ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Judicial Review
From: Emily Schleicher Bremer
Jonathan R. Siegel
Date: September 23, 2011
Re: Section 1500 Supplemental Research

This memo responds to the Committee's request at its March 28 meeting for additional research into several issues bearing on the draft recommendation. This memo provides: (1) an analysis of duplicative litigation, including examples of viable duplicative claims, a discussion of how courts manage existing duplicative litigation, and an assessment of whether duplicative litigation permits double recovery; (2) an evaluation of whether the jurisdictional competency exception to res judicata undermines the Report's conclusion that existing preclusion principles would mitigate the potential negative effects of repealing Section 1500; (3) an examination of whether supplemental jurisdiction is a viable option in lieu of Section 1500; and (4) suggestions for statutes that could replace Section 1500.

I. Existing Duplicative Litigation

This section responds to several interrelated questions raised by the Committee. First, the Committee asked for examples of genuinely viable duplicative claims. In particular, some members of the Committee expressed concern that repealing Section 1500 would produce *unnecessary* duplicative litigation because plaintiffs would file cases in two courts not because of any legitimate need to do so, but rather to assert all possible claims, no matter how absurd. Second, the Committee requested insight into how courts manage duplicative litigation permitted under current law. Third, and related to the first two questions, the Committee requested more factual details about Section 1500 cases, to enable a less theoretical consideration of whether Section 1500 has unjust effects. Finally, the Committee inquired whether repealing Section 1500 would present a risk of permitting double recoveries.

A. Examples of Viable Duplicative Claims

Our research reveals two kinds of situations in which plaintiffs may reasonably wish to file duplicative cases 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. Proper characterization may determine whether the claim is within the exclusive jurisdiction of the CFC or the district court. Filing in both courts ensures that the plaintiff will not entirely lose his claim due to a reasonable characterization error. Second, in some cases, plaintiffs may have viable duplicative claims that cannot be joined in a single action. 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:

- Federal employees' employment claims.[1] 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.[2]

- Challenges to agency action that may arise under the Administrative Procedure Act, be characterized as a bid protest, or both.[3]

- 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).[4]

- Claims for monetary and injunctive (including specific performance) relief arising out of the government's violation of a settlement agreement.[5]

A couple of specific examples will illustrate the kinds of genuine problems Section 1500 causes for plaintiffs. First, a pair of cases captioned *Hansen v. United States*[6] 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.[7] 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).[8]

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1 *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).

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

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

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

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

6 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.)

7 *Hansen*, 65 Fed. Cl. at 83.

8 *Id.* at 93.

Because the CFC action was filed first, it was not barred by Section 1500,[9] and the district court stayed its proceedings pending resolution of the CFC action.[10]

The CFC's treatment of Hansen's claims 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."[11] 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.[12] 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.

Another pair of cases, captioned *Trusted Integration, Inc. v. United States*,[13] demonstrate that plaintiffs may have viable duplicative claims against the government. The Department of 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 FIMSA 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.[14]

Section 1500 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.[15] The CFC dismissed based on Section 1500,[16]

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9 *Id.* at 93 n. 27.

10 *Id.* at 93.

11 *Id.* at 79.

12 *Id.* at 80.

13 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.).

14 *Id.* at 95-96.

15 *Id.* at 96.

16 *Id.* at 104.

and the plaintiff was ultimately deprived of any opportunity to litigate what appeared to be viable contract claims against DOJ.[17]

B. Management of Duplicative Litigation Allowed Under Current Law

The Committee asked for more information about how courts manage the duplicative litigation permitted under current law. 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.[18] In the end, the district court case was dismissed after 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.[19] 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.[20]

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.[21] 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.

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

18 *See Hansen*, 65 Fed. Cl. at 93.

19 *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).

20 *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.).

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

The variety of management techniques in use suggests it would be difficult to design a 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. 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.

C. Assessment of the Possibility of Double Recovery

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.[22] As long as they 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.

II. The Jurisdictional Competency Exception to Res Judicata

The Committee asked whether the "jurisdictional competency exception" to res judicata would prevent courts from using ordinary preclusion principles to mitigate the costs of duplication that might result if Section 1500 were repealed. Our research suggests it would not.

"Res judicata" encompasses the concepts of claim preclusion and issue preclusion,[23] but the jurisdictional competency exception generally applies only to claim preclusion.[24] As the Federal Circuit has explained, claim preclusion "bar[s] subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief."[25] This principle vindicates a general rule against claim splitting, requiring litigants to join all their claims in a

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[22] *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)).

[23] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982). There is much confusion and disparity in the use of these terms. Many use "res judicata" to refer exclusively to "claim preclusion," but we understand it to include both claim preclusion and issue preclusion. To avoid unnecessary confusion, however, we refer to "claim preclusion" and "issue preclusion" as distinct concepts wherever possible and as appropriate.

[24] This general rule may not be universally observed. *See* United States v. B.H., 456 F.3d 813, 817 (8th Cir. 2006).

[25] Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983).

single action or risk losing one or more of those claims.[26] It thus "rests on the assumption that all forms of relief could have been requested in the first action."[27] As the RESTATEMENT (SECOND) OF JUDGMENTS explains:

> The general rule [of claim preclusion] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigants presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.[28]

The "formal barriers" that may prevent claim preclusion under this exception include those "stem[ming] from limitations on the competency of the system of courts in which the first action was instituted."[29] If the first court lacked the jurisdictional competence to hear a claim the plaintiff brings before the second court, claim preclusion is inapplicable. Thus, in *Golden Pacific Bancorp v. United States*,[30] the Federal Circuit held that claim preclusion did "not apply because Golden Pacific's taking claim before the Claims Court was not the same as Golden Pacific's APA and FTCA claims before the district court," and "the taking claim could not have been litigated" before the district court, which "lacked subject matter jurisdiction" over that claim.[31]

An illustrative example, provided in the RESTATEMENT (SECOND) OF JUDGMENTS, arises out of the division of jurisdiction between state and federal courts. Consider a plaintiff who has both state and federal claims arising out of the same transactional facts. Assume the plaintiff could bring all his claims in federal court, but instead elects to sue in state court and, after losing his action there, sues in federal court on his remaining federal claims, over which the federal

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[26] *See* Phillips/May Corp. v. United States, 524 F.3d 1264, 1271 (2008) (rejecting plaintiff's argument that claim preclusion did not apply where it had been within the plaintiff's "control to make all ten claims ripe for review at once," and "[o]nly its own strategic choice prevented the joinder of all claims").

[27] *Id.*; *see also* Bailey v. United States, 54 Fed. Cl. 459, 474 (2002) ("The doctrine of res judicata also provides, as a prerequisite, that a 'full and fair opportunity to litigate' claims has occurred." (quoting Poyner v. Murray, 508 U.S. 931, 933 (1993))).

[28] RESTATEMENT (SECOND) OF JUDGMENTS § 26(c) (1982).

[29] *Id.*

[30] 15 F.3d 1066 (Fed. Cir. 1994).

[31] *Id.* at 1071.

court has exclusive jurisdiction.[32] In these circumstances, claim preclusion does not bar the federal action. Or consider an "an out-of-state defendant [who] may be subject to a state's jurisdiction for the commission of a tort but not, on the particular facts, for a breach of contract" arising out of the same facts.[33] "In such a case, the plaintiff, having lost his action in tort, should not be precluded from pursuing a contract remedy in a state in which jurisdiction over the defendant can be obtained."[34] So too for a plaintiff who has both a contract and a tort claim against the government arising out of the same facts. The reason for the jurisdictional division may be different, but preclusion principles should—and would in the event of Section 1500's repeal—apply in the same fashion.

The jurisdictional competency exception does not prevent courts from applying the principles of issue preclusion in appropriate circumstances. Under the Federal Circuit's test, issue preclusion applies if "(1) the issues . . . are identical to those involved in the prior action; (2) in that action the issues were raised and 'actually litigated'; (3) the determination of those issues . . . was necessary and essential to the resulting judgment; and (4) the party precluded was fully represented in the prior action."[35] If these criteria are fulfilled, a court may find specific issues precluded, even if the prior action involved different claims, and the prior judgment was issued by a court that lacked jurisdiction to consider the claims raised in the second action. For example, in *Martin v. United States*, the CFC held that a plaintiff prosecuting a Tucker Act claim under the CFC's exclusive jurisdiction was precluded from litigating certain issues that had been actually litigated and necessarily resolved in the plaintiff's prior action in district court involving claims of breach of contract, common law, and statute, as well as RICO violations.[36]

The contours, reasoning, and result of the jurisdictional competency exception mirror those of the proposal we have put before the Committee: (1) it is unfair and courts should not preclude a plaintiff from pursuing different claims in two different courts when neither court has the jurisdictional competency to adjudicate all the claims; and (2) if the plaintiff has had an opportunity to fully and fairly litigate issues in the first action that are relevant in the second action, issue preclusion should and will apply.

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[32] RESTATEMENT (SECOND) OF JUDGMENTS § 26, Comment c(1) & Illustration 2 (1982).

[33] *Id.* § 26, Comment c(1).

[34] *Id.*

[35] Martin v. United States, 30 Fed. Cl. 542, 546 (1994) (citing Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569 (Fed. Cir. 1983) and DeVries v. United States, 28 Fed. Cl. 496, 499 (1993)).

[36] *See id.* at 546, 551; *cf.* 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).

III. The Supplemental Jurisdiction Alternative

The Report concludes that a fundamental restructuring of the division of jurisdiction between the district courts and the CFC is likely not achievable, and the Committee requested that we examine the more modest possibility of a supplemental jurisdiction solution to the Section 1500 quandary. After further consideration of this issue, we conclude that supplemental jurisdiction can effectively target particularly manifestations of Section 1500's unfairness, but is not a viable option for broader reform. In case the Committee disagrees with this conclusion, however, we include suggested statutory language for a supplemental jurisdiction alternative.

To begin, it is clear that a supplemental jurisdiction alternative would require legislation. One scholar critical of section 1500 has suggested that the courts could use principles of pendent jurisdiction to ameliorate the statute's harsh effects without statutory authorization.[37] A statute already on the books, 28 U.S.C. § 1367, provides "a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction."[38] It provides, in relevant part, 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.[39]

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.'"[40] The Tucker Act is such a statute. Courts have consistently held that Section 1367 does not override the Tucker Act's grant of exclusive jurisdiction to the CFC.[41]

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

[38] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558-59 (2005).

[39] 28 U.S.C. § 1367(a).

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

[41] *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)).

In the past, Congress has 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.[42] 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.[43]

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.[44] 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 further research and consideration has reinforced our initial conclusion 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.[45] We therefore continue to believe that the best option is to repeal Section 1500 without urging significant changes to the jurisdictional scheme.

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

[43] 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).

[44] *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).

[45] *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).

While the staff does not recommend the supplemental jurisdiction option, it is of course up to the Committee to decide what to do. The following draft statutes, modeled after 28 U.S.C. § 1367, are potential starting points for the Committee's use, if the Committee decides to recommend that Congress use supplemental jurisdiction to solve the problem posed by § 1500:

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.
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> (b) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
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> (1) the district court has dismissed all claims over which it has original jurisdiction,
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> (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.
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> (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.

Even if the Committee forgoes the supplemental jurisdiction option, there may be non-jurisdictional legislative measures that could reduce the potential costs of duplicative litigation that may result Section 1500's repeal. We examine such alternatives below.

IV. Other Statutory Alternatives to Repealing Section 1500

Finally, the Committee suggested it would like to consider options for repealing and replacing Section 1500 with a new statute, rather than simply repealing it and expecting courts to deal with the aftermath. As we learned during the last Committee meeting, the Judicial Conference opposed a previous attempt to repeal Section 1500 because no alternative statute was proposed to mitigate the burden of the duplicative litigation that would result.

One alternative would be to replace Section 1500 with a statute permitting or even mandating a stay of litigation in one court while litigation in the other court proceeds. Such a statute could provide:

> 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

whether 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.

Another option would be to enact a statute that directs 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.