2004) (rejecting government’s argument for claim preclusion because district court had no jurisdiction to consider contract claim in prior civil forfeiture action, but rejecting government’s issue preclusion argument on the merits, rather than on the basis of limits on the district court’s jurisdiction).

²⁶¹ *E.g.,* EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (“It goes without saying that the courts can and should preclude double recovery by an individual.” (internal quotation omitted)).

²⁶² *Cf.* S. Rep. No. 104–90, at 114–15 (1995) (suggesting, in past efforts to repeal Section 1500, that members of Congress have not been particularly concerned about the potential for duplicative litigation in the statute’s absence).

²⁶³ *E.g.,* Proctor & Gamble Co. v. Kraft Foods Global, Inc., 549 F.3d 842, 848-49 (Fed. Cir. 2008) (“The Supreme Court has long recognized that district courts have broad discretion to manage their dockets, including the power to grant a stay of proceedings.” (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936))); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (“As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit.”); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (explaining that “[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case,” regardless of “whether the separate proceedings

proceedings in actions involving duplicative claims not subject to Section 1500.²⁶⁴ DOJ, which is responsible for defending the federal government against private claims, could help courts identify instances in which issue preclusion, transfer, or docket management is warranted. It could do this by keeping track of potentially duplicative cases and moving for stays or other judicial relief in appropriate circumstances.²⁶⁵ This would significantly reduce any potential burden associated with duplicative litigation that would go forward in the absence of Section 1500.

For these reasons, this Report recommends that Section 1500 be repealed.

3. *Replace Section 1500*

Simple repeal of Section 1500, as suggested in the previous section, would entail the cost that the United States would be exposed to duplicative litigation. Another alternative would be to replace Section 1500 with a statute that attempts to mitigate this cost by permitting, or even mandating, a stay of litigation in one court while litigation in the other court proceeds.

As noted in the previous section, we believe that courts would, in appropriate cases, issue such stays without statutory prompting. Indeed, one way to evaluate what would happen if Section 1500 were repealed is to examine how courts manage duplicative litigation currently permitted under the statute (recall that duplicative litigation is currently permitted provided the CFC case is filed first). The CFC's "experience reflects that, in the wide majority of instances where two related suits are filed in different courts, one of them is stayed."²⁶⁶ A close review of the CFC and district court dockets in the 18 cases identified in Appendix A to the Report as having survived a motion to dismiss under Section 1500 reveal great variety in how courts handle the issue. A few examples are illustrative. In *Hansen*, the takings-tort case arising out of the Forest Service's contamination of a private ranch's groundwater, a judicial stay of proceedings reduced the burden of the duplicative litigation. As noted above, the plaintiff filed first in the CFC, and in the district court months later, and the district court issued a stay while proceedings moved forward in the CFC.²⁶⁷ In the end, the district court case was dismissed after

are judicial, administrative, or arbitral in character," and without finding that "the issues in such proceedings are necessarily controlling of the action before the court").

²⁶⁴ See, e.g., *Boston Five Cents*, 864 F.2d at 140 (reversing Section 1500 dismissal and remanding to CFC with instructions to stay action pending related litigation in district court); *Hossein*, 218 Ct. Cl. 727, 729 (1978) (suspending litigation for six months pending related litigation in a district court "for reasons of comity and avoidance of piecemeal litigation"); *City of Santa Clara*, 215 Ct. Cl. 890 (1977) (holding that Section 1500 did not bar suit, but granting government's "alternative motion to stay . . . proceedings pending the outcome of litigation . . . being pursued in the district court").

²⁶⁵ See *infra* Section V.B.7.

²⁶⁶ *Kaw Nation of Oklahoma v. United States*, 2012 U.S. Claims LEXIS 79, *59 (Feb. 29, 2012); see also *id.* at *59 n.30 (collecting examples of duplicative cases in which stays have been granted).

²⁶⁷ See *Hansen*, 65 Fed. Cl. at 93.

the parties reached a settlement requiring the government to pay the plaintiff \$250,000. In other cases, litigation has proceeded independently to completion in both courts.²⁶⁸ In still other cases, one court has ordered Alternative Dispute Resolution (ADR), resulting in a settlement that narrowed the issues and helped bring proceedings in the second court to a swifter end.²⁶⁹

Despite the variation in how courts manage existing duplicative litigation, a few trends emerged from our review. First, both courts were typically aware of the duplicative litigation. The CFC's awareness was evident from the Section 1500 motion practice, but most of the district court dockets revealed similar awareness of the duplication. This may be because plaintiffs are required to identify related cases when they file a case in federal court.²⁷⁰ Second, stays of litigation were frequently entered, often to give the parties time to discuss settlement in related cases. In some cases, it was difficult to determine why a stay or extension was entered, but by reviewing the orders and related motions or status reports, we were able to confirm that the reason for delay was to permit the parties to work out a settlement that would cover both cases. Additionally, several cases were referred to ADR, sometimes successfully, to enable the parties to reach a comprehensive settlement. Finally, often, but not always, the same attorneys represented the government in both cases. This overlap, or lack thereof, appears to depend upon the identity of the defendant in both cases, as well as where each case was filed.

The variety of management techniques in use suggests it would be difficult to design a statutory, one-size-fits-all rule that would effectively reduce the burdens of duplication that may arise in such a wide variety of cases. Indeed, it appears the flexibility available in the status quo enables courts to appropriately tailor docket management practices to suit the needs of the parties and court in particular cases. It enables courts to stay or transfer a case when doing so is in the interests of judicial economy, while preserving the courts' ability to proceed with a case when parallel litigation appears to have stalled in the other forum.²⁷¹ This may support the Report's conclusion that allowing courts to use their inherent power to manage the docket, guided by experience and superior knowledge of the individual case and parties, provides the best opportunity for reducing the burdens of duplicative litigation.

However, if the Committee is of the view that statutory guidance is needed, such a statute could provide:

²⁶⁸ See *Cooke v. United States*, No. 1:06-cv-00748-TCW (Fed. Cl.); *Cooke v. Rosenker*, No. 1:06-cv-01928-JDB (D.D.C.).

²⁶⁹ See *OSI, Inc. v. United States*, No. 1:04-cv-01210-MCW (Fed. Cl.); *OSI, Inc. v. United States*, No. 2:98-cv-00920-MEF-WC (M.D. Ala.).

²⁷⁰ See United States Courts, Form JS-44, Civil Cover Sheet at 2, available at <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf>.

²⁷¹ See *Court of Federal Claims Technical and Procedural Improvements Act, Hearing on S. 2521 Before the S. Comm. on the Judiciary*, 102nd Cong. 59 (Apr. 29, 1992) (statement of Hon. Loren Smith, Chief Judge, U.S. Claims Court).

Whenever a civil action is pending in the United States 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), for or in respect to the same claim, any action or appeal against the United States or an agency or officer thereof, the court in which such action or appeal was later filed shall, if it is in the interest of justice, stay such action or appeal until the previously filed action or appeal has terminated. If such actions or appeals were filed simultaneously (including at any times on the same day), the United States Court of Federal Claims action shall be deemed to have been filed first.

This language is adapted from Section 1631 (the transfer statute) and Section 1500. Another option would remove “if it is in the interest of justice,” thereby eliminating the court’s discretion to determine whether a stay is appropriate. The language could also be modified to specify that the district court (or the CFC) should stay litigation, rather than using the order of filing to determine which court should stay and which should proceed with litigation. Alternatively, the choice of which suit to stay could be given to the plaintiff, who would be required to make a choice once the two suits were simultaneously pending.

A different option would be to enact a statute directing courts to use preclusion principles to minimize the costs of duplicative litigation. Such a statute could provide that:

Whenever a plaintiff pursues, simultaneously or otherwise, a case in the United States Court of Federal Claims and a related case in another court, both courts shall give due effect to the doctrines of claim preclusion and issue preclusion and shall appropriately limit or adjust the remedies they provide so as to do justice. For purposes of this section, a “related case” may include a case against the United States or against any person who, at the time when the cause of action alleged in such case arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

A reform proposal along these lines may allay concerns regarding the potential costs of duplicative litigation that would be permitted if Section 1500 were repealed. On the other hand, it appears such a statute may not be necessary because courts already possess authority to take appropriate steps to achieve that end. Indeed, crafting a statutory solution carries a risk of unintended consequences.

4. *Eliminate the Timing Work-Around*

Of all the complex rules associated with Section 1500, the least defensible is the rule that if a plaintiff files the same claims in district court and in the CFC, both cases can proceed if the CFC case is filed first, but the CFC case must be dismissed if the district court case is filed first. This bizarre rule operates a trap for unwary plaintiffs and serves no valid purpose.

This Report has suggested that this anomaly be corrected by repealing section 1500, but the anomaly could also be corrected in the opposite direction, by amending or reinterpreting the statute to bar simultaneous litigation of the same claim in district court and the CFC regardless of which is filed first. Like repealing Section 1500, this approach would have the virtue of eliminating the strange and unjust feature of existing doctrine that makes the CFC's jurisdiction depend on the order of filing. The Federal Circuit attempted to so reinterpret Section 1500 in *UNR*,²⁷² and the Supreme Court, in its recent *Tohono* decision, suggested (without holding) that it disapproves of the time-of-filing rule.²⁷³ So the rule may in the future be judicially reversed.

Eliminating the time-of-filing rule (judicially or otherwise), however, is not a solution to the problems posed by Section 1500. Indeed, it would exacerbate those problems. It would make Section 1500 more logical, but less fair. While resolving some of Section 1500's subsidiary problems, this "solution" would exacerbate the statute's core problem: it would require many more plaintiffs to elect among potentially valid claims.

Today, knowledgeable plaintiffs can avoid the injustice of Section 1500 by filing in the CFC first. Only the unwary are subject to its unjust effect. If the time-of-filing rule were eliminated, then *all* plaintiffs with multiple claims against the United States arising out of the same facts, but cognizable only different courts, would be required to elect among their claims. As previously explained, such a requirement would be unfair and would contradict basic principles of our system of civil procedure. It would give new strength to an outdated rule and waste an opportunity to move toward a fairer and more efficient way to reduce the costs of the duplicative litigation that results from the jurisdictional divide between the CFC and the district courts.

It is also worth observing that, even if the order-of-filing rule were eliminated, some plaintiffs would still be able to achieve a "work-around" that would permit them to bring all their claims. If a plaintiff brought suit in either the district court or the CFC, and managed to complete the litigation before the statute of limitations on the claims that belonged in the other court expired, the plaintiff would then be free to sue in the other court. Such a litigation strategy would

²⁷² See *UNR*, 962 F.2d at 1023.

²⁷³ *Tohono*, 563 U.S. ____ (2011), slip. op. at 6-7. The Court did not issue a holding on the time-of-filing rule because it was not presented in the *Tohono* case. *Id.*; see also Brief for the Petitioner at 37 n.8, *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 78 U.S.L.W. 3687 (Apr. 19, 2010) (No. 09-846) (urging the Court to abolish the time-of-filing rule).

expose the plaintiff to the significant risk that the first litigation (including any necessary appeals) would run on too long.

An examination of the duplicative cases currently permitted under the time-of-filing rule shows that many plaintiffs would not be able to sequentially litigate district court and CFC claims within the CFC's six-year statute of limitations. For example, several of the Indian trust cases that remain pending after *Tohono* have been before both the district court and the CFC for nearly six years.²⁷⁴ Another example is *Fire-Trol Holdings v. United States Forest Service*, which involved an APA claim in district court and a simultaneous bid protest action in the CFC.²⁷⁵ The district court action was filed on October 21, 2003, and the district court completed its proceedings quickly, dismissing the case for lack of subject matter jurisdiction on August 13, 2004. The plaintiffs appealed to the Ninth Circuit, however, waiting until October 19, 2006 for oral argument. The Ninth Circuit issued a decision (with unusual speed)²⁷⁶ on November 2, 2006, affirming the case in part, but also reversing in part, and remanding to the district court for further proceedings. The litigation ended shortly thereafter, but only because the plaintiff was forced to withdraw on January 31, 2007, in accord with an agreement disposing of the company's assets. Had the plaintiff chose to litigate the APA and bid protest claims sequentially, and had been able to complete the litigation, it seems unlikely that it could have litigated the district court case to completion in the Ninth Circuit in the approximately 19 months that would have remained in the CFC statute of limitations. A third example is *Bailey v. United States*, which involved a claim for breach of contract based on a criminal attorney's claim that he was supposed to be paid for a criminal representation out of assets seized in civil forfeiture in connection with the criminal case.²⁷⁷ The district court case was filed on February 28, 1994, and Bailey's part in it was not closed out until November 8, 2004, more than a decade later. And his CFC action took more than seven and a half years to complete, from the time it was filed on October 22, 1996 until an appeal to the Federal Circuit was completed and the mandate issued to the CFC on April 19, 2004.

The potential for sequential litigation nonetheless shows that fixing the timing work-around would simply replace the current anomaly with a lesser anomaly. Instead of plaintiffs being permitted to raise all their claims, but only if they brought them in the right order, they would be permitted to raise all their claims, but only if they managed to litigate them speedily. But the speed of litigation, like the order of filing, should not affect the ability to bring claims.

²⁷⁴ See, e.g., *Ak-Chin Indian Community v. United States*, No. 1:06-cv-02245-TFH (D.D.C.), 1:06-cv-00932-ECH (Ct. Fed. Cl.).

²⁷⁵ See No. 2-03-cv-02039-JAT (D. Ariz.), No. 1:05-cv-00205-LAS (Ct. Fed. Cl.).

²⁷⁶ It typically takes approximately 12-20 months for a civil appeal in the Ninth Circuit to progress from the notice of appeal to oral argument, and another three months to a year from oral argument to decision. See U.S. Court of Appeals for the Ninth Circuit, Frequently Asked Questions 17, 18, available at <http://www.ca9.uscourts.gov/content/faq.php>.

²⁷⁷ See 1:94-cr-01009-MP-5 (N.D. Fla.), 1-96-cv-00666-MBH (Ct. Fed. Cl.).

This solution may reduce some of the costs of duplicative litigation, but only indirectly and without eliminating the costs of Section 1500 litigation. And it would exacerbate the core injustice of denying plaintiffs the right to pursue all available claims against the United States. Thus, it is not the best solution.

5. *Amend Section 1500*

Another option is to replace or amend Section 1500 to impose a requirement that better serves the purposes of Section 1500, while avoiding the uncertainty and injustice that has plagued the statute. Such a requirement could take a variety of forms. For example, an influential article published in 1967 urged an alternative “statute providing that issues decided in a suit against an agent of the United States, in which the United States participated by providing counsel for the defendant, shall be res judicata in a suit between the plaintiff or those in privity with him and the United States,” and vice versa.²⁷⁸ The suggestion was reiterated in a 1994 article, in which the authors stated that “if Congress were truly interested in preventing two claims, where one is a claim against a federal official and the other is a claim against the United States,” a more effective solution would be replace Section 1500 “with a statute that stipulated that an adjudicated claim against a United states officer was res judicata in a subsequent proceeding against the United States.”²⁷⁹ As previously explained, however, the law of preclusion has already evolved to embrace this principle. A statute embodying the same principle would thus be superfluous.

Moreover, a difficulty with this solution is that, as the examples in this Report demonstrate, there are so many different possible permutations of facts that it is difficult to capture them all in a fixed set of words that will correctly resolve all cases. If Congress desired to amend Section 1500 to remove its jurisdictional bar, but to retain an instruction to apply preclusion appropriate rules of preclusion, it might consider using open-ended language that left it up to the courts to resolve cases correctly, perhaps something such as:

- (a) The jurisdiction of the United States Court of Federal Claims over any case shall not be affected by the filing or pendency of a related case in any other court.
- (b) Whenever a plaintiff pursues, simultaneously or otherwise, a case in the United States Court of Federal Claims and a related case in another court, both courts shall give due effect to the doctrines of claim preclusion and issue preclusion and shall appropriately limit or adjust the remedies they provide so as to do justice.

²⁷⁸ Schwartz, *supra* note 23, at 601.

²⁷⁹ See Peabody, *supra* note 33, at 110.

(c) For purposes of subsection (b), a “related case” may include a case against the United States or against any person who, at the time when the cause of action alleged in such case arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

This hybrid option might serve the goals of Section 1500, while leveraging existing judicial doctrines to further the cause.

The difficulty with amending or replacing Section 1500 is that, at best, it might be redundant, and, at worst, it could cause greater, unforeseeable problems. To the extent issue preclusion and the inherent judicial power to manage the docket can accomplish the purposes of Section 1500, any statute incorporating such tools may not add value. And enshrining these tools into statute may reduce the flexibility necessary for the courts to tailor the rules to fill any void left by Section 1500. Some of these risks could be mitigated by artful drafting, but that can be a dangerous game: the more complicated a statutory solution becomes, the greater the opportunities for manipulation and perversion of the statute’s intended policy goals. These dangers may be reduced by repealing the statute, but holding off on replacing it until time and practice demonstrate whether there is a problem in need of a statutory solution and, if so, what that solution ought to look like. But the apparent reasonableness of this wait-and-see approach is countered by the possibility that the legislature might not be willing to revisit the statute down the road.

6. *Judicial Amelioration*

Until Congress repeals Section 1500, or if it fails to do so, the courts could ameliorate some of Section 1500’s unfairness by reforming precedent to improve both fairness and predictability. This could take several forms. One option, discussed in detail above, would be to eliminate the order of filing work-around. This would level the playing field among litigants, but would do so by extending the illogic of Section 1500 to capture more litigants. A different, and rather extreme, proposal Professor Kirgis has put forward would have courts extend pendent jurisdiction principles to enable litigants to seek relief on all their claims in either the CFC or a Federal district court.²⁸⁰ But such officious intermeddling with Congress’s scheme for dividing jurisdiction between the CFC and the district courts would be inconsistent with a variety of statutes and generally appears to exceed the courts’ authority. It might also be an overbroad solution to a relatively narrow problem.

A more modest option, which is within the court’s power and has the potential to do much good, is for the Federal Circuit to reverse *County of Cook*. This case, which adopted the simultaneous filing rule and applied it to claims filed in the CFC by operation of the transfer

²⁸⁰ See Kirgis, *supra* note 33, at 344-49.

statute, “needlessly extended the reach of § 1500.”²⁸¹ Some Federal Circuit judges have urged it be reversed. Dissenting from denial of panel rehearing and rehearing en banc in *Griffin v. United States*, Judge Plager, joined by Judge Newman, charged that “[t]he rule of law created by *County of Cook* should be overturned,” and took their colleagues to task for passing up “an opportunity to correct th[is] unjust error in our precedent.”²⁸² Judge Plager explained that “[d]ue to the evolving law of pleading and jurisdiction including doctrines such as res judicata and collateral estoppel, § 1500 has long outlived its purpose, and has been described many times as now being little more than a ‘trap for the unwary.’”²⁸³ *County of Cook* “unnecessarily widened the trap.”²⁸⁴ Judge Plager observed that “Congress thus far has not heeded calls for the repeal of § 1500,” and the Federal Circuit cannot “undo the basic mischief inherent in” the statute. “[B]ut [the court] need not make matters worse for pleaders who inadvertently fall afoul of the federal jurisdictional maze.”²⁸⁵

Our research revealed that under the law as currently interpreted, two-thirds of locatable cases that were transferred to the CFC and then faced a motion to dismiss under Section 1500 were dismissed.²⁸⁶ Moreover, *County of Cook* unfairly punishes scrupulous plaintiffs who file in the district court, and not in the CFC, precisely because they wish to litigate in only one forum and believe the district court is proper. When their understanding of jurisdiction requirements turns out to be wrong, the transfer statute ought to protect their interests. But under *County of Cook*, it does not. Rather, these litigants may find there is no forum available to adjudicate their claim(s). While reversing *County of Cook* would not solve all of Section 1500’s problems, it would at least remedy the confusion and unfairness the decision has contributed to Section 1500 jurisprudence.

7. *Department of Justice Amelioration*

If Section 1500 is repealed, DOJ can take steps to reduce the costs of duplicate suits. DOJ could use electronic docketing or other tools to keep track of cases and identify potentially duplicative litigation.²⁸⁷ Then, in appropriate cases, DOJ could move for a stay of proceedings or appeal to judicial doctrines such as issue preclusion to further judicial economy and obviate the need for relitigation of issues already decided.

²⁸¹ *Griffin*, 621 F.3d. at 1366 (Plager, J., dissenting).

²⁸² *Id.* at 1365 (Plager, J., dissenting).

²⁸³ *Id.* at 1364 (Plager, J., dissenting) (footnote omitted).

²⁸⁴ *Id.* at 1365 (Plager, J., dissenting).

²⁸⁵ *Id.* at 1366 (Plager, J., dissenting).

²⁸⁶ *See* Appendix A.

²⁸⁷ 141 Cong. Rec. S2334 (daily ed. Feb. 8, 1995) (statement of Sen. Howell Heflin).

VI. Conclusion

The time to reform Section 1500 has come. Since it was originally enacted, preclusion doctrines have evolved to fill the gap that the statute was initially intended to address. Today, the statute's only ostensibly valid purpose is to reduce the costs of simultaneous suits against the government. But it does not serve this purpose well, and it causes significant unfairness in the process. A better and more just approach would be to repeal Section 1500 and allow the courts to use preclusion principles and their inherent power to manage the docket to ensure access to justice while reducing the costs to the government of duplicative litigation. We urge the Committee to recommend this superior approach to Congress.