

December 4, 2012

From: Jonathan R. Siegel
To: Administrative Conference of the United States
Subject: Comments regarding the § 1500 project

On November 30, the Department of Justice (DOJ) submitted a statement regarding the § 1500 project that the Administrative Conference (ACUS) will consider at its plenary session on December 6. My comments on the DOJ statement appear below. ACUS members reading these comments should bear in mind that I am serving as one of the researchers on this project.

I. DOJ's Suggestion for Delay

DOJ suggests delaying the § 1500 recommendation for a year. It suggests that the Supreme Court's recent decision in *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011), which is currently being elaborated in the lower courts, "is likely to eliminate the basis for many if not all of the prior complaints" about § 1500.

A. Deferring the ACUS recommendation might make sense if litigation could eliminate the problems with § 1500 without congressional action. I would respectfully suggest, however, that further litigation could only cause the main problem with § 1500 to stay the same or to get worse.

As the research report on § 1500 details, the main problem with § 1500 is that it effectively compels some plaintiffs to elect among remedies, in a way that is contrary to basic principles of modern civil procedure (which normally permit a plaintiff to pursue multiple claims against a defendant). In pending litigation, DOJ is attempting to expand the scope of § 1500's jurisdictional barrier (1) by expanding the set of cases regarded as having "substantially the same operative facts," which under *Tohono* is the key to triggering § 1500, and (2) by reversing the "order of filing" rule, which currently permits sophisticated plaintiffs to avoid the § 1500 barrier by filing in the Court of Federal Claims (CFC) first.

To the extent DOJ succeeds in expanding § 1500's operation, even more plaintiffs will be subject to its rule of dismissal, and the main problem caused by § 1500 will get worse. To the extent DOJ fails to expand § 1500, the main problem caused by the statute will remain the same as it is now. In neither case could further litigation avoid the need for changes to § 1500.

B. DOJ suggests putting off the project for a year, but its logic suggests that a much longer delay would be necessary. DOJ suggests waiting until evidence shows whether plaintiffs forbidden from litigating related claims against the United States *simultaneously* could litigate such claims *sequentially* within the statute of limitations. DOJ suggests that such evidence will be available after the "order of filing" rule is eliminated. But even if DOJ succeeds in getting that rule judicially reversed in the next year, it would likely be several further years before one could tell whether plaintiffs can litigate related claims sequentially within the limitations period.

C. DOJ is correct that there are some uncertainties regarding the meaning of § 1500 in the wake of *Tohono*. However, as the research report on § 1500 shows, uncertainties regarding the meaning of the statute have been a pervasive feature of its history. The existence of some

uncertainty surrounding the statute's meaning is not a reason for delay. To the contrary, the long history of judicial difficulties in interpreting the statute suggests that congressional action to reform the statute could be useful.

II. DOJ's Request to Modify the Proposed "Stay" Provision

DOJ suggests that § 2 of the proposed recommendation does not properly implement the desire of the ACUS Committee on Judicial Review to replace § 1500 with a presumptive stay that would apply when two related claims against the United States are pending in different courts. DOJ proposes language that it suggests will better implement the committee's desires.

While I am not a member of the committee, I was present during its public meetings, and, in my respectful opinion, the committee understood quite well that, under its proposed language, courts would have some discretion regarding imposition of a stay when related claims against the government are pending in separate courts. In my opinion, the committee properly recognized that cases present a great variety of different circumstances, and that it is not possible to specify, in advance, a single rule that would best apply to all cases. That, I believe, is why the committee chose language under which imposing a stay would be the norm, but which left room for a court to act differently if in particular circumstances imposing a stay would not be in the interests of justice.

Suppose, for example, that two cases against the United States arising out of the same facts are pending simultaneously, one in district court for a tort, and one in the CFC for a taking, and the United States believes that the case is properly characterized as a taking and moves for dismissal in district court. It might be advantageous to have that motion resolved quickly, but under the DOJ's proposed language, the district court might be unable to rule on the motion until the CFC case is completed. I think that is just one example of the kind of circumstance that led the committee to recommend leaving some discretion to courts regarding the imposition of a stay.

III. Committee Consultation with DOJ.

DOJ says that "[t]he Committee staff did not solicit the Department's comments when drafting the text of the recommendation and its proposed statutory language." DOJ later makes clear, however (*see* DOJ statement at 5), that this point refers to the drafting of the final language of the proposed recommendation. The committee gave DOJ numerous opportunities to participate throughout the course of its deliberations and was well aware of DOJ's views regarding the § 1500 project. The language that the committee ultimately chose was based on language in the research report that was publicly available long before the committee concluded its work.

IV. Purpose of § 1500

Finally, DOJ states that the purpose of § 1500, as articulated by the Supreme Court in *Tohono*, is to save the government from the burdens of redundant litigation. The Supreme Court did say that in *Tohono*, but it is important to bear in mind that the Supreme Court previously stated that the purpose of § 1500 was only to protect the government from duplicative lawsuits where the judgment in one suit would not have preclusive effect in the other. *Matson Nav. Co. v. United States*, 284 U.S. 352, 355-56 (1932). As the research report details, this purpose of § 1500 has been overtaken by developments in preclusion doctrine that today make the rule of § 1500 unnecessary.