Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation

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SECTION 1500 AND THE JURISDICTIONAL PITFALLS OF FEDERAL GOVERNMENT LITIGATION

PAUL FREDERIC KIRGIS*

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INTRODUCTION

During the United States' first half-century, sovereign immunity prohibited virtually all suits against the federal government. A citizen's only avenue of redress for an injury by the federal government was to petition Congress to pass a private bill granting relief. As the government grew and became more involved in the life and business of the country through regulation, taxing, and spending, the rigid rule of sovereign immunity came under increasing scrutiny. Courts relaxed the rule by allowing private parties to sue federal officials in federal district court for conduct in derogation of private rights. Inundated with private bills, Congress soon recognized the need to weaken sovereign immunity. Beginning with the establishment of the Court of Claims in 1855, Congress dramatically expanded the range of conduct for which the United States may be sued.

1. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . .").

2. See Wilson Cowen et al., The United States Court of Claims, a History, Part II: Origin-Development-Jurisdiction, 1855-1978, at 9 (1978) (describing process of seeking relief in private bill in Congress). The private bill mechanism was notoriously unfair because of the logistical difficulties both for plaintiffs presenting bills to Congress and for Congress in investigating bills. "This system permitted fraudulent, exorbitant or unjust claims to be presented and considered in view of the inability of Congress to give them careful examination. Because of the difficulty of reaching a proper determination, Congress often found it safer and wiser not to act at all." Id. (footnote omitted). The system was described by a legislator of the day as "a system of unparalleled injustice and wholly discreditable to any civilized nation." See Cong. Globe, 30th Cong., 2d Sess., app. at 372, 491 (1848).

3. Probably the most famous indictment of sovereign immunity came from President Abraham Lincoln, who declared that "[i]t is as much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. at 2 (1862).

4. See Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 870-71 (1824). Osborn, a suit against a state official, established the accepted American doctrine of sovereign immunity both as to states and as to the United States, by holding that sovereign immunity did not apply where a suit alleged personal and individual wrongdoing. Today, an action against a federal official is barred if the relief sought would: (1) expend itself on the public treasury; (2) interfere with public administration; or (3) restrain the government from acting or compel the government to act. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984) (citing Dugan v. Rank, 372 U.S. 609, 620 (1963)).

5. See Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (establishing Court of Claims, with jurisdiction over "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States").

The court originally constituted as the Court of Claims has gone through a number of reconstitutions and name changes since its founding in 1855. See generally Cowen et al., supra note 2. The Court of Claims initially consisted of three judges, who appointed commissioners to hear testimony and investigate claims. See id. at 16-17. The court was limited to finding facts and making recommendations to Congress. See id. at 17-18. In 1863, the court's size and jurisdiction were expanded, and its judgments were made final, with appeal to the Supreme Court. See id. at 23-25. In 1925, the court was divided into trial and appellate divisions. See id. at 90.

Although the court's validity was accepted, its constitutional status was uncertain. In 1933, the Supreme Court ruled that the Court of Claims was not an Article III court. See Williams v. United States, 289 U.S. 553, 580 (1933). The Supreme Court changed course, though, in 1962,
The result of this piecemeal erosion of sovereign immunity was a significant overlap in the jurisdiction of federal district courts to hear cases against government officials and in the jurisdiction of the Court of Claims to hear cases against the United States. In many cases, conduct by a government official was actionable both against him individually and against the United States as his principal. Predictably, plaintiffs brought duplicative lawsuits against the official in district court, and against the United States in the Court of Claims.

The situation reached a breaking point in the years following the Civil War. The Captured and Abandoned Property Act of 1863 had provided for the confiscation of rebel property for use by the United States during the war. Property not used was sold, with the proceeds supplementing the federal treasury. Claimants to seized property could recover the proceeds of sale through suit in the Court of Claims upon a showing that the claimant had not given aid to the Confederacy. Because this showing was difficult to make, many of these "cotton claimants" brought suit in their local federal district


Decisions by the former Court of Claims are accorded precedential status by both the Federal Circuit and the Court of Federal Claims. See STEADMAN ET AL., supra, at 162. Court of Claims decisions were reported in both the Federal Supplement and the Federal Reporter, as well as in the Court of Claims Reporter, designated "Ct. Cl." Decisions of the Claims Court were reported in the Claims Court Reporter, designated "Cl. Ct.,” and sometimes in the Federal Supplement. Current decisions of the Court of Federal Claims are reported in the Federal Claims Reporter, which is designated "Fed. Cl.” and which simply continued in sequence with the Claims Court Reporter, and sometimes in the Federal Supplement.


8. See infra note 13 and accompanying text.

9. See Act of Mar. 3, 1863, ch. 120, § 1, 12 Stat. 820, 820 (giving authority to Secretary of Treasury to appoint agents to collect abandoned or captured property).

10. See id. § 2, 12 Stat. at 820.

11. See id.

12. See David Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 GEO. L.J. 573, 575-77 (1967) (describing situation in which southern cotton farm owners sued treasury for selling property seized during Civil War).
courts against the Treasury officers who had seized the property, in addition to bringing suit in the Court of Claims.\textsuperscript{13}

Seeking to avoid the mounting costs of defending the cotton claims, and demonstrating a general lack of sympathy for the cotton claimants, Congress in 1868 passed what is now codified at 28 U.S.C. § 1500.\textsuperscript{14} The Act prohibited a plaintiff who had a pending claim in a district court against an officer or agent of the United States from maintaining an action on the same claim in the Court of Claims against the United States.\textsuperscript{15} The statute, which passed virtually without debate, succeeded in stifling the cotton claimants and in curbing duplicative suits generally.\textsuperscript{16} But its sledgehammer approach to the relatively narrow problem it addressed engendered a range of new problems.

For many years, a wrongfully terminated government employee could not seek both back pay and reinstatement, because the former was available only in the Court of Claims, the latter was available only in a district court, and § 1500 prevented a plaintiff from pursuing both suits.\textsuperscript{17} Another problem involved government entities with “sue

\textsuperscript{13} See id. at 576-77 (explaining how, after losing in court of law, cotton claimants would sue in Court of Claims).

\textsuperscript{14} The predecessor to § 1500 read:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, 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 other 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, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.


Upon reading the legislation, one senator stated that its objective was to prevent those who “put the government to the expense of beating them once in court of law” from suing in the Court of Claims. See CONG. GLOBE, 40th Cong., 2d Sess. 2769 (1868), quoted in Schwartz, supra note 12, at 576-77.

\textsuperscript{15} Despite the Act’s language limiting its effect to pending suits, the Act apparently was originally intended to serve as a substitute for res judicata, preventing the relitigation in the Court of Claims of issues resolved against the cotton claimants in district court. See Matson Navigation Co. v. United States, 284 U.S. 352, 355-56 (1932) (“[T]he declared purpose of the section was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims.”) (internal citations omitted), superseded by statute as stated in Keene Corp. v. United States, 508 U.S. 200, 211 n.5 (1993). Res judicata would not apply in such a case because of the existence of two different defendants: the Government and the official. See Schwartz, supra note 12, at 578 (explaining that section was promulgated in effort to overcome limited application of res judicata in suits against government).

\textsuperscript{16} See Schwartz, supra note 12, at 577 (asserting that in original draft of § 1500, the amendment to provide for unqualified right to appeal was enacted without subsequent discussion).

\textsuperscript{17} See id. at 585-86 (discussing problems in suits brought by wrongfully discharged civil servants). The Court of Claims has never had general equity power. See United States v. Jones,
and be sued" power. A plaintiff could not sue both an agency and
the United States for a wrong committed by the agency, because only
the United States may be sued in the Court of Claims, and sovereign
immunity prevented the plaintiff from joining the United States in a
suit in district court.\(^{16}\) Section 1500 barred the plaintiff from solving
the problem by filing suits in both forums.\(^ {19}\)

Problems such as these were addressed not through revision of
\(\S\) 1500, but through the creation of new exceptions to the sovereign
immunity doctrine. The Tucker Act\(^ {20}\) was amended to give the Court
of Claims power to hear reinstatement claims by government em-
ployees.\(^ {21}\) The 1976 amendments to the Administrative Procedures
Act\(^ {22}\) gave district courts jurisdiction over suits for equitable remedies
against the United States.\(^ {23}\) In addition, the worst inequities associ-
ated with \(\S\) 1500 were alleviated by the passage of 28 U.S.C. \(\S\) 1631,
which provided a mechanism for transferring claims between district
courts and the Court of Claims where the plaintiff inadvertently
brought suit in a court without jurisdiction over his particular claim.\(^ {24}\)
Prior to that time, a plaintiff who filed in the wrong court risked be-
ing barred by the statute of limitations from pursuing his remedy in

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131 U.S. 1, 19 (1889). Hence, the only avenue to the equitable remedy of reinstatement was
suit in the district court against the head of the employer agency. See Schwartz, supra note 12,
at 586 (noting that head cabinet member was subject to order restoring claimant to position).
The Court of Claims avoided this limitation by holding that \(\S\) 1500 did not apply where a pla-
intiff sought equitable relief in the district court and money damages in the Court of Claims.
See Casman v. United States, 135 Ct. Cl. 647 (1956) (finding that Congress could not have int-
tended to force plaintiff to choose between back pay and getting reinstated). Casman is dis-
cussed in detail below.


19. See id.


21. In 1972, Congress amended the Tucker Act by adding a provision that authorized the
Court of Claims to order a federal official to restore a government employee to a position or
appropriate duty or retirement status. See Act of Aug. 29, 1972, Pub. L. No. 92-415, \(\S\) 1, 86 Stat.
652, 652 (codified at 28 U.S.C. \(\S\) 1491 (a) (2) (1994)); see also infra notes 63-70 and accompany-
ing text (describing limited equity jurisdiction of Court of Federal Claims).

U.S.C. \(\S\) 702 (1994)) (abrogating sovereign immunity of United States by allowing judicial re-
view of federal administrative actions otherwise subject to review).

23. See infra notes 84-134 and accompanying text (describing district court jurisdiction
over United States).

24. 28 U.S.C. \(\S\) 1631 provides:

Whenever a civil action is filed [or an appeal noticed] in a court [of the United
States] ... and that court finds that there is a want of jurisdiction, the court shall, if it
is in the interest of justice, transfer such action or appeal to any other such court in
which the action or appeal could have been brought at the time it was filed or no-
ticed, and the action or appeal shall proceed as if it had been filed in or noticed for
the court to which it is transferred on the date upon which it was actually filed in or
noticed for the court from which it is transferred.

28 U.S.C. \(\S\) 1631.
the proper forum.\textsuperscript{25}

While these scattered remedial efforts made § 1500 easier to live with, they did not eliminate the arbitrariness of the statute. Section 1500 was, and continues to be, burdened with ambiguity that creates real-world problems for many litigants.\textsuperscript{26} The central problem is the statute’s undefined use of the term “claim.”\textsuperscript{27} Courts interpreting the statute have failed to establish clear criteria for determining when two suits involve the same claim. Some courts have focused on operative facts,\textsuperscript{28} others on the relief sought,\textsuperscript{29} and still others on the legal theories pursued.\textsuperscript{30} The result is that similarly-situated litigants are treated differently, sometimes with stark results.\textsuperscript{31}

In recent years, both the Court of Appeals for the Federal Circuit and the United States Supreme Court have addressed the issue of when § 1500 bars a plaintiff from maintaining simultaneous suits in a district court and in the Court of Federal Claims. Unfortunately, these efforts have failed either to relax the requirements of § 1500 or to establish conclusively a rule of strict construction. This Article examines the current state of § 1500 in light of these attempts at reconstruction. Part I presents the basic jurisdictional reach of the Court of Federal Claims and of the district courts in suits against the United States and its instrumentalities. Part II analyzes § 1500 and its interpretations in light of recent case law. Part III discusses the problems

\textsuperscript{25} See Schwartz, supra note 12, at 583 (describing jurisdictional impediments for contractor attempting to sue government corporation).


\textsuperscript{27} See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1549 (Fed. Cir. 1994) (stating that precise issue is meaning of term “claims”).

\textsuperscript{28} See British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438, 441 (1939) (dismissing case because operative facts in case are same as those in case filed in different court).

\textsuperscript{29} See Casman v. United States, 135 Ct. Cl. 647, 650 (1956) (permitting case to be heard in Court of Claims because plaintiff requested money damages while plaintiff’s request in district court was for equitable relief), overruled by UNR Indus., Inc. v. United States, 962 F.2d 1013, 1022 n.3 (9th Cir. 1992). In 1992, the court in \textit{UNR Industries, Inc. v. United States}, 962 F.2d 1013, 1022 n.3 (9th Cir. 1992), purported to overrule \textit{Casman}. When \textit{UNR} reached the United States Supreme Court, however, the Court declined to address the correctness of \textit{Casman}, finding that question outside the scope of the case or controversy. Subsequently, the Federal Circuit expressly affirmed \textit{Casman} in \textit{Loveladies Harbor, Inc. v. Baldwin}, 27 F.3d 1545 (Fed. Cir. 1994).

\textsuperscript{30} See Allied Materials & Equip. Co. v. United States, 210 Ct. Cl. 714, 715-16 (1976) (denying government’s motion to dismiss because § 1500 does not support dismissal of breach of contract claims even though plaintiff also filed suit based on antitrust law and tort law in district court).

\textsuperscript{31} \textit{Compare} Wessel, Duval & Co. v. United States, 124 F. Supp. 636, 638 (Ct. Cl. 1954) (denying request by plaintiff who filed parallel suits based on different theories in Court of Claims and district court to stay Court of Claims suit pending resolution of jurisdictional issues), with Hossein v. United States, 218 Ct. Cl. 727, 729 (1978) (staying suit in Court of Claims while parallel district court suit was pending on ground that Court of Claims was proper jurisdictional forum), overruled by UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992).
inherent in current interpretations of § 1500 and suggests the most likely judicial responses. The Article concludes that, because a complete revision or repeal is unlikely, the best way to reduce the inequity and arbitrariness of § 1500 is to grant both district courts and the Court of Federal Claims limited pendent jurisdiction over suits against the government that are normally cognizable only in the other forum.

I. JURISDICTION OVER SUITS AGAINST THE UNITED STATES, ITS AGENCIES, AND OFFICERS

A wide variety of statutes and regulations, as well as the Constitution itself, waive sovereign immunity to create causes of action against the federal government. In some instances, these laws include a jurisdictional provision. The majority of suits against the federal government or its instrumentalities, however, arise under a handful of jurisdictional statutes that allocate jurisdiction to the Court of Federal Claims or to district courts. These statutes create an overlapping system of jurisdiction in which the same government conduct may support a cause of action in either court, but in which different remedies are available depending on the forum.

A. Jurisdiction in the Court of Federal Claims

The Court of Federal Claims ("CFC") is the primary forum for suits against the United States, and the Tucker Act is the most important mechanism of CFC jurisdiction. The Tucker Act is often thought of as two separate statutes, and it was codified accordingly. The primary text of the Tucker Act confers jurisdiction on the CFC. The "Little Tucker Act" confers concurrent jurisdiction in certain cases on district courts. The Tucker Act, as amended, provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or

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33. 28 U.S.C. § 1491(a).
34. See id. § 1491(a) (1) (giving CFC jurisdiction over any claim against United States founded in Constitution, statute or contract).
35. See id. § 1346(a) (2).
36. See id. § 1346(a) (1)-(2) (establishing concurrent jurisdiction in district court for cases involving revenue collection and other cases under the Constitution, statutes, or contracts, and seeking $10,000 or less).
any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.\textsuperscript{37}

The statute provides for jurisdiction over three substantive areas: claims founded upon the Constitution, claims founded upon acts of Congress or regulations, and claims founded upon contracts.\textsuperscript{38} Of these, the last has been the most important. The Tucker Act makes the CFC the primary forum for suits against the United States for breach of contract. Most of these cases arise out of government procurement contracts and employment contracts.\textsuperscript{39} A new, area of government contract law may be developing, however, in the aftermath of the Supreme Court's 1996 decision in \textit{United States v. Winstar Corp.}.\textsuperscript{40} In \textit{Winstar}, the Supreme Court held that purchasers of failing savings and loans\textsuperscript{41} had valid breach of contract claims against the United States stemming from the subsequent passage of laws and regulations that disallowed the use of certain favorable regulatory accounting practices that government agencies had promised would be available to the purchasers.\textsuperscript{42} Although \textit{Winstar}'s effect will not be known for some time, the case could dramatically affect the way federal regulators deal with regulated industries, and, in the process, could spawn a new species of contract cases in the CFC.\textsuperscript{43}

\textsuperscript{37} Id. § 1491(a).

\textsuperscript{38} See id. § 1491(a)(1).

\textsuperscript{39} The importance of procurement and employment contracts in the Tucker Act is demonstrated by the inclusion of specific provisions relating to those types of claims. See id. § 1491(a)(2). With respect to employment claims, the statute expressly allows the CFC to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." Id. The statute refers to procurement by giving the CFC jurisdiction over claims brought under the Contract Disputes Act of 1978 and by giving the CFC power to award equitable relief prior to contract award. See id.

\textsuperscript{40} 116 S. Ct. 2432 (1996).

\textsuperscript{41} Justice Souter defined "the savings and loan, or 'thrift,' industry, ... as 'a federally-conceived and assisted system to provide citizens with affordable housing funds.'" Id. at 2440 (quoting H.R. REP. No. 101-54, pt. 1, at 292 (1989), \textit{reprinted in} 1989 U.S.C.C.A.N. 86, 88).

\textsuperscript{42} See id. Writing for the majority, Justice Souter described the issue and holding as follows:

The issue in this case is the enforceability of contracts between the Government and participants in a regulated industry, to accord them particular regulatory treatment in exchange for their assumption of liabilities that threatened to produce claims against the Government as insurer. Although Congress subsequently changed the relevant law, and thereby barred the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach.

Id.

The decision is a lengthy and complex dissertation on the intricacies of the sovereign immunity doctrine. While it is enormously significant for what it portends for CFC jurisdiction, it is beyond the scope of this Article. For an analysis of the Supreme Court decision, see Jerry Stouck & David R. Lipson, \textit{United States v. Winstar Corp.: Affirming the Application of Private Contract Law Principles to the Federal Government}, 6 FED. CIR. B.J. 815 (1996).

\textsuperscript{43} At the writing of this Article, more than 115 cases alleging \textit{Winstar} causes of action
The CFC's jurisdiction over claims founded upon the Constitution is its second most important substantive area of jurisdiction, because this area encompasses takings claims. Surprisingly, takings claims were not always understood to fall under this branch of the court's jurisdiction. Prior to its 1946 decision in United States v. Causby, the Supreme Court had not recognized seizures of property by the government as claims founded upon the Constitution. Instead, where a plaintiff alleged a governmental invasion of his property pursuant to statute or regulation, the Court would imply a contract to pay just compensation and treat the case as a contract action. But where the government asserted its own right to title, an implied contract could not be found. In such a case, the seizure constituted a tort for which the government had not waived sovereign immunity. Similarly, where the claim alleged an unauthorized seizure by a government official, the Court considered the act a tort and barred suit in the Court of Claims. Decided the same year the Federal Tort Claims Act waived sovereign immunity for most torts, Causby discarded the Court's prior jurisprudence and held that "[i]f there is a taking, the claim is 'founded upon the Constitution' within the meaning of the Tucker Act." Since Causby, takings claims have become a staple of the CFC's docket. They may involve physical invasions, such as where the government floods private property in the construction of a dam, or regulations that deprive a property owner of the economic value of his property. As it did more recently for contract actions in Winstar,
the Supreme Court in 1992 opened the door to a new wave of takings actions with its decision in *Lucas v. South Carolina Coastal Council.* In *Lucas,* the Court held that a state may not deprive a landowner of all economically beneficial use of his land without paying just compensation unless the uses proscribed would constitute an enjoinal "nuisance" under state common law. The third major substantive area of CFC jurisdiction is for claims founded upon "an Act of Congress" or a regulation. Most litigation arising under this branch of the Tucker Act is for tax refunds. Like takings jurisdiction, tax refund jurisdiction has a complex history. In *Nichols & Co. v. United States,* decided in 1868, the Supreme Court held that cases arising under the revenue laws did not fall under the Tucker Act. That rule held sway throughout the remainder of the 19th century, but exceptions gradually reduced its force thereafter. Finally, in 1915, in *United States v. Emery,* the Supreme Court abandoned *Nichols,* finding jurisdiction under the Tucker Act over a suit seeking the refund of corporate taxes. Today, the CFC has express concurrent jurisdiction with district courts over tax refund claims. Tax refund cases now account for about thirty percent of the CFC's docket.

All actions in the CFC under the Tucker Act are governed by three limiting principles, two stated explicitly in the statute and one the product of judicial gloss and long-standing practice. First, only the

54. *See id.* at 1028-29. The Court in *Lucas* addressed the question of whether the government must pay just compensation when it deprives property of value through a regulation designed to prevent serious public harm. The Court held that the government must meet the same standard applicable to private plaintiffs to enjoin an activity. *See id.* at 1029. *Lucas* has yet to produce a flood of regulatory takings litigation, but it promises to limit, to some degree, the areas in which states and the federal government may regulate without cost. In the process, it seems almost certain to expand the range of regulatory takings litigation in the CFC.
55. *See Gerald A. Kafka & Rita A. Cavanaugh, Litigation of Federal Civil Tax Controversies* § 1.01 (2d ed. 1997) (discussing Court of Federal Claims tax litigation jurisdiction). Aggrieved taxpayers may bring suit in district court or the CFC only after paying the full tax assessed. In order to avoid paying the disputed tax, a taxpayer must bring suit in the United States Tax Court. *See id.*
56. 74 U.S. (7 Wall.) 122 (1868).
57. *See id.* at 131.
58. *See United States v. Hvoslef,* 237 U.S. 1, 10 (1915) (finding jurisdiction under Tucker Act for suit seeking refund of stamp taxes); *Dooley v. United States,* 182 U.S. 222, 228 (1901) (finding jurisdiction under Tucker Act over claim to recover customs duties); *South Carolina v. United States,* 59 Ct. Cl. 257 (1904), aff'd, 199 U.S. 437 (1905) (implicitly recognizing jurisdiction over claim by state to recover taxes).
60. *See id.* at 30. Writing for the Court, Justice Holmes declared that it was "an inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." *Id.* at 32 (citations omitted).
62. *See Kafka & Cavanaugh,* supra note 55, § 1.01.
United States may be sued in the CFC under the Tucker Act. No other party, including departments and agencies of the United States, may be named as a defendant. Thus, although a plaintiff may have cognizable claims against both a federal official and the United States based on the same conduct, she may not join both parties as defendants in a single Tucker Act suit in the CFC.

Second, the Tucker Act specifically excludes actions in tort from its scope. Because the Tucker Act served for a considerable time as the principal mechanism for suing the United States, this exclusion used to have enormous substantive effect as a bar to the waiver of sovereign immunity with respect to tort claims. With the passage of the Federal Tort Claims Act, however, the United States consented to certain tort suits in federal district court. The tort exclusion in the Tucker Act now serves only as a procedural hobgoblin, preventing plaintiffs from joining valid tort claims with valid contract claims in the CFC.

Finally, although the statute does not expressly require it, the Tucker Act has been construed to grant jurisdiction only to claims for money damages. In keeping with the original understanding of

63. See 28 U.S.C. § 1491(a) (providing for CFC jurisdiction over claims “against the United States”).
64. See Fed. Cl. R. 10(a) (“[T]he United States [is] designated as the party defendant in every case . . . .”).
66. The effect of the Tucker Act as a waiver of sovereign immunity is uncertain. The statute has been construed not as a blanket waiver of sovereign immunity for the types of suits it contemplates, but only as a waiver of sovereign immunity where some other legal rule, statutory or otherwise, grants a right to relief within the scope of Tucker Act jurisdiction. This interpretation has its origin in United States v. Testan, 424 U.S. 392, 400 (1976), in which the Supreme Court rejected an argument that the Tucker Act itself waives sovereign immunity for any claim invoking a federal statute, holding instead that “the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity.” Id. at 400. Testan addressed a suit against the United States in the Court of Claims by government attorneys seeking to have their employment reclassified at a higher pay grade and an award of back pay. The attorneys claimed that the Classification Act gives rise to a claim for money damages as a result of an erroneous classification. See id. at 399. The Supreme Court found “no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications.” Id. at 400.
67. See 28 U.S.C. § 2674 (“The United States shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .”).
68. See United States v. King, 395 U.S. 1, 3 (1969) (stating that Tucker Act does not include awards in equitable matters, and jurisdiction has been interpreted by the Court to include only money damages).
the role of the Court of Claims, the CFC does not have a generalized power to award equitable relief. 69 Nevertheless, the courts have consistently held that equitable doctrines are available "as an incident" to a claim for money damages, such as in the use of reformation or rescission in contract actions alleging frustration or mutual mistake. 70

B. District Court Jurisdiction

Unlike the CFC, district courts have very broad jurisdiction, extending to most cases involving issues of federal law and to many cases involving state law. 71 District courts historically have provided the primary avenue for seeking redress for government action in cases outside the narrow scope of the original Tucker Act, through the mechanism of suits against government agents. 72 These actions may be brought against a government official or against an agency if a statute subjects the agency to suit. 73 Although suits against federal officials and agencies may arise under state law, as a practical matter federal district courts are the default fora; if an action is brought

69. See Glidden Co. v. Zdanok, 370 U.S. 530, 557 (1962) ("From the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief.") (citations omitted).

70. See Pauley Petroleum Inc. v. United States, 591 F.2d 1308, 1315 (Ct. Cl. 1979) (allowing rescission of contract and finding that "[e]quitable doctrines can be employed incidentally to this court's general monetary jurisdiction either as equitable procedures to arrive at a money judgment, or as substantive principles on which to base the award of a money judgment") (internal citations omitted); see also United States v. Milliken Imprinting Co., 202 U.S. 168, 173-74 (1906) (granting reformation on ground that effect of reformation is to confer right to money damages). In addition to the "incidental" equitable power the courts have assumed, the Tucker Act has been amended to provide for equitable relief in certain specific areas. Under 28 U.S.C. § 1491(a), as amended:

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the [CFC] may . . . issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records . . . . In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.


71. See Erwin Chemerinsky, Federal Jurisdiction §§ 5.2.1, 5.3.1 (2d ed. 1994) (describing federal question jurisdiction and diversity jurisdiction in the federal courts). Federal question jurisdiction is conferred by 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Diversity jurisdiction is conferred by 28 U.S.C. § 1332, which gives the district courts jurisdiction over all civil actions in which the amount in controversy exceeds $50,000 and the parties are citizens of different states or foreign countries. See id. § 1332.

72. See Steadman et al., supra note 5, at 477 (describing four common-law orders available to review acts of government officials). The four common-law orders for reviewing the acts of government officials were certiorari and habeas corpus, used to review the acts of courts; mandamus, used to compel the performance of a specific duty; and prohibition, used to prevent a government officer from acting in a way he had no legal power to act. See id.

73. Only individuals and government corporations statutorily given the power to sue and be sued are subject to suit. See id. at 478. Departments, bureaus, and commissions are not entities capable of being sued. See id.
against a federal official or agency in state court, the defendant may remove it to federal court.\textsuperscript{74}

The slow erosion of sovereign immunity has broadened the areas in which the United States may be sued in federal district court. Today, in addition to their jurisdiction over suits involving government agents, district courts have significant jurisdiction over claims directly against the United States. The result is a patchwork of jurisdiction covering each of the three main common-law areas of litigation: torts, contracts, and equity.

1. *Tort suits in district court*

The Federal Tort Claims Act ("FTCA"), passed in 1946, fundamentally altered the landscape in tort suits stemming from government conduct. Under the FTCA, the United States is "liable ... to tort claims, in the same manner and to the same extent as a private individual under like circumstances."\textsuperscript{75} The effect of the FTCA is to allow suits against the United States in the same situations in which a common-law "master" is liable for the torts of his "servant."\textsuperscript{76} District courts have exclusive jurisdiction over FTCA claims.\textsuperscript{77} Before pursuing an FTCA claim in district court, however, the plaintiff must submit the claim to the agency involved and seek administrative relief.\textsuperscript{78}

Recovery under the FTCA is limited in several ways. First, the United States accepts liability only for its agents' negligent acts; a plaintiff generally cannot sue the United States for the intentional torts of its agents and cannot sue under a theory of strict liability.\textsuperscript{79}

\textsuperscript{74} See 28 U.S.C. § 1442(a)(1) (stating that civil action commenced in state court against "any officer (or any person acting under that officer) of the United States or of any agency thereof" may be removed by them to United States district court). In addition to the existence of the removal statute, recent changes to federal jurisdictional statutes have ensured that any claim against a federal official involving federal law will proceed in federal district court. With the 1976 amendments to the Administrative Procedures Act (discussed below), 28 U.S.C. § 1331 was amended to remove the amount-in-controversy requirement for district court federal question jurisdiction against government officers. See Califano v. Sanders, 430 U.S. 99, 105 (1977) ("The obvious effect of [the elimination of the amount-in-controversy requirement] ... is to confer jurisdiction on federal courts to review agency action ... "). Section 1331 was later amended to eliminate the amount-in-controversy requirement in all federal question litigation. See 28 U.S.C. § 1331.

\textsuperscript{75} 28 U.S.C. § 2674.

\textsuperscript{76} See RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE § 1.131 (4th ed. 1991) ("The United States is liable for the [torts] of an employee acting within the scope of employment, as determined by the law of respondeat superior of the state where the tort was committed.").

\textsuperscript{77} See 28 U.S.C. § 1346(b).

\textsuperscript{78} See id. § 2675(a).

\textsuperscript{79} See id. § 2680(h) (excluding from scope of FTCA “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights"); Dalehite v. United States, 346 U.S. 15, 45 (1953) (holding that FTCA "requires a negligent act"). Certain intentional torts, such as trespass and conversion, are actionable under the FTCA. See CHEMERINSKY, supra note
Second, the United States is not liable for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." This limitation simply extends to the United States the long-standing discretionary function defense available to government officers.

With slim exceptions, the FTCA makes the United States the only available defendant in a suit alleging a government tort by barring all suits against an officer or agency for any "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Upon certification by the United States Attorney General that an act was done within the scope of an official’s employment, the action is deemed to be against the United States. Because the FTCA excludes most intentional torts, the rules precluding all suits against government officials for "wrongful" conduct in the scope of employment can leave victims of intentional torts by government agents without any remedy. In ad-

71, § 9.2.3 (discussing scope of FTCA liability).

80. 28 U.S.C. § 2680(a). In implementing the discretionary function exception to FTCA liability, the Supreme Court has relied in large part on a distinction between planning functions and operational functions. The Court has held that planning involves the use of judgment, i.e., discretion, and so is not actionable. See Dalehite, 346 U.S. at 42 (overruling award of damages because "decisions held culpable were all responsibly made at a planning rather than operational level").

81. The provision in the FTCA referring to "discretionary" acts incorporates the traditional rule of executive immunity, which gives absolute immunity to any government official exercising his judgment and discretion in performing governmental acts. See Kendall v. Stokes, 44 U.S. (3 How.) 87, 88 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done . . . is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake.").

82. 28 U.S.C. § 2679(b)(1). Section 2679 provides, in pertinent part:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1)The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate is precluded without regard to when the act or omission occurred.

Id. § 2679.

83. See id. § 2679(d)(1).

84. See Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990). Mitchell shows the mixed blessings of the FTCA. A nurse at a military facility sued her superior for assault and battery in state court. See id. at 130. The superior got a certification from the U.S. Attorney’s office that she was acting in the scope of her employment, and then removed the case to federal court. See id. The United States was substituted as defendant, and it then moved to dismiss on the ground that the plaintiff had not submitted an administrative claim to the Army. See id. The district
dition, the FTCA precludes any liability where a government employee exercises due care in carrying out any statutory mandate.\(^{85}\)

The principal exception to the FTCA's occasionally draconian preclusion rules is in claims for constitutional torts. In the landmark decision *Bivens v. Six Unknown Named Agents of Bureau of Narcotics*,\(^{86}\) the Supreme Court inferred a right to sue for money damages for torts by federal officials that violate constitutional rights.\(^{87}\) The FTCA does not preclude *Bivens* actions against federal officials as individuals.\(^{88}\) The FTCA does, however, allow a plaintiff injured by a constitutional tort to sue the United States, and any suit against the United States precludes a *Bivens* suit based on the same injury.\(^{89}\)

2. Breach of contract suits

28 U.S.C. § 1346(a)(2), dubbed "The Little Tucker Act," vests in the district courts concurrent jurisdiction with the CFC over Tucker Act claims not exceeding $10,000.\(^{90}\) Excluded from the jurisdiction of the district courts are government contract cases covered by the Contract Disputes Act of 1978.\(^{91}\) Because of this exclusion, and because takings claims invariably exceed $10,000, district courts have minimal Tucker Act jurisdiction. Effectively, the Little Tucker Act

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\(^{85}\) See 28 U.S.C. § 2680(a). The provision in the act barring suit where an employee exercises due care in executing a statute prevents the FTCA from being used to challenge the constitutionality of a statute. See Chemerinsky, supra note 71, § 9.2.

\(^{86}\) 403 U.S. 388 (1971).

\(^{87}\) See id. at 392. Prior to *Bivens*, a citizen who suffered damages as a result of an invasion of his constitutional rights by a federal official had no available monetary remedy. *Bivens* effectively created a cause of action against federal officials parallel to the causes of action available under 42 U.S.C. § 1983 for civil rights violations by state officials. The discretionary function defense available to state officials under section 1983 is also available to federal officials in *Bivens* suits. See Butz v. Economou, 438 U.S. 478, 499 (1978).


\(^{89}\) See id. § 2676. *Bivens* suits are further limited by doctrines of executive immunity. All federal officials normally have absolute immunity from suit when engaged in the discretionary duties that are within the scope of their offices. See Westfall v. Erwin, 484 U.S. 292, 297-98 (1988).

In *Bivens* actions, all federal officials have qualified immunity for their discretionary acts, meaning they are immune from suit unless the conduct violates clearly established rights of which a reasonable person would know. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

\(^{90}\) See 28 U.S.C. § 1346(a)(2). The "Little Tucker Act" provides that the district courts shall have jurisdiction concurrent with the CFC of any... civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

\(^{91}\) See id.
gives district courts jurisdiction only over the smallest contract actions.

Notwithstanding the Little Tucker Act, the potential exists for significant district court jurisdiction over contract actions against officers and agencies. In general, contract claims against federal agencies seeking money damages have been allowed where an applicable "sue and be sued" clause subjects the agency to such a suit and where the relief sought is limited to funds in the possession and control of the agency. Where the suit would reach funds in the United States Treasury, the suit may be considered a suit against the United States, maintainable only in the CFC under the Tucker Act.

Contract claims seeking equitable remedies both against agencies and against the United States are discussed in the next section, in the context of claims for equitable relief.

3. Claims for equitable relief

Because of their potential to restrict government activity, suits seeking injunctions and other equitable remedies pose particularly difficult sovereign immunity issues. Prior to 1976, it was nearly impossible to get an injunction against the United States. Injunctions were sometimes available against government officials, but courts used the sovereign immunity doctrine and the principle of indispensable parties to dismiss actions against officials that crossed the line into suits against the government. Under Larson v. Domestic & Foreign Commerce Corp., an action seeking an injunction against a federal official

92. See Mann v. Pierce, 803 F.2d 1552, 1557 (11th Cir. 1986) (recognizing contract suit in district court against Department of Housing and Urban Development under "sue and be sued" clause); Crowel v. Administrator of Veterans' Affairs, 699 F.2d 347, 351 n.1 (7th Cir. 1983) (recognizing contract suit for money damages under "sue and be sued" clause); Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th Cir. 1981).

93. See Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co. of Cal., Inc., 595 F.2d 1126, 1131 (9th Cir. 1979) (holding that where judgment would be paid by United States, contract action for more than $10,000 must be in Court of Claims).

94. Prior to the 1976 amendments to the APA expressly allowing injunctions against the United States, the provisions of the APA providing for judicial review of agency action were the basic method of affirmatively challenging the United States' exercise of its executive powers. See 5 U.S.C. § 702 (1994) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). In some cases, a court's order directed to an agency had the practical effect of an injunction. See Peter L. Strauss, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 256-57 (Carolina Academic Press 1989) ("In connection with APA review, the court may issue any but monetary relief: orders of enforcement, declaratory judgments, compulsory orders directing the agency or its officials either to act or to refrain from acting, or—most commonly—judgments upholding or setting aside... the results of agency action.").


96. 337 U.S. 682 (1949).
was barred by the doctrine of sovereign immunity unless it was based on conduct outside the scope of the official’s statutory authority or undertaken pursuant to an unconstitutional grant of authority.  

Larson served as the primary authority on sovereign immunity in injunction suits against government officials until Congress amended § 702 of the Administrative Procedures Act in 1976. The amended language provides that “[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.” This language was intended to “remove[] the defense of sovereign immunity as a bar to judicial review of federal administrative action otherwise subject to judicial review.” While the amendment to § 702 eliminated the defense of sovereign immunity, both as to government agents and as to the United States, it expressly retained all other available defenses, including the discretionary function defense.  

The waiver of sovereign immunity for suits seeking equitable relief against the United States has resulted in confusion over the types of claims now cognizable in district court. Section 702 waives sovereign immunity only for actions “seeking relief other than money damages.” Because the CFC’s general jurisdiction extends only to suits for monetary relief, it seems logical that § 702 should apply to waive sovereign immunity and confer jurisdiction on district courts in precisely those cases in which the CFC would not have jurisdiction. But § 702 has not been interpreted that neatly.  

As a result of the Supreme Court’s decision in Bowen v. Massachus
§ 702 further stirs the murky jurisdictional waters in suits against the government. *Bowen* involved a suit by the Commonwealth of Massachusetts to compel the federal government to pay a portion of the federal Medicaid contribution that the Department of Health and Human Services ("HHS") had determined was not allowed. Massachusetts sued the Secretary of HHS and the United States in federal district court asking the court to "[e]njoin the Secretary . . . from failing or refusing to reimburse [Massachusetts] . . . [for] the federal share of expenditures for medical expenses to eligible residents . . . ." The government argued that, although it nominally sought an injunction, the suit was in practical effect for "money damages"—the payment of the disallowed funds—and was therefore outside the purview of § 702.

The Supreme Court held that the suit was cognizable under § 702 because the monetary relief it sought was a form of specific relief. The Court distinguished between claims seeking compensatory money damages and claims seeking specific relief requiring a monetary payment, and found that the Medicaid reimbursements were fundamentally different from a damage award designed to compensate for a past injury.

The Court strongly suggested that relief of the type sought in *Bowen* would not be available in the CFC because the *Bowen* monetary remedy constituted equitable relief. But at the same time, relying...
on Judge Robert Bork's opinion for the D.C. Circuit in Maryland Department of Human Resources v. Department of Health & Human Services, 108 the Court found that the term "money damages" in § 702 was not intended to correspond with the category of monetary relief available in the CFC under the Tucker Act. 109 Judge Bork concluded, and the Supreme Court agreed, that the exclusion of "money damages" in § 702 was not intended to remove from the district court's jurisdiction the precise category of cases available in the CFC. 110 Bowen thus leaves open the possibility that some types of monetary relief could fall under the jurisdictions of both forums. The Federal Circuit, the primary arbiter of all Tucker Act issues, reached a similarly imprecise holding in a case slightly different from Bowen. In Far West Federal Bank v. Office of Thrift Supervision, 111 investors in a failed savings and loan, relying on a theory similar to that raised in Winstar, 112 sued the bank's regulatory agencies in federal district court. 113 In addition to injunctive and declaratory relief, the plaintiffs sought monetary relief—in the form of recission and restitution—couched in equitable terms. 114 The defendants moved to sever and transfer the monetary claims to the Claims Court on the ground that, because the Office of Thrift Supervision's "sue and be sued" clause prohibited suits for money damages, the claims were

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108. 765 F.2d 1441 (D.C. Cir. 1985).
109. See Bowen, 487 U.S. at 899 (citing Maryland Dep't of Human Resources v. Department of Health & Human Servs., 763 F.2d 1441, 1447-48 (D.C. Cir. 1985)). Judge Bork concluded from sovereign immunity case law that Congress, in drafting the amendments to § 702, "would have understood the recovery of specific monies to be specific relief," and not the recovery of monetary relief available under the Tucker Act. See Maryland Dep't of Human Resources, 763 F.2d at 1447.
110. See Bowen, 487 U.S. at 899.
111. 930 F.2d 883 (Fed. Cir. 1991).
112. See supra notes 40-43 and accompanying text.
113. See Far West, 930 F.2d at 885-86. The plaintiffs alleged that they had a contract with the regulating agencies that promised them more lenient than normal regulatory capital requirements. After the passage of the Financial Institutions Reform, Recovery and Enforcement Act, the newly created Office of Thrift Supervision eliminated the more lenient capital requirements. The plaintiffs sued seeking declaratory relief and an injunction preventing the regulatory agencies from breaching the contract. The plaintiffs also sought recission of the contract and restitution of the funds the plaintiffs had invested in the thrift, and compensation for violation of Fifth Amendment due process rights. The claim for due process violations was transferred to the Claims Court. See id. at 887.
114. See id. at 887. The complaint sought "restitution of the funds invested in Far West, together with the enhancement of the Bank's value that has occurred since the conversion, plus interest, expenses incurred, and such further relief as equity permits." Id.
really contract claims against the United States. Without deciding whether the claims in fact sought "money damages," the Federal Circuit held that sovereign immunity had been waived no matter how the claims were characterized. The court concluded that the underlying policies favoring heightened exposure to suit militated in favor of allowing a single court to resolve all related claims.

As a result of Bowen and Far West, the potential exists for significant overlap in district court and CFC jurisdiction to hear non-tort claims for monetary relief against the United States. Both the Supreme Court and the Federal Circuit seem willing to accept that claims for monetary relief stemming from relational duties are not always contract claims for money damages within the meaning of the Tucker Act. The resulting grey areas will inevitably create problems for litigants and courts interpreting the application of § 1500.

II. SECTION 1500 OF THE JUDICIAL CODE

A. History and Interpretation Prior to 1992

The predecessor to § 1500 was enacted in 1868 to relieve the United States of the burden of defending duplicative lawsuits filed in the district courts and the Court of Claims. A key ingredient in accomplishing that goal was establishing a means to identify duplicative lawsuits. The statute identifies duplicative lawsuits in terms of claims:

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.

Thus, a plaintiff may not pursue a claim in the CFC if he has another suit "for" that claim or "in respect to" that claim pending in a

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115. See id. at 891.
116. See id. at 887-94.
117. See id. at 892.
118. Speaking in favor of the bill in the Senate, Senator Edmunds of Vermont declared that

[the object of this amendment 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.

CONG. GLOBE, 40th Cong., 2d Sess. 2769 (1868).
district court. The statute applies whether the district court suit is against the United States or against an agent of the United States.

Section 1500 has proved to be an effective weapon in curtailing duplicative suits against the government and its agents. But its success in achieving its broad goals has come without the establishment of a rational and consistent jurisprudence. The Court of Claims and its successors have never clearly defined the term "claim" for § 1500 purposes. As a result, there is not a clear standard—particularly when equitable claims are involved—for determining when a Court of Claims suit will be barred by the existence of a district court suit.

1. Early interpretations of the term "claim"

The Court of Claims avoided any real discussion of the meaning of "claim" until 1939, when it decided *British American Tobacco Co. v.

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120. The statute would apply to suits in any court, but because of the elimination of the amount in controversy requirement in federal question cases and the amendment of the removal statute to allow federal officials to remove any action against them to federal court, § 1500 virtually always applies to suits in federal district court.

121. The most exacting tool used by the Court of Claims to defeat duplicative suits has been the statute of limitations. Section 1500 requires plaintiffs doubtful of the proper forum to choose between the Court of Claims and a district court. In many cases, that election can be difficult to make. For example, maritime contracts fall under the exclusive jurisdiction of district courts, but non-maritime contracts fall under the exclusive jurisdiction of the CFC. Because arbitrary rules determine what is a maritime contract, plaintiffs can easily get caught in the wrong court. See, e.g., *Northwest Marine Iron Works v. United States*, 493 F.2d 652, 655 (Ct. Cl. 1974) (holding that, although contract to procure insurance for ship is non-maritime contract, contract for actual insurance for ship is maritime contract enforceable only in district court). Before the passage of the transfer statute, 28 U.S.C. § 1631, if such a plaintiff chose the wrong court but did not receive a decision on that issue until after the expiration of the statute of limitations in the proper court, he could be permanently barred from pursuing his claims. The transfer statute, allowing transfers between district courts and the Court of Claims, greatly reduces this problem. See id. Nevertheless, because the statutes of limitations applicable in the Court of Claims and in the district courts frequently differ, a plaintiff gambling on jurisdiction in the forum with the longer statute may find his suit barred if that court declines jurisdiction and the suit was filed after the expiration of the statute in the other forum.

122. The meaning of "claim" is, unfortunately, not the only confusing part of § 1500's jurisprudence. There is also uncertainty as to timing. For example, although § 1500 by its terms applies only to a suit brought in the Court of Claims after a suit on the same claim has been filed in a district court, the Court of Claims has generally read the statute to divest the Court of Claims of jurisdiction where the situation is reversed, and the district court action follows the Court of Claims action. See, e.g., *Hobbs v. United States*, 168 Ct. Cl. 646, 647-48 (1964) (holding no jurisdiction where day after filing Court of Claims petition, plaintiff filed appeal of administrative action in court of appeals); *Maguire Indus., Inc. v. United States*, 86 F. Supp. 905, 906-907 (Ct. Cl. 1949) (finding no jurisdiction where, subsequent to filing petition in Court of Claims, plaintiff appealed Tax Court decision to court of appeals). But the Court of Claims cast doubt on that rule in *Tecon Engineers, Inc. v. United States*, 943 F.2d 943 (Ct. Cl. 1965), in which the Court held that a complaint filed in district court subsequent to a petition in the Court of Claims did not defeat jurisdiction under § 1500. See id. at 943-46 (explaining how plaintiff moved for dismissal after deciding that he preferred litigating case in district court). The court ignored previous cases holding the opposite in similar situations, apparently because of the facts of the case. See id. at 949 (indicating that any other ruling would put court's control of its jurisdiction at the "mere whim of a litigant").
United States. In British American, the plaintiff delivered an amount of gold bullion to the Federal Reserve Bank of New York, as required by executive orders and regulations regarding the surrender of gold. Alleging that it was owed more for the gold than it was paid, the plaintiff filed suits the same day in the United States District Court for the Southern District of New York and in the Court of Claims. The district court suit was a tort action against the Federal Reserve, and the Court of Claims suit was a contract action against the United States. The two actions sought the same monetary recovery based on the same facts. The Court of Claims dismissed the suit before it, based on the predecessor to § 1500. The court found that a “claim” is identified “in respect of the subject matter or property in respect of which the claim was made,” rather than upon the legal theory asserted. Because the subject matter of the two suits was the same, the suits were “in respect of” the same claim. British American’s “subject matter” test, although a little vague, potentially provided some certainty by establishing that the substance of the claim—rather than the legal theory, the remedy, or anything else that is part of a cause of action—is the sole factor to consider in identifying claims. The test has been interpreted to establish “operative facts” as the primary yardstick for measuring claims. But the consis-

123. 89 Ct. Cl. 438 (1939).
124. See id. at 439.
125. See id.
126. See id. at 440.
127. See id. at 439 (suing in each case for recovery of $4,331,509.75).
128. See id. at 440; see also Johns-Manville Corp. v. United States, 855 F.2d 1556, 1562 (Fed. Cir. 1988) (affirming that claim is “to be defined by the facts” and not based on legal theories).
129. See British Am. Tobacco, 89 Ct. Cl. at 440 (noting that plaintiff's attempts "to adapt the single claim to the jurisdiction of the different courts ... [did] not obscure the unity or sameness of the claim"). British American Tobacco addressed the timing issue in addition to the claim issue. Although the two suits were filed at the same time, the district court suit had been dismissed and an appeal taken and denied before the Court of Claims ruled on the government's § 1500 motion. See id. at 440-41. In dismissing the suit before it, the Court of Claims effectively stated that its jurisdiction under § 1500 is determined at the time of the filing of the complaint in the Court of Claims. See id. at 441 (holding that once a fully adjudicated suit is dismissed, it does not convert the case into a no longer "pending" case for purposes of a determination of jurisdiction). The opinion is not clear, but the court implied that § 1500 would bar not only a claim that is pending when the Court of Claims action is filed and that is subsequently dismissed, but also any claim that had been previously disposed on the merits in district court. See id. at 440 (detailing how plaintiff tried for second round of prosecution in Court of Claims after same claim was unsuccessful and dismissed in other court). "There is no provision that a suit in this court against the United States may be prosecuted if the suit in another court against an agent of the United States is dismissed by final adjudication upon the merits." Id. at 441. The court may have read § 1500 to operate as an automatic res judicata bar despite the plain language addressing the statute only to "pending" claims. For more information on § 1500 and res judicata, see supra note 15 and accompanying text.
130. See British Am. Tobacco, 89 Ct. Cl. at 440-41.
131. See Keene Corp. v. United States, 508 U.S. 200, 201 (1993); see also Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994); Johns-Manville, 855 F.2d at 1262.
tency promised in *British American* has not come to pass. Less than twenty years after the decision, the Court of Claims injected a new and variable element by holding in *Casman v. United States* that under certain circumstances, § 1500 does not apply to simultaneous claims based on the same operative facts.

2. The Casman exception

*Casman* involved a former government employee who alleged a wrongful discharge. He brought suit in federal district court against the Secretary of State seeking reinstatement to his former position, and won. The Secretary appealed the decision, and while the appeal was pending, the plaintiff filed suit in the Court of Claims against the United States for back pay. The government sought to dismiss the Court of Claims suit based on § 1500.

The Court of Claims held that it had jurisdiction over the plaintiff's back pay claim. The court focused on the purpose of the statute: to force an election between suit in the Court of Claims and suit in another court. The court apparently assumed the statute was meant to apply only where the plaintiff had the option of pursuing his claims in either forum. Because the plaintiff in *Casman* could bring its equitable claim only in district court and its back pay claim only in the Court of Claims, the court held § 1500 inapplicable.

It is unclear whether the election the *Casman* court believed necessary for § 1500 to apply was an election of legal theories or an election of remedies. According to the Federal Circuit, the term

132. 135 Ct. Cl. 647 (1956).
133. See id. at 649-50 (holding that litigant seeking monetary relief in Court of Claims did not have "pending" suit in other court where that suit was for injunctive relief only).
134. See id. at 648.
135. See id.
136. See id.
137. See id.
138. See id. at 650 (noting that a claim for back pay is within the exclusive jurisdiction of the Court of Claims).
139. See id. at 649.
140. Id. at 650 (noting that the plaintiff can sue in more than one court as long as it has no choice in deciding where to bring those suits and its claims and requested relief are not identical). The court concluded that:

Since plaintiff has no right to elect between two courts, section 1500 is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you want your job back you must forget your back pay"; conversely, "If you want your back pay, you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.

“claim” has no fixed meaning. As a result, it is not surprising that courts applying Casman have interpreted it in both ways.

3. Interpretations of Casman

In City of Santa Clara v. United States, the city of Santa Clara, California, reached an agreement with a federal government electric power producer to purchase electricity directly rather than through a middleman utility company. The government agency then stopped selling the city electricity, thereby requiring Santa Clara to purchase its electricity at a much higher cost from a utility company, PG&E. Rather than pay PG&E, the city put its electricity expenses into escrow and sued the Government in federal district court, seeking a declaratory judgment and an injunction requiring the Government to sell the electricity to Santa Clara. The injunction would have entitled the city to recover the funds it put in escrow. When the district court action bogged down, the city filed suit for breach of contract in the Court of Claims. The Court of Claims held that, under Casman, the suit before it was not barred because the monetary remedies sought in the Court of Claims could not be obtained in the district court.

In a number of cases, the courts have applied Casman to distinguish claims seeking the same or similar relief, but based on different legal theories. Prillman v. United States involved a dismissed government employee who brought a claim for compensation under the Back Pay Act in the Court of Claims, and simultaneously sued for

142. See Johns-Manville Corp. v. United States, 855 F.2d 1556, 1560 (Fed. Cir. 1988) (explaining that the term “claim” lacks plain meaning, having no express definition or particular legislative history to illuminate its meaning).
143. Compare Prillman v. United States, 220 Ct. Cl. 677, 679 (1979) (arguing that plaintiff may pursue litigation based on the same operative facts in two separate courts as long as not producing duplicate remedies), with Froudi v. United States, 22 Cl. Ct. 290, 299 (1991) (deciding that the Casman exception permits the transfer of equitable claims to district court while simultaneously retaining monetary claims in the Claims Court).
145. See id. at 891 (noting that Central Valley Project, a federal Government power producer, reserved the right to withdraw from an agreement to sell power directly to the city of Santa Clara).
146. See id. (noting that purchasing from PG&E cost six times more than purchasing from the Government).
147. See id. at 892.
148. See id. at 893 (noting that the escrow agreement would likely make a Court of Claims case moot if the district court ruled in plaintiff’s favor).
149. See id. at 892 (arguing that money damages were a necessary remedy for breach of contract).
150. See id. at 892-93 (holding that plaintiff should not be forced to choose between either monetary or injunctive relief).
“equitable relief” under Title VII in district court.\textsuperscript{152} Responding to the Government’s motion to dismiss the suit based on § 1500, the Court of Claims found that:

In this situation, plaintiff’s claim straddles a jurisdictional boundary between this court and the district court. The district court has jurisdiction over Title VII and relief thereunder while this court does not. However, the district court does not have jurisdiction over civil actions against the United States under the Back Pay Act, for example, in excess of $10,000.”\textsuperscript{153}

Based on this rationale, the court found it had jurisdiction to hear plaintiff’s Back Pay Act claim, pending resolution of the district court case.\textsuperscript{154} Although the court spoke in terms of the “relief” available under Title VII in distinguishing the district court claim, the plaintiff actually sought both equitable and monetary remedies in both courts, in the form of reinstatement and back pay.\textsuperscript{155} Thus, the case makes sense only if it is read to distinguish plaintiff’s multiple suits on the basis of the legal theories pleaded.\textsuperscript{156}

In \textit{Hossein v. United States},\textsuperscript{157} the Court of Claims again distinguished claims based on the legal theory pleaded. The plaintiff in \textit{Hossein} filed identical suits in the Court of Claims and district court, alleging breach of an implied contract, negligence, and a claim for equitable relief.\textsuperscript{158} The Court of Claims dismissed the negligence and equity counts, but retained jurisdiction over the breach of contract claim because it sought an amount in excess of $10,000.\textsuperscript{159} On that basis, the court found that it would be “improper” for it to dismiss the claim before it, despite the fact that claims based on the same operative facts, but pleading different legal theories, were pending in district court.\textsuperscript{160}

\begin{footnotesize}
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  \item \textsuperscript{152} See id. at 678.
  \item \textsuperscript{153} Id. at 679 (internal citations omitted).
  \item \textsuperscript{154} See id.
  \item \textsuperscript{155} See id. at 678 (noting that the plaintiff sought reinstatement and back pay in both district court and the Court of Claims).
  \item \textsuperscript{156} See id. at 679 (allowing plaintiff to maintain a Back Pay Act claim for damages in excess of $10,000 in the Court of Claims where plaintiff had similar claim pending in district court and district court relief was limited to $10,000).
  \item \textsuperscript{157} 218 Ct. Cl. 727 (1978).
  \item \textsuperscript{158} See id. at 728. The plaintiff's agent brought lapis lazuli into the United States and was compelled to surrender it to Customs officials. When the agent returned to collect it, Customs failed to deliver it. The plaintiff alleged breach of an implied contract, negligence, and the existence of a bailment, which entitled it to specific relief. See id.
  \item \textsuperscript{159} See id. at 728-29 (asserting lack of jurisdiction over negligence and equitable claims, but exclusive jurisdiction over implied-in-fact contract claims in excess of $10,000).
  \item \textsuperscript{160} See id. (noting that the court had exclusive jurisdiction over the breach of contract claim, but refraining from ruling on the claim so as to avoid piecemeal litigation).
\end{itemize}
\end{footnotesize}
Hossein is striking in its failure to recognize the conflict it creates.\textsuperscript{161} In British American, the court held that claims are the same under § 1500 if they arise out of the same operative facts.\textsuperscript{162} British American barred a breach of contract claim in the Court of Claims when the plaintiff had a tort claim simultaneously pending in district court.\textsuperscript{163} Hossein disregards British American entirely, holding that under Casman, the existence of a tort claim based on the same operative facts in district court does not divest the Court of Claims of jurisdiction.\textsuperscript{164} Moreover, the Court of Claims reinforced Hossein in Allied Materials & Equipment Co. v. United States.\textsuperscript{165} In Allied Materials, the court allowed a breach of contract suit to proceed even though the plaintiff was at the same time pursuing a district court action on the same set of facts against federal employees and seeking similar relief for anti-trust violations and tortious interference with contract.\textsuperscript{166}

Without overruling any cases, the Federal Circuit appeared to undercut the holdings of Hossein, Prillman, and Allied Materials in Johns-Manville Corp. v. United States,\textsuperscript{167} the circuit court's first full exposition of the meaning of "claim" in § 1500.\textsuperscript{168} In Johns-Manville, several defendants in mass tort asbestos litigation sued the Government for indemnification in the Claims Court while simultaneously suing the Government in tort in two district courts.\textsuperscript{169} All claims were based on

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  \item \textsuperscript{161} See Cases and Recent Developments, 2 FED. CIR. B.J. 361, 362 (1992) (discussing various exceptions to § 1500 and how the Hossein decision deviates from the purpose of § 1500).
  \item \textsuperscript{162} See British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438, 441 (1939) (deciding that two separate claims are not created if they are based on the same facts, even if they sound separate in contract and tort).
  \item \textsuperscript{163} See id. at 440 (finding that the term "claim" has nothing to do with the legal theory presented by plaintiff and, therefore, barring plaintiff's contract claim).
  \item \textsuperscript{164} See Hossein, 218 Ct. Cl. at 728-29 (discussing Court of Claims' exclusive jurisdiction over implied-in-fact contracts even though tort litigation on the same operative facts exists in district court). See generally Peabody et al., supra note 141, at 104 (discussing the difficulties of reconciling the holdings of Casman and British Am. Tobacco).
  \item \textsuperscript{165} 210 Ct. Cl. 714 (1976).
  \item \textsuperscript{166} See id. at 715 (refusing to dismiss a Court of Claims suit, despite the existence of a simultaneous district court action, because defendant could not have brought all of its claims in a single court). Relying on Casman, the court found that, because the plaintiff could not combine all his claims in one forum, § 1500 did not apply. See id. at 715-16.
  \item \textsuperscript{167} 855 F.2d 1556 (Fed. Cir. 1988).
  \item \textsuperscript{168} See id.
  \item \textsuperscript{169} See id. at 1557-59. Johns-Manville had been sued by shipyard workers who were exposed to asbestos manufactured by Johns-Manville and sold to the United States government. See id. at 1557. In one district court, Johns-Manville sued the United States for indemnification for its actual and potential liabilities based on the Federal Tort Claims Act. Johns-Manville alleged negligence on the part of the United States in its use of the asbestos products, in its breach of implied warranties to Johns-Manville, and in failing to reveal knowledge of the dangers of asbestos. See id. at 1558. In another district court, Johns-Manville filed third-party complaints for indemnification alleging the United States had breached both warranties to Johns-Manville and its duty to maintain a safe workplace. See id. at 1558-59. After filing those suits, Johns-Manville brought suit in the Claims Court alleging breach of an implied warranty of specifications, breach of a duty to reveal superior knowledge, mutual mistake, and entitlement
the same operative facts and sought monetary relief, although they did so under different legal theories. The Claims Court dismissed the case before it based on § 1500.

The Federal Circuit affirmed in a comprehensive decision in which the court examined the plain language of the statute, principles of statutory construction, the legislative history, the case law, and even Black’s Law Dictionary to discover the meaning of “claim.” The court finally relied on British American to find that individual “claims” are distinguished based on their operative facts. The court specifically noted that British American involved parallel suits presenting tort and contract theories, as did Johns-Manville. The court rejected Johns-Manville’s argument, based on Casman, that § 1500 does not apply where the plaintiff cannot elect to pursue all theories in one court, finding that the purpose of the statute was to prevent duplicative suits regardless of the number of legal theories available to a plaintiff.

Johns-Manville discredits the holdings of Prillman and Allied Materials without expressly rejecting them. The court’s treatment of Prillman, however, is particularly unsatisfying. The court noted that Prillman involved claims for money damages in both the district court and the Court of Claims. The court then distinguished the district court’s jurisdiction over monetary claims from the Court of Claims’ jurisdiction over monetary claims based on the $10,000 Little Tucker Act cutoff. Without further analysis, the court found: “Thus,... Prillman merely follow[s] the exception to section 1500 originating in

to an equitable adjustment. See id. at 1557.

170. See id. at 1559 (describing the factual overlap among the case in the Claims Court and the suits filed in the Northern District of California and the Eastern District of Virginia). Additionally, all claims maintained that the United States compelled compliance with its specifications, that the United States had control of the shipyard working conditions, and that the United States established safety standards for the shipyards, but failed to follow them. See id.

171. See Keene Corp. v. United States, 12 Cl. Ct. 197, 216-17 (1987) (denying jurisdiction over a claim that was identical to one proceeding against the United States in another court), aff’d sub nom. Johns-Manville Corp. v. United States, 855 F.2d 1556 (Fed. Cir. 1988).

172. See Johns-Manville, 855 F.2d at 1560 (noting that “claim” is difficult to define because it has more than one meaning in law).

173. See id. at 1562-63 (noting that a distinct claim is not created if it originates under the same set of facts as a preexisting claim, even when the new claim is based on a different legal theory).

174. See id. (affirming that a “claim” is not distinguished by an original legal theory, but rather by its grounding in different operative facts).

175. See id. at 1565 (stating that, despite § 1500’s tendency to force a plaintiff to choose between two courts, a court may not “even in the interest of justice, extend its jurisdiction where none exists”).

176. See id. (noting that the plaintiff sought money damages in the Court of Claims and both equitable and monetary relief in the district court).

177. See id. (“A district court’s concurrent jurisdiction with the Claims Court is limited to claims not exceeding $10,000.”).
Casman and do[es] not support any other exception to section 1500."\(^{178}\)

This reasoning simply does not hold water. The purpose of Casman was to allow a plaintiff to pursue both equitable and monetary claims where both could not be pursued in a single court. Prilman, in contrast, was a rare case in which the plaintiff could pursue both equitable relief and money damages in either court.\(^{179}\) The Casman rationale did not apply and was not invoked by the court. The Prilman court's express reason for refusing to dismiss the case before it was that the plaintiff's Civil Rights Act claim did not fall within its jurisdiction and the plaintiff's Back Pay Act claim did not fall within the district court's jurisdiction.\(^{180}\) To the extent that Prilman has any justification, it is that § 1500 applies only where the same court could hear both claims, just as Johns-Manville argued.

The suggestion by the Johns-Manville court that Prilman turned on the $10,000 limit on the damages available in the district court runs contrary to the basic purpose of § 1500. If the cap on back pay recoverable in the district court in Prilman rendered the district court claim different within the meaning of § 1500, then the $10,000 cap on Little Tucker Act claims must have the same effect. Under this interpretation a plaintiff could bring simultaneous Tucker Act and Little Tucker Act suits in the CFC and a district court, respectively, without regard to § 1500. That result would emasculate § 1500 by allowing duplicative suits in precisely the situation the statute was intended to address. Prilman cannot be interpreted to require such an untenable outcome. Notwithstanding the Johns-Manville court's efforts to stuff Prilman into the Casman box, Prilman can be read only as the plaintiff in Johns-Manville read it.

The Johns-Manville court evaded Allied Materials through more cogent, though no more convincing, reasoning. The court did not analyze Allied Materials on what it said, but on what it did not say:

It is not evident to us that Allied intended to extend the exception established in Casman to cover pending cases seeking monetary relief so long as the Court of Claims had no jurisdiction over the legal theories asserted in the district court. Allied does not state the plaintiff is seeking monetary relief in the pending district court cases. Nor does Allied discuss any of the precedents which would need to be overruled or distinguished before reaching the holding Johns-Manville argues Allied reaches. In summary, we find Johns-

\(^{178}\) Id.

\(^{179}\) See Prilman v. United States, 220 Ct. Cl. 677, 678 (1979) (noting that the plaintiff sought monetary and equitable relief in both CFC and district court).

\(^{180}\) See id. at 679.
Manville's reliance on Allied unfounded since it does not clearly hold section 1500 is inapplicable where the pending suit seeks monetary relief in both courts on the same operative facts.\(^{181}\) Although Allied Materials may not have "clearly held" that § 1500 is inapplicable where suits seek the same relief on the same facts, it did hold that the plaintiff, who was pursuing two suits for the same relief on the same facts, was not barred from the Court of Claims by § 1500.\(^{182}\)

Although the court in Johns-Manville never discussed Hossein, its holding and its revisionist treatment of Prilman and Allied Materials suggest that the court intended to realign its § 1500 jurisprudence in order to prevent an extension of the Hossein line of cases.\(^{183}\) The court seems to have desired a relatively bright line test under which a "claim" is identified by reference to a set of operative facts and, in a nod to Casman, to the type of relief sought, but not by the legal theories raised.\(^{184}\)

The same year as Johns-Manville, however, the Federal Circuit revitalized Hossein in Boston Five Cents Savings Bank v. United States.\(^{185}\) In that case, the plaintiff brought a district court suit against the Department of Housing and Urban Development ("HUD") seeking a declaratory judgment that an action contemplated by HUD would constitute a breach of contract between it and HUD.\(^{186}\) The district court denied plaintiff leave to add a claim for damages to its complaint.\(^{187}\) In response, the plaintiff brought suit in the Claims Court and, on the same day, filed a new lawsuit in district court alleging the same facts and seeking the same damages as sought in the Claims Court.\(^{188}\) The Claims Court dismissed plaintiff's suit as barred by § 1500.\(^{189}\)

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181. Johns-Manville, 855 F.2d at 1567.
182. See Allied Materials & Equip. Co. v. United States, 210 Ct. Cl. 714, 715 (1976) (refusing to dismiss a Court of Claims suit, despite the existence of a simultaneous district court action, because defendant could not have all of its legal claims heard in a single court).
183. See Johns-Manville, 855 F.2d at 1566-67 (discussing the effect of Allied Materials and Prilman on the proper jurisdiction of federal courts).
184. See id. at 1559-62, 1567 (contending that a "claim" is defined by its operative facts, even if those facts "support different legal theories which cannot all be brought in one court").
185. 864 F.2d 137 (Fed. Cir. 1988).
186. See id. at 138. The plaintiff was a mortgagee of a building, whose mortgage was guaranteed by HUD. Over the plaintiff's objection, HUD agreed to allow the mortgagor to convert the building into cooperative housing. The plaintiff brought the declaratory judgment action after the agreement, but prior to the conversion. See id.
187. See id. (denying motion to add a damages claim on the basis of inexcusable delay).
188. See id.
The Federal Circuit reversed.\footnote{See Boston Five Cents, 864 F.2d at 137.} Citing Casman, the court held that the original district court suit for declaratory judgment did not bar Claims Court jurisdiction because it sought relief different from that available in the Claims Court.\footnote{See id. at 139 (allowing suit in Claims Court to proceed because plaintiff's claims in both courts sought different remedies).} The court held that the plaintiff's subsequent unsuccessful attempt to add a damages claim did not bar suit because the damages claim was not actually pending at the time the Claims Court suit was filed.\footnote{See id. (permitting Claims Court to have jurisdiction over plaintiff's money claim as it was not pending in the district court at the time suit was filed in the Claims Court).}

Most significantly, the court held that, under Hossein, the second district court action, filed contemporaneously with the Claims Court action and seeking identical relief, did not bar jurisdiction in the Claims Court.\footnote{See id. at 140.} The court stated that:

Because the Claims Court has exclusive jurisdiction over Boston Bank's monetary claim, it should not have dismissed the suit. Identical complaints were filed in the Claims Court and the district court. Thus, only one legal theory forms the basis for the complaints, and the Claims Court has sole jurisdiction over the claim.\footnote{Id. at 139-40.}

Apparently, the Federal Circuit treated the case as if it were sitting in review of both the Claims Court and district court actions, and found the former to be the proper forum. But the Federal Circuit had only the Claims Court action before it. It had no authority to adjudicate Boston Bank's standing in the district court. As a result, the court ignored entirely the requirements of §1500. The appropriate remedy, in the event the district court concluded that it lacked jurisdiction, was transfer to the claims court.\footnote{See 28 U.S.C. § 1631 (1994).} By allowing both suits to remain pending, the court ignored §1500's categorical withdrawal of jurisdiction in the Claims Court where another suit is pending on the same claim.

The confusion engendered by the cases applying Casman is heightened by the fact that, in almost every case, the Court of Claims has negated the effect of Casman's §1500 holding. In each instance, with the exception of Allied Materials, the Court of Claims has elected to stay an action there pending the resolution of district court proceed-
ings. None of these decisions have held that a stay was required, or even contemplated, under § 1500. Instead, the decisions rest exclusively on the courts' conclusions that § 1500 was not implicated at all. On another common thread, the courts have invariably couched their decisions to stay the Court of Claims proceeding in terms of "comity" and "balancing competing interests." At the same time, however, it cannot be ignored that the courts interpreting Casman have accomplished the basic purpose of § 1500—preventing duplicative suits—while finessing the most onerous aspects of the statute.

This review of the cases indicates that the Court of Claims and its successors are uncomfortable with the attempt to define "claim" in any terms other than operative facts. Yet when faced with cases in which, for whatever reason, they believe the plaintiff should have a cause of action in the Court of Claims, the courts have found ways to avoid dismissal. The result has been a crapshoot, in which two plaintiffs in nearly identical procedural postures could meet entirely conflicting results. In 1992, however, the Federal Circuit attempted to put a stop to the confusion and bring some much needed coherence to its § 1500 jurisprudence.


197. See Boston Five Cents, 864 F.2d at 140 (using a balancing test to justify a suspension of proceedings); Prillman, 220 Ct. Cl. at 679 (justifying a stay on the basis that district court proceedings were already underway); Hossein, 218 Ct. Cl. at 729 (defending a suspension of proceedings for reasons of "comity" and the need to avoid "piecemeal litigation"); City of Santa Clara, 215 Ct. Cl. at 891 (staying proceedings for reasons of "comity, justice [and] judicial administration").

198. See Boston Five Cents, 864 F.2d at 139 (ruling that § 1500 did not apply at all); see also Prillman, 220 Ct. Cl. at 678 (same); Hossein, 218 Ct. Cl. at 728-29; Santa Clara, 215 Ct. Cl. at 891.

199. See Boston Five Cents, 864 F.2d at 140 (holding that the "balancing of competing interests" dictates stay of Claims Court action); Prillman, 220 Ct. Cl. at 679 (finding that "it would be inappropriate to litigate at the same time in two different courts, on the identical issues"); Hossein, 218 Ct. Cl. at 729 (suspending Court of Claims case for "reasons of comity and avoidance of piecemeal litigation"); Santa Clara, 215 Ct. Cl. at 891 (staying proceedings due to "unique circumstances").

200. But see 139 CONG. REC. S10,383-84 (daily ed. Aug. 4, 1993) (statement of Sen. Heflin) (contending that § 1500 has increased duplicative suits); Peabody et al., supra note 141, at 97 n.5 (1994) (discussing the effect of § 1500); Schwartz, supra note 12, at 599 (arguing that the volume of litigation would be less without § 1500).

201. See Boston Five Cents, 864 F.2d at 140 (calling on a balancing test to avoid dismissal); Prillman, 220 Ct. Cl. at 679 (justifying its failure to dismiss on grounds that district court proceedings were already "well underway" and the plaintiff, upon favorable conclusion of those proceedings, could return and seek further damages in the Court of Claims); Hossein, 218 Ct. Cl. at 729 (defending its decision to stay on grounds of "comity" and the need to avoid "piecemeal litigation").

202. Compare Hossein, 218 Ct. Cl. at 729 (retaining jurisdiction of one of plaintiff's claims pending outcome of district court case), with Johns-Manville, 855 F.2d 1556, 1568 (Fed. Cir. 1988) (affirming Claims Court's dismissal of all plaintiff's claims).

203. See UNR Indus., Inc. v. United States, 962 F.2d 1013, 1023 (Fed. Cir. 1992), aff'd sub
B. UNR/Keene and Recent Attempts at Consistency

In UNR Industries, Inc. v. United States, the Federal Circuit undertook a comprehensive overhaul of its § 1500 jurisprudence.\(^{204}\) A successor case to Johns-Manville, UNR involved three asbestos companies that were sued in federal court for personal injuries resulting from exposure to asbestos.\(^{205}\) In district court, the companies filed third-party complaints against the United States seeking contribution or indemnification for adverse judgments resulting from the government specifications requiring the use of asbestos.\(^{206}\) In addition, one of the companies, Keene Corporation, filed an FTCA suit against the Government in another district court.\(^{207}\) While their district court claims were pending, the companies also brought suit against the United States in the Claims Court for breach of contract and breach of warranty.\(^{208}\) Subsequently, the suits in the district courts were dropped.\(^{209}\) Not long after, the Claims Court also dismissed the complaints before it based on § 1500, finding a "homogeneity of operative facts" in the district court and Claims Court actions.\(^{210}\)

On appeal, the Federal Circuit faced two fairly straightforward issues: (1) whether § 1500 applies when the district court complaint is dismissed prior to dismissal by the claims Court, and (2) whether a "claim" under § 1500 is identified on the basis of operative facts.\(^{211}\) In fact, British American had already effectively answered both questions.\(^{212}\) British American introduced the operative facts test, and also held that a claim is barred by § 1500 if another suit is pending at the time the claim is filed in the Court of Claims, irrespective of when

\(^{204}\) See id.

\(^{205}\) See id. at 1015.

\(^{206}\) See id.

\(^{207}\) See id. at 1016.

\(^{208}\) See id. at 1015-16.

\(^{209}\) See id. at 1015 (explaining that § 1500 denies the U.S. Claims Court jurisdiction over claims of plaintiffs who have any suit or process against the U.S. pending in any other court).

\(^{210}\) Keene Corp. v. United States, 508 U.S. 200 (1993) (addressing inconsistencies within § 1500’s jurisprudence, the court attempted to resolve jurisdictional issues sua sponte).

\(^{211}\) See UNR, 962 F.2d at 1016 (discussing the Claims Court’s association of "claim" with the "operative facts" standard). These two issues were the only ones presented by the facts before the court. The Federal Circuit, however, asked the parties to address a broader range of issues in its order accepting rehearing, including whether the Claims Court is divested of jurisdiction if the plaintiff subsequently files suit in district court on the same claim and whether a suit is "pending" within the meaning of § 1500 if a petition for writ of certiorari is pending. See id. at 1017.

\(^{212}\) See British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438, 440-41 (1999) (holding that a suit’s "dismissal on the merits" in one court would preclude another court’s jurisdiction under § 1500, and that the meaning of "claim" has no "reference to the legal theory upon which a claimant seeks to enforce his demand").
the Court of Claims decides the § 1500 issue.\textsuperscript{213} Despite subsequent inconsistent caselaw, neither aspect of the \textit{British American} decision had been overruled.\textsuperscript{214} Nevertheless, the court, clearly eager to set its § 1500 precedent straight, strayed far from the facts of the instant case to address a variety of § 1500 issues.\textsuperscript{215}

As to the initial issue regarding the timing of claims in multiple courts, \textit{UNR} reaffirmed the holding of \textit{British American}.\textsuperscript{216} At the same time, \textit{UNR} also overruled \textit{Brown v. United States},\textsuperscript{217} a case in which the Court of Claims found that a suit was not barred when an identical district court action had been dismissed subsequent to the filing of the Court of Claims action.\textsuperscript{218} The court then expanded its discussion to include the line of cases in which the Court of Claims stayed claims before it, pending resolution of district court proceedings, and then reinstated those claims upon dismissal by the district courts.\textsuperscript{219} Having expressly overruled \textit{Brown}, the court unflinchingly announced that it was also overruling "cases like Casman, Hossein, and \textit{Boston Five Cents}, which declined to dismiss complaints in the Claims Court when the same claim was the basis for a case pending in district court."\textsuperscript{220} Finally, the court overruled \textit{Tecon Engineers, Inc. v. United States},\textsuperscript{221} a case in which the Court of Claims retained jurisdiction when a district court action was filed after the commencement of the Court of

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  \item \textsuperscript{213} \textit{See id.} (holding that the plaintiff's attempt to manipulate the same set of facts so as to allege a cause of action in both tort and contract "does not obscure the unity or sameness of the claim").
  \item \textsuperscript{214} \textit{See supra} notes 117-27 and accompanying text (analyzing \textit{British Am. Tobacco} and its progeny).
  \item \textsuperscript{215} With respect to the timing issue alone, the court issued this holding: "[W]e hold today that in accordance with the words, meaning, and intent of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the [Court of Federal Claims], the [Court of Federal Claims] has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the [Court of Federal Claims], the [Court of Federal Claims] is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the [Court of Federal Claims], ordinary rules of \textit{res judicata} and available defenses apply."
  \item \textsuperscript{216} \textit{UNR}, 962 F.2d at 1021.
  \item \textsuperscript{217} \textit{See id.} "There is nothing in section 1500 to suggest a free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it. Jurisdiction cannot be bestowed by the parties." \textit{Id}
  \item \textsuperscript{218} 175 Ct. Cl. 343 (1966), \textit{overruled by} \textit{Keene Corp. v. United States,} 508 U.S. 200 (1993).
  \item \textsuperscript{219} \textit{See supra} notes 189-95 and accompanying text (discussing the practice of staying a Court of Claims suit when a district court action is based on the same operative facts).
  \item \textsuperscript{220} \textit{UNR}, 962 F.2d at 1022 n.3 (citations omitted).
  \item \textsuperscript{221} 343 F.2d 943 (Ct. Cl. 1965), \textit{overruled by} \textit{UNR Indus., Inc. v. United States,} 962 F.2d 1013 (Fed. Cir. 1992).
\end{itemize}
Claims action. In justification of its broad holding, despite the absence of a similarly broad controversy, the court declared, "[w]e are today undertaking a comprehensive effort to set out the proper interpretation of a jurisdictional statute, a matter that does not require a pointed dispute between parties." Next, the court addressed the definition of "claim." Again, with relative ease, the court resolved the issue before it by reaffirming the series of cases holding that "claims" under § 1500 are determined with reference to operative facts. The court went on to address one appellant's argument that its claims were distinct because the relief sought in its FTCA district court action differed from that sought in its Claims Court action. The court denied this argument based on its overruling of Casman, definitively noting that "Casman and its progeny are no longer valid.

In sum, the UNR court stated the following holdings:

- Jurisdiction in the CFC is determined at the time of filing. Thus, if a district court suit for the same claim is pending on the date of filing in the CFC, the CFC suit is barred, even if the district court action is subsequently dismissed.
- If the same claim is pending in the district court and the CFC, the CFC may not avoid the application of § 1500 by staying the matter before it.
- The CFC is divested of jurisdiction if, after bringing suit in the CFC, the plaintiff files a second suit for the same claim in district court.
- A claim is "pending" for § 1500 purposes if it is on appeal. Thus, a CFC suit is barred if the plaintiff is in the process of

222. See id. at 949 (ruling that the Court of Claims does not relinquish jurisdiction upon filing of a subsequent district court claim).
223. UNR, 962 F.2d at 1023. The court continued:

"Courts are obliged to resolve jurisdictional questions on their own even if parties do not raise them. In the course of this interpretative effort, if prior cases are seen as inconsistent, it is incumbent on the court to acknowledge their nonviability. For that reason we revisit Tecon, an aberrational case which stands astride the path to a proper interpretation of section 1500 as it pertains to a post Claims Court filing in another court.

Id. (internal citation omitted).
224. See id. at 1024 (holding that legal theories are an improper basis for defining "claim" (citing British Am. Tobacco Co. v. United States, 89 Ct. Cl. 438, 440 (1939)); see also Los Angeles Shipbuilding & Drydock Corp. v. United States, 152 F. Supp. 256, 258 (Ct. Cl. 1957) (holding that factual content, not legal theories, is the key element of a § 1500 "claim").
225. See UNR, 962 F.2d at 1024.
226. See id. at 1025.
227. See id. at 1021.
228. See id. at 1022.
229. See id.
appealing a district court suit on the same claim.\textsuperscript{230}

- The term "claim" refers to operative facts, not to legal theory.\textsuperscript{231}
- A claim is not made different if it seeks different relief.\textsuperscript{232}

If taken at face value, UNR would have overruled \textit{Casman, Tecon, Brown, Hossein, Prillman, Allied Materials, Santa Clara, and Boston Five Cents}. UNR has not been taken at face value.

The plaintiffs appealed and the Supreme Court granted certiorari under the case name \textit{Keene Corp. v. United States}.\textsuperscript{233} Justice Souter's sober opinion for the majority narrowed some of the Federal Circuit's excesses. The majority summarily affirmed the Federal Circuit's holding that jurisdiction under § 1500 is determined at the time of the filing of the complaint.\textsuperscript{234} The Court further found that subject-matter jurisdiction normally turns on the facts upon filing and that § 1500 contains no language suggesting a deviation from that rule.\textsuperscript{235} In so deciding, the Court defanged much of the "holding" of UNR:

We do not decide whether the statute also continues to bar a plaintiff from prosecuting a claim in the Court of Federal Claims while he has pending a later-filed suit in another court "for or in respect to" the same claim. . . . As the dissenting judge noted below, this case does not raise that issue.\textsuperscript{236}

The Court then delved deeper to decide when two actions involve the same "claim."\textsuperscript{237} It first reviewed the case law and concluded that the statute and its predecessors had traditionally and correctly been interpreted to bar as duplicative claims based on the same operative facts.\textsuperscript{238}

These precedents demonstrate that under the immediate predecessor of § 1500, the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.\textsuperscript{239}

\begin{footnotes}
\item[230] See \textit{id.} at 1024.
\item[231] See \textit{id.} at 1023.
\item[232] See \textit{id.} at 1024-25.
\item[234] See \textit{id.} at 207.
\item[235] See \textit{id.} at 207-08.
\item[236] \textit{Id.} at 209 n.4 (citations omitted). The Supreme Court affirmed the overruling of \textit{Brown and Hossein}, noting that the holdings in those cases could not be squared with its ruling that jurisdiction is determined at the time of filing. See \textit{id.} at 217 n.12.
\item[237] See \textit{id.} at 212-13.
\item[238] See \textit{id.}
\item[239] \textit{Id.}
\end{footnotes}
The Court dismissed the Federal Circuit's attempt to eradicate the exceptions based on the relief requested, noting that "[b]ecause the issue is not presented on the facts of this case, we need not decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500."240

The decision upheld, however, the Federal Circuit's rejection of the Hossein line of cases. The Supreme Court held that a difference in legal theories does not make the claims different for purposes of § 1500.241 Responding to Keene's argument that Casman and Allied Materials applied a legal theories test, the Court reprised the Johns-Manville strategy of selective interpretation. Citing Johns-Manville and Boston Five Cents, the Court found that Casman had been limited to cases in which the plaintiff seeks different relief in the two courts.242 The Court echoed Johns-Manville in the following declaration:

Although it is not clear whether the plaintiff in Allied Materials was seeking completely different relief in the District Court, the Court of Claims simply applied Casman without much explanation. Neither Casman nor Allied Materials discussed, much less purported to overrule, British American Tobacco Co. v. United States, a case that undoubtedly is well established.243

Although the Supreme Court in Keene creatively interpreted Brown and Hossein, it expressly overruled those cases. According to the Court, Brown and Hossein held that § 1500 "does not apply after dismissal of an earlier filed District Court suit brought in derogation of the Court of Federal Claims's exclusive jurisdiction."244 The Court noted that "Brown and Hossein do not survive our ruling today, for they ignored the time-of-filing rule" which determines jurisdiction at the time the CFC action is filed.245 In reality, Brown and Hossein did not rely on the fact that the district court dismissed the action. The cases simply held that § 1500 does not apply where the CFC is the proper and exclusive forum for the legal theory pleaded in district court.246 Still, Keene probably effectively overrules those cases.247

240. Id. at 212 n.6.
241. See id. at 216-17.
242. See id. at 214 n.9.
243. Id. (internal citations omitted).
244. Id. at 216.
245. See id. at 217 n.12.
246. See Brown v. United States, 358 F.2d 1002, 1004-05 (1966) (holding that since there is no appeal from the district court's ruling and the appeals' period has expired, § 1500 does not require the court to deprive plaintiffs' only forum remaining to test their demand of compensation); Hossein v. United States, 218 Ct. Cl. 727, 728-29 (1978) (refusing to dismiss section 1500 count because of the court's exclusive jurisdiction over the amount of damages even when the same claim was pending in federal district court), overruled by UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992), aff'd sub nom. Keene Corp. v. United States, 508 U.S. 200 (1993).
Despite these holdings, the Supreme Court left much of the pre-UNR ambiguity intact. The Court stated that "[i]n 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." Thus, it is not clear whether a claim filed in district court after the same claim is filed in the CFC will divest the CFC of jurisdiction. Because Casman apparently is still valid, claims may be considered different if they seek different relief. Moreover, Boston Five Cents, a case in which the plaintiff was allowed to pursue district court and CFC claims based on the same operative facts and seeking the same relief, still stands.

Of the six holdings announced by the Federal Circuit in UNR, the Supreme Court in Keene conclusively affirmed the first, holding that jurisdiction in the CFC is always determined at the time of filing. The Court ostensibly affirmed the second and fifth as well, holding that the CFC may not stay a case pending resolution of the district court action and that "claims" are identified on the basis of operative facts. The Court avoided the other three, which had held that the CFC is divested of jurisdiction by a later-filed district court suit, that a claim is "pending" if a petition for certiorari is pending, and that claims are not made different if they seek different relief.

247. See Keene, 508 U.S. at 215 (noting that court of appeals announced overruling of Brown and Hossein).
248. Id. at 216. The Supreme Court's implication that the Federal Circuit had no business ruling on these three cases was somewhat circuitous. Keene apparently did not argue in its appeal that those cases were improperly or ineffectively overruled. Instead, it argued that the overruling of those cases was a change in the law necessary for the Federal Circuit to reach the holding it reached. See id. at 215. Keene then argued that such a change in the law should only be applied prospectively, and therefore could not apply to defeat Keene's claims. See id. The Supreme Court rejected this argument by finding that the overruling of those cases was not essential to the Federal Circuit's holding because the cases were not applicable to Keene's facts. See id. at 216-17.
249. But see Hardwick Bros. Co. II v. United States, 72 F.3d 883, 886 (Fed. Cir. 1995) (holding that a later-filed district court action does not divest CFC of jurisdiction if properly established).
250. See Dico, Inc. v. United States, 48 F.3d 1199, 1202 (Fed. Cir. 1995) (citing court's decision in Lowladies as keeping the Casman decision intact).
252. See Keene, 508 U.S. at 208-09.
253. See Miller & Abram, supra note 251, at 896 n.269. The Court left some doubt as to these latter holdings by leaving Boston Five Cents intact. The court in Boston Five Cents had stayed a Claims Court action on the ground that the identical claims pending before the district court were improperly before that court. See Boston Five Cents Sav. Bank v. United States, 864 F.2d 197, 140 (Fed. Cir. 1988), overruled by UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992).
254. See Keene, 508 U.S. at 215-16 (finding it "unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500").
The year after the decision in *Keene*, the Federal Circuit had a chance to address directly the *Casman* issue and some of the confusion left by *UNR* and *Keene*. *Loveladies Harbor, Inc. v. United States* was a regulatory takings case involving the denial of a wetlands development permit. The property owner, Loveladies, had first filed suit in federal district court challenging the validity of the denial under the APA. The trial court denied the relief requested, and while an appeal to the Third Circuit was pending, Loveladies filed suit in the CFC seeking compensation for the taking of Loveladies' private property. The CFC heard the case, found in favor of Loveladies, and awarded damages. The government appealed, and while the appeal was pending, the Federal Circuit decided *UNR*. The government then moved to vacate the judgment for Loveladies on jurisdictional grounds, arguing that the two claims were the same because they were based on the same operative facts, notwithstanding the fact that the actions sought different remedies.

Reaching its decision after the Supreme Court's decision in *Keene*, the Federal Circuit denied the government's motion to vacate and affirmed the judgment for Loveladies. The court relied on the Supreme Court's language disavowing *UNR* as it applied to *Casman* and the cases holding that different claims exist where one claim is for money damages and the other is for specific relief. Expressly reaffirming *Casman*, the Federal Circuit in *Loveladies* held that a congruity of operative facts defeats jurisdiction only where two claims seek money damages. "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief."
Thus, UNR/Keene and Loveladies have brought some degree of clarity to the morass of § 1500 interpretations. It seems that a firm test of “claim” has been established: a claim is the same if it is based on the same operative facts and seeks the same relief. Combining this rule and the other holdings in the cases, the following rule ostensibly has been established: a suit in the CFC is barred if the plaintiff has pending at the time that suit is filed a suit in a district court or court of appeals based on the same operative facts and seeking the same relief, regardless of the legal theories pleaded. Despite the seeming clarity of this rule, confusion still remains due to the difficulty of identifying the same “relief” in light of recent cases on “equitable” claims for monetary relief. Two cases, Bowen v. Massachusetts and Far West Federal Bank v. Office of Thrift Supervision, raise the question of whether claims are the same under § 1500 where one seeks breach of contract money damages and the other seeks monetary relief based on equitable theories, such as restitution. The next section addresses this issue.

III. THE BOWEN-CASMAN DILEMMA AND POSSIBLE RESPONSES

The Casman exception to the operative facts test, as that exception has been developed, holds that § 1500 does not apply where two suits based on the same operative facts seek different relief. While the exception creates ambiguity as to the meaning of the term “claim” in § 1500, embedded in the exception is a second ambiguity, as to the meaning of the term “relief.” If claims are different when they seek different relief, then there must be a way to identify different reliefs. Casman begged the question by holding that the relief is different if it is not available in both forums. That test would suffice if a clear dividing line could be drawn between the types of relief available in district courts and in the CFC. When Casman was decided, such a line probably existed. It does not today.

267. See id. at 1548-51 (tracing caselaw development of term “claim” as used in § 1500).
268. See id.
269. See infra Part III and accompanying text (discussing Bowen-Casman dilemma and difficulty of applying § 1500 to claims based on the same operative facts that seek different relief).
272. See infra notes 276-78 and accompanying text (listing cases that have developed the Casman exception).
273. See Casman v. United States, 135 Ct. Cl. 647, 649-50 (1956) (stating that claim and relief sought under § 1500 “are entirely different”).
274. See id. (holding § 1500 inapplicable where plaintiff sought reinstatement available only in district court and back pay available only in CFC).
275. See supra notes 96-103 and accompanying text (explaining how Bowen blurred the clear distinct line between relief in district courts and relief in CFC).
A. The Potential Impact of Bowen

The Supreme Court in *Bowen v. Massachusetts* 276 blurred the lines dividing the relief available in district courts and the CFC. As a result of *Bowen*, both district courts and the CFC have some degree of jurisdiction over suits for monetary relief based on non-tort obligations.277 Although the *Bowen* Court suggested that Massachusetts may not have been able to pursue its claims in the CFC in that case,278 it is not hard to imagine a case in which an "equitable" action for restitution of monies due could be joined with a contract claim for money damages. Indeed, *Far West Federal Bank v. United States* 279 presents such a case. The plaintiff in *Far West* almost certainly could have sued the United States in the CFC for damages resulting from the breaches of contract by FDIC and OTS.280 In the wake of *Bowen*, Casman's methodology falls short, because at least one type of monetary relief—restitution for breach of contract—is available in both district courts and the CFC based on the same operative facts.

The cases developing and interpreting the Casman exception have concentrated more than Casman did on the meaning of "different relief." They generally have treated Casman as a case holding that claims are different under § 1500 where one claim seeks specific relief and the other seeks money damages.281 Typically, the Casman exception has been applied in cases where the plaintiff in the CFC has a claim in district court based on the same wrong but seeking an injunction, 282 a declaratory judgment,283 or the reversal of administrative agency action.284

277. See id. at 911-12.
278. See id. at 905-07 (noting in dicta that CFC may not have jurisdiction to hear claims arising under Medicaid Act).
280. See id. at 888 (citing 28 U.S.C. § 1491(a)(1), the Tucker Act, which grants the CFC jurisdiction over contractual claims for money damages in claims against the government). In many Winstar type cases alleging facts similar to *Far West*, the plaintiffs initially filed suit in district court seeking injunctions, and then subsequently filed CFC suits on the same facts for money damages. Most of those cases are pending at the writing of this article.
281. See id. Casman was not so precise in its terminology. The court held simply that section 1500 did not apply where the plaintiff could not elect to pursue his "claims" in either forum. See *Casman v. United States*, 135 Ct. Cl. 647, 650 (1956).
283. See *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) (holding, based on *Casman*, that plaintiff may maintain district court suit for declaratory relief and simultaneous CFC suit for money damages).
284. See *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1548 (1994) (holding CFC has jurisdiction over takings claim where plaintiff is also prosecuting district court suit seeking review of agency action).
Yet *Bowen* plays havoc with this "specific relief" distinction. In finding jurisdiction in the district court, the Supreme Court in *Bowen* relied heavily on the fact that the plaintiff couched its claims in terms of specific relief.\(^{285}\) The Supreme Court held that a suit seeking restitution of money wrongfully withheld is a suit seeking specific relief.\(^{286}\) If the *Casman* cases are read to distinguish between CFC suits for money damages and district court suits seeking specific relief, *Bowen* falls squarely within the *Casman* exception.

Unless *Bowen* is treated as an anomaly and discarded, which seems unlikely in light of *Far West*, eventually a plaintiff will file corresponding suits in district court seeking the specific remedy of monetary restitution and in the CFC seeking money damages for breach of contract. The government will move to dismiss the CFC action under § 1500, and a court will face the *Bowen-Casman* dilemma. It will have several options: (1) it can treat *Bowen* cases as outside the scope of § 1500 under *Casman*, and allow simultaneous claims to proceed; (2) it can distinguish *Bowen* from *Casman* and apply § 1500, dismissing the CFC action; (3) it can follow *UNR* by eliminating the *Casman* exception entirely; or (4) it can find a hybrid solution.\(^{287}\) None of these options is entirely satisfactory.

### B. Possible Responses to the Bowen-Casman Problem

#### 1. Options within the existing precedent

The first option for a court addressing the *Bowen-Casman* issue is to fit *Bowen* under the *Casman* exception by holding that any suit seeking specific relief in a district court falls outside the scope of § 1500, and in such a situation a CFC suit may be pursued simultaneously on the same operative facts. This option is probably unacceptable because it would destroy the very purpose of § 1500—to prevent duplicative lawsuits.\(^{288}\) It would allow a plaintiff to sue a government

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286. See *id.*

287. In all likelihood, the CFC or the Federal Circuit, or both, will face this issue, as section 1500 normally is applied by those courts. It should be noted, however, that § 1500 also has been held to apply to district court claims brought under the Little Tucker Act. See *Shapiro v. United States*, 168 F.2d 625, 626 (3d Cir. 1948); *Ohio Locomotive Crane Co. v. Denman*, 73 F.2d 408 (6th Cir. 1934) (holding, under Tucker Act and § 1500, that taxpayer could elect whether he wanted judgment against administrator of deceased collector or United States). Accordingly, a district court could decide to decline jurisdiction based on § 1500 in a Little Tucker Act suit.

288. See *Keene Corp. v. United States*, 508 U.S. 200, 206 (1993) (citing Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863)); *Schwartz, supra* note 12, at 571-80 (tracing history and purpose of § 1500 to show that duplication of lawsuits prompted congressional legislation).
agency in district court, under the agency's "sue and be sued" power, for breach of contract seeking the specific remedy of restitution, while at the same time suing the United States in the CFC for the same breach but seeking the remedy of money damages. That result would leave § 1500 arbitrary and irrational—a plaintiff could not join all his legal theories in one case, but he could sue twice based on the same legal theory. A court almost certainly would find a way to avoid such an outcome.

The easiest way to avoid such an irrational result while keeping the basic Casman exception alive is to distinguish Bowen from Casman. The obvious way to distinguish Bowen is to find that the Casman exception applies only where the district court suit seeks something other than monetary payment. The problem with drawing such a distinction is that the practical outcome of many injunctions and declaratory judgments is a ruling that one party must take or refrain from taking action that will result, either directly or indirectly, in a monetary payment to the other party. That was the situation in Boston Five Cents Savings Bank v. United States, which held that the Casman exception applies to declaratory judgments. A victory in the district court declaratory judgment action would have entitled the plaintiff to the same recovery in the district court as that available in the Claims Court for money damages. Thus, although it is theoretically defensible, the option of applying § 1500 whenever a monetary payment is sought has some of the arbitrariness of squeezing Bowen into the Casman category.

A third option is to follow UNR and overrule the entire Casman line. A court could simply hold that the sole test for whether claims are the same under § 1500 is the operative facts test; § 1500 was intended to require an election and that election includes the election of remedies. A court might conclude that the particular injustice

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289. See Alaska v. United States, 32 Fed. Cl. 689, 696-97 (1995) (holding that action for declaratory and injunctive relief is different than action for damages).
290. But see Marks v. United States, 34 Fed. Cl. 387, 400 (1995) (determining that similar phrases requesting costs and other appropriate relief in district court action for declaratory and injunctive relief were distinguishable from Fifth Amendment takings claim in CFC).
291. 864 F.2d 137 (Fed. Cir. 1988).
292. See id. at 139.
293. See id. at 138.
294. See UNR Indus., Inc. v. United States, 962 F.2d 1013, 1025 (Fed. Cir. 1992) (holding that "Casman and its progeny are no longer valid").
295. See Johns-Manville Corp. v. United States, 855 F.2d 1556, 1562 (Fed. Cir. 1988) (construing § 1500's use of the term "claim" to refer to operative facts rather than legal theories).
296. See Brown v. United States, 358 F.2d 1002, 1005 (Ct. Cl. 1966) ("Section 1500 was designed to require an election between two forums both of which could presumably grant the same type of relief.")
encountered in *Casman* was rectified by Congress in its amendment to the Tucker Act allowing certain limited equitable remedies in the CFC. If Congress decides that plaintiffs should have even greater leeway to pursue both equitable remedies and money damages, it has the power to amend the Tucker Act further. Although this option has some attraction, if for no other reason than that it offers coherence, it seems precluded by *Loveladies* at least until the Supreme Court chooses to visit the issue.

A court looking to keep all parties happy and to follow a precedent might rely on *City of Santa Clara v. United States*. *Santa Clara* addressed a situation very similar to that in *Bowen*. A non-federal government entity—the state of Massachusetts in *Bowen* and in *Santa Clara*, the city of Santa Clara—brought suit in district court alleging that an arm of the federal government had improperly withheld a benefit due the local government. In contrast to the plaintiffs in *Bowen*, the city of Santa Clara pursued claims in both the district court and the Court of Claims. The Court of Claims held that § 1500 did not apply because the district court suit sought equitable remedies. Recognizing that the district court suit could result in an identical recovery to the one sought in the Court of Claims, the Court of Claims stayed its suit during the pendency of the district court suit.

*Santa Clara* is easily applied to *Bowen*. A court addressing the effect of § 1500 in a *Bowen* situation could dodge the issue by relying on *Santa Clara* to allow the plaintiff to “maintain” both suits, while staying one. The problem with this solution is that the Supreme Court implicitly rejected the *Santa Clara* approach in *Keene Corp. v. United States*. The Supreme Court held that jurisdiction under § 1500 is determined at the time the CFC action is filed. The Court overruled *Brown* and *Hossein*, cases that stayed Court of Claims cases while parallel district court suits proceeded, on the ground that they

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298. *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (construing § 1500 as barring claim in Court of Federal Claims only if the claim is in another court and based on same operative facts and requesting same relief).
300. *Id.* at 892.
301. *See id.*
302. *See id.* at 893.
303. *See id.* at 893-94.
304. *See, e.g.*, U.S. Supreme Court Brief Reply Brief, *Keene Corp. v. United States*, 1993 WL 290110, at *15 (Feb. 17, 1993) (arguing that the purpose of § 1500—avoiding “improperly duplicative simultaneous litigation”—is not compromised by allowing the Court of Federal Claims to stay its proceedings while the plaintiff maintains the district court suit).
306. *See id.* at 207.
“ignored the time-of-filing rule.” Although the decision in Keene is not entirely clear, the Supreme Court apparently held that the CFC has no power over the parties if at the time the case is filed the same claim is pending in a district court, and so it cannot grant a stay of the action. At a minimum, the Santa Clara approach is suspect.

The potential problem created by Bowen and Casman cannot be resolved satisfactorily within the existing precedent. The jurisdictional grants providing for suit against the federal government simply cannot be reconciled with § 1500 as it has been interpreted. The absence of an easy way out may prove fortuitous, though. The fact that the Bowen-Casman problem stems from basic contradictions within the U.S. Code and the relevant caselaw suggests that the problem should be resolved at a more fundamental level. The lack of a clear answer could provoke a court to take a more daring approach, one that could generate benefits for many plaintiffs aggrieved by government action, based on the doctrine of pendent jurisdiction.

2. The pendent jurisdiction option

Pendent jurisdiction gives district courts jurisdiction beyond that prescribed by 28 U.S.C. §§ 1331 and 1332 in cases where those statutes confer partial jurisdiction. The Tucker Act is simply another section of the Judicial Code that allocates jurisdiction over certain causes of action to certain federal courts, apparently on an equal

307. Id. at 217 n.12.
308. See Jurisdiction—Court of Federal Claims—Claim Pending in Another Court, 9 FED. LITIGATOR 266, 268 (1994) (stating that Keene requires Court of Federal Claims to dismiss a case for want of jurisdiction where similar relief is sought in another court); see also Virginia S. Albrecht, Regulating Takings & Wetlands: What Are the Constitutional Limits?, SB 14 ALI-ABA 531 (1996) (noting that Supreme Court in Keene held that § 1500 precludes Court of Federal Claims from exercising jurisdiction if the plaintiff contemporaneously seeks similar relief in another court).
309. See Peabody et al., supra note 141, at 98 (calling the inconsistent application of § 1500 a "minefield of seemingly arbitrary rules").
310. See id. at 107 (advocating that Congress repeal § 1500).
311. See CHEMERINSKY, supra note 71, § 5.4 (describing pendent and ancillary jurisdiction). The doctrine of pendent jurisdiction allows federal courts to hear claims based solely on state law, where the parties are not diverse, where the state law claims are intertwined with federal claims properly before the court. See id. § 5.4.2. The Supreme Court gave the doctrine its current formulation in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court stated:

"Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under" [federal law] ... and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case" ... The state and federal claims must derive from a common nucleus of operative fact."

Id. at 725. The Court noted that whether to accept pendent jurisdiction is a matter within the discretion of the district court, and advised that courts should decline jurisdiction if the state law claims "substantially predominate." Id. at 726.
312. See CHEMERINSKY, supra note 71, § 5.4 (discussing the application of pendent and ancillary jurisdiction).
footing with those statutes. None of the statutes contains language suggesting that it is entitled to a stricter interpretation than the others, but courts generally have refused to allow the jurisdictional leeway contemplated by pendent jurisdiction to creep into the Tucker Act.

Yet in Far West Federal Bank v. Office of Thrift Supervision, the Federal Circuit set a precedent for limited pendent jurisdiction in suits against the federal government. Far West was a Winstar-type case in which the plaintiff sued the Director of the Office of Thrift Supervision ("OTS") and the FDIC in district court for breach of contract, seeking both an injunction barring further breach and restitution of funds invested pursuant to the contract at issue. OTS argued that the claim for restitution was a disguised contract claim for money damages available only in the CFC against the United States because OTS’s "sue and be sued" clause excluded suits for money damages.

The Federal Circuit rejected this argument, relying on the doctrine of pendent jurisdiction. The court found a Supreme Court policy favoring unitary resolution of disputes with the government in the recent decision in United States v. Hohri, in which the Supreme Court held that a single court of appeals could hear both an FTCA appeal and a Little Tucker Act appeal normally appealable only to the Federal Circuit. Based on Hohri, the Federal Circuit in Far West found that "[t]o assign to different courts the determination of various aspects of the same complex transaction; to redevelop the identi-


314. See Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 477 (1993) (stating that Tucker Act expressly excludes tort claims against the government in Court of Federal Claims); Free v. United States, 17 Cl. Ct. 488, 495 (1989) (refusing to extend Tucker Act jurisdiction to include Fifth Amendment takings claim because "constitutional provision does not in itself obligate the federal government to pay money damages"). The Federal Circuit's decision in UNR is a good example of the rigidity ascribed to Tucker Act jurisdiction. In its attempt to withdraw the jurisdictional loopholes created by Casman and other cases, the court in UNR proclaimed that "[a]ll jurisdictional rules are absolute." UNR Indus., Inc. v. United States, 962 F.2d 1013, 1022 (Fed. Cir. 1992), aff'd sub nom. Keene Corp. v. United States, 508 U.S. 200 (1993). The court entirely overlooked the fact that, with the Supreme Court's blessing, federal courts routinely hear claims outside their prescribed jurisdiction.


316. See id. at 887.

317. See id.

318. See id. at 888.

319. See id. at 889.


321. See id. (noting that Federal Circuit has exclusive jurisdiction over all Tucker Act and Little Tucker Act appeals).
The court concluded that traditionally, the law has disfavored multiple litigation. Finding that “[j]ustice, as well as efficiency,” were more likely to be served by resolution of all issues in a single court, the Federal Circuit upheld the jurisdiction of the district court over the claims against OTS.

The holding of Far West, however, is fairly narrow. The court ignored a narrow “sue and be sued” clause in order to allow a government corporation to be sued for money damages where a sister agency was properly being sued for money damages in the same district court. The case does provide, however, a basis for an expanded—although still limited—doctrine of pendent jurisdiction. For the first time, the Federal Circuit applied the rationales underlying traditional pendent jurisdiction to a case raising issues of sovereign immunity, suggesting that the principles of judicial efficiency promoted by pendent jurisdiction have as much or more weight than the principle of sovereign immunity. As sovereign immunity is the only principle that can explain the historical reluctance to relax the jurisdictional rules of the Tucker Act and other statutes allowing suits against the government, Far West suggests that it is time to rethink the application of pendent jurisdiction in all types of suits against the government.

Given the importance of sovereign immunity over the years, though, pendent jurisdiction probably cannot be imported wholesale into the government litigation arena, erasing all jurisdictional barriers between courts. If it is to be accepted, the doctrine must be limited. The Supreme Court, in its landmark pendent jurisdiction case...
United Mine Workers v. Gibbs, held that whether to exercise pendent jurisdiction is within the discretion of the trial court, and urged trial courts to decline jurisdiction where state law claims "substantially predominate." The firm application of this element of Gibbs could make expanded pendent jurisdiction more palatable to courts understandably reluctant to abrogate congressional authority over the scope of sovereign immunity.

Acting within the constraints of Gibbs, courts should decline jurisdiction over a suit against the federal government in any case in which claims normally cognizable only in another forum substantially predominate. Thus, for example, a district court should accept jurisdiction over a takings claim for more than $10,000 where that claim is subsidiary to a related tort claim brought under the FTCA. But the district court should decline jurisdiction where a plaintiff links a subsidiary tort claim to a more predominant breach of contract claim seeking more than $10,000. Similarly, the CFC should accept jurisdiction over an equitable claim that is subordinate to a breach of contract claim, seeking money damages, but should decline jurisdiction where the equitable claim predominates. Where either a district court or the CFC declines jurisdiction, the court may transfer the case to the proper forum under the transfer statute.

The exercise of pendent jurisdiction in this way must be limited in one important respect. Because the Tucker Act expressly precludes the CFC from hearing tort claims, the CFC probably can never accept pendent jurisdiction over an FTCA claim. This means not only that a plaintiff cannot initially raise a tort claim in the CFC, but also that a district court may not transfer a tort claim with a Tucker Act claim if it finds the Tucker Act claim predominates. Until the Tucker Act is amended, plaintiffs will not be able to join a subsidiary tort claim with a predominant breach of contract or takings claim in a single court.

By exercising discretion to hear a limited range of pendent claims, courts can respect congressional authority to allocate jurisdiction while also recognizing the practical dissolution of sovereign immunity and giving citizens access to the same justice against their government that they have against each other.

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330. Id. at 726.
332. See id. § 1491(a)(1).
CONCLUSION

Section 1500 is the flashpoint in many disputes regarding the locus and nature of the claims a plaintiff may assert against the United States because it provides the means for counteracting the lawyer's natural impulse to cover all bases. But § 1500 is not the root of those disputes. The essential problem is the antiquated system of jurisdiction in suits against the government.

Federal government litigation represents one of the last bastions of 19th Century pleading and practice. The Tucker Act makes the CFC the only court outside the recalcitrant state courts in Virginia, Delaware, and New Jersey to continue to honor the division of law and equity and the modern litigant is hard-pressed to find another jurisdictional grant that speaks of claims that “sound in tort,” as the Tucker Act does. In the face of a century of movement towards flexibility in pleading at all other levels of the judicial system, the federal government has maintained and reinforced a system based on archaic forms of action, in which a litigant who cannot style his injury in the proper phraseology is barred from his remedy.

The adherence to narrow, formalistic jurisdictional rules in federal government litigation creates much more mischief now than it did in the past because of the rapid retreat of sovereign immunity. While sovereign immunity retained its basic viability, the use of narrow jurisdictional grants helped restrain the type and number of suits the government had to defend. Today sovereign immunity has been stripped of its armor; the United States may be sued for breach of contract, tort, constitutional violations, errors in carrying out its executive functions, and most other perceived harms to its citizens. The narrow jurisdictional grants persist, however, creating a system that penalizes some plaintiffs with valid claims while rewarding those with the savvy to pursue all the available relief through creative pleading.

A thorough overhaul of § 1500 seems unlikely; a thorough reworking of the various statutes waiving sovereign immunity and allocating jurisdiction over federal government litigation seems inconceivable.

333. See Va. Code Ann. § 8.01-270 (describing procedures for transferring cases between equity and law sides of court); see also Vicars v. First National Bank Mountain Empire, 458 S.E.2d 293, 294 n.1 (Va. 1995) (noting that trial court transferred case to law side of court pursuant to plaintiff's motion requesting transfer).
334. See generally Glanding v. Industrial Trust Co., 45 A.2d 553 (Del. 1945) (discussing history of separate equity jurisdiction in Delaware).
Assuming that Congress fails to address these issues, and that the current trend toward a reduced reverence for sovereign immunity continues, it may become possible for courts to address some of the most vexing jurisdictional problems—such as the *Bowen-Casman* dilemma—through the expansion of the doctrine of pendent jurisdiction.

The Federal Circuit’s suggestion in *Far West* that in some cases the principles of judicial efficiency and fairness underlying the pendent jurisdiction doctrine may overcome the sanctity of sovereign immunity makes possible a new approach to the many problems of federal government litigation. Courts may ultimately feel free to alleviate the arbitrariness created by the piecemeal waivers of sovereign immunity and by § 1500 by allowing limited pendent jurisdiction under which district courts may hear some claims currently assigned to the CFC and the CFC may hear some claims currently assigned to the district courts. Until then, unfortunately, uncertainty reigns, and litigants against the federal government must simply await the next pronouncement on the scope of § 1500, while choosing carefully the denomination and locus of their claims.