ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2012-6

Reform of 28 U.S.C. Section 1500

Adopted December 6, 2012

The Administrative Conference of the United States has long had an interest in ensuring appropriate judicial review of Government actions and in considering related questions regarding jurisdiction and forum. For example, the Conference's seminal Recommendation 69-1 recommended amendment of the Administrative Procedure Act—subsequently enacted by Congress—to waive sovereign immunity and thereby permit citizens "to challenge in courts the legality of acts of governmental administrators."[1] Recommendation 68-7 encouraged Congress to revise the general "federal question" provision in Title 28 of the U.S. Code in order to eliminate the jurisdictional-amount requirement for district court actions seeking review of federal administrative actions.[2] The Conference has also recommended ways to improve procedures in suits involving the federal government.[3]

Building upon the principles underlying such Recommendations, the Conference addresses another bar to judicial review which deprives some litigants of their rights—28 U.S.C. § 1500 (Section 1500). Section 1500 prohibits consideration by the United States Court of

[1] Administrative Conference of the United States, Recommendation 69-1, "Statutory Reform of the Sovereign Immunity Doctrine," 1 ACUS 23 (1969).

[2] Administrative Conference of the United States, Recommendation 68-7, "Elimination of Jurisdictional Amount Requirement in Judicial Review," 1 ACUS 22 (1968).

[3] *E.g.*, Administrative Conference of the United States, Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals From Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980); Administrative Conference of the United States, Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the United States*, 47 Fed. Reg. 30,706 (June 18, 1982).

Federal Claims of otherwise cognizable claims while the plaintiff has litigation against the United States or an officer thereof "pending in any other court" and arising from substantially the same operative facts.[4]

With its origins in the Reconstruction era, the statutory predecessor to Section 1500 arose against the backdrop of a proliferating number of suits, in multiple fora, by residents of the Confederacy who sought compensation from the United States for property (typically, cotton) seized during the Civil War.[5] To curb this duplicative litigation, Congress enacted legislation divesting the Court of Claims (the trial court predecessor to the Court of Federal Claims) of jurisdiction when a plaintiff had a related action against the United States or an officer thereof pending in another court. This legislation was reenacted several times, most recently in 1948 as Section 1500 of the Judicial Code, and the provision's jurisdictional limitation has remained essentially unchanged.[6] Though the "cotton claimants" are long gone, Section 1500's restrictions on the jurisdiction of the Court of Federal Claims remain.

Application of Section 1500 in the context of modern-day federal court jurisdiction and complex litigation, however, causes serious problems for courts and litigants alike. Plaintiffs confront difficult questions of forum selection and timing when the same set of operative facts arguably gives rise to two or more claims against the United States—for which Congress has otherwise waived sovereign immunity—but the Court of Federal Claims has exclusive

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[4] Section 1500 of Title 28 of the United States Code reads in full:

> 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.

28 U.S.C. § 1500 (2012). *See also* United States v. Tohono O'odham Nation, 131 S. Ct. 1723, 1731 (2011) ("Two suits are for or in respect to the same claim, precluding jurisdiction in the [Court of Federal Claims], if they are based on substantially the same operative facts, regardless of the relief sought in each suit.").

[5] *See, e.g.*, Keene Corp. v. United States, 508 U.S. 200, 206 (1993).

[6] *Id.*

jurisdiction over one or more claims, and another federal court has exclusive jurisdiction over the other claims. Does a claim sound properly in contract (within the exclusive jurisdiction of the Court of Federal Claims) or in tort (within the exclusive jurisdiction of district courts)? Where the answer is not clear or could be both, the choice of any other court for an initial filing could result in dismissal of a claimant's subsequent suit in the Court of Federal Claims under Section 1500. When a plaintiff prosecutes a challenge to agency action in district court based on the Administrative Procedure Act (which may necessarily precede pursuit of any monetary relief for the same claim in the Court of Federal Claims) appellate proceedings on his or her Administrative Procedure Act litigation could well carry past the Court of Federal Claims' six-year statute of limitations. Thus, in conjunction with the statute of limitations, Section 1500 may foreclose full recovery for plaintiffs prosecuting meritorious claims in good faith.

Section 1500 affects a wide variety of plaintiffs with many different kinds of claims. Federal employees, property owners, businesses, local governments, and Indian tribes may be affected. The statute may present intractable jurisdictional conundrums for sophisticated litigants and *pro se* plaintiffs alike. Examples of the diverse parties and claims affected include:

- A federal employee's claims under the Equal Pay Act were transferred to and dismissed by the Court of Federal Claims for lack of jurisdiction because the Title VII claims with which the action was filed in district court were considered "pending" under Section 1500, even though the district court already had entered summary judgment on all non-transferred claims.[7]
- Characterizing the result as "neither fair nor rational," the Court of Federal Claims dismissed a Fifth Amendment-based takings claim filed *pro se* by property owners and that had been transferred from a district court tort action, despite finding that the uncertain legal distinction between tort and takings actions made plaintiffs' confusion about the appropriate forum "understandable."[8]

[7] Griffin v. United States, 590 F.3d 1291 (Fed. Cir. 2009).

[8] Vaizburd v. United States, 46 Fed. Cl. 309, 311-12 (Fed. Cl. 2000).

- A government contractor's bid protest action was rejected by the Court of Federal Claims as jurisdictionally lacking 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 Court of Federal Claims.[9]
- A local government sued by the United States over taxation of certain federal office buildings counterclaimed for the taxes it believed it was owed. The counterclaims were transferred to the Court of Federal Claims—and dismissed under Section 1500.[10]
- An Indian tribe suing in the Court of Federal Claims for breach of trust had its claims dismissed under Section 1500 because it had filed a related action in the district court on the same day.[11]

Because of the barrier it imposes on some plaintiffs pursuing cognizable claims against the United States, Section 1500 has been strongly criticized by litigants, courts, and legal scholars as overly harsh, anachronistic, unfair, and in need of reform.[12]

On the other hand, some of the aims attributed to Section 1500 have modern relevance. In *United States v. Tohono O'odham Nation*, the Supreme Court held that Section 1500 applies to any claim filed in the Court of Federal Claims that shares substantially the same operative facts as a claim pending in another court.[13] The decision thus reversed Federal Circuit precedent that allowed the Court of Federal Claims to retain jurisdiction over a claim under

[9] Vero Technical Support v. United States, 94 Fed. Cl. 784 (Fed. Cl. 2010).

[10] United States v. County of Cook, 170 F.3d 1084, 1091-92 (Fed. Cir. 1994).

[11] Passamaquoddy Tribe v. United States, 82 Fed. Cl. 256 (Fed. Cl. 2008). Notably, if the plaintiff tribe had filed its district court action one day later, it would have been permitted to proceed simultaneously in both the Court of Federal Claims and district court under Federal Circuit precedent. *See* Tecon Engineers, Inc. v. United States, 170 Ct. Cl. 389 (Ct. Cl. 1965).

[12] Emily S. Bremer & Jonathan R. Siegel, *The Need to Reform 28 U.S.C. § 1500* (2012) (report to the Administrative Conference of the U.S.) (collecting criticism of Section 1500), *available at* www.acus.gov.

[13] *Tohono*, 131 S. Ct. at 1731.

Section 1500 if a plaintiff sought different relief in the Court of Federal Claims than it sought in another forum. This had the effect of expanding the range of cases to which Section 1500 could be found to apply. The Supreme Court faulted the Federal Circuit for saying that it "could not identify 'any purpose that § 1500 serves today.'"[14] The Court remarked that "the statute's purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today."[15]

In *Tohono*, the Supreme Court also observed that "[i]f indeed the statute leads to incomplete relief" or causes undue hardship for plaintiffs, citizens are "free to direct their complaints to Congress."[16] After careful consideration and consultation with affected parties over eighteen months, including the Department of Justice, the Conference accepts the Court's invitation to approach Congress. While Section 1500's purpose as articulated in *Tohono* has legitimate aspects, the Conference's research reveals that the statute is an undesirably blunt tool for reducing the duplicative burdens that may arise from simultaneous litigation. Federal courts have both the authority and the competence to use measures such as stays, transfers, and the doctrine of preclusion to prevent double recoveries and ease the burdens of simultaneous litigation on the Government without unfairly depriving plaintiffs of the opportunity to pursue all potentially meritorious claims against the United States.[17] Replacing Section 1500 with a context-specific judicial management tool for simultaneous litigation in different fora would also better serve Congress's various waivers of sovereign immunity.

Accordingly, the Administrative Conference recommends that Congress repeal Section 1500. The Conference further recommends that Congress replace Section 1500 with a

[14] *Id*. at 1729.

[15] *Id*. at 1730.

[16] *Id*. at 1731.

[17] *E.g.,* 28 U.S.C. § 1631; *see also 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) (observing that repeal of Section 1500 would save "wasteful litigation over non-merits issues" and that the "Court can stay duplicative litigation, if the matter is being addressed in another forum, or proceed with the case, if the matter appears to be stalled in the other forum").

provision that permits plaintiffs to bring congressionally authorized suits arising from the same set of operative facts in the Court of Federal Claims and other federal courts at the same time, but also contains a presumptive stay mechanism to mitigate any burden on the courts or parties from simultaneous litigation.[18] As a general rule, the later-filed action should be the subject of the presumptive stay. Nonetheless, the Administrative Conference recognizes that a stay presumption may not be appropriate in all situations. In the absence of other compelling considerations, the presumption of a stay should not apply where the parties agree that the later-filed action should proceed.

In various situations, the interests of justice may override the presumption favoring a stay in the later-filed action. Such a situation might exist, for example, where a decision in the first-filed action is dependent on the outcome of a later-filed action, or where the later-filed action requires factual discovery from witnesses who might not be available in the future. Alternatively, a plaintiff might have a strong interest in obtaining prompt resolution in the Court of Federal Claims of a claim for just compensation stemming from an agency decision, even though the ultimate validity of the decision remains at issue in an earlier-filed district court action. These examples are not intended to be exhaustive.

The Administrative Conference also recommends that repeal of the current Section 1500 apply to claims pending at the time the Recommendation is enacted.[19] Elimination of Section 1500's jurisdictional bar for current litigants would directly serve their fairness interests, without substantially impairing the Government's reliance interests or disrupting the orderly progress of any pending litigation. A specific pronouncement by Congress on this

[18] This position comports with that of the Judicial Conference of the United States in 1995, which dropped its historical opposition to the repeal of Section 1500 so long as such repeal was "accompanied by a provision for stay or transfer of duplicative claims." Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States 83 (Sept. 19, 1995).

[19] Application of new procedural legislation to pending cases is not uncommon in the law. Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (noting that the Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.")

important issue would also avoid unnecessary litigation over the application of the repeal legislation.

RECOMMENDATION

1. Congress should repeal 28 U.S.C. § 1500 (2012).

2. Congress should enact a new statute as follows:

28 U.S.C. Section 1500.

Presumption of Stay. Whenever a civil action is pending in the United States Court of Federal Claims, or on appeal from the 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) any claim against the United States or an agency or officer thereof involving substantially the same operative facts, the court presiding over the later-filed action shall stay the action, in whole or in part, until the first action is no longer pending. If such actions or appeals were filed on the same day, regardless of the time of day, the United States Court of Federal Claims action shall be treated as having been filed first. This provision shall not apply if the parties otherwise agree or if the stay is not or ceases to be in the interest of justice.

3. The public law that enacts the provision in paragraph two should contain the following additional provision:

EFFECTIVE DATE—[The presumptive stay provision] shall apply to all claims pending on or after the date of its enactment, unless the later-filed action is pending in a court of appeals or the Supreme Court. No claim in a case pending on or after the date of enactment of this Act shall be subject to the jurisdictional bar previously imposed by former Section 1500 of Title 28, United States Code prior to the enactment of this Act.

SEPARATE STATEMENT OF GOVERNMENT MEMBER ELANA TYRANGIEL, ACTING ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

The preamble to the Administrative Conference of the United States (ACUS) Recommendation entitled "Reform of 28 U.S.C. Section 1500" states: "After careful consideration and consultation with affected parties over eighteen months, including the Department of Justice, the Conference accepts the Court's invitation to approach Congress [to recommend replacing the existing Section 1500 with a substitute provision formulated by ACUS]." The Department of Justice writes separately to make clear that it did not support adoption of the recommendation, and that the Department believes ACUS's proposed statutory substitute has serious flaws.