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I appreciate the invitation for public comment on the Section 1500 project and recommendation.

My article on the jurisdiction of the Court of Federal Claims post-Tohono, including some thoughts on Section 1500, is forthcoming in the Indiana Law Journal. I am attaching the latest pre-publication version in pdf format, and it is also available here:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963978

Over the past year, many cases were pending before the Court of Federal Claims in which the government moved to dismiss under Section 1500, resulting in a large, if short-lived, surge of Section 1500 rulings in the immediate aftermath of *Tohono*. Those cases have not yet worked through the appellate process, so we may expect further clarification of Section 1500 by the Federal Circuit. In addition to the question whether the *Tecon* order of filing rule survives, the question now coming forward is the precise meaning of the "operative facts" test for similarity of claims that triggers Section 1500. Depending on the outcome of the *Tecon* question and whether the Federal Circuit adopts a broad or narrow test for what counts as operative facts (a legal question that is still in flux after the Federal Circuit's *Trusted Integration* decision), a new set of cases eventually may attract the attention of the Supreme Court.

Reading the minutes of the September 27, 2011 meeting, and speaking as a scholar who focuses attention on federal government litigation generally and on the Court of Federal Claims specifically, I very much agree with Judge Plager's warning (which follows the staff recommendation in the Sept. 23 memo) that adding something on supplemental jurisdiction to the proposal would complicate matters and invite further forum-shopping, overlapping jurisdictional rules, and conflicting precedents on both jurisdiction and the merits of disputes implicating the federal fisc. A simple repeal of Section 1500 is the cleanest approach. In my view, conferring supplemental jurisdiction over Tucker Act claims to the District Court likely would accelerate duplicative litigation rather than accomplish the opposite, as plaintiffs would move strategically among various judicial fora, sometimes making innocent mistakes but on other occasions deliberately seeking to avoid Court of Federal Claims rules or precedents with contrived non-Tucker Act claims filed in District Court.

On the general question of the continuing value of Section 1500, the statute may have the effect of reducing incentives toward duplicative litigation against the federal government, but at some cost of efficiency and fairness. But I submit that the problem of duplicative litigation is more often a consequence of forum-shopping between the District Court and Court of Federal Claims, with Section 1500 generally playing the secondary role of highlighting unnecessary resort to multiple courts without directly arresting the problem. As developed at length in my forthcoming article, I believe that the primary instigator for duplicative litigation has been the mistaken extension by some District Courts of *Bowen v. Massachusetts* to encompass the types of claims that may be adequately addressed in the Court of Federal Claims and fully resolved in a single lawsuit. Given the Supreme Court's nod to the adequacy of the Court of Federal Claims money remedy in *Tohono* and the Federal Circuit's ongoing clarification that a money judgment in the Court of Federal Claims presumptively is an adequate remedy, I believe that this door to forum-shopping of what should be Tucker Act claims and resulting duplicative litigation is closing.

Thus, a repeal of Section 1500 at this time would not result in a larger duplicative litigation problem. Moreover, the remaining non-forum-shopping scenarios that still implicate Section 1500 are what Craig Schwartz rightly calls "necessarily sequential" filings, such as in APA/regulatory taking cases, in which the question is less one of duplication, which is unavoidable in that peculiar context, than of timing and unpredictability in the length of litigation in the forum that necessarily draws the first filing. A repeal of Section 1500 would result in the Court of Federal Claims regularly staying a taking action pending the outcome of an APA challenge, but should not actually expand the number of lawsuits actually litigated.

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