UCLA LAW REVIEW DISCOURSE

Footloose: How to Tame the Tucker Act Shuffle After *United States v. Tohono O'odham Nation*

Craig A. Schwartz

ABSTRACT

The purpose of 28 U.S.C. § 1500, "Pendency of claims in other courts," is to force upon plaintiffs suing the federal government a mutually exclusive election between either the U.S. Court of Federal Claims (CFC) or other courts, so as to minimize jurisdictional conflict and to preclude duplicative claims. Under current precedent, the statute strips the CFC of jurisdiction if the claim before the CFC arose from substantially the same operative facts as any earlier-filed claim pending in another court. Recently, in *United States v. Tohono O'odham Nation*, the U.S. Supreme Court clarified that § 1500 applies even when the two claims seek different relief.

Going forward, this Article argues that the CFC should distinguish between the two primary classes of plaintiffs engaged in duplicative litigation before it: (1) "*Bowen v. Massachusetts* claimants" who elect to pursue both money damages in the CFC and specific relief that happens to be monetary in district court; and (2) regulatory takings plaintiffs who must file initial Administrative Procedure Act claims in district court to challenge adverse agency action. Section 1500 should not bar the latter class of plaintiffs, whose claims are "necessarily sequential" to preserve a "substantial legal right" and therefore are better suited for stay and abeyance. More broadly, Congress should amend the statute to extend stay and abeyance to duplicative *Bowen* claims before the CFC pending their disposition in the other courts. Modern preclusion doctrine would apply to the stayed claims. Finally, Congress, or the Supreme Court upon hearing a suitable case, should eliminate a judicially created order-of-filing loophole, which allows a plaintiff to bypass § 1500 merely by filing in the CFC first.

AUTHOR

J.D., Northwestern University School of Law, 2011; B.A., Haverford College, 2004. This Article is the outgrowth of my paper, "Enough Already: Why the Time Is Right to Reform 28 U.S.C. § 1500 and Its Jurisprudence," which won the 2010 Court of Federal Claims Bar Association Law Student Writing Competition. Thank you to Judge Thomas C. Wheeler, Laura Durity, and Jennifer Everett for exposing me to § 1500 and its jurisdictional impact. Additional thanks to my friends and family for tolerating numerous conversations about "cotton claimants" and the "Tucker Act Shuffle."

TABLE OF CONTENTS

INTRODUCTION....4
I. THE PURPOSE OF SECTION 1500....7
A. The 1868 Enactment....7
B. The 1874 Modernization....8
C. The 1948 Codification....9
II. SECTION 1500 "CLAIM" JURISPRUDENCE AND THE IMPLICATIONS OF *UNITED STATES V. TOHONO O'ODHAM NATION*....10
A. The Recent *Tohono O'odham* Controversy....10
1. The Government's Motion to Dismiss Before the CFC....11
2. The Tribe's Appeal to the Federal Circuit....12
3. The Government's Successful Appeal to the Supreme Court....12
B. Preceding Claim Prong Jurisprudence....13
1. *Keene Corp. v. United States*....13
2. Justice Stevens's *Keene* Dissent....14
3. *Loveladies Harbor, Inc. v. United States*....14
III. PAST UNSUCCESSFUL ATTEMPTS TO REPEAL SECTION 1500....15
A. The 1992 Attempt at Repeal....15
B. Subsequent Attempts at Repeal....17
IV. THE NECESSARY STEPS TO REFORM SECTION 1500....18
A. Preserving the "Substantial Legal Rights" of Regulatory Takings Claimants in Light of *Tohono O'odham*....19
1. The Supreme Court Was Correct to Reject the Federal Circuit's "Distinctly Different" Test....20
2. The CFC Should Employ a "Necessarily Sequential" Test Instead....21
B. Reform Legislation for *Bowen* Claimants....22
1. Congress Should Amend Section 1500 to Extend Stay and Abeyance to Duplicative *Bowen* Claims....22
2. The Time Is Finally Right for Reform Legislation....23
C. Congress or the Supreme Court Should Eliminate the Pending Prong's Order-of-Filing Loophole....24
CONCLUSION....25

INTRODUCTION

Amid the throes of the Civil War, the U.S. Congress passed the Captured and Abandoned Property Act of 1863, authorizing the federal government to confiscate private property in the seceding states in order to sell it to fund the Department of the Treasury.[1] Owners of the confiscated property, which was mostly cotton, could claim restitution if they had not aided the rebellion.[2]

Clever "cotton claimants," as they became known, pursued two simultaneous avenues to recovery: (1) suit in the Court of Claims against the United States; and (2) suit in state court against Treasury officials in personam.[3] The Civil War–era conception of claim preclusion was much more formalistic than it is today.[4] At the time, the doctrine only applied if the caption names of the defendants were identical.[5] Thus, a claim against Secretary of the Treasury "Salmon Chase" would not have precluded the same claim against the "United States." Congress responded to the scourge of double-filing cotton claimants by passing what is now 28 U.S.C. § 1500, "Pendency of claims in other courts," by which it intended to impose a mutually exclusive election between the Court of Claims and other courts.[6]

The U.S. Supreme Court recently issued *United States v. Tohono O'odham Nation* (*Tohono O'odham III*),[7] which offered the Court its first meaningful opportunity to interpret 28 U.S.C. § 1500 in more than a decade.[8]

---

1. *See* Act of Mar. 3, 1863, ch. 120, 12 Stat. 820; Payson R. Peabody et al., *A Confederate Ghost That Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4 FED. CIR. B.J. 95, 98 (1994).
2. *See* § 3, 12 Stat. at 820; Peabody et al., *supra* note 1, at 98–99.
3. Peabody et al., *supra* note 1, at 99 n.13, 100. *See generally* David Schwartz, Symposium, *The United States Court of Claims: Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 573, 574–80 (1967) (providing greater detail on the cotton claimants' maneuverings). Under the second approach, the claimants would evade the bar of sovereign immunity by alleging the common law torts of conversion and trespass against the officials in their personal capacities. *See* United States v. Lee, 106 U.S. 196 (1882) (upholding this strategy decades later in another Civil War–era dispute). Inevitably, the officials would seek removal to federal court pursuant to an 1833 statute mandating federal jurisdiction over suits against Treasury officials. *See, e.g.*, Dennistoun v. Draper, 7 F. Cas. 488, 488–89 (C.C.S.D.N.Y. 1866) (No. 3804) (applying Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633).
4. *See* Keene Corp. v. United States, 508 U.S. 200, 214 n.8 (1993); Nevada v. United States, 463 U.S. 110, 130–31 (1983).
5. *See Keene*, 508 U.S. at 214 n.8.
6. *See* CONG. GLOBE, 40TH CONG., 2D SESS. 2769 (1868) ("The object is to put . . . to their election either to leave the Court of Claims or to leave the other courts.").
7. 131 S. Ct. 1723 (2011) (*Tohono O'odham III*), *rev'g* Tohono O'odham Nation v. United States (*Tohono O'odham II*), 559 F.3d 1284 (Fed. Cir. 2009).
8. *See Keene*, 508 U.S. 200.

Tohono O'odham is important because the question of how to delineate between duplicative *Bowen v. Massachusetts*[9] claimants (*Bowen* claimants) and ordinary regulatory takings plaintiffs who must double-file has embroiled the U.S. Court of Federal Claims (CFC) and the U.S. Court of Appeals for the Federal Circuit. *Bowen* allows for a plaintiff to recover specific (equitable) relief against the government that happens to be monetary, namely through an action in district court under the Administrative Procedure Act (APA).[10] A *Bowen* claimant also can pursue money damages (legal relief) through an action in the CFC under the Tucker Act.[11] This possibility has led to a marked increase in dual-forum litigation,[12] raising complex § 1500 issues. Unless the Supreme Court overrules *Bowen* in a future case, the CFC must develop a framework to manage the frequent questions of duplicative litigation that will continue to arise so long as *Bowen* remains good law.[13] This framework would distinguish between discretionary *Bowen* claimants and regulatory takings plaintiffs, who first must file their "necessarily sequential"[14] claims in district court (challenging adverse agency action) to preserve a "substantial legal right."[15]

---

9. 487 U.S. 879 (1988).
10. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).
11. 28 U.S.C. § 1346(a)(2) (2006).
12. *See generally* Brief of Professor Gregory C. Sisk as Amicus Curiae in Support of Neither Party, *Tohono O'odham III*, 131 S. Ct. 1723 (No. 09-846), 2010 WL 3198843 (arguing for the Court to use *Tohono O'odham* to overrule *Bowen*).
13. At Oral Argument on November 1, 2010, Justice Antonin Scalia indicated a willingness to limit the ambit of *Bowen*: "Your argument assumes that there is available in the district courts injunctive relief under the Administrative Procedure Act (APA), and that is far from clear, even after *Bowen*, it's far from clear if you had any business being in the district court anyway." Oral Argument at 27:05, *Tohono O'odham III*, 131 S. Ct. 1723 (No. 09-846), *available at* http://www.oyez.org/print/66580. Justice Scalia had dissented in *Bowen*. 487 U.S. at 913–30 (Scalia, J., dissenting). However, neither party argued to overrule *Bowen* in its brief, and neither lower court raised the prospect of doing so. The Court did not use *Tohono O'odham III* to overrule *Bowen*. It remains unclear whether the Court would consider overruling if confronted with the issue more directly. Writing for the *Tohono O'odham III* majority, Justice Anthony M. Kennedy noted that the *Bowen* claimant party to the litigation "could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses." 131 S. Ct. at 1730. On the other hand, in her separate concurrence, Justice Sonia M. Sotomayor seemingly reaffirmed *Bowen* by writing, in a sentence immediately proceeding a citation to *Bowen*, "A plaintiff seeking both money damages and injunctive relief to remedy distinct harms arising from the same set of facts may be forced to file actions in both the CFC and federal district court." *Id.* at 1734 (Sotomayor, J., concurring).
14. A necessarily sequential test differentiates between claims that could be filed in either order, like the average *Bowen* claim for specific relief and Tucker Act claim for money damages, and claims that must be filed in sequence, like an APA challenge followed by an inverse condemnation claim.
15. Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1555 (Fed. Cir. 1994) (en banc) (8–3 decision) (discussing Pa. R.R. Co. v. United States, 363 U.S. 202, 205–06 (1960); Aulston v.

This Article argues first, that the CFC could and should allow for the stay and abeyance of regulatory takings claims, shielding them from both § 1500 and the CFC's six-year statute of limitations.[16] Second, much as Justice John Paul Stevens envisioned in his dissent in *Keene Corp. v. United States*,[17] Congress should amend § 1500 to extend stay and abeyance to duplicative *Bowen* claims pending their disposition in the other courts. Modern preclusion doctrine would apply to the stayed claims. Finally, Congress, or the Supreme Court upon hearing a suitable case, should clarify the proper interpretation of "pending" for purposes of § 1500. The statute should apply in the same manner regardless of the order in which a claimant files in the CFC and the other court.

Part I of this Article examines § 1500's purpose, while Part II assesses the impact of the Court's recent *Tohono O'odham* decision and chronicles the statute's claim jurisprudence. Next, Part III explores past unsuccessful attempts to repeal the statute, which largely aimed to address the dilemma that § 1500 creates for regulatory takings plaintiffs, a "jurisdictional dance"[18] known as the "Tucker Act Shuffle."[19] Finally, Part IV outlines the steps necessary for reform and concludes that the time finally is right to implement them.

United States, 823 F.2d 510 (Fed. Cir. 1987)); *see also* Creppel v. United States, 41 F.3d 627, 633 (1994) (applying *Pa. R.R. Co.*, 363 U.S. 202; *Loveladies Harbor*, 27 F.3d 1545; *Aulston*, 823 F.2d 510). In *Pennsylvania Railroad Co.*, the Supreme Court ruled that the Court of Claims had "a duty to stay its proceedings" pending the review of an agency's order for which only a district court had jurisdiction. 363 U.S. at 205–06. And, in *Aulston*, the Federal Circuit held that in order to pursue a takings claim before the U.S. Claims Court, a claimant first had to obtain a proper reversal, in district court under the APA, of adverse agency action concerning title. 823 F.2d at 51. The court added, "[J]ustice requires that the Claims Court action should be stayed pending resolution of the issues in a district court proceeding." *Id.* at 514. It directed the Claims Court to hold the litigants' takings claim "on its docket in suspension for such time as is reasonably necessary for [litigants] to challenge the [agency] decision in a district court and, if successful there, to return promptly to the Claims Court." *Id.* This Article proposes a "necessarily sequential" test as the proper means of identifying a duplicative claim whose preceding claim was required to preserve a substantial legal right.

16. 28 U.S.C. § 2501.

17. 508 U.S. 200, 219–20 (1993) (Stevens, J., dissenting) (citing Hossein v. United States, 218 Ct. Cl. 727 (1978) (per curiam); Brown v. United States, 175 Ct. Cl. 343 (1966) (per curiam), both of which the majority in *Keene* overruled, 508 U.S. at 217 n.12).

18. *Loveladies Harbor*, 27 F.3d at 1549.

19. *See*, *e.g.*, H.R. REP. NO. 105-424, at 2 (1998) ("H.R. 992 is intended to end the 'Tucker Act Shuffles' that currently can bounce property owners between U.S. District Courts and the Court of Federal Claims when seeking redress against the federal government for the taking of their property.").

I. The Purpose of Section 1500

A. The 1868 Enactment

In 1868, Vermont Senator George F. Edmunds proposed a bill to curtail duplicative cotton claimants,[20] explaining:

> The object of this [bill] 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.[21]

Congress passed what is now 28 U.S.C. § 1500 later that year, directing:

> That no person shall file or prosecute any claim or suit in the [C]ourt of [C]laims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States.[22]

First and foremost, the purpose of the 1868 Act was to induce cotton claimants "either to leave the Court of Claims or to leave the other courts."[23] Congress was concerned with *duplicative* litigation but accepted that a plaintiff could have prosecuted a *singular* action in either the Court of Claims or the other courts at his or her election. Senator Edmunds's "try the whole question [again]"[24] language suggests that the plaintiff's election of one venue would have been mutually exclusive of the other. By allowing plaintiffs only a mutually exclusive election, Congress acted to minimize jurisdictional conflict. Thus, the purpose of the 1868 Act was to force upon cotton claimants a

20. *See supra* Introduction and notes 1–6.
21. CONG. GLOBE, 40TH CONG., 2D SESS. 2769 (1868) (emphasis added).
22. Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77 (the 1868 Act) (emphasis omitted).
23. CONG. GLOBE 2769.
24. *Id.*

mutually exclusive election between the Court of Claims and the other courts, so as to minimize jurisdictional conflict and to preclude duplicative claims.[25]

B. The 1874 Modernization

In 1874, Congress embarked upon a broad statutory modernization effort, which included minimal updates to the text of the 1868 Act.[26] Representative Benjamin Franklin Butler of Massachusetts, who led that effort, explained:[27]

> We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate and bring together statutes *in pari materia*; so that you have here, except insofar as it is human to err, the laws of the United States under which we now live.[28]

The purpose of what is now 28 U.S.C. § 1500 remained unaltered by the 1874 modernization: to force upon plaintiffs a mutually exclusive election between the Court of Claims and the other courts so as to minimize jurisdictional conflict and to preclude duplicative claims. In 1911, Congress codified the 1874 text without amendment,[29] and the statute remained unchanged for another thirty-seven years.

25. While this Article argues that the 1868 Act forced a mutually exclusive election, the courts regularly have reinterpreted this aspect of the statute's purpose throughout its history. *See* Griffin v. United States, 85 Fed. Cl. 179, 191–92 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009), *reh'g en banc denied*, 621 F.3d 1363 (Fed. Cir. 2010) ("[T]he jurisprudence in this area appears to undergo a sea change every generation or so."). Admittedly, the 1868 Act was poorly written, which has led to lingering disputes about the intent behind the original language and the significance of any updates to it. *Compare Tohono O'odham III*, 131 S. Ct. 1723, 1730 (2011) ("[T]he 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."), *with id.* at 1736 n.7 (Sotomayor, J., concurring) ("Because § 1500's jurisdictional bar applies only when the other suit is pending, 'there is a good argument that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor.'" (quoting Keene Corp. v. United States, 508 U.S. 200, 217 (1993))).

26. *See* Revised Statutes of the United States, Act Effective Dec. 1, 1873, ch. 21, § 1067, 18 Stat. 197.

27. Representative Butler chaired the Committee on the Revision of the Laws in the forty-second Congress (March 4, 1871–March 4, 1873). *See* H.R. MISC. DOC. NO. 3, at 7 (1872). He subsequently chaired the Committee on the Judiciary in the forty-third Congress (March 4, 1873–March 4, 1875). *See* H.R. MISC. DOC. NO. 2, at 5 (1875).

28. 2 CONG. REC. 129 (1873).

29. *See* Act of March 3, 1911, ch. 231, § 154, 36 Stat. 1138 (codified at 28 U.S.C. § 260 (1940)).

C. The 1948 Codification

In 1948, Congress created 28 U.S.C. § 1500, deriving its text from a revision of § 154 of the Judicial Code of 1911:

> The Court of 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.[30]

Notably, Congress added the language "against the United States" to supersede a Supreme Court statutory interpretation, which had undermined the statute's claim preclusion function.[31] Congress also replaced the 1911 text's specific "file or prosecute" language with a general reference to "jurisdiction."[32] However, according to the Court, that replacement did not indicate anything "more than a change 'in phraseology.'"[33] Other than making insubstantial revisions to account for the CFC's two changes in name,[34] Congress has not modified the text of § 1500 since 1948.

30. Act of June 25, 1948, ch. 646, § 1500, 62 Stat. 942 (codified as amended at 28 U.S.C. § 1500 (2006)). Put more simply, today, the CFC "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." *Tohono O'odham III*, 131 S. Ct. at 1727.

31. *See Tohono O'odham III*, 131 S. Ct. at 1730; Keene Corp. v. United States, 508 U.S. 200, 211 n.5 (1993) (discussing Matson Navigation Co. v. United States, 284 U.S. 352, 355–56 (1932) (restricting the ambit of the 1911 text to suits against "agent[s] of the government" but not suits against "the United States"), *superseded by statute*, § 1500, 62 Stat. at 942). The Court's *Matson Navigation* interpretation aligned with the 19th Century conception of sovereign immunity. *See, e.g.*, United States v. Lee, 106 U.S. 196 (1882) (allowing only for suits against agents of the government); *see also supra* note 3. However, by 1948, Congress already had enacted two limited waivers to suits against the United States. *See* Federal Tort Claims Act of Aug. 2, 1946, ch. 753, 60 Stat. 842 (repealed and reenacted 1948); Tucker Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; *see also Tohono O'odham III*, 131 S. Ct. at 1733–34 (Sotomayor, J., concurring) ("Since the enactment of § 1500 in 1868, Congress has expanded the avenues by which persons with legitimate claims against the United States may obtain relief."). These waivers of sovereign immunity necessitated a broadening of § 1500 for the statute to remain effective.

32. *Compare* § 154, 36 Stat. at 1138, *with* § 1500, 62 Stat. at 942.

33. *Keene*, 508 U.S. at 209 (quoting H.R. REP. NO. 80-308, at A140 (1947)).

34. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516 (renaming the "United States Claims Court" the "United States Court of Federal Claims"); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133(e)(1), 96 Stat. 40 (renaming the trial division of the "Court of Claims" the "United States Claims Court").

II. Section 1500 "Claim" Jurisprudence and the Implications of *United States v. Tohono O'odham Nation*

Under current Supreme Court and Federal Circuit precedent, the CFC lacks jurisdiction under 28 U.S.C. § 1500 if the claim before the CFC arose from substantially the same operative facts as any earlier-filed claim pending in another court,[35] regardless of relief sought. In other words, the statute applies if substantially the same claim (the claim prong) already is pending in another court (the pending prong). *Tohono O'odham* implicated the claim prong. However, as discussed in Part IV, complete § 1500 reform will require addressing the pending prong as well.

A. The Recent *Tohono O'odham* Controversy

The Tohono O'odham Nation is an Indian tribe (Tribe).[36] In 1976, the United States paid the Tribe $26 million to settle a claim for takings and trespass.[37] The government now holds that money in trust, in addition to income derived from the Tribe's approximately three million acres of land.[38]

On December 28, 2006, the Tribe brought suit against various federal officials in district court, alleging a breach of fiduciary duty in the management of its trust assets.[39] The Tribe primarily requested a decree for the government to provide an accounting of its trust assets and a restatement of its trust fund account balances in accordance with that accounting.[40] The next day, on December 29, 2006, the Tribe brought suit against the "United States" in the CFC. Before the CFC, the Tribe primarily requested a determination that the government was liable to it for injuries and losses

35. *Tohono O'odham III*, 131 S. Ct. at 1731.
36. *Tohono O'odham II*, 559 F.3d 1284, 1285 (Fed. Cir. 2009).
37. *Id.*
38. *Id.*
39. *Id.* This pattern of allegations by an Indian tribe against the government for mismanagement of trust assets is relatively common. *See, e.g.*, Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009). The tribes often file first in district court for relief framed as an accounting and then in the CFC for relief framed as damages (as the Tohono O'odham did). However, unlike for other *Bowen* claimants, the statute of limitations for Indian claims in the CFC does not begin running until the filing tribe has received an appropriate accounting. *Tohono O'odham III*, 131 S. Ct. at 1731 (citing to 123 Stat. 2922 and 104 Stat. 1930 as examples). *But see id.* at 1735 n.5 (Sotomayor, J., concurring) (cautioning that the statute of limitations does not toll for claims concerning tangible assets, such as mineral estates).
40. *Tohono O'odham II*, 559 F.3d at 1285–86 (quoting District Court Complaint at 18–19, Tohono O'odham Nation v. United States (*Tohono O'odham I*), 79 Fed. Cl. 645 (2007) (No. 1:06-CV02236)).

resulting from the government's alleged breach of fiduciary duty, as well as damages due to the Tribe.[41] The government interposed § 1500 and moved to dismiss the claim before the CFC.[42] At issue in *Tohono O'odham* was whether "a common factual basis like the one apparent in the [Tribe's] suits suffices to bar jurisdiction under § 1500."[43]

1. The Government's Motion to Dismiss Before the CFC

Granting the government's motion, CFC Judge Eric G. Bruggink interpreted the statute to apply where "there is meaningful overlap both in the underlying facts and in the relief sought."[44] Here, he found the underlying facts to be the same.[45] His analysis in *Tohono O'odham I* therefore hinged on the relief sought.

To determine whether there was "meaningful overlap" in the relief sought, Judge Bruggink weighed two competing considerations.[46] On the one hand, the Tribe prayed for an accounting[47] and for money[48] in both courts. On the other hand, the Tribe explicitly framed its requests before the district court as being for declaratory and other equitable relief, and its requests before the CFC as being for money damages (legal relief).[49] Despite that distinction, Judge Bruggink found that there was "virtually *100 percent* overlap" between the respective sets of requests.[50] He added, "A perfect symmetry of demands for relief is not necessary [to implicate § 1500]."[51]

41. *Id.* at 1286 (quoting CFC Complaint at 13, *Tohono O'odham I*, 79 Fed. Cl. 645 (No. 06-CV-944)).
42. *Tohono O'odham I*, 79 Fed. Cl. at 646, *rev'd*, 559 F.3d 1284 (Fed. Cir. 2009).
43. *Tohono O'odham III*, 131 S. Ct. at 1727.
44. *Tohono O'odham I*, 79 Fed. Cl. at 656.
45. *Id.*
46. *See id.*
47. *Id. Compare Tohono O'odham II*, 559 F.3d 1284, 1286 (Fed. Cir. 2009) ("[A] decree directing the defendants . . . to provide a complete, accurate, and adequate accounting of the Nation's trust assets . . . and . . . to comply with all other fiduciary duties . . . ."), *with Tohono O'odham I*, 79 Fed. Cl. at 656 ("[A] determination of the amount of damages due . . . .").
48. *Tohono O'odham I*, 79 Fed. Cl. at 656. *Compare Tohono O'odham II*, 559 F.3d at 1286 ("[A] decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate . . . ."), *with Tohono O'odham I*, 79 Fed. Cl. at 651 ("[A] determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty.").
49. *See Tohono O'odham I*, 79 Fed. Cl. at 656.
50. *Id.* at 656–57 (emphasis added).
51. *Id.* at 656.

2. The Tribe's Appeal to the Federal Circuit

On appeal in *Tohono O'odham II*, a Federal Circuit panel reversed the CFC's holding.[52] The panel reasoned that the Tribe had requested an accounting only from the district court;[53] whereas, from the CFC, the Tribe had requested solely damages.[54] The panel stated, "it is the relief that the plaintiff requests that is relevant under § 1500,"[55] and observed that the Tribe's "prayer for relief in the Court of Federal Claims [did] not request an accounting."[56] It further noted that the presumed need for an accounting to determine the proper amount of damages "[did] not transform the Nation's unambiguous request for damages into a request for an accounting."[57]

The panel similarly analyzed the Tribe's dual prayers for money. It reasoned that the Tribe's request for "a decree providing for the restatement of the Nation's trust fund account balances" was for "old money,"[58] that is, money already belonging to the Tribe, which erroneously was unaccounted for in the Tribe's trust fund balances. In contrast, the panel reasoned that the Tribe's request "[f]or a determination that the Defendant is liable to the Nation *in damages* for the injuries and losses caused *as a result* of Defendant's breaches of fiduciary duty" was for "new money,"[59] that is, money the Tribe would have earned, but for the alleged fiduciary mismanagement. The panel therefore concluded that there was *no* overlap in the relief the Tribe requested.[60]

3. The Government's Successful Appeal to the Supreme Court

Recently, in *Tohono O'odham III*, the Supreme Court reversed the Federal Circuit's ruling.[61] Writing for the majority, Justice Anthony M. Kennedy observed that the purpose of § 1500 is "to save the Government from burdens of redundant litigation,"[62] including "[d]eveloping a factual record."[63]

52. *Tohono O'odham II*, 559 F.3d 1284.
53. *See id.* at 1291.
54. *See id.*
55. *Id.* (emphasis omitted).
56. *Id.*
57. *Tohono O'odham II*, 559 F.3d at 1291.
58. *Id.* at 1286, 1290.
59. *Id.* at 1291.
60. *See id.* at 1289–91.
61. *Tohono O'odham III*, 131 S. Ct. 1723 (2011).
62. *Id.* at 1730.
63. *Id.*

Effectively overruling *Casman v. United States*,[64] the majority rejected a reading of the statute focused on the relief sought, which would transform § 1500 into "a mere pleading rule, to be circumvented by carving up a single transaction into overlapping pieces seeking different relief."[65] The majority held: "Two 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."[66]

B. Preceding Claim Prong Jurisprudence

1. *Keene Corp. v. United States*

The Supreme Court's last significant § 1500 ruling, *Keene Corp. v. United States* in 1993,[67] also had concerned the statute's claim prong. In *Keene*, the Court synthesized three holdings from the 1920s and 1930s. It ruled that the statute deprives the CFC of jurisdiction when a plaintiff has a claim pending in another court predicated on "substantially the same operative facts," irrespective of the legal theory on which the claim was based.[68] The Court reasoned that Congress was aware of settled judicial interpretations of § 154 of the 1911 text and therefore adopted those interpretations when it codified § 1500 in 1948.[69]

64. 135 Ct. Cl. 647 (1956). *Casman* distinguished between claims requesting different relief. *See id.* at 649–50. The en banc Federal Circuit repudiated *Casman* in April of 1992. UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992) (en banc) (9–1 decision), *aff'd in part sub nom.* Keene Corp. v. United States, 508 U.S. 200 (1993). As clarified *infra* in Part IV.A, the Supreme Court ultimately ruled that addressing *Casman* was unnecessary. *Keene*, 508 U.S. at 216. By May 1994, in *Loveladies Harbor v. United States*, 27 F.3d 1545, 1551 (Fed Cir. 1994), the Federal Circuit had rehabilitated *Casman*.

65. *Tohono O'odham III*, 131 S. Ct. at 1730.

66. *Id.* at 1731.

67. 508 U.S. 200.

68. *Id.* at 211–12 ("[T]he comparison of the two cases . . . would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action. . . . That the two actions were based on different legal theories did not matter." (discussing *Ex parte* Skinner & Eddy Corp., 265 U.S. 86, 96 (1924); Corona Coal Co. v. United States, 263 U.S. 537, 539–40 (1924); British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438 (1939) (per curiam))).

69. *Id.* at 212–13. Furthermore, the Court noted, "While the [1948] language does not set the limits of claim identity with any precision, it does make it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity . . . ." *Id.* at 213.

2. Justice Stevens's *Keene* Dissent

Justice Stevens dissented from the eight-to-one *Keene* majority.[70] Focusing on the pending prong instead of the claim prong, he reasoned that it should not be necessary for the CFC to dismiss an action just because a plaintiff already has filed another action on the same claim before another court.[71] Under Justice Stevens's interpretation, the CFC would retain the case on its docket until the disposition of the action in the other court.[72] The action before the CFC automatically would reinstate upon dismissal of the other action.[73] In *Tohono O'odham III*, both Justice Sonia Sotomayor[74] and Justice Ruth Bader Ginsburg[75] agreed with Justice Stevens, in expressing their belief that stay and abeyance is possible without additional legislation.[76]

3. *Loveladies Harbor, Inc. v. United States*

Keene left unresolved whether two actions based on the same operative facts but requesting different relief would implicate § 1500's jurisdictional bar by constituting the same claim.[77] The Federal Circuit addressed that question en banc in *Loveladies Harbor, Inc. v. United States*,[78] one year after *Keene*. *Loveladies Harbor* involved an APA claim challenging a permit denial and a

70. *See id.* at 218–22 (Stevens, J., dissenting).
71. *Id.* at 218.
72. *Id.* at 219–20 (citing Hossein v. United States, 218 Ct. Cl. 727 (1978) (per curiam); Brown v. United States, 175 Ct. Cl. 343 (1966), both of which the majority in *Keene* overruled, 508 U.S. at 217 n.12).
73. *Id.* at 222 n.5 (citing Nat'l Steel & Shipbuilding Co. v. United States, 8 Cl. Ct. 274, 275–76 (1985)).
74. *Tohono O'odham III*, 131 S. Ct. 1723, 1737 (2011) (Sotomayor, J., concurring) ("To the extent the majority is concerned about the burdens of parallel discovery, federal courts have ample tools at their disposal, such as stays, to prevent such burdens."). Justice Stephen G. Breyer joined Justice Sotomayor in her concurrence.
75. *Id.* at 1739–40 (Ginsburg, J., dissenting) ("To avoid both duplication and the running of the statute of limitations, the CFC suit could be stayed while the companion District Court action proceeds . . . . I see no impediment . . . in § 1500 or any other law or rule.").
76. This Article argues that stay and abeyance is possible without additional legislation only for duplicative claims whose preceding claims were required to preserve a substantial legal right, that is, for "necessarily sequential" claims. *See infra* Part IV.A.2.
77. *Keene*, 508 U.S. at 212 n.6, 214 n.9, 216; *see also* Casman v. United States, 135 Ct. Cl. 647 (1956). *Keene* involved two sets of duplicate filings: (1) claims for contribution or indemnification (in district court) and for alleged breach of implied warranties (in the CFC); and (2) a *Bowen* claim and a claim in tort (in district court) and a takings claim (in the CFC). *See Keene*, 508 U.S. at 203–05; *see also Tohono O'odham III*, 131 S. Ct. at 1737 (Sotomayor, J., concurring). *Casman* involved claims for restoration of position (injunction) and for back pay. *See Casman*, 135 Ct. Cl. at 648. At the time of *Casman*, the Court of Claims did not yet have ancillary injunctive power. *See* Remand Act of Aug. 29, 1972, § 1, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2) (1982)).
78. 27 F.3d 1545 (Fed. Cir. 1994).

Fifth Amendment regulatory takings claim seeking compensation for the denial.[79] The Federal Circuit asserted that overlap in legal theory does not necessarily mean overlap in relief.[80] Reviving *Casman*,[81] it held that § 1500 does not deprive the CFC of jurisdiction when a plaintiff has an action pending in another court based on the same operative facts but is seeking "distinctly different" relief.[82] By overruling *Casman*, the *Tohono O'odham III* majority effectively overruled the "distinctly different" test from *Loveladies Harbor* as well.[83]

Additionally, the *Loveladies Harbor* court provided that § 1500 should not place claimants "in the position of having to give up a substantial legal right protected by the Takings Clause of the Constitution."[84] The court proceeded to cite approvingly to *Aulston v. United States*,[85] in which the Federal Circuit directed the Claims Court to stay a takings claim pending an APA challenge to an adverse title determination in district court.[86]

III. Past Unsuccessful Attempts to Repeal Section 1500

A. The 1992 Attempt at Repeal

In 1992, Senator Howell T. Heflin[87] introduced the Court of Federal Claims Technical and Procedural Improvement Act,[88] which sought to repeal 28 U.S.C. § 1500. Senator Heflin introduced his bill several weeks before the Federal Circuit was to address § 1500 en banc in *UNR Industries, Inc. v. United*

79. *See id.* at 1546–47.
80. *Id.* at 1554 n.23. To illustrate, a plaintiff's APA challenge to enjoin an agency action that diminished his or her land value and inverse condemnation claim for money damages equal to the diminishment in value both would rely on the theory that the agency action caused the diminishment in value.
81. 135 Ct. Cl. 647; *see supra* note 64.
82. *Loveladies Harbor*, 27 F.3d at 1551 (citing *Casman*, 135 Ct. Cl. 647; British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438 (1939)). As discussed *infra* in Parts III and IV, the "distinctly different" test may have reflected one effort by the *Loveladies Harbor* majority to relax the CFC's statute of limitations for "necessarily sequential" claims without opening the floodgates to duplicative *Bowen* claims.
83. *Tohono O'odham III*, 131 S. Ct. 1723, 1730 (2011); *see supra* Part II.A.3.
84. 27 F.3d at 1555 (discussing Pa. R.R. Co. v. United States, 363 U.S. 202, 205–06 (1960)); *see supra* note 15.
85. 823 F.2d 510 (Fed. Cir. 1987).
86. *Id.* While *Tohono O'odham III* implicitly overrules the *Loveladies Harbor* "distinctly different" test by overruling *Casman*, the "substantial legal right" test retains vitality. It provides an alternative means for preserving "necessarily sequential" claims through stay and abeyance. *See infra* Part IV.A.2.
87. Senator Heflin was a Democrat from Alabama.
88. S. 2521, 102d Cong. (as introduced by Sen. Howell T. Heflin, Apr. 2, 1992).

States.[89] He offered it as an amendment to the Federal Courts Administration Act of 1992,[90] which ultimately became law in October 1992 without the amendment.[91]

An April 1992 hearing held less than a week after the *UNR Industries* ruling sheds light on the ultimate failure of Senator Heflin's bill. Loren A. Smith, then–Chief Judge of the Claims Court, presented a statement in favor of the bill:[92]

> Although, on its face, § 1500 may appear to prevent wasteful duplicative litigation, in practice it has had precisely the opposite effect. Elimination of this jurisdictional bar to suits related to cases in other courts will save much wasteful litigation over non-merits issues and will leave the court free to deal with potential duplication through discretionary means. *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*.[93]

89. 962 F.2d 1013 (Fed. Cir. 1992) (en banc) (9–1 decision) (overruling Bos. Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137 (Fed. Cir. 1988); Hossein v. United States, 218 Ct. Cl. 727 (1978); Brown v. United States, 358 F.2d 1002 (1966); Tecon Eng'rs, Inc. v. United States, 343 F.2d 943 (Ct. Cl. 1965)), *aff'd in part sub nom.* Keene Corp. v. United States, 508 U.S. 200 (1992) (overruling only *Hossein*, 218 Ct. Cl. 727; *Brown*, 358 F.2d 1002). The Federal Circuit issued *UNR Industries* on April 23, 1992.

90. As previously discussed, the Federal Courts Administration Act of 1992 renamed the "United States Claims Court" the "United States Court of Federal Claims." *See supra* note 34.

91. *See* Newport News Shipbuilding & Dry Dock Co. v. Garrett, 6 F.3d 1547, 1569–70 (Fed. Cir. 1993) (Bennett, J., dissenting). The Federal Courts Study Committee Implementation Act of 1992 incorporated provisions of the Claims Court Technical and Procedural Improvements Act of 1991, which the U.S. Claims Court had submitted to Congress as proposed legislation. *Id.* at 1569. As originally submitted to Congress, § 12 of the proposed legislation also would have repealed 28 U.S.C. § 1500. JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS, Mar. 16, 1992, at 22, *available at* http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/1992-03.pdf. The on-again, off-again inclusion of the § 1500 repeal may have reflected resistance from the Judicial Conference of the United States (Judicial Conference) to other expansions of the Article I Claims Court's jurisdiction. *See id.* at 22–23. Besides repealing 28 U.S.C. § 1500, the Claims Court had proposed an extension of its declaratory judgment power and a grant of jurisdiction to hear ancillary Federal Tort Claims Act claims. *Id.* at 22. The Judicial Conference is "[t]he policy-making body of the federal judiciary, responsible for surveying the business of the federal courts, making recommendations to Congress on matters affecting the judiciary, and supervising the work of the Administrative Office of the United States Courts." BLACK'S LAW DICTIONARY 923 (9th ed. 2009); *see also* 28 U.S.C. § 331 (2006).

92. *See Court of Federal Claims Technical and Procedural Improvements Act*: *Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 102d Cong. 2–15 (1992) [hereinafter *Senate Hearing*] (statement of C.J. Loren A. Smith).

93. *Id.* at 10–11 (statement of C.J. Loren A. Smith) (emphasis added).

Stuart E. Schiffer, then–Deputy Assistant Attorney General, presented the prevailing counterargument.[94] Mr. Schiffer asserted that "Section 1500 is a very straightforward provision which simply provides that the Claims Court shall not have jurisdiction over any claim where the same claim is pending in another court."[95] He proceeded to quote from that week's *UNR Industries* decision, which found the rationale behind "requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claim"[96] to be "even more salutary in this day of excessive litigation" than at the time § 1500 was adopted.[97] Thus, the 1992 attempt to repeal § 1500 stalled in the face of the Federal Circuit's sweeping reinterpretation of the statute in *UNR Industries.* The Supreme Court only later limited that reinterpretation in *Keene*.[98]

B. Subsequent Attempts at Repeal

By the mid-1990s, repeal of § 1500 had become a partisan issue. Increasingly, the political parties disagreed over the appropriate ease of regulatory takings claims against the government.

As *Loveladies Harbor*[99] illustrates, a potential regulatory takings plaintiff faces a dilemma.[100] If the plaintiff prefers to challenge an adverse agency action rather than merely recover compensation for any taking that action effectuates, he or she would file first in district court under the APA. However, by the time the plaintiff exhausts all appeals challenging the agency, it is possible the CFC's six-year statute of limitations[101] would have run, barring suit in that court. Once the plaintiff proceeds in the CFC, he or she might recover compensation for a taking but could not further challenge the agency action. This dilemma attracted congressional attention[102] and the moniker, the "Tucker Act Shuffle."[103]

94. *See id.* at 16–33 (statement of Stuart E. Schiffer, Deputy Assistant Att'y Gen. of the U.S.).
95. *Id.* at 18 (statement of Stuart E. Schiffer, Deputy Assistant Att'y Gen. of the U.S.).
96. *Id.* (statement of Stuart E. Schiffer, Deputy Assistant Att'y Gen. of the U.S.) (quoting UNR Indus., Inc. v. United States, 962 F.2d 1013, 1021 (Fed. Cir. 1992)).
97. *Id.* (statement of Stuart E. Schiffer, Deputy Assistant Att'y Gen. of the U.S.).
98. Keene Corp. v. United States, 508 U.S. 200 (1993). While *Tohono O'odham III* moves the jurisprudence back towards *UNR Industries*, the implications of § 1500's interaction with *Bowen* were not yet apparent in 1992. The case for legislative reform remains strong despite *Tohono O'odham III*. *See infra* Part IV.
99. 27 F.3d 1545 (Fed. Cir. 1994).
100. *See supra* Part II.B.3.
101. 28 U.S.C. § 2501 (2006).
102. *See, e.g.*, H.R. REP. NO. 105-424, at 5 (1998) ("[I]f a property owner wishes to both challenge the appropriateness of a taking of property and pursue monetary damages arising from the taking,

Besides Senator Heflin's bill, Congress considered six other bills to repeal § 1500 throughout the 1990s.[104] In each bill, support for or opposition to repeal fell largely along party lines, with Republicans generally in support and Democrats generally in opposition.[105] No member of Congress has introduced a bill to repeal or amend § 1500 since May 1999.[106]

IV. The Necessary Steps to Reform Section 1500

This Part details the necessary steps to reform 28 U.S.C. § 1500 and argues that the time is finally right to implement them. As a practical matter, it remains uncertain whether the present Supreme Court would overrule *Bowen v. Massachusetts*.[107] Nevertheless, the proceeding three-step reform, which would distinguish between discretionary *Bowen* and "necessarily sequential" regulatory takings plaintiffs, would be an effective alternative to overrule.

First, going forward, the CFC should interpret the "substantial legal right" test from *Loveladies Harbor, Inc. v. United States*[108] to allow for the stay and abeyance of "necessarily sequential" regulatory takings claims before the CFC, pending their disposition in district court. This interpretation would remain true to § 1500's jurisdictional conflict-prevention purpose, yet would be

---

the owner must choose to pursue one claim before the other—both claims may not be pursued at the same time.").

103. *See supra* note 19.

104. Utah Senator Orrin G. Hatch, a Republican who chaired the Senate Committee on the Judiciary throughout the second half of the 1990s, played a leading role in five of the six repeal efforts: the (1) Tucker Act Shuffle Relief Act of 1997, H.R. 992, 105th Cong. § 3(a) (1998) (as passed by House of Representatives and referred to S. Comm. on the Judiciary, Mar. 12, 1998); H.R. 992, 105th Cong. § 2(c)(2)(A) (as introduced by Rep. Lamar S. Smith, Mar. 6, 1997); (2) Citizens Access to Justice Act of 1998, *compare* H.R. 1534, 105th Cong. § 6(a)(2)(A) (as amended by Sen. Orrin G. Hatch, Feb. 26, 1998) (providing for repeal of 28 U.S.C. § 1500), *with* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (as passed by House of Representatives, Oct. 22, 1997, and referred to S. Comm. on the Judiciary, Nov. 13, 1997) (not providing for repeal of § 1500); (3) Omnibus Property Rights Act of 1997, S. 781, 105th Cong. § 205(d)(2)(A) (as introduced by Sen. Orrin G. Hatch, May 22, 1997); (4) Citizens Access to Justice Act of 1997, S. 1256, 105th Cong. § 8(a)(2)(A) (as introduced by Sen. Orrin G. Hatch, Oct. 6, 1997); (5) Property Rights Implementation Act of 1998, S. 2271, 105th Cong. § 6(a)(2)(A) (as introduced on behalf of Sen. Orrin G. Hatch, July 7, 1998); and (6) Citizens Access to Justice Act of 1999, S. 1028, 106th Cong. § 6(a)(2)(A) (as introduced by Sen. Orrin G. Hatch, May 13, 1999).

105. *See, e.g.*, Tucker Act Shuffle Relief Act of 1997, H.R. 992, 105th Cong. (as passed by House of Representatives, Mar. 12, 1998) (passing with 184 Republican votes and 46 Democratic votes, while garnering opposition from 36 Republicans, 143 Democrats, and Independent Bernard Sanders of Vermont).

106. S. 1028, § 6(a)(2)(A).

107. 487 U.S. 879 (1988); *see supra* note 13.

108. 27 F.3d 1545, 1555 (Fed. Cir. 1994); *see supra* notes 84–86 and accompanying text.

predictable for litigants and administrable for lower courts. Second, Congress should amend the statute to allow for the stay and abeyance of duplicative *Bowen* claims as well. Modern preclusion doctrine would apply to the stayed claims. Finally, § 1500 should apply in the same manner regardless of the order in which a plaintiff files in the CFC and the other court. Either the Supreme Court should reconsider contrary Federal Circuit pending prong precedent in a future case or Congress should supersede that precedent.

A. Preserving the "Substantial Legal Rights" of Regulatory Takings Claimants in Light of *Tohono O'odham*

In *UNR Industries, Inc. v. United States*,[109] decided in April 1992, the en banc Federal Circuit repudiated *Casman v. United States*,[110] which distinguished between claims that requested different relief.[111] While the Supreme Court ultimately ruled that addressing *Casman* was unnecessary to decide *Keene*,[112] the Court did not express either support for or opposition to its overrule.[113] By May 1994, in *Loveladies Harbor*, the en banc Federal Circuit had rehabilitated *Casman*.[114]

United States v. Tohono O'odham Nation[115] raised the question of whether the *Loveladies Harbor* court was correct to spare duplicative claims from § 1500, on the basis of the relief each claim sought. The Supreme Court correctly overruled the Federal Circuit's means (sparing "distinctly different" claims) but not its end (sparing duplicative claims where double-filing was required to preserve a "substantial legal right").[116] Such claims do not create jurisdictional

109. 962 F.2d 1013 (Fed. Cir. 1992), *aff'd in part sub nom.* Keene Corp. v. United States, 508 U.S. 200 (1993).
110. 135 Ct. Cl. 647 (1956).
111. *UNR Indus.*, 962 F.2d at 1025 ("[A]s of today, *Casman* and its progeny are no longer valid.").
112. 508 U.S. at 216.
113. *See id.* ("In applying § 1500 to the facts of this case, we find it unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*, *Casman*, and *Boston Five*."). *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988), was an application of *Casman* and *Hossein*. *See UNR Indus.*, 962 F.2d at 1020–21.
114. *See* Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994) ("The description of the *Casman* rule as an 'exception' to § 1500 is inapt . . . . *Casman* and its progeny reflect a carefully considered interpretation of the statutory term 'claims,' a term undefined in the statute and subject to conflicting views as to its meaning.").
115. 131 S. Ct. 1723 (2011).
116. Justice Kennedy's majority opinion implicitly repudiated *Casman* and, thereby, the "distinctly different" test from *Loveladies Harbor* that relied on it; however, only Justice Sotomayor's concurrence expressly characterized *Casman* as overruled. *Compare id.* at 1730 ("An interpretation of § 1500 focused on the facts rather than the relief a party seeks preserves the provision as it was meant to function." (citing Casman v. United States, 135 Ct. Cl. 647 (1956), counterfactually)),

conflict. To be sure, filing sequential claims is necessary for any private property owner who desires both to challenge adverse agency action and to receive just compensation for his or her loss.[117] To test whether a duplicative claim preserves a "substantial legal right," and therefore is appropriate for stay and abeyance, the CFC should employ a "necessarily sequential" standard.[118]

1. The Supreme Court Was Correct to Reject the Federal Circuit's "Distinctly Different" Test

In *Tohono O'odham III*, the Supreme Court was correct to reverse the Federal Circuit's "technical law-equity distinction."[119] The *Tohono O'odham II* panel's hairsplitting between "old money" and "new money" provided only minimal protection for the unwary and would have led to inconsistent judicial outcomes.[120] At the CFC level, it is likely that many of the same plaintiffs who already were unaware of the pending prong's order-of-filing rule[121] would have been equally oblivious to the linguistic parsing necessary to avert § 1500's application under the panel's approach.[122] The "distinctly different" test, as applied

with id. at 1734 (Sotomayor, J., concurring) ("The consequence of today's decision is clear: The *Casman* rule is no longer good law."). Neither opinion repudiated *Loveladies Harbor*. Indeed, Justice Kennedy did not even cite directly to the case. The "substantial legal right" language from *Loveladies Harbor* remains good law.

117. A plaintiff who prefers to challenge agency action rather than merely recover compensation for the diminishment in property value that agency action causes must pursue an APA claim in district court first. Once compensated in the CFC, the plaintiff has sold the taken property (the diminishment in property value) and no longer would have grounds to enjoin the agency action. However, by the time a plaintiff has exhausted all appeals on the APA claim, the CFC's statute of limitations might have run. *See supra* Part III.B. This peculiar dilemma that regulatory takings plaintiffs face might explain the shift from the 9–1 *UNR Industries* majority (a *Bowen* claim) to the 8–3 *Loveladies Harbor* majority (a regulatory takings claim) in little more than two years.

118. Note that a "necessary sequential" test to identify and preserve *only* those sequential claims necessary to preserve a "substantial legal right" would not implicate *Brown v. United States*, 358 F.2d 1002 (1966), or *Hossein v. United States*, 218 Ct. Cl. 727 (1978), which the Supreme Court expressly overruled in *Keene*. *See* 508 U.S. 200, 217 n.12 (1993). *Brown* and *Hossein* preserved duplicative claims before the CFC, which earlier had failed in district court due to lack of subject matter jurisdiction. *Id.* at 216–17. Unlike the *Brown*/*Hossein* rule, which incentivized duplicative litigation by saving litigants who mistakenly filed the same claim in the wrong court, a "necessarily sequential" rule merely would incentivize litigants to exhaust their APA injunctive remedies before pursuing distinct takings claims in the CFC.

119. Petition for Writ of Certiorari, *Tohono O'odham Nation III*, 131 S. Ct. 1723 (2011) (No. 09-846), 2010 WL 169506, at *21.

120. *Tohono O'odham II*, 559 F.3d 1284, 1290 (Fed. Cir. 2009), *rev'd*, 131 S. Ct. 1723.

121. *See infra* Part IV.C.

122. Similarly, it is not clear that the average *Bowen* claimant before the CFC gains much advantage by also pursuing specific relief in district court. While Congress should amend § 1500 to extend stay and abeyance to duplicative *Bowen* claims, it is important to note that many *Bowen* claimants miscalculated by filing in district court in the first place. Having already exhibited a lack of

in *Tohono O'odham II* to distinguish between express requests for "old money" and "new money," would not have saved their claims. Additionally, under the panel's approach, future Federal Circuit judges engaged in fact-sensitive parsing might have reached inconsistent and unpredictable outcomes when reviewing dismissals from the CFC.[123]

Moreover, if a law-equity distinction between claims were pertinent to § 1500, the statute would not have applied in *Keene*.[124] After all, *Keene* involved a third-party action in district court for indemnification or contribution, and a damages action in the CFC for breach of implied warranties.[125]

By comparison, a "necessarily sequential" standard would protect regulatory takings plaintiffs, who *must* file sequentially, without sacrificing ease of judicial administration or contradicting the purpose of § 1500. While sympathetic *Bowen* claimants, like the Tribe in *Tohono O'odham*, would not benefit from this interpretation,[126] such ineligible double-filers would be better served by pursuing congressional references[127] or, where justified, professional malpractice suits against their attorneys. Under *Tohono O'odham III*, *Bowen* claimants who overlook the order-of-filing loophole will be unable to survive a motion to dismiss in the CFC regardless. Their salvation lies with Congress.[128]

2. The CFC Should Employ a "Necessarily Sequential" Test Instead

A "necessarily sequential" test would build on the logic of *Pennsylvania Railroad Co. v. United States*,[129] *Loveladies Harbor*, and *Aulston v. United States*[130] without opening the floodgates to every *Bowen* claimant. It gives those claimants who have no choice but to file multiple claims in multiple courts in a specific order the flexibility to do so without fearing an arbitrary statute of limitations bar. At the same time, its application would be relatively predictable

strategic litigation foresight, it is probable that the average *Bowen* double-filer also would have failed to distinguish properly between "old money" and "new money" in his or her pleadings.

123. *See* Petition for Writ of Certiorari, *supra* note 119, at *25.

124. *Id.* at *22–23; *see* Keene Corp. v. United States, 508 U.S. 200, 207, 217–18 (1993) (applying § 1500 to affirm the dismissal of Keene Corp.'s suit before the CFC).

125. *See Keene*, 508 U.S. at 203–05. In other words, *Keene* involved a suit in district court for equitable relief and a suit in the CFC for legal relief.

126. However, as previously discussed, federal law provides for the tolling of the statute of limitations for many claims by Indian tribes against the government. *See supra* note 39.

127. A congressional-reference case is "[a] request by Congress for the United States Court of [Federal] Claims to give an advisory opinion on the merits of a nonpension claim against the United States." BLACK'S LAW DICTIONARY (9th ed. 2009); *see also* 28 U.S.C. §§ 1492, 2509 (2006).

128. *See infra* Part IV.B.

129. 363 U.S. 202 (1960).

130. 823 F.2d 510 (Fed. Cir. 1987).

and administrable without reading § 1500 out of existence. By providing a workable standard to identify duplicative claims required to preserve a "substantial legal right," a "necessarily sequential" test would eliminate § 1500's "traps for the unwary"[131] without accelerating the wasteful "litigation about where to litigate"[132] that Justice Antonin Scalia predicted in his *Bowen* dissent.

B. Reform Legislation for *Bowen* Claimants

1. Congress Should Amend Section 1500 to Extend Stay and Abeyance to Duplicative *Bowen* Claims

Congress should extend stay and abeyance to *Bowen* claimants by amending § 1500 to adopt the procedure that Justice Stevens first outlined in his *Keene* dissent.[133] Stay and abeyance (rather than repeal) would allay past concerns about constitutional overreach by the CFC[134] and about unbounded regulatory takings litigation.[135] In addition, stay and abeyance would minimize jurisdictional conflict without frustrating the otherwise legitimate claims of vulnerable *Bowen* claimants. As Judge Bruggink observed in *Tohono O'odham I*,[136] modern preclusion doctrine would act as a backstop to foreclose those claims against the government that truly are duplicative.[137] And, as then–Chief Judge Loren Smith noted in 1992, today's computerized dockets would allow the Justice Department, the CFC, and the other courts to identify and manage those preclusion issues with relative ease.[138] Rather than attempt repeal again,

131. Vaizburd v. United States, 46 Fed. Cl. 309, 310 (2000). Indeed, § 1500 *only* traps unwary *Bowen* claimants. A wary claimant merely would file in the CFC first to avoid § 1500's interposition. *See infra* Part IV.C (discussing the pending prong's order-of-filing rule). In contrast, a regulatory takings plaintiff must pursue an APA claim first if he or she intends to pursue an APA claim at all.

132. Bowen v. Massachusetts, 487 U.S. 879, 930 (Scalia, J., dissenting).

133. *See* Keene Corp. v. United States, 508 U.S. 200, 219–20 (1993) (Stevens, J., dissenting) (suggesting that, when a case is pending in another court, the CFC "may retain the case on its docket pending disposition of the other action"); s*ee also supra* Part II.B.2.

134. *See supra* note 91.

135. *See supra* Part III.B. As previously discussed, regulatory takings claims already are suitable for stay and abeyance under the surviving "substantial legal right" language from *Loveladies Harbor*. *See supra* note 116.

136. 79 Fed. Cl. 645 (2007), *rev'd*, 559 F.3d 1284 (Fed. Cir. 2009).

137. *Id.* at 659 n.16 ("[I]f the filing dates of the complaints had been reversed, [S]ection 1500 would not be a problem and the two courts would use traditional principles of comity, collateral estoppel, and res judicata to sort out any duplication.").

138. *Senate Hearing*, *supra* note 92, at 11.

Congress instead should amend § 1500 to extend stay and abeyance to *Bowen* claimants[139] and to codify it for regulatory takings plaintiffs.

2. The Time Is Finally Right for Reform Legislation

The time is right to amend § 1500. In 1995, the Judicial Conference expressed its willingness not to oppose repeal of the statute if "accompanied by a provision for stay or transfer of duplicative claims."[140] More recently, the Administrative Conference of the United States[141] has labeled § 1500 a "purposeless procedural trap."[142] Additionally, the CFC has taken to warning pro se filers of the statute's existence.[143] The legal system no longer can tolerate the status quo.

Congressional Democrats should be more receptive to reform as well. In 1992, *Bowen* was not yet five years old and the implications of the decision's interaction with § 1500 were not fully understandable. Today, it is apparent that unwary *Bowen* claimants regularly will double-file. Unlike regulatory takings plaintiffs who want to challenge agency action, these claimants gain little from double-filing and often do so more out of inexperience than strategic design. In practice, the statute acts to trap sympathetic litigants like the Tribe

139. Upon outright repeal, the courts might adopt stay and abeyance over time, in line with modern docket management conceptions. However, the lack of a formal statutory scheme or legal test like "necessarily sequential" to identify and manage preclusion issues might elicit Judicial Conference opposition or spur avoidable litigation, for example, motions to dismiss *Bowen* claims that likely would be stayed.

140. JUDICIAL CONF. OF THE U.S., REPORT OF THE PROCEEDINGS, Sept. 19, 1995, at 83, *available at* http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/1995-09.pdf. The Judicial Conference's 1992 and 1995 comments constitute the only references to § 1500 in the entirety of the Reports of the Proceedings of the Judicial Conference between March 1990 and March 2011.

141. The Administrative Conference of the United States is an "independent federal agency that provide[s] a forum where agency heads, private attorneys, university professors, and others stud[y] ways to improve the procedures that agencies use in administering federal programs." BLACK'S LAW DICTIONARY (9th ed. 2009). It had been abolished in 1995. *Id.* However, it was reestablished in 2010. *See* ADMIN. CONF. OF THE U.S., REVIVED ADMINISTRATIVE CONFERENCE PUBLISHES FIRST RECOMMENDATION IN FIFTEEN YEARS, Jan. 4, 2011, http://www.acus.gov/revived-administrative-conference-publishes-first-recommendation-in-fifteen-years.

142. ADMIN. CONF. OF THE U.S., A PROCEDURAL TRAP: 28 U.S.C. § 1500, http://www.acus.gov/research/the-conference-current-projects/weeding-out-purposeless-procedural-traps/section1500 (last visited July 9, 2011).

143. *See Pro Se Information*, U.S. COURT OF FED. CLAIMS, http://www.uscfc.uscourts.gov/pro-se-information (last visited July 9, 2011) (discussing § 1500 within a subsection headed, "Some of the Statutes that may be helpful in learning if your claim belongs in this court").

and to provoke complex litigation about where to litigate that might even trump the government's expense of defending against double-filing claimants.

Although the *Keene* majority broke with Justice Stevens by an 8–1 margin, the majority's position was not a rejection of his approach. Rather, the majority recognized that stay and abeyance for non–"necessarily sequential" claimants (like the litigants in *Keene*) called for legislative revision rather than legal rule.[144] Congress should take its cue from Justice Stevens's *Keene* dissent and amend § 1500 to extend stay and abeyance to *Bowen* claims.

C. Congress or the Supreme Court Should Eliminate the Pending Prong's Order-of-Filing Loophole

Congress, or the Supreme Court upon hearing a suitable case, should close the judicially created order-of-filing loophole that allows a claimant to bypass § 1500 merely by filing in the CFC before filing in another court.[145] This interpretation of the statute's pending prong is entirely at odds with its intended purpose. The order-of-filing rule destroys the exclusivity of any election between the CFC and the other courts, *creating* jurisdictional conflict. Perversely, it encourages plaintiffs to double-file in order to preserve access to the CFC.[146]

144. *See* Keene Corp. v. United States, 508 U.S. 200, 217 (1993) ("[T]he 'proper theatre' for such arguments . . . 'is the halls of Congress.'" (quoting *In re* Smoot, 82 U.S. (15 Wall.) 36, 45 (1873))); *see also Tohono O'odham III*, 131 S. Ct. 1723, 1731 (2011) ("If indeed the statute leads to incomplete relief, and if plaintiffs like the Nation are unsatisfied, they are free to direct their complaints to Congress.").

145. *See* Hardwick Bros. Co. II v. United States, 72 F.3d 883 (Fed. Cir. 1995), *aff'g* Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 949 (Ct. Cl. 1965) ("[T]he only reasonable interpretation of the statute is that it serves to deprive this court of jurisdiction . . . *only* when the suit shall have been commenced in the other court *before* the claim was filed in this court." (emphasis added)). The jurisprudence takes another twist in the event that a district court transfers part of a single-filed claim to the CFC under 28 U.S.C. § 1631. In that scenario, the CFC then would have to dismiss the partial claim for lack of jurisdiction due to § 1500. Harbuck v. United States, 378 F.3d 1324, 1328 (2004), *aff'g* United States v. Cnty. of Cook, 170 F.3d 1084, 1091 (1999); *see also* Griffin v. United States, 85 Fed. Cl. 179, 184–86 (2008) (applying *Harbuck*, 378 F.3d 1324; *Cnty. of Cook*, 170 F.3d 1084).

146. *See Griffin*, 85 Fed. Cl. at 193. A plaintiff often would be foolish not to double-file (in the proper order) because there is little cost in doing so under *Hardwick Bros. II/Tecon Engineers* but potentially great cost in not doing so under *Harbuck/County of Cook*. As CFC Judge Francis M. Allegra observed in *Griffin*, the rules of *County of Cook* and *Tecon Engineers* arguably are mutually inconsistent. *See id.* at 184 ("Under *Tecon*, the simultaneous filing of claims in the district court and [the CFC] seemingly would not trigger section 1500 as the former would not be 'before' the latter. The Federal Circuit, however, . . . reached the opposite conclusion . . . in *County of Cook* . . . .").

As with § 1500 jurisprudence as a whole, pending prong judicial development has been "erratic."[147] The Federal Circuit had overruled the order-of-filing rule in *UNR Industries*,[148] but the Supreme Court revived it on appeal in *Keene*.[149] As with the recently repudiated rule from *Casman*,[150] which distinguished between claims requesting different remedies, the Supreme Court merely found that the facts of *Keene* did not implicate the order-of-filing rule. The Court did not take a position on the rule's desirability. In 1995,[151] the Federal Circuit completed its retreat from *UNR Industries* by reaffirming the order-of-filing rule.

Pending prong jurisprudence recently reached a crossroads. In *Tohono O'odham II*,[152] the Federal Circuit panel cited the order-of-filing rule to justify reading § 1500 nearly out of existence. The panel asserted, "In practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims. It merely requires that the plaintiff file its action in the Court of Federal Claims before it files its district court complaint."[153] The panel concluded, "Because a party can simply file its Court of Federal Claims action first and avoid § 1500 entirely, it functions as nothing more than a 'jurisdictional dance.'"[154]

In *Tohono O'odham III*, the Supreme Court found that reasoning to be circular.[155] After all, it is the order-of-filing rule that serves no purpose if it renders § 1500 nothing more than the jurisdictional dance known as the "Tucker Act Shuffle."[156] Thus, Congress or the Supreme Court should eliminate the pending prong's order-of-filing rule to conform with § 1500's

147. *Id.* at 192 (quoting UNR Indus., Inc. v. United States, 962 F.2d 1013, 1019 (Fed. Cir. 1992)).
148. 962 F.2d at 1023 ("*Tecon* is overruled.").
149. 508 U.S. at 216.
150. 135 Ct. Cl. 647 (1956). *See supra* notes 64, 116.
151. Hardwick Bros. Co. II v. United States, 72 F.3d 883, 886 (Fed. Cir. 1995) ("*Tecon Engineers* remains good law and binding on this court.").
152. 559 F.3d 1284 (Fed. Cir. 2009), *rev'd*, 131 S. Ct. 1723 (2011).
153. *Id.* at 1291 (emphasis omitted).
154. *Id.* at 1292 (quoting Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1549 (Fed. Cir. 1994)).
155. *See* 131 S. Ct. at 1729 ("The panel . . . could not identify any 'purpose that § 1500 serves today,' in large part because it was bound by . . . precedent that left the statute without meaningful force." (citation omitted)); *see also id.* at 1730 ("Courts should not render statutes nugatory through construction."). Nevertheless, the Court again deferred the order-of-filing issue to a future case. *Id.* at 1729–30 ("The *Tecon* holding is not presented in this case because the CFC action here was filed after the District Court suit."); *see also id.* at 1735 n.5 (Sotomayor, J., concurring) ("The validity of the . . . holding in *Tecon Engineers* is not presented in this case." (citation omitted)).
156. *See supra* note 19.

intended purpose: to prevent jurisdictional conflict and to preclude duplicative claims.

CONCLUSION

After *United States v. Tohono O'odham Nation*,[157] both the text of 28 U.S.C. § 1500 and the jurisprudence interpreting it are in need of reform. The Supreme Court's *Bowen v. Massachusetts*[158] decision has allowed into district court many claimants seeking specific monetary relief from the government. These claimants also can seek money damages in the CFC. At the same time, regulatory takings and other "necessarily sequential" plaintiffs regularly double-file out of necessity. Thorny § 1500 questions have become plentiful in this environment, creating the need for reform.

Going forward, the CFC should allow for the stay and abeyance of those claims that are duplicative simply to preserve a "substantial legal right,"[159] by testing whether or not the claims are "necessarily sequential." This interpretation would remain true to § 1500's jurisdictional conflict-prevention purpose, yet would be predictable for litigants and administrable for lower courts. It would allow for necessary regulatory takings claims in both courts without opening the floodgates to duplicative litigation in contravention of the statute.

Additionally, Congress should amend § 1500 to extend stay and abeyance to duplicative *Bowen* claims before the CFC pending their disposition in the other courts. Modern preclusion doctrine would apply to the stayed claims. Finally, the Supreme Court should overrule the pending prong's order-of-filing rule upon a suitable case or Congress should supersede it by statute. The order in which a plaintiff files in the CFC and another court should have no bearing on the applicability of § 1500.

In recent years, various permutations of § 1500 issues have come before the CFC, turning words and phrases like "claim," "pending," and "distinctly different" into terms of art. It is time for Congress and the courts to relieve "footloose" litigants from Tucker Act Shuffle fatigue.

157. 131 S. Ct. 1723.
158. 487 U.S. 879 (1988).
159. *Loveladies Harbor*, 27 F.3d 1545.