ACUS and Suits Against Government

*Jonathan R. Siegel**

ABSTRACT

The Administrative Conference of the United States ("ACUS") has played an important role in improving the system of lawsuits against the federal government. ACUS should continue to play this role, for which it is uniquely well suited. Because it does not litigate, ACUS is free from the pressure to win particular cases and can focus on improving the overall system.

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INTRODUCTION

As the Administrative Conference of the United States ("ACUS") turns fifty, it is hard to choose which of the agency's many achievements to celebrate. ACUS's unique organic statute gives it a

* Professor of Law and F. Elwood and Eleanor Davis Research Professor of Law, The George Washington University Law School. The author served as ACUS's Director of Research and Policy from 2010–2011, and was one of the researchers on one of the ACUS projects described in this Article. *See* Emily S. Bremer & Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 ALA. L. REV. 1, 1 n.** (2013).

mandate that is nearly as broad as the entire federal government. With only a couple of exclusions (for military and foreign affairs),[1] ACUS is empowered to study and make recommendations regarding "the administrative procedure used by administrative agencies in carrying out administrative programs,"[2] and these terms are broadly defined.[3] ACUS can thus make recommendations regarding a remarkably diverse array of issues that come up throughout the federal government.

This Article highlights ACUS's achievements in improving the procedures for bringing lawsuits against the federal government. In its original incarnation, ACUS made numerous recommendations on this topic,[4] one of which, Recommendation 69-1,[5] was one of ACUS's most important and successful recommendations ever. When I served as the Director of Research and Policy of the revived ACUS in 2010 and 2011, I initiated and acted as one of the in-house researchers on another project concerning suits against the government that led to Recommendation 2012-6.[6]

This Article tells the story of these two recommendations. Part I discusses Recommendation 69-1, "Statutory Reform of the Sovereign Immunity Doctrine." Prior to this recommendation, the structure of suits seeking judicial review of federal agency action was in disarray.[7] Although plaintiffs aggrieved by federal agency action could typically receive judicial review, the procedures for doing so were beset by technical snares and pitfalls. As a result, many lawsuits seeking relief for allegedly wrongful agency actions were dismissed for reasons unrelated to their merits and also unrelated to any sound policy regarding

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1 *See* 5 U.S.C. § 592(1) (2012).

2 *Id.* § 594(1).

3 *See id.* § 592(1), (3). For example, 5 U.S.C. § 592(3) specifically notes that the term "administrative procedure" "is to be broadly construed."

4 In addition to ACUS Recommendation 69-1, which is discussed in detail in the text below, see ACUS Recommendation 80-5, 1 C.F.R. § 305.80-5 (1988); ACUS Recommendation 82-3, 1 C.F.R. § 305.82-3 (1988); ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-7, ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW 1 (1968), https://www.acus.gov/sites/default/files/documents/68-7.no-FR.pdf.

5 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-1, STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE, 23 (1969), https://www.acus.gov/sites/default/files/documents/69-1.no-FR.pdf.

6 ACUS Recommendation 2012-6, Reform of 28 U.S.C. Section 1500, 78 Fed. Reg. 2,939 (Dec. 6, 2012).

7 *See* Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

which kinds of agency actions should be reviewable. The difficulties faced by plaintiffs in these lawsuits arose from the essentially improvised system by which agency actions were reviewed: the system was not centrally planned, but emerged from court decisions. ACUS recommended that Congress amend the Administrative Procedure Act ("APA") to eliminate many of the artificial barriers to seeking judicial review, and Congress's adoption of the recommendation cleared the way for the much simpler and more straightforward system of judicial review of agency actions that we know today.[8]

Part II discusses Recommendation 2012-6, "Reform of 28 U.S.C. Section 1500." Although narrower than Recommendation 69-1, Recommendation 2012-6 addresses a similar theme: artificial barriers in certain lawsuits against the federal government that cause certain suits to be dismissed for reasons unrelated to their merits or to sound policy. Again, the barriers arise because of the lack of centralized attention to the system of seeking relief against the federal government. While Recommendation 2012-6 has yet to be implemented at the time of this writing, bills to implement it have been introduced in Congress.

In telling the story of these two recommendations, this Article attempts to draw a couple of lessons along the way. The first is the need for ACUS or some similar organization to act in this area. As the story of these recommendations shows, natural institutional forces tend to create barriers to lawsuits against the federal government. Unless some other force such as ACUS intervenes, these technical barriers tend to accumulate over time and lead to an increasing number of non-merits-based dismissals that serve no useful purpose and contravene sound public policy. ACUS can serve the public good by periodically acting to rationalize the system for bringing lawsuits against the federal government. Recommendations 69-1 and 2012-6 also provide useful guidance to ACUS itself with regard to the elements of a successful recommendation project: they each address a clear problem and identify a specific solution.

I. Recommendation 69-1, "Statutory Reform of the Sovereign Immunity Doctrine"

ACUS Recommendation 69-1, "Statutory Reform of the Sovereign Immunity Doctrine," recommended that Congress amend the APA to waive the federal government's sovereign immunity for lawsuits challenging action by an agency, officer, or employee of the

8 *See generally* Recommendation 69-1, *supra* note 5.

United States and seeking relief other than money damages.[9] Today, the recommendation seems unremarkable. We are now thoroughly accustomed to lawsuits that seek judicial review of federal agency action and ask a court to order agency officials to behave lawfully. Such lawsuits face many challenges, including many technical barriers,[10] but sovereign immunity is typically not one of them.

But things were not always thus. In the days before 1976 (when Congress implemented ACUS Recommendation 69-1),[11] the system for seeking judicial review of federal government action was in disarray. In many cases, Congress had expressly authorized judicial review of particular agency actions, and in those cases, review could be had in a straightforward suit under a statutory review provision.[12] These statutory review provisions, however, did not cover many functions of older federal agencies such as the Departments of Agriculture, Defense, Interior, Justice, State, and Treasury, and they contained gaps even with regard to the agencies they did cover.[13] In cases in which Congress had not specifically authorized judicial review, plaintiffs faced a series of technical hurdles—now mostly forgotten—capable of knocking out their lawsuit for reasons unrelated to its merits or any sound policy goal. The hurdles resulted from institutional forces that favored making suits against government needlessly difficult.

A. The Background to Recommendation 69-1

1. The Problem of Sovereign Immunity and Its Initial Solution

The background law of suits against the United States arises from a longstanding tension. On the one hand, the United States enjoys sovereign immunity from suit.[14] The federal government cannot be sued without its consent, and in consenting Congress has "absolute discretion" to specify the conditions under which the government may

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9 *Id.*

10 Plaintiffs must, for example, show that they have standing, that their suit is ripe for judicial action, and that the matter complained about is not committed to agency discretion by law or otherwise judicially unreviewable. And, of course, they must prevail on the merits, if the merits are reached.

11 *See* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

12 *See, e.g.*, S. REP. NO. 94-996, at 4 (1976) ("For years almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens.").

13 *See id.*

14 *E.g.*, Schillinger v. United States, 155 U.S. 163, 166 (1894) ("The United States cannot be sued in their courts without their consent."); United States v. Lee, 106 U.S. 196, 250–51 (1882) (noting the "fundamental principle" that the United States "cannot be sued without its consent").

be sued.[15] Superficially, therefore, it seems that the federal government can choose when to be sued and when not to be sued.

However, for as long as the federal government's sovereign immunity has existed, it has coexisted with judicial recognition of the need to provide justice to persons injured by wrongful government action. The ancient maxim *ubi jus, ibi remedium* shows that justice demands that a remedy be available for violations of rights.[16] Court opinions reflected this principle at least as early as *Marbury v. Madison*,[17] in which the Supreme Court stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[18]

There is obvious tension between the principle of sovereign immunity and the principle that justice demands remedies for violations of rights—the former can block the straightforward route to achieving the latter. The courts, however, have not stood by helplessly when wrongful government action injured private parties. Faced with the need to provide remedies for violations of rights, courts invented a remedy that evaded the bar of sovereign immunity.

The main such remedy was the "officer suit."[19] In cases in which a government officer injured a private party, but Congress had not waived the government's sovereign immunity, the injured party might nonetheless sue the government *officer* who had caused the injury.[20] Because a government officer is distinct from the government itself, courts held that the officer does not enjoy sovereign immunity.[21]

This form of suit is often traced back to the 1908 case of *Ex parte Young*,[22] but it is in fact much older. In the United States, the officer suit is at least as old as *Marbury v. Madison.* Although of course most famous for other reasons,[23] *Marbury* was an early suit against a government officer by a party seeking redress for allegedly wrongful government action. As already noted, the Court in *Marbury* recognized

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15 *Schillinger*, 155 U.S. at 166; *see also* Lane v. Pena, 518 U.S. 187, 192 (1996).

16 *See, e.g.*, Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39–40 (1916) (reasoning that a statute prohibiting conduct must create a remedy for harm suffered as a result of that prohibited conduct).

17 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

18 *Id.* at 163.

19 Cramton, *supra* note 7, at 398.

20 *Id.* at 398–99.

21 *See id.*

22 *Ex parte* Young, 209 U.S. 123 (1908); *see* Davis, *supra* note 7, at 437 (calling *Young* "[t]he foundation case").

23 *Marbury v. Madison* is most famous for being the first case in which the Supreme Court exercised its power of judicial review to declare acts of Congress to be unconstitutional.

the need to provide remedies for violations of rights, and, notwithstanding any doubts as to whether a private party might sue the United States itself,[24] the Court stated that a suit for redress could be maintained against a government *officer*, "for whom," the Court said, "the law, in matters of right, entertains no respect or delicacy."[25] The Court suggested that, but for the pesky problem of lack of jurisdiction,[26] it would have been proper for the Court to issue a writ of mandamus to command Madison to remedy the wrong suffered by Marbury.[27] In other cases, suitors were actually successful in using the officer suit form to obtain relief from wrongful government action.[28]

Thus, U.S. law has always exhibited a curious dichotomy with regard to sovereign immunity. On the one hand, the law has always recognized federal sovereign immunity as an established doctrine.[29] On the other hand, the law has also always provided mechanisms to evade that doctrine.[30] With suits against the government barred by sovereign immunity, courts permitted suits against government officers.

2. *Problems with Officer Suits*

The officer suit form solved the fundamental problem posed by sovereign immunity, but it came with its own cost, which arose from the artful nature of the solution. Reluctant to openly discard the venerable doctrine of sovereign immunity, the courts created the officer suit as a workaround.[31] The workaround, however, rested on fiction. Officer suits avoided the barrier of sovereign immunity by relying on the premise that a suit against an officer of the sovereign was not a suit against the sovereign and therefore did not implicate the sovereign's immunity.[32] A sovereign, however, can act only through its officers, and a suit that restrains the officers from taking official action necessarily restrains the sovereign.[33]

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24 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) (opinion of Jay, C.J.) (doubting whether the United States could be sued by a private citizen).

25 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165 (1803).

26 *See id*. at 173–80.

27 *See id*. at 168–73.

28 *E.g.*, United States v. Lee, 106 U.S. 196, 204–23 (1882); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

29 *Lee*, 106 U.S. at 207.

30 *See, e.g.*, *id.* at 204–23; *Barreme*, 6 U.S. (2 Cranch) at 179.

31 *See* John F. Duffy, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 302–03 (1989).

32 *See* Davis, *supra* note 7, at 436-37.

33 *See Lee*, 106 U.S. at 226 (Gray, J., dissenting).

To call the officer suit form a fiction is not to condemn it. The courts that adopted this fiction were not blind to its falsity; they adopted it for an instrumental purpose, namely, getting around sovereign immunity.[34] "Fiction has its purposes in the law as elsewhere."[35] The officer suit performed the basic function of a legal fiction, which is "to reconcile a specific legal result with some premise or postulate."[36] Courts desired to reach the legal result of providing relief to those injured by wrongful government action; they did not think themselves empowered to discard the postulate of sovereign immunity; hence, they arrived at the desired result by creating a suit form which they could fictionally pretend did not violate that postulate, even though in reality it obviously did.

The officer suit fiction was an expedient solution to the problem posed by sovereign immunity; however, it did not succeed completely. As numerous scholars observed in the period leading up to the 1976 APA amendments, "[r]eliance on fiction as a method of accommodating legal institutions to a new role . . . entailed some long-run costs."[37]

The costs were the inevitable by-product of resting the doctrine on fiction. It was difficult for courts to maintain the fictional premise that a suit against a government officer was not really a suit against the government. If this premise were taken seriously, it entailed logical consequences that could themselves prevent a suit from going forward. Many officer suits escaped the sovereign immunity barrier only to perish on shoals created by their own fictional nature.

Problems arose, for example, in cases in which the government officer defendant died or resigned from office during the pendency of the suit.[38] If the suit were really against the *government*, the departure of the particular officer defendant would not be a problem; the court would simply substitute the officer's successor as defendant and proceed.[39] But the suit avoided the barrier of sovereign immunity only by pretending that the suit was *not* against the government.[40] Thus, the connection between the original defendant and the potential successor—that they both held the same government office—could not be

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34 *See* Davis, *supra* note 7, at 436-37.

35 Cramton, *supra* note 7, at 399.

36 L.L. Fuller, *Legal Fictions* (pt. 2), 25 ILL. L. REV. 513, 514 (1931).

37 Cramton, *supra* note 7, at 399.

38 *See, e.g.*, Secretary v. McGarrahan, 76 U.S. (9 Wall.) 298, 313 (1869); Davis, *supra* note 7, at 451–52.

39 *See* Davis, *supra* note 7, at 452.

40 *See id.* at 436–37.

recognized. Therefore, the Supreme Court, in such a case, said that when the first defendant left office, "of course the suit abated."[41]

Similar problems arose when a plaintiff attempted to complain about an alleged wrong committed by a local federal official implementing a policy set by a national official. In some such cases, the courts held that the national official was a necessary party, rendering the suit against the local federal official improper.[42] The reason given was that the national official should be "given opportunity to defend his direction and regulations,"[43] which, again, made logical sense if one fictionally disregarded the official status of the initial defendant, but made no sense if one recognized the reality that both the local and national officials were part of the same government and would be represented by the same lawyers.[44] Again, the fiction that initially allowed the suit to go forward caused a logical problem to which the suit then succumbed.

Moreover, many lawsuits foundered on the fundamental difficulty of implementing the officer suit fiction. The Supreme Court sometimes stated that the test for officer suits was whether "by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. . . . If it is, then the suit is barred . . . because it is, in substance, a suit against the Government . . . ."[45] Of course, by that test, *every* officer suit should be dismissed, because every officer suit seeks relief that is in effect relief against the sovereign; that is the whole purpose of officer suits.[46]

Problems such as these illustrate the wisdom of Lon Fuller's observation that "[a] fiction taken seriously, i.e., 'believed', becomes dangerous and loses its utility. . . . A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity."[47] The officer suit fiction served a useful purpose, but when courts forgot that purpose and imagined that an officer suit was *really* not a suit against the government, problems ensued and plaintiffs with potentially worthy claims got entangled in procedural technicalities. Innumerable of-

41 *McGarrahan*, 76 U.S. (9 Wall.) at 313.

42 *E.g.*, Gnerich v. Rutter, 265 U.S. 388 (1924). Often the national officer could not easily be added as a defendant in the plaintiff's originally chosen venue.

43 *Id*. at 391–92.

44 *See* Davis, *supra* note 7, at 438 (recognizing that "the real defendant, the Government, has its lawyers in all districts, and can defend a suit about as conveniently in one district as in another").

45 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949).

46 *See* Cramton, *supra* note 7, at 411.

47 L.L. Fuller, *Legal Fictions* (pt.1), 25 ILL. L. REV. 363, 370 (1930).

ficer suits were dismissed on technicalities,[48] because courts could not maintain a "complete consciousness"[49] of the falsity of the officer suit fiction.

The technical barriers that accumulated around the officer suit form prevented it, in many cases, from serving its useful purpose of providing a mechanism by which injured parties could obtain judicial review of federal agency action. Moreover, these barriers served no rational policy. Policy considerations do sometimes demand that government action not be subject to judicial review—an action might, for example, raise a political question or be committed to agency discretion by law, or Congress might have precluded review by statute.[50] But no such policy concerns were triggered in cases in which, for example, an officer defendant died or resigned from office. An agency action might or might not be suitable for judicial review, but it is hard to imagine a case where judicial review would be appropriate if the officer who took the action remained in office throughout the pendency of the lawsuit, but not if the officer died or left office during that time. To hold that actions for judicial review must be dismissed when an official defendant dies or resigns is to say that some such suits will be dismissed on grounds that are wholly fortuitous, unrelated to the merits of the lawsuit, and unrelated to any rational policy.

Thus, while the courts had developed a system for avoiding sovereign immunity and permitting judicial review of federal agency action, the system was, in the period before 1976, sadly flawed. The officer suit form suffered from an accumulation of technical barriers that frequently prevented it from serving its purpose.

3. The Underlying Source of the Problems

One might wonder how such problems could arise and particularly how they could persist in a popular democracy. Surely, one might imagine, the premise of American democratic society is that we have a limited government subject to the rule of law.[51] If the government is taking unlawful actions that injure private parties, surely we would want those actions ceased and the injuries redressed, and if bizarre technicalities unrelated to the merits of plaintiffs' claims and serving no rational policy get in the way of proper redress, one might

48 Cramton, *supra* note 7, at 449–51.

49 Fuller, *supra* note 47, at 370.

50 *See* Cramton, *supra* note 7, at 426–27.

51 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

imagine that the legal system would find some way to remove those technicalities.

Writing about this problem in the 1960s, Kenneth Culp Davis identified two reasons why these technical problems arise and persist.[52] The first was the essentially improvised nature of the system of remedies against unlawful government action.[53] The "officer suit" system was not the result of a centralized, planned effort; it was the result of a series of common law decisions by courts working case by case to avoid the barrier of sovereign immunity.[54] As Davis put it:

> The reason is not that someone in the Government has decided that the burden on plaintiffs who want to challenge the legality of official action should be heavy instead of light. The reason is not that someone on behalf of the Government has made a malevolent decision against convenience and in favor of inconvenience. The reason is that the system we have evolved has been planned by no one.[55]

Davis also pointed out another feature of the system that led to a gradual accumulation of technical difficulties: the role of government counsel.[56] Faced with a lawsuit against a government officer, government counsel, like any defense counsel, view their main goal as defeating the lawsuit.[57] Government counsel do not, Davis observed, "normally have occasion to look at the perspectives of the system."[58] That is, government counsel do not regard their task as promoting a good procedural system that decides cases on their merits. Rather, government counsel simply want the cases dismissed, whether the reason for dismissal be sound or silly. Of course, to some degree, government counsel recognize that they have a special responsibility, beyond that of private counsel, to seek justice rather than simply to win,[59] but in many cases this higher calling yields to the natural impulse that any counsel feels to win cases.[60]

Therefore, in the pre-1976 era, government counsel frequently sought dismissal of officer suits on technical grounds that served no

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52 Davis, *supra* note 7, at 439–41.

53 *Id.* at 439–40.

54 *Id.*

55 *Id.*

56 *Id.* at 440–41.

57 *Id.* at 441.

58 *Id.* at 440.

59 *Id.* at 441.

60 *See id.*at 440–41; Cramton, *supra* note 7, at 420–21.

important policy, but that helped them win.[61] This impulse combined with the fact that government counsel, unlike private counsel, were repeat players in the system and became expert at winning by creating pointless technical barriers, which private counsel were not as skilled at surmounting.[62] Government counsel were therefore able to win on technicalities, and, of course, each such win facilitated wins in new cases; thus, technical snares and traps tended to accumulate with time.[63]

Courts had labored valiantly to create a mechanism to provide justice for those injured by wrongful government action, but that mechanism was beset by problems. Neither the courts nor government counsel proved to have the perspective needed to solve the problem.[64] What was needed was some institution that pursued the goal of improving the overall system.

B. Enter ACUS: Recommendation 69-1 and Its Implementation

That institution, of course, was ACUS. Unlike the Department of Justice ("DOJ"), ACUS did not have to concern itself with winning any particular case. ACUS's mandate was not to win cases, but to think about and work to improve the system.[65] This larger perspective was just what was needed.

Addressing the problems in judicial review of federal agency action was one of ACUS's first projects. ACUS started doing business in 1968. Shortly thereafter, it started the project that became Recommendation 69-1.[66]

ACUS engaged Roger Cramton, then a professor at the University of Michigan Law School, as its consultant for the project.[67] Professor Cramton's report, also published as an article in *The Michigan Law Review*,[68] fully laid out the difficulties with the existing system. Drawing on other recent scholarship on the topic,[69] Cramton ex-

61 *See* Cramton, *supra* note 7, at 420.

62 *See* Davis, *supra* note 7, at 440.

63 *See id*.

64 *See id.*

65 *See* 5 U.S.C. § 594(1)–(5) (2012).

66 *See* Roger C. Cramton, *Report of the Committee on Judicial Review in Support of Recommendation No. 9*, 1 ACUS 190, 210 (1971); *see also* Cramton, *supra* note 7.

67 Cramton, *supra* note 66, at 191.

68 Cramton, *supra* note 7.

69 Cramton cited scholarly works including 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962); Clark Byse, *Suing the*

plained the use of officer suits as a device to avoid sovereign immunity, the fictional nature of such suits, the myriad problems besetting such suits that grew out of their fictional nature, and the harmful consequences that followed.[70]

Cramton's report proposed eliminating the sovereign immunity barrier and allowing suits for judicial review to proceed against the government *eo nomine*.[71] Cramton proposed adding the following language to section 702 of the APA:

> An 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 denied on the ground that it is against the United States or that the United States is an indispensable party. . . .[72]

ACUS adopted Cramton's proposal in short order. ACUS Recommendation 69-1, adopted October 22, 1969, contained the above language verbatim.[73] Finally, after decades of problems, ACUS emerged as an institutional actor with a larger perspective and mandate that could work to improve the system of judicial review.

Of course, ACUS had no actual power to fix the system. It had then, as it has now, no actual powers at all.[74] It could only make recommendations. It had no authority, only influence. And how much influence could a two-year-old agency with no powers have?

As it turned out, rather a lot. Within five months after ACUS adopted Recommendation 69-1, Senator Kennedy introduced a bill to implement it.[75] Hearings were held on the bill and it was reported favorably by a Senate subcommittee.[76] The bill ultimately died in committee (possibly because DOJ opposed it),[77] but other bills to im-

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"Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 HARV. L. REV. 40 (1963); Davis, *supra* note 7.

70 Cramton, *supra* note 7, at 398–417.

71 Cramton, *supra* note 7, at 428–29.

72 *Id.* Cramton also proposed additional language that would make clear that the new legislation would not have undesired effects such as abolishing other barriers to judicial review (such as standing). *Id.*

73 RECOMMENDATION 69-1, *supra* note 5.

74 *See* 5 U.S.C. § 594(1), (3) (2012) (describing ACUS's powers generally to "study," "make recommendations," and "collect information").

75 S. 3568, 91st Cong. (as introduced Mar. 9, 1970).

76 *See* S. REP. NO. 94-996, at 3 (1976).

77 *Id.* at 3, 25.

plement Recommendation 69-1 were introduced in subsequent Congresses.[78]

The recommendation also gathered support from many quarters. The American Bar Association, the Federal Bar Association, and the Environmental Defense Fund all supported it.[79] So did the Judicial Conference of the United States.[80] Perhaps most important, DOJ changed its position and supported the bill.

The Justice Department's support for implementing Recommendation 69-1 came in the form of a letter to Senator Kennedy from the Assistant Attorney General for the Office of Legal Counsel, who was none other than Antonin Scalia—now, of course, Justice Scalia.[81] Perhaps not incidentally, Scalia had recently finished his term as Chairman of ACUS.[82] His fortuitous move from ACUS to DOJ no doubt helped DOJ to see the value of promoting justice by supporting Recommendation 69-1 even though the recommendation could ultimately deprive DOJ of procedural tools that previously helped it win cases.

Scalia's letter to Senator Kennedy canvassed arguments in favor of Recommendation 69-1 and said:

> Foremost among them, in my view, is the failure of the criteria for sovereign immunity, as they have been expressed in a long and bewildering series of Supreme Court decisions, to bear any necessary relationship to the real factors which should determine when the Government requires special protection which ordinary litigants would not be accorded.[83]

Scalia recognized that Recommendation 69-1 did not seek to make federal agency action universally reviewable, but only to sweep away technical barriers to review that served no real purpose.[84] Scalia characterized the Supreme Court's cases on officer suits as "a mass of confusion" and appellate cases on the topic as "confusion com-

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78 *See* S. 800, 94th Cong. (as introduced Feb. 22, 1975); H.R. 12632, 92d Cong. (as introduced Jan. 25, 1972); S. 598, 92d Cong. (as introduced Feb. 4, 1971).

79 *See* S. REP. NO. 94-996, at 3.

80 *See id.*

81 *See id.* at 24–29.

82 Justice Scalia was Chairman of ACUS from 1972–1974 and Assistant Attorney General for the Office of Legal Counsel from 1974–1977.

83 S. REP. NO. 94-996, at 25.

84 *See id.* ("It is not the intent of the Department [of Justice] nor, as I understand it, the intent of the drafters of this bill, that all of the cases which have heretofore been disposed of on the basis of sovereign immunity would in the future be entertained and adjudicated by the courts. To the contrary, one of the very premises of the proposal is the fact that many (indeed, I would say most) of the cases disposed of on the basis of sovereign immunity could have been decided the same way on other legal grounds . . . .").

pounded."[85] In light of the existing confusion, he predicted that implementation of the recommendation would be:

> [L]ikely to produce a more stable and predictable system of immunity from suit than the present doctrine of sovereign immunity can ever attain—because it will be a system directly and honestly based upon relevant governmental factors rather than upon a medieval concept whose real vitality is long since gone and which we have tried vainly to convert to rational modern use.[86]

Thus, DOJ, through Scalia, commendably agreed that having a rational system of judicial review was more important than winning cases on irrational, technical grounds.

With support from ACUS, DOJ, and other groups, the bill to implement Recommendation 69-1 made progress. The Senate report accompanying the bill laid out in detail the problems that sovereign immunity and the officer suit form created for parties injured by allegedly wrongful government action.[87] It recognized that many suits seeking judicial review of government action might properly deserve dismissal, but agreed that the need for dismissal should be determined on relevant policy grounds and not by "sophistry and semantics."[88]

The implementing bill passed the Senate on July 1, 1976.[89] The House of Representatives took up the measure, and the House report on it was quite similar to the Senate's.[90] The House passed the Senate bill without amendment on October 1, 1976.[91] President Ford signed the bill into law on October 21, 1976.[92]

As a result, the system of judicial review of federal administrative action became far more rational than it had previously been. To be sure, many suits for judicial review are still dismissed. A government action may be wholly unreviewable because it raises a political question,[93] because Congress has precluded review by statute, or because the matter is committed to agency discretion by law.[94] Even if an action is potentially reviewable, a particular suit challenging it may be

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85 *Id.*

86 *Id.*

87 *Id.* at 4–9.

88 *Id.* at 8.

89 122 CONG. REC. 22,010–14 (1976).

90 *See* H.R. REP. NO. 94-1656 (1976).

91 *See* 122 CONG. REC. 35,112–13 (1976).

92 *See* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

93 *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77 (2007).

94 *See* Cramton, *supra* note 7, at 427.

dismissed for want of standing or ripeness,[95] for failure to exhaust administrative remedies, for being filed in the wrong court, or for similar technical reasons.[96] But these dismissals serve, or are at least thought to serve, rational policy purposes.[97] Actions are no longer dismissed on pointless, technical grounds that bear no relation to any sensible policy. The whole "mass of confusion" that arose from the officer suit fiction has been rightly consigned to the trash heap, where it lies largely forgotten.[98] Recommendation 69-1 has fulfilled its purpose, and it remains one of ACUS's great achievements.

II. RECOMMENDATION 2012-6, "REFORM OF 28 U.S.C. SECTION 1500"

Recently, ACUS made another recommendation that, like Recommendation 69-1, seeks to remove a pointless technical barrier to certain lawsuits against the United States. Recommendation 2012-6, "Reform of 28 U.S.C. Section 1500,"[99] recommends that Congress repeal and replace a statute that bars certain suits brought against the United States in the Court of Federal Claims ("CFC").[100] Although the recommendation has a much narrower scope than Recommendation 69-1, the recommendations share many themes.

A. The Origins of the Section 1500 Project

I became ACUS's Director of Research and Policy in 2010, when ACUS was revived after being on hiatus for fifteen years because of a lack of appropriations. From my academic research into lawsuits against governments, I was familiar with the myriad technical problems created by the officer suit fiction and with the 1976 APA amendments that cured those problems.[101] From my days as an attorney with the Appellate Staff of DOJ's Civil Division, I was also famil-

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95 *See* Siegel, *supra* note 93, at 77.

96 *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1643 (1997).

97 I have previously suggested that some of the justiciability doctrines do not, in fact, serve any rational policy purpose. Siegel, *supra* note 93, at 78. But my views on this topic have yet to prevail, and the doctrines are officially thought to serve important purposes.

98 That is, insofar as review of federal administrative action is concerned. The officer suit fiction still plays a central role in review of *state* action. *See, e.g.*, Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1638 (2011).

99 ACUS Recommendation 2012-6, Reform of 28 U.S.C. Section 1500, 78 Fed. Reg. 2,939 (Dec. 6, 2012).

100 *Id.* at 5-7.

101 *See generally* Siegel, *supra* note 96.

iar with technical problems that still baffled plaintiffs suing the United States.

One set of cases I particularly remembered from my DOJ days involved federal employees who claimed to have suffered employment discrimination in violation of Title VII of the Civil Rights Act of 1964.[102] Some such cases reminded me of the problems facing plaintiffs in the old, pre-1976 days, in that plaintiffs were getting tossed out of court for reasons that bore no relationship to the merits of the cases or to any rational policy.

A federal employee who desires to bring an equal employment opportunity ("EEO") claim under Title VII must first seek administrative relief.[103] If such relief is denied, the employee may bring a civil claim in court.[104] In bringing a civil claim, however, the employee is statutorily required to name "the *head* of the [employee's] department, agency, or unit" as the defendant.[105] Thus, for example, an employee of the Postal Service must sue a postmaster or the Postmaster General; the Postal Service itself is not a proper defendant. The point seems simple enough, but some federal employees who bring Title VII claims against the United States get it wrong: when filing in court, they name their employing agency as the defendant, rather than the *head* of the employing agency.[106]

Incredible though it may seem, this tiny, technical error used to cause some federal employees to lose their Title VII claims entirely. Under rules applicable in the 1980s, an amendment to a complaint that changed the name of the defendant might not be valid unless it was made within the statute of limitations,[107] and in those days the statute of limitations for filing a civil Title VII complaint was a mere thirty days from the termination of administrative proceedings.[108] Thus, by the time the plaintiff learned of the error in the original complaint, it would likely be too late to fix it. As a result, some plaintiffs lost their right to sue.

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102 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

103 *See id.* § 2000e-16(c).

104 *See id.*

105 *Id*. (emphasis added).

106 *See, e.g.*, Rys v. U.S. Postal Serv., 886 F.2d 443, 444 (1st Cir. 1989); Bell v. Veterans Admin. Hosp., 826 F.2d 357, 358–60 (5th Cir. 1987).

107 *See Rys*, 886 F.2d at 445–48; *Bell*, 826 F.2d at 360–61; *cf*. Schiavone v. Fortune, 477 U.S. 21, 29–30 (1986) (holding generally that an amendment to a complaint that changes the name of the defendant may not relate back to the original date of filing). *But see* Warren v. Dep't of the Army, 867 F.2d 1156, 1157, 1159–61 (8th Cir. 1989) (allowing relation back in a Title VII case).

108 *See Bell*, 826 F.2d at 360.

This result was obviously irrational. It could hardly matter to the government whether a plaintiff sued the Postal Service or the Postmaster General; the same lawyers would defend either case. There was no public policy served by requiring the naming of a particular defendant; that requirement arose from the mere happenstance of how the statutory language was phrased. And yet DOJ lawyers—including me—sought and sometimes won dismissal on this absurd basis.[109]

As a lawyer, I recognized the need to serve my client by arguing nonfrivolous (indeed, in the view of some courts, meritorious) grounds on which my client should win the case. Even at the time, however, it offended my sense of justice to have to argue for dismissal on grounds that seemed to lack a policy basis. It seemed so like the problems in the old, pre-1976 days: skilled government attorneys were helping to create technical barriers that could baffle plaintiffs who were not repeat players in the system.

Some of my DOJ colleagues justified these results on the ground that nearly all EEO complaints by federal employees were meritless anyway, and that it was therefore appropriate to try to get them dismissed on any possible basis—doing so, one attorney said to me, merely prevented plaintiffs from "winning the EEO lottery." Such an approach was, of course, unfair to plaintiffs with valid claims, and, in any event, even if it is true that most EEO claims against the federal government fail, I did not believe that that justified getting them dismissed on a ground that was not only unrelated to their merits, but unjustified as a policy matter.

The problem of the federal Title VII plaintiffs who named the wrong defendant was resolved by a 1991 amendment to the Federal Rules of Civil Procedure that allowed more generous relation back of an amendment to a complaint that added a federal officer or agency as a defendant (also, in the same year, the statute of limitations on Title VII claims was extended to ninety days).[110] Still, when I started at ACUS, my experience with those cases made me wonder: were any comparable technicalities still plaguing plaintiffs suing the federal government? Given the institutional forces at work—there were

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109 The case I was personally involved in was *Wood v. U.S. Postal Service*, 499 U.S. 956 (1991). In that case, the plaintiff escaped because the Supreme Court remanded for further consideration under a recent decision allowing equitable tolling with regard to statutes of limitation. *See id.* at 956.

110 *See* FED. R. CIV. P. 15(c)(2); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 114 (codified as amended at 42 U.S.C. § 2000e-16(c) (2012)).

thousands of skilled DOJ attorneys trying to win cases, in part by arguing technicalities—it seemed likely that there were.

I therefore suggested to ACUS Chairman Paul Verkuil that ACUS institute a project that would seek out and work to eliminate pointless technical barriers to lawsuits against the United States. Chairman Verkuil agreed, and the ACUS Council approved the project. ACUS Attorney-Advisor Emily Bremer and I became the in-house researchers on the project.[111]

B. Section 1500

Our research uncovered a suitable candidate for the project: 28 U.S.C. § 1500.[112] This statute concerns the jurisdiction of the CFC. It provides that the CFC shall not have jurisdiction over a claim if the plaintiff has the same claim pending in another court.[113]

This rule sounds quite sensible, but in fact it poses pointless obstacles to many potentially legitimate claims. The reason is twofold: first, the statutory term "claim" is understood to refer to a set of facts, not to the legal label that a plaintiff may put on those facts.[114] Thus, for example, if a plaintiff, based on a single incident, brings a tort claim against the United States in federal district court and then brings a contract claim against the United States in the CFC, section 1500 obliges the CFC to dismiss, because the two cases are considered to involve the same "claim."

Second, the jurisdictional statutes concerning claims against the United States require plaintiffs to bring different types of claims to different courts. Tort claims and claims for equitable relief (such as claims under the APA) must go to district court,[115] but claims for monetary relief not sounding in tort, such as contract claims and takings claims, must go to the CFC.[116]

Therefore, a plaintiff injured by the United States may face a dilemma. The plaintiff's claim may be hard to characterize. There can be a fine line between a tort and a breach of contract or between a tort and a taking; the plaintiff might be in legitimate doubt as to the

111 *See* Bremer & Siegel, *supra* note *, at 1 nn.*–**.

112 28 U.S.C. § 1500 (2012).

113 *Id.*

114 *See* United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1728 (2011); Keene Corp. v. United States, 508 U.S. 200, 212 (1993).

115 *See* 28 U.S.C. § 1346(b)(1) (2012); *see also* Bowen v. Massachusetts, 487 U.S. 879, 905 (1988) ("[T]he Court of Claims has no power to grant equitable relief.").

116 28 U.S.C. § 1491(a)(1) (2012).

best characterization of his claim.[117] Such a plaintiff would not wish to litigate a tort claim in district court only to discover, after years of litigation, that the claim should have been characterized as a taking and brought to the CFC—and that the limitation period for doing so has run.

Of course, a plaintiff suing an ordinary defendant would solve such a problem by simply bringing all potential claims together. Under modern principles of civil procedure, a plaintiff may join together all claims that the plaintiff has against a defendant.[118] Thus, a plaintiff suing an ordinary defendant, if uncertain whether her claim was best characterized as a tort, a breach of contract, or something else, would simply bring all the possible claims together in one lawsuit and let the court sort out which were valid and which invalid.

A plaintiff suing the United States, however, may be unable to employ this straightforward approach. On the one hand, the plaintiff must bring different kinds of claims to different courts; on the other hand, the plaintiff cannot bring different claims based on the same incident to district court and the CFC simultaneously, because section 1500 would oblige the CFC to dismiss. Such a plaintiff is therefore stuck. In effect, section1500 may potentially force such a plaintiff to make his best guess as to which is the best characterization of his claim, bring a case based on that characterization, and abandon the others.[119]

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117 *See, e.g.*, Bremer & Siegel, *supra* note *, at 15 n.76 (noting cases in which a plaintiff suing the United States actually prevailed on a tort theory in district court, only to have a court of appeals rule that the plaintiff's claim was really a contract claim that the plaintiff should have brought to the CFC).

118 *See* FED. R. CIV. P. 18(a).

119 For purposes of this short Article, I have simplified the operation of section 1500 somewhat. I have presented only the main, fundamental problem that the statute poses, and I have omitted certain workarounds that are possible under the statute. In fact, the hypothetical plaintiff described in the text might have some other options.

First, as currently interpreted, the jurisdictional bar of section 1500 applies only to a plaintiff who has the same claim pending in another court at the time the plaintiff files in the CFC. *See* Hardwick Bros. Co. II v. United States, 72 F.3d 883, 886 (Fed. Cir. 1995). Thus, for example, a plaintiff who files a contract claim against the United States in the CFC and then files a tort claim against the United States based on the same facts in district court the next day can proceed with both cases. However, if the plaintiff filed in the reverse order, the CFC would have to dismiss. Of course, this "order-of-filing" rule is absurd—no sensible policy could justify it—and it turns section 1500 into a trap for the unwary plaintiff who does not know about it. Still, under current law, a clever plaintiff could proceed with multiple claims by filing in the correct order. The Justice Department is waging a campaign to abolish the order-of-filing rule, and the Supreme Court recently hinted that it might abolish the rule if presented with the opportunity to do so. *See Tohono O'Odham Nation*, 131 S. Ct. at 1729–30.

Second, while section 1500 bars a plaintiff from pursuing related claims against the United

Section 1500, therefore, is contrary to modern principles of justice. We do not normally require plaintiffs, at their peril, to guess which of their possible claims against a defendant is strongest, but section 1500 does so. The statute is in effect a throwback to the era of the "forms of action" that predated modern civil procedure.[120] In those days, a plaintiff could not, as a plaintiff can today, bring a generic "civil action."[121] Rather, the plaintiff had to choose a specific form of action to bring against a defendant, and woe betide the plaintiff who sued in "trespass" when he should have brought "trespass on the case."[122] Such a plaintiff might lose simply because he mischaracterized an otherwise valid claim.

Today, we look back with some amazement at the long-discredited forms of action. It seems absurd that plaintiffs should have lost because they put the wrong legal label on an otherwise valid claim. The problem of characterization was resolved well over a century ago by procedures that allowed plaintiffs to assert all their theories of relief together. And yet, kicking some plaintiffs out of court over the characterization of their claims, rather than the claims' merits, is precisely what we are doing now, pursuant to section 1500.

C. The Origin and Persistence of the Section 1500 Problem

Like the problems posed by officer suits[123] or for federal employees bringing EEO claims,[124] the section 1500 problem arose by historical accident. Section 1500 was passed in the nineteenth century to deal with a problem posed by principles of res judicata.[125] Following the Civil War, many claimants sought damages for property (mostly

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States in the CFC and another court simultaneously, the statute does not bar a plaintiff from pursuing such claims *sequentially*. Thus, a plaintiff unsure of whether a claim against the United States is best characterized as a tort or a breach of contract might file based on either theory in the appropriate court and, if unsuccessful, pursue the other theory in another court after the first case was finally resolved. Such a plaintiff would, however, run the risk that the statute of limitations on the second suit would expire during the pendency of the first.

For a full account of the many strange details of section 1500's operation, see Bremer & Siegel, *supra* note *.

120 Bremer & Siegel, *supra* note *, at 40.

121 FED. R. CIV. P. 2.

122 *Cf.* Scott v. Shepherd, (1773) 96 Eng. Rep. 525 (K.B.) [526-28] (Blackstone, J., dissenting) (arguing that the plaintiff mistakenly sued in trespass instead of trespass on the case). *See generally* F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES X (1963).

123 *See supra* Part I.

124 *See supra* Part II.A.

125 Bremer & Siegel, *supra* note *, at 16.

cotton) seized by Union forces during the war.[126] Such claimants often sued both the United States in what was then the Court of Claims and an individual federal officer in district court.[127] Under preclusion principles that existed at the time, neither suit would have preclusive effect with regard to the other.[128] Thus, a claimant might lose one suit and still proceed with the other, even if the factual findings in the first suit would, if given preclusive effect, bar the second.[129] This result was illogical, and a statute altering it was appropriate.

Today, however, such a statutory bar is no longer needed, because preclusion principles are now broader.[130] Today, the federal government and its officers would be considered to be in privity for preclusion purposes,[131] and issue preclusion does not require identity of parties anyway.[132] Thus, there is no danger that a plaintiff might sue a federal officer, lose, and then sue the federal government over the same incident in a way that should be barred by preclusion.[133]

Section 1500 is therefore no longer needed to serve its original purpose. But of course, statutes do not automatically sunset simply because they are no longer needed. Section 1500 lives on and knocks out claims for no good reason.

Section 1500 has been widely criticized. Numerous law review articles have called attention to the statute's shortcomings.[134] Moreover, the statute has been roundly criticized by courts and by individual judges—often, even as they dismissed claims pursuant to the statute. Courts and judges have called section 1500 an "anachronistic," "badly drafted" "trap for the unwary" that causes dismissals that are "neither fair nor rational."[135]

So why does section 1500 persist? Like the problems posed by officer suits, it has persisted because institutional forces favor it. Section 1500 allows the Justice Department to win cases.[136] Therefore,

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126 *Id.*

127 *Id.*

128 *Id.*

129 *See id.* at 16–17.

130 *See id.* at 18-20.

131 *Id.* at 19.

132 *See id.* at 19 n.104.

133 *See id.* at 18–20.

134 *See id.* at 7 n.33 (citing articles).

135 Keene Corp. v. United States, 508 U.S. 200, 217 (1993) ("anachronistic"); *id*. at 222 (Stevens, J., dissenting) ("badly drafted"); *see also* Lan-Dale Co. v. United States, 85 Fed. Cl. 431, 433 (2009) ("trap for the unwary" (internal quotation marks omitted)); Vaizburd v. United States, 46 Fed. Cl. 309, 311 (2000) ("neither fair nor rational").

136 Bremer & Siegel, *supra* note *, at 12.

the Justice Department has favored keeping section 1500[137] and indeed has attempted to persuade courts to interpret section 1500 ever more strictly.[138] In addition, the Justice Department is a repeat player in the system, whereas many counsel suing the United States are not.[139] The Justice Department's superior understanding of the many complexities surrounding section 1500 give it a tactical advantage which makes it more likely to prevail in borderline cases. Such victories give it ammunition to use in future cases.

Scholars have attempted to call attention to the need to reforms section 1500,[140] but individual scholars can only do so much. Courts and judges have also recommended reform,[141] but courts and judges are not lobbyists. What is needed is an institutional player focused on improving the system rather than on winning cases.

D. Enter ACUS, Again

Once again, that institutional player was ACUS. ACUS is independent of DOJ and any other agency that might have a parochial interest in maintaining technical obstacles for plaintiffs suing the government.[142] ACUS also combines public and private elements,[143] thereby putting it in a good position to balance public and private interests with regard to reforming the system for seeking relief from wrongful government action.

The Section 1500 project, which led to Recommendation 2012-6, did not have an easy journey through the ACUS recommendation process. The Justice Department opposed the recommendation and sought to have it delayed multiple times,[144] and the DOJ member of ACUS dissented when the recommendation was finally adopted.[145]

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137 *See* ACUS Recommendation 2012-6, Reform of 28 U.S.C. Section 1500, 78 Fed. Reg. 2,939, 2941 (Dec. 6, 2012) (Separate Statement of Government Member Elana Tyrangiel, Acting Assistant Attorney General, U.S. Department of Justice).

138 *See* Bremer & Siegel, *supra* note *, at 23.

139 *See id.* at 11–12.

140 *See supra* note 134.

141 *See supra* note 135.

142 *See supra* Part I.B.

143 The voting membership of ACUS consists of both government officials and private citizens. *See* 5 U.S.C. § 593(b).

144 *See, e.g.*, ADMIN. CONFERENCE OF THE U.S., MINUTES OF 57TH PLENARY SESSION 3 (Dec. 6–7, 2012), https://www.acus.gov/sites/default/files/documents/57th%20Plenary%20Session%20Meeting%20Minutes.pdf (noting defeat of DOJ motion to postpone consideration of ACUS Recommendation 2012-6 for one year).

145 *See* ACUS Recommendation 2012-6, Reform of 28 U.S.C. Section 1500, 78 Fed. Reg. 2,939, 2941 (Dec. 6, 2012) (Separate Statement of Government Member Elana Tyrangiel, Acting Assistant Attorney General, U.S. Department of Justice).

Nonetheless, ACUS ultimately adopted a recommendation that proposed fundamental reform to section 1500.

ACUS's imprimatur has already had an impact. While Recommendation 2012-6 has not been implemented at the time of this writing, a bipartisan group of senators introduced a bill to implement it in the 113th Congress.[146] In the House of Representatives, a similar bill actually cleared the Judiciary Committee.[147] This was the first legislation directed at section 1500 since 1997. Thus, ACUS's recommendation revived a reform effort that had been dormant for nearly twenty years.

There was not enough time remaining in the 113th Congress to enact the proposed implementing legislation. Still, the introduction of implementing legislation is an important first step. It took seven years for Congress to implement ACUS Recommendation 69-1.[148] With further effort and persistence, ACUS Recommendation 2012-6 may take its rightful place alongside Recommendation 69-1 among ACUS's proud achievements in the area of reforming the procedures for bringing lawsuits against the federal government.

III. Lessons of the Recommendations

The story of Recommendations 69-1 and 2012-6 suggests two potential lessons for the future of ACUS. First, these recommendations call attention to the vital role that ACUS plays with regard to reform and rationalization of the procedures for seeking relief from wrongful government action. As the story of these recommendations shows, it is unrealistic to expect the government agencies most closely involved with these procedures to be the catalyst for reform themselves. In the ideal world, DOJ, when it won cases on technical grounds that served no useful purpose, would seek to reform the system so that private parties seeking relief from government action would have ready access to justice. Indeed, in the ideal world, DOJ might waive such grounds and avoid winning on them in the first place.

In the real world, however, government lawyers' natural desire to serve their client's immediate interest frequently outweighs their higher calling of doing justice.[149] While government lawyers recognize

146 S. 2769, 113th Cong. (2014) (introduced by Senator Wicker (R-MS), cosponsored by Senators Cornyn (R-TX) and Tester (D-MT)).

147 H.R. 5683, 113th Cong. (as introduced, Nov. 12, 2014).

148 ACUS Recommendation 69-1 was published in 1969, *see supra* note 5, and the bill implementing it was signed into law on October 21, 1976. *See supra* note 92.

149 *See supra* notes 59–60 and accompanying text.

that higher calling, and sometimes even act upon it to the detriment of the government's immediate interest in a particular case, their duty to represent their client's interest puts them in a difficult position. In some cases they may sincerely believe that winning on a technicality is appropriate because the case lacks merit anyway. The conflicting pressures on government counsel make them an unlikely source of systemic reform that would work to the detriment of the government in individual cases.

For these reasons, the role of ACUS in reforming procedures for lawsuits against the government is vital, and ACUS should continue its important work in this area. Of course, this does not mean that ACUS should seek to eliminate all technical barriers to suit. Some such barriers serve important policy purposes, even if they are unrelated to the merits of a case.[150] But where a procedural barrier serves no useful purpose, it should be eliminated.

Such work may require ACUS to oppose DOJ in the short run, but reform may be in the long-run interests of all parties. No one seems to have any desire to turn the clock back on Recommendation 69-1 and return to the days of obscure, metaphysical arguments about sovereign immunity. Once a needless technical barrier is eliminated and cases can be won or lost on grounds that matter, the superiority of the reformed system is clear to all.

The other lesson of these recommendations is the value of recommendations that point out a clear problem and identify a specific solution. Many recent ACUS recommendations follow this valuable pattern.[151] Some recent recommendations, however, are so mild that it is difficult to identify the problem to which they are addressed. For example, ACUS's recent recommendation regarding the Government in the Sunshine Act[152] represented an opportunity for ACUS to address the difficulties that the Sunshine Act creates for the ability of multimember agencies to engage in collegial decisionmaking—difficulties that a committee of ACUS itself had called attention to nearly

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150 For example, the requirement that a plaintiff present a tort claim against the United States administratively before bringing suit, 28 U.S.C. § 2675(a) (2012), is thought to promote fair and expeditious settlement. *See* S. REP. NO. 89-1327, at 6 (1966).

151 In addition to the Section 1500 recommendation, see, e.g., ACUS Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2259 (Jan. 17 2012); ACUS Recommendation 2012-3, Immigration Removal Adjudication, 77 Fed. Reg. 47,802 (Aug. 10, 2012); ACUS Recommendation 2012-8, Inflation Adjustment Act, 78 Fed. Reg. 2943 (Jan. 15, 2013).

152 ACUS Recommendation 2014-2, Government in the Sunshine Act, 79 Fed. Reg. 35,990 (June 25, 2014).

twenty years earlier.[153] The recommendation, however, merely calls upon agencies to take such mild steps as "develop[ing] and . . . releas[ing] a succinct advisory document that discusses the mechanisms for attending and participating in open meetings,"[154] "post[ing] a meeting agenda on their websites as far in advance of [an open] meeting as possible,"[155] and, if meeting minutes or transcripts are prepared, "post[ing] these documents online in a timely manner after the meeting."[156] These steps are not undesirable but they hardly address any clear problem. Similarly, ACUS's recent recommendation regarding the many regulatory analyses an agency must undertake when conducting a rulemaking proceeding[157] could have attempted to reduce the burden on agencies by identifying requirements that could have been consolidated or eliminated. Instead it called upon Congress and the President to determine whether that was possible (without providing any specific suggestions),[158] while recommending steps such as having the Executive Office of the President "prepare and post on its website a chart listing the various cross-cutting analytical rulemaking requirements" and having agencies prepare and post a list of agency-specific requirements on their websites.[159] Again, such steps are not themselves undesirable but neither do they address a clear problem.

While there is certainly a place for recommendations that collect best practices or suggest incremental improvements, ACUS can add the most value by addressing problems. The section 1500 recommendation is a model in this regard. While narrow in scope, it identifies a clear problem and recommends a solution. If the recommendation is implemented, it will result in a clear improvement.

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153 *See id*. at 35,991 & n.11; JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 158 (7th ed. 2014) (noting that the previous ACUS committee had concluded that the Sunshine Act had a "chilling effect" on collegial agency decisionmaking). The previous ACUS committee had suggested asking Congress to establish a pilot program to experiment with allowing agency members to meet privately provided they promptly released a detailed summary of the meeting. *See* ACUS Recommendation 2014-2, *supra* note 152, at 35,991 & n.11.

154 ACUS Recommendation 2014-2, *supra* note 152, at 35,992.

155 *Id.* at 35,992.

156 *Id.*

157 ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

158 *Id.* at 47,801.

159 *Id.*

Conclusion

ACUS has a proud history of working to reform the system for bringing suits against government action so as to eliminate purposeless procedural barriers. ACUS's unique structure, which merges public and private elements and which is independent of agencies that might have short-term interests in maintaining barriers to suit, makes it an appropriate institution to carry out such efforts. ACUS should continue its important work in this area.