American Bar Association
www.supremecourtpreview.org

No. 09-846

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TOHONO O'ODHAM NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ANNIE L. OWENS
SONYA L. LEBSACK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

KEITH M. HARPER
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
(202) 508-5800

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Ave.
Raleigh, NC 27612
(919) 420-1700

QUESTION PRESENTED

Whether 28 U.S.C. §1500 strips the Court of Federal Claims of jurisdiction over a claim against the United States for money damages if the plaintiff has pending in district court a suit against the United States seeking different relief.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ... i

TABLE OF AUTHORITIES ... vi

STATEMENT ... 1

SUMMARY OF ARGUMENT ... 13

ARGUMENT ... 17

I. SECTION 1500 APPLIES ONLY WHEN A PENDING ACTION SEEKS THE SAME RELIEF AS THE CLAIM ASSERTED IN THE CFC ... 17

   A. The Text And Structure Of The Jurisdictional Scheme Demonstrate That §1500 Applies Only To Claims Seeking The Same Relief ... 17

   B. The Statute's History And Purpose Support Reading §1500 To Bar Only Suits Seeking The Same Relief ... 25

   C. The Court Of Claims And Its Successors Have Held That §1500 Applies Only To Claims For The Same Relief, And Congress Has Implicitly Ratified That Interpretation ... 28

   D. The Government's Reading Of §1500 Would Lead to Absurd And Unjust Results ... 32

   E. Sovereign Immunity Principles Do Not Warrant Reading §1500 To Bar Claimants From Obtaining Complete Relief ... 36

TABLE OF CONTENTS—Continued

Page

F. The *Tecon* Rule Is Not Before This Court 40

II. BECAUSE EACH OF THE NATION'S SUITS SEEKS DIFFERENT RELIEF, SECTION 1500 DOES NOT BAR THE NATION'S CFC ACTION 41

A. Each Complaint Seeks Different Relief To Redress A Different Breach Of Trust 41

B. The Relief Sought In The Nation's Two Suits Does Not Overlap 47

CONCLUSION 53

STATUTORY ADDENDUM

Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612, 612 ..... 1a

Act of Mar. 3, 1863, ch. 92, §§1-3, 5, 12 Stat. 765, 765, 766 ..... 1a

Act of Mar. 3, 1863, ch. 120, §§1-3, 12 Stat. 820, 820 ..... 3a

Act of June 25, 1868, ch. 71, §8, 15 Stat. 75, 77 ..... 5a

1 Rev. Stat. 197, §1067 (2d ed. 1878) 5a

Act of Mar. 3, 1887, ch. 359, §§1-2, 24 Stat. 505, 505 ..... 5a

Act of Mar. 3, 1911, ch. 231, §154, 36 Stat. 1087, 1138 ..... 7a

Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056 ..... 7a

TABLE OF CONTENTS—Continued

Page

Act of June 25, 1948, ch. 646, §1500, 62 Stat. 869, 942 .... 8a

28 U.S.C. §1500 (2006) 8a

TABLE OF AUTHORITIES

CASES

Page(s)

AD Global Fund, LLC v. *United States*, 68 Fed. Cl. 663 (2005) ... 24

Allied Materials & Equipment Co. v. *United States*, 210 Ct. Cl. 714 (1976) ... 29

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956) ... 41

Block v. *Neal*, 460 U.S. 289 (1983) ... 36

Boston Five Cents Savings Bank, FSB v. *United States*, 864 F.2d 137 (Fed. Cir. 1988) ... 29, 35

Bowen v. *Massachusetts*, 487 U.S. 879 (1988) ... 50

Branch v. *Smith*, 538 U.S. 254 (2003) ... 19

British American Tobacco Co. v. *United States*, 89 Ct. Cl. 438 (1939) ... 27, 29

Casman v. *United States*, 135 Ct. Cl. 647 (1956) ... 2, 28, 29, 33

Cherokee Nation v. *United States*, 21 Cl. Ct. 565 (1990) ... 46

Cheyenne-Arapaho Tribes v. *United States*, 512 F.2d 1390(Ct. Cl. 1975) ... 9

Clinton v. *Jones*, 520 U.S. 681 (1997) ... 40

Cobell v. *Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) ... 47

Corona Coal Co. v. *United States*, 263 U.S. 537 (1924) ... 29

TABLE OF AUTHORITIES—Continued

Page(s)

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 45

DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 18

Dennistoun v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) 4

Department of Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 36, 50, 51, 52

Dolan v. *United States Postal Service*, 546 U.S. 481 (1996) 37, 38

Eastern Shawnee Tribe v. *United States*, 582 F.3d 1306 (Fed. Cir. 2009) 35

E.E. Bolles Wooden Ware Co. v. *United States*, 106 U.S. 432 (1882) 26

Franconia Associates v. *United States*, 536 U.S. 129 (2002) 39

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 7

Great-West Life & Annuity Insurance Co. v. *Knudson*, 534 U.S. 204 (2002) 50, 51

Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 32

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 40

Hobbs v. *McLean*, 117 U.S. 567 (1886) 18

In re Skinner & Eddy Corp., 265 U.S. 86 (1924) 29

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 39

TABLE OF AUTHORITIES—Continued

Page(s)

John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 33

Johns-Manville Corp. v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988) 25

Keene Corp. v. *United States*, 508 U.S. 200 (1993) ....*passim*

Klamath & Modoc Tribes v. *United States*, 174 Ct. Cl. 483 (1966)...................11, 34, 46, 49

Kosak v. *United States*, 465 U.S. 848 (1984) 23, 37

Landis v. *North American Co.*, 299 U.S. 248 (1936) 35

Lane v. *Peña*, 518 U.S. 187 (1996)..................................37

Lehman v. *Nakshian*, 453 U.S. 156 (1981).....................37

Lorillard v. *Pons*, 434 U.S. 575 (1978)............................30

Los Angeles v. *Lyons*, 461 U.S. 95 (1983).......................18

Loveladies Harbor, Inc. v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994)......12, 22, 29, 30, 33, 35

Matson Navigation Co. v. *United States*, 284 U.S. 352 (1932) 4, 25

McLeod v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. 1869)...4

Moseley v. *V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) 19

National Air Traffic Controllers Ass'n v. *United States*, 160 F.3d 714 (Fed. Cir. 1998) 21

TABLE OF AUTHORITIES—Continued

Page(s)

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Insurance Co.*, 514 U.S. 645 (1995) 23

Osage Nation v. *United States*, 57 Fed. Cl. 392 (2003) 46

Overall Roofing & Construction Inc. v. *United States*, 929 F.2d 687 (Fed. Cir. 1991) 21

Papago Tribe v. *United States*, 38 Ind. Cl. Comm'n 542 (1976) 8

Pauley Petroleum Inc. v. *United States*, 591 F.2d 1308 (Ct. Cl. 1979) 49

Richlin Security Service Co. v. *Chertoff*, 128 S. Ct. 2007 (2008) 40

Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 37

Scarborough v. *Principi*, 541 U.S. 401 (2004) 39

Shepard v. *United States*, 544 U.S. 13 (2005) 31

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 18

Smith v. *City of Jackson*, 544 U.S. 228 (2005) 20

Tecon Engineers, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965) 40

Truckee-Carson Irrigation District v. *United States*, 223 Ct. Cl. 684 (1980) 29

TABLE OF AUTHORITIES—Continued

Page(s)

UNR Industries, Inc. v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) 30

United States v. *Alire*, 73 U.S. (6 Wall.) 573 (1868) 20

United States v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915) 53

United States v. *Freeman*, 44 U.S. (3 How.) 556 (1845) 20

United States v. *Hougham*, 364 U.S. 310 (1960) 53

United States v. *Idaho*, 508 U.S. 1 (1993) 39

United States v. *Jones*, 131 U.S. 1 (1889) 21

United States v. *Mitchell*, 463 U.S. 206 (1983) .... *passim*

United States v. *New York Rayon Importing Co.*, 329 U.S. 654 (1947) 36

United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 36

United States v. *Testan*, 424 U.S. 392 (1976) 46

United States v. *Williams*, 514 U.S. 527 (1995) 36, 39, 40

United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 37

White Mountain Apache Tribe v. *United States*, 26 Cl. Ct. 446 (1992) 9

Winthrop Iron Co. v. *Meeker*, 109 U.S. 180 (1883) 49

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

Administrative Procedure Act,
5 U.S.C. §702 .... 8, 11, 34, 36, 46

11 U.S.C. §106(c) 36

American Indian Trust Fund Management
Reform Act of 1994, 25 U.S.C.
§§4001 *et seq.* 9
§4022 48

28 U.S.C.
§1292(d)(2) 14, 24
§1346(a)(1) 36
§1346(a)(2) 7
§1346(b)(1) 7, 8
§1491 36
§1491(a)(1) 7
§1491(a)(2) 21, 31, 46
§1491(b)(2) 21
§1500 .... *passim*
§1505 .... 7, 36
§2501 39
§2516 37
§2674 7
§2680(b) 37

Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 .... 3, 20

Act of Mar. 3, 1863, ch. 92, 12 Stat. 765 .... 3, 20

Act of Mar. 3, 1863, ch. 120, 12 Stat. 820 .... 4, 26

Act of Mar. 17, 1866, ch. 19, 14 Stat. 9 3

Act of June 25, 1868, ch. 71, 15 Stat. 75 5

TABLE OF AUTHORITIES—Continued

Page(s)

Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 .... 6, 20, 21

Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 6

Act of Aug. 2, 1946, ch. 753, 60 Stat. 812 7

Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 7

Act of June 25, 1948, ch. 646, 62 Stat. 869 6

Pub. L. No. 92-415, 86 Stat. 652 (1972) 31

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 .... 6, 31

Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 6

25 C.F.R. §162.619 48

LEGISLATIVE MATERIALS

Misplaced Trust, H.R. Rep. No. 102-499 (1992) 9

S. Rep. No. 92-1066 (1972) 31

Cong. Globe, 37th Cong., 2d Sess. (1862) 2

Cong. Globe, 40th Cong., 2d Sess. (1868) 6

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009) 19

Bogert, George T., *Trusts* (6th ed. 1987) 9, 10, 47, 49

Bogert, George Gleason, & George Taylor Bogert, *The Law of Trusts and Trustees* (2d ed. 1995) 48

TABLE OF AUTHORITIES—Continued

Page(s)

Bouvier, John, *A Law Dictionary* (12th ed. 1868) 18

Burrill, Alexander, *A Law Dictionary and Glossary* (2d ed. 1867) 18

Cowen, Wilson, et al., *The United States Court of Claims* (1978) 3, 4

Dobbs, Dan B., *The Law of Remedies* (2d ed. 1993) 50

Peabody, Payson R., et al., *A Confederate Ghost that Haunts the Federal Courts*, 4 Fed. Cir. B.J. 95 (1994) 4, 6

Restatement (Second) of Judgments (1982) 19

Restatement (Second) of Trusts (1959) 48

Schwartz, David, *Section 1500 of the Judicial Code*, 55 Geo. L.J. 573 (1967) 4, 5

Wharton, J.J.S., *Law Lexicon, or Dictionary of Jurisprudence* (2d ed. 1860) 18

Wright, Charles Alan, & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 2002) 19

IN THE

Supreme Court of the United States

No. 09-846

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

Section 1500 of the Judiciary Code provides that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States." As this Court noted when it last considered §1500, the statute was enacted during Reconstruction in response to "duplicative lawsuits" by claimants suing in two different courts, on different theories, for the same substantive relief: monetary compensation for cotton seized in the Civil War. *Keene Corp.* v. *United States*, 508 U.S. 200, 206 (1993).

Over fifty years ago, the Court of Claims held that §1500 does not strip it of jurisdiction over a claim for money damages against the United States when the plaintiff has a suit pending in another court seeking *different* relief. *Casman* v. *United States*, 135 Ct. Cl. 647, 650 (1956). Such a suit, the court concluded, is not "for or in respect to" the claim in the CFC. *Id.* Moreover, because the Court of Claims could, with few exceptions, award only money damages, any other rule would leave some plaintiffs without a complete remedy for their injuries. *Id.* The Government and private litigants alike have long operated under the *Casman* rule, and Congress has implicitly ratified the Court of Claims' holding.

The Government now asks this Court to discard that established interpretation and hold that §1500 bars a plaintiff from seeking money damages in the CFC whenever the plaintiff has pending in another court any suit "associated in any way" with the CFC action—whether or not the suits seek duplicative relief, and whether or not the plaintiff could be made whole in a single action. That surpassingly broad reading of §1500 stretches the statute far beyond its text, disregards its historical purpose, and would lead to absurd and unjust results, forcing litigants to choose between money damages and equitable relief even if they are entitled to both. And it wrongly reads §1500 to thwart the goal of the larger jurisdictional scheme of which it is a part: to ensure that plaintiffs with claims against the Government obtain meaningful redress, consistent with President Lincoln's observation that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., App. 2 (1862).

1. a. Before 1855, Congress provided remedies to persons with claims against the Government by enacting private bills in individual cases. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Over time, requests for private bills mounted, and their disposition became increasingly burdensome. In 1855, Congress created the Court of Claims to "hear and determine 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." Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612. The court operated as an advisory body, making recommendations to Congress, which retained final decision-making authority. *Id.* §§7-9, 10 Stat. 613-614; Cowen et al., *The United States Court of Claims* 13-19 (1978).

This system proved inadequate to resolve the enormous volume of Civil War claims. Nor did it provide a disinterested tribunal capable of "render[ing] prompt justice" against the Government. In 1863, therefore, at President Lincoln's urging, Congress authorized the Court of Claims to enter final judgment against the United States in the cases described in the 1855 Act. Act of Mar. 3, 1863, ch. 92, §3, 12 Stat. 765; Cowen 20-25.[1]

That same day, Congress enacted the Captured and Abandoned Property Act. CAPA authorized the Secretary of the Treasury to appoint agents to seize property—primarily cotton—in insurrectionist areas, auc-

---

[1] In 1866, Congress repealed a provision of the 1863 Act that had required Treasury to appropriate funds before judgments could be paid, making the court's judgments truly final. Act of Mar. 17, 1866, ch. 19, §1, 14 Stat. 9.

tion it, and retain the proceeds. Act of Mar. 3, 1863, ch. 120, §§1-2, 12 Stat. 820. CAPA also gave the owner of seized property the right to bring suit in the Court of Claims. If the owner could demonstrate that he had "never given any aid or comfort" to the rebellion, he could recover the auction proceeds, less the expenses incurred in the sale. *Id.* §3, 12 Stat. 820; Cowen 25-27.

Numerous claimants whose cotton had been seized brought suit against the United States under CAPA. Many claimants, however, had difficulty establishing that they had never given aid or comfort to the rebellion, as CAPA required. To circumvent that requirement, certain claimants also brought suits against Treasury officers or agents in state court (generally removed to federal court) on tort theories such as conversion or trespass. *Dennistoun* v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866); *McLeod* v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. 1869); *see Keene*, 508 U.S. at 206; Schwartz, *Section 1500 of the Judicial Code*, 55 Geo. L.J. 573, 576-577 (1967).

Although they proceeded on different legal theories against different defendants, these tort suits sought the same relief for the same injury as their counterpart suits in the Court of Claims: money for the same confiscated cotton. Because, at the time, *res judicata* might not have barred successive suits against the United States and its officers or agents, the suits presented the prospect that the Government would be required to defend itself twice, or even that plaintiffs might recover twice, on account of the same captured property. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-356 (1932); Peabody et al., *A Confederate Ghost that Haunts the Federal Courts*, 4 Fed. Cir. B.J. 95, 99-102 (1994).

In 1868, seeking to stem the flood of claims arising from the Civil War, Congress enacted legislation requiring claimants to "prove affirmatively" their loyalty to the United States and expanding the United States' right to appeal Court of Claims judgments. Act of June 25, 1868, ch. 71, 15 Stat. 75; Schwartz 576-577. The predecessor to §1500 was a last-minute amendment to the 1868 Act. It provided:

> [N]o 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 … 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.

1868 Act §8, 15 Stat. 77.

Its sponsor explained:

> 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. The object is to put that class of persons to

> their election either to leave the Court of Claims or to leave the other courts.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (statement of Sen. Edmunds). By barring claimants from bringing to the Court of Claims "any claim … for or in respect to which" a suit against a U.S. officer or agent was pending in another court, the amendment prevented cotton claimants from bringing duplicative claims for compensation for the same confiscated property. *Keene*, 508 U.S. at 206; Peabody 100-101.[2]

b. Since the 1860s, Congress has repeatedly expanded the United States' waiver of sovereign immunity, broadening both the Court of Claims' and the district courts' jurisdiction over claims against the Government, in keeping with the 1863 statute's original aim of rendering prompt justice for claimants injured by government action.

The 1887 Tucker Act expanded the Court of Claims' jurisdiction to encompass "[a]ll claims founded upon the Constitution," as well as statutes, regulations, and contracts. Act of Mar. 3, 1887, ch. 359, §1, 24 Stat.

---

[2] Section 8 of the 1868 Act was codified with minor changes as §1067 of the 1878 Revised Statutes, and reenacted without change as §154 of the 1911 Judicial Code. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1138. In 1948, Congress moved the statute to its present location in Title 28, modernized its language, and expanded the class of suits that trigger its application to include suits "against the United States" as well as officers or agents. Act of June 25, 1948, ch. 646, 62 Stat. 869, 942. Congress made nonsubstantive revisions to §1500 in 1982 when it transferred the trial functions of the Court of Claims to the U.S. Claims Court, Pub. L. No. 97-164, §129, 96 Stat. 25, 40, and in 1992 when it renamed the Claims Court the Court of Federal Claims, Pub. L. No. 102-572, §902(a), 106 Stat. 4506, 4516.

505 (codified as amended at 28 U.S.C. §1491(a)(1)). At the same time, the "Little Tucker Act" granted the district and circuit courts concurrent jurisdiction over such claims "where the amount of the claim does not exceed" $1,000 or $10,000 respectively. *Id.* §2 (codified as amended at 28 U.S.C. §1346(a)(2)). These provisions significantly broadened the Government's waiver of immunity, "'giv[ing] the people of the United States what every civilized nation of the world ha[d] already done—the right to go into the courts to seek redress against the Government for their grievances.'" *Mitchell*, 463 U.S. at 213-214.

In 1946, Congress granted the Court of Claims jurisdiction over Indian tribes' claims against the United States. Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056 (codified as amended at 28 U.S.C. §1505). The "Indian Tucker Act" granted tribal claimants the same access to the Court of Claims that the Tucker Act had granted individual claimants, giving tribes "'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed.'" *Mitchell*, 463 U.S. at 214.

Also in 1946, Congress enacted the Federal Tort Claims Act, which for the first time waived immunity for a broad range of tort claims against the United States and gave the district courts exclusive jurisdiction over those claims. Act of Aug. 2, 1946, ch. 753, 60 Stat. 812, 842 (codified as amended at 28 U.S.C. §§1346(b)(1), 2674).

The Court of Claims' jurisdiction had from the beginning been construed to extend only to claims for money. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962) (plurality). The FTCA likewise authorized the award

only of "money damages." 28 U.S.C. §1346(b)(1). In 1976, however, Congress again expanded the relief available against the United States by amending the Administrative Procedure Act to waive immunity in suits "seeking relief other than money damages." 5 U.S.C. §702. Section 702 gave district courts the power to award equitable relief against the Government in cases otherwise within their jurisdiction.

Accordingly, §1500 now forms part of a complex jurisdictional scheme under which the Government has waived immunity for a wide range of claims for money damages and equitable relief, with some such claims cognizable only in the CFC and some only in the district courts.

2. This case arises out of the Tohono O'odham Nation's attempt to obtain two distinct remedies for two distinct breaches of the Government's fiduciary duties as trustee for the Nation.

For more than a century, the Government has held in trust for the Nation substantial funds and other assets, including approximately 2.9 million acres of land in southern Arizona. Over the years, that land has produced copper, other minerals, sand, and gravel, and trust lands and mineral rights have been leased to third parties. The Nation's trust corpus also includes judgment funds and other monies, including $26 million settling the Nation's claim for the Government's taking of 6.3 million acres of aboriginal lands. Pet. App. 60a-62a, 80a; *Papago Tribe* v. *United States*, 38 Ind. Cl. Comm'n 542, 542-544 (1976).

As trustee, the Government has at least two basic fiduciary obligations. *First*, "[t]he most fundamental fiduciary responsibility of the government … is the duty to make a full accounting of the property and

funds held in trust." *Misplaced Trust*, H.R. Rep. No. 102-499, at 7 (1992); *see White Mountain Apache Tribe* v. *United States*, 26 Cl. Ct. 446, 448-449 (1992) (describing standards for accounting action brought under Indian Claims Commission). Where a trustee has failed to provide a beneficiary with an adequate accounting, a court may order one as an equitable remedy, requiring the trustee to provide all information about the trust assets necessary to protect the beneficiary's interests. Bogert, *Trusts* §§141-142 (6th ed. 1987).

Second, "[a]part from the duty to account, the Federal Government has a fiduciary duty to 'maximize the trust income by prudent investment,'" *Misplaced Trust* 7 (quoting *Cheyenne-Arapaho Tribes* v. *United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975)), and to "manage Indian resources so as to generate proceeds for the Indians," *Mitchell*, 463 U.S. at 227. A breach of this separate duty can give rise to a claim for money damages. *Id.* at 226.

The Government's long-standing failure to fulfill those two distinct obligations to tribal trust beneficiaries is well-documented. A 1992 House Report, after surveying the lengthy history of the trusts' management, concluded both that "[t]he Bureau [of Indian Affairs] has failed to accurately account for trust fund moneys" and that "[i]t cannot consistently and prudently invest trust funds." *Misplaced Trust* 56. The 1992 report prompted enactment of the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§4001 *et seq.*, which reaffirmed the Governments' fiduciary duties to tribal beneficiaries. Nonetheless, the Government has yet to remedy the breaches of its fiduciary duties to the Nation.

Accordingly, on December 28 and 29, 2006, the Nation filed two complaints against the United States, the first in the District Court for the District of Columbia and the second in the CFC. Although the complaints contain similar background descriptions of the Government's breaches of its fiduciary obligations to the Nation, they pursue distinct claims for relief for distinct injuries.

As set out more fully below, *infra* Part II.A, the Nation's district court complaint alleges that the Government has failed to provide an adequate accounting. Pet. App. 74a-93a. In addition to related declaratory relief, the complaint seeks "a decree directing the defendants … to provide a complete, accurate, and adequate accounting of the Nation's trust assets" and "a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement [or] equitable restitution…)." *Id.* 92a.

The gravamen of the district court complaint is its plea for the equitable remedy of an accounting. To obtain that remedy, the Nation need not demonstrate that the Government has mismanaged its trust assets. Bogert §142. Such a "pre-liability" accounting is purely informational: it would tell the Nation precisely what its trust assets are and describe their condition, including any leases or easements the Government may have granted—important information the Nation does not now have. If the accounting reveals that assets to which the Nation already holds title are not properly recorded in the Government's books, the Nation seeks to have those books corrected through a restatement of its account. The complaint seeks equitable monetary relief only if "appropriate" to give effect to the

accounting and restatement—for instance, if the court deems it appropriate to order the restoration of assets that already belong to the Nation but are missing from the trust.

By contrast, the gravamen of the CFC complaint is a request for "money damages" resulting from the Government's breach of its duty to invest and otherwise manage the Nation's assets prudently—*i.e.*, compensation for returns that should have been earned but were not. Pet. App. 58a-73a. Specifically, the complaint seeks damages arising from the Government's failure to obtain fair market value for leases, permits, and rights-of-way relating to the Nation's land and mineral rights, as well as damages based on the Government's failure to act as a reasonably prudent investor to maximize returns on the funds held in trust for the Nation. *Id.* 67a-73a.

Limitations on each court's ability to grant relief required the Nation to file two complaints to be made whole. The Court of Claims has held that it cannot grant the pre-liability equitable accounting the Nation seeks in the district court. *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 487-488 (1966). And the district court cannot grant the money damages the Nation seeks in the CFC. 5 U.S.C. §702.

3. The Government moved to dismiss the Nation's CFC complaint under §1500. The CFC granted the motion, concluding that the two complaints arose "from the same operative facts and [sought] the same relief." Pet. App. 55a. Observing that the complaints contained similar descriptions of the suits' historical background, the CFC concluded that the same "background facts" were "relevant" to both suits. *Id.* 49a. The CFC also found "overlap" between the complaints' requests for

relief. *Id.* Although the court stated that it lacked jurisdiction to order a stand-alone pre-liability equitable accounting, it concluded that an "'accounting in aid of judgment'" would be necessary to determine damages once liability had been established. *Id.* 40a, 55a. Finally, the court construed the Nation's prayer in the district court for "appropriate" equitable relief incident to an accounting and restatement to seek the same money damages the Nation sought in the CFC. *Id.* 53a & n.14.

The Court of Appeals reversed. Following its en banc decision in *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994), the court held that §1500 bars a claim in the CFC only when another pending suit arises from the same operative facts and seeks the same relief. Pet. App. 8a. Without reaching the question whether the Nation's complaints arise from the same operative facts, the court held that §1500 did not apply because the complaints do not seek the same relief. *Id.* 10a-14a.

Specifically, the Court of Appeals held that even if both complaints seek monetary relief, the complaints do not seek the *same* money. *Id.* 12a-14a. In the district court, the Nation requested a restatement of its trust account balances "to correct any errors discovered in the accounting," and equitable restitution or disgorgement incident to that restatement if appropriate—for instance, if an accounting revealed that assets were missing from the trust. *Id.* 13a. The Nation's request for equitable relief in the district court thus encompassed only restoration of money that the Nation already owned, "but that erroneously does not appear in the Nation's accounts." *Id.* By contrast, in the CFC the Nation sought only "'damages for the injuries and losses'" resulting "from the United States' failure to

properly manage the Nation's assets"—compensation for money the Nation never owned, but that a prudent manager would have earned. *Id.*

The court rejected the contention that the relief sought overlapped because each proceeding could involve an "accounting." *Id.* 15a. That the CFC might employ an "accounting in aid of judgment" to ascertain damages if the Nation proved liability, the court held, did not "transform the Nation's unambiguous request for damages into a request for an accounting." *Id.*

The court emphasized that the two suits posed "no risk of double recovery." *Id.* 18a. In the CFC, the Nation sought only "'money' damages—relief that the Nation has not requested in district court, and which the district court is, in any event, powerless to award." *Id.* Conversely, the court noted that "the Court of Federal Claims is powerless to award" the equitable relief sought in the district court complaint. *Id.*

SUMMARY OF ARGUMENT

I. Section 1500 bars CFC jurisdiction over "any claim for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States." The statute thus requires a determination whether two suits are "'for or in respect to' the same claim." *Keene*, 508 U.S. at 210. As the Court of Claims held long ago, two suits are "for or in respect to" the same "claim" only if they seek the same relief. The CFC and its predecessors have always been courts of limited jurisdiction, and the word "claim" in the Tucker Act and related statutes has always been read to mean a demand for particular relief—money. When §1500 is read *in pari materia* with the remainder of the jurisdictional scheme, it is clear that §1500 likewise

uses "claim" to denote a demand for particular relief. Section 1500 thus applies when two suits seek the same substantive relief, even if on different legal theories or against different defendants.

The Government argues that §1500 applies even to different claims seeking wholly different relief, contending that §1500 turns on the existence of a pending suit "for or in respect to" the CFC claim, and that "in respect to" means "associated [with] in any way." But there is no textual, historical, or purposive reason for reading "in respect to" so broadly. The phrase can have a much narrower sense. *E.g.*, 28 U.S.C. §1292(d)(2) (interlocutory appeal requires "a controlling question of law … *with respect to* which there is a substantial ground for difference of opinion"). Here, a "suit" "for or in respect to" a "claim" for damages in the CFC is most naturally read to mean a suit seeking recovery *on that specific claim*—not a different, but somehow "associated," claim. The words "in respect to" make clear that a plaintiff may not evade §1500 by bringing the same claim for relief twice on different legal theories. *Keene*, 508 U.S. at 213-214. They do not force a claimant to choose between two different remedies to which he is entitled.

That reading is consistent with §1500's historical origin as a means of preventing cotton claimants from bringing duplicative actions. Such suits were objectionable because they gave claimants two opportunities to seek the same relief: money in return for the same confiscated cotton. It is also consistent with *Keene*, which also addressed multiple suits seeking the same relief: money to compensate Keene for payments made to asbestos claimants.

Indeed, the Court of Claims and its successors have held for over fifty years that §1500 applies only when two suits seek the same relief, reasoning that a suit seeking relief other than money damages is not "for or in respect to" a claim for money damages. And Congress has implicitly ratified that interpretation by making significant amendments to the jurisdictional scheme in 1972 and 1982 without evincing any disagreement with the Court of Claims' holding. *Cf. Keene*, 508 U.S. at 212.

That interpretation is also the only one that avoids working significant injustice. Because (with minor exceptions) the CFC can entertain only claims for money damages, a plaintiff who seeks non-monetary relief is typically forced to seek it in district court. The Government's sweeping interpretation of §1500 as encompassing all suits "associated in any way" with a CFC claim would thus prevent plaintiffs entitled to both monetary and non-monetary relief from obtaining a complete remedy. The injustice is particularly obvious in regulatory takings cases. On the Government's theory, a plaintiff who brought an APA challenge to regulation of his property in district court would have to wait for the district court action to run its course before seeking just compensation in the CFC. If the APA challenge were ultimately rejected, the Tucker Act statute of limitations could well have expired in the interim, depriving the plaintiff of his right to seek just compensation.

Sovereign immunity provides no justification for the Government's surpassingly broad reading of §1500. While waivers of immunity are narrowly construed, there is no question that the Government has waived immunity from claims for money damages arising from breaches of its trust obligations. Section 1500 merely

carves out of the CFC's jurisdiction suits concededly within the waiver if another suit "for or in respect to" the CFC claim is pending. As this Court has repeatedly held regarding other such limitations and conditions on suits against the United States, §1500 should be read not through the lens of "strict construction," but using ordinary tools of statutory interpretation. Here, all of those tools yield the same conclusion: Suits that seek different substantive relief are not "for or in respect to" the same claim under §1500.

II. The Nation's two suits seek different substantive relief. The district court action seeks a pre-liability accounting of the Nation's trust assets. Simply put, the Nation seeks basic information about its trust property that it currently lacks: the metes and bounds of its land, the extent of its mineral rights, the leases and easements the Government has granted with respect to those property rights, the amount of its funds, and the manner in which those funds are invested. The Nation needs that information so that it can intelligently exercise its right to decide who should manage those assets and how. Should the accounting reveal a shortfall—showing that assets belonging to the Nation are not in its trust account—the Nation seeks a restatement of its account balances and appropriate equitable relief incident to the accounting and restatement. In short, the district court action seeks to find out what the Nation *already owns*, to correct the books if the accounting reveals they are in error, and, if appropriate, to restore missing assets to the Nation's account.

In contrast, the CFC complaint seeks money damages in compensation for money the Nation *never owned*, but that the trust would have earned were it not for the Government's mismanagement. Specifically, it seeks money damages flowing from the Gov-

ernment's failure to obtain fair market value for the Nation's rights in its land and to maximize the returns on the funds held in trust for the Nation. Because the district court complaint seeks no such relief, it is not a suit "for or in respect to" the Nation's claim in the CFC.

ARGUMENT

I. SECTION 1500 APPLIES ONLY WHEN A PENDING ACTION SEEKS THE SAME RELIEF AS THE CLAIM ASSERTED IN THE CFC

A. The Text And Structure Of The Jurisdictional Scheme Demonstrate That §1500 Applies Only To Claims Seeking The Same Relief

1. Section 1500 provides that the CFC lacks jurisdiction over "any claim for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States." As *Keene* recognized, §1500 thus poses the question whether two suits are "'for or in respect to' the same claim," and "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." 508 U.S. at 210.

As *Keene* noted, the word "claim" "can carry a variety of meanings," and, in isolation, does not greatly "illuminate[]" the statutory inquiry. *Id.* Nonetheless, one core meaning of "claim"—in 1868 as now—is "demand for relief." So understood, §1500 bars the CFC from entertaining any demand for relief already sought in another court, just as the Court of Claims has long held.

In the late nineteenth century, this Court observed: "What is a claim against the United States is

well understood. It is a right to demand money from the United States." *Hobbs* v. *McLean*, 117 U.S. 567, 575 (1886). American law dictionaries from the 1860s similarly define "claim" as a demand for a particular kind of relief: a specific thing, act, or sum of money. 1 Bouvier, *A Law Dictionary* 278 (12th ed. 1868) ("[a] challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant"; "[t]he assertion of a liability to the party making it to do some service or pay a sum of money"); 1 Burrill, *A Law Dictionary and Glossary* 296-297 (2d ed. 1867) ("[a] challenge [or demand] by any man, of the property or ownership of a thing, [or of some interest in it]"; "[a] demand … made by one person upon another to do or to forbear to do some act or thing as a matter of duty" (brackets in original)); Wharton, *Law Lexicon, or Dictionary of Jurisprudence* 148 (2d ed. 1860) ("a challenge of interest of anything which is in another's possession"). Such contemporaneous sources are entitled to particular weight in construing §1500. *See Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 745 (1996) (consulting Bouvier, Burrill, and Wharton to construe "interest" in 1864 National Bank Act).

In modern usage, "claim" continues to mean "demand for relief" in many contexts. This Court's Article III standing decisions, for instance, require a plaintiff to "demonstrate standing for each *claim* he seeks to press"—that is, to establish standing separately for "'each *form of relief* sought'"—even when "all claims for relief derive from a 'common nucleus of operative fact.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (emphases added). Thus, in *Los Angeles* v. *Lyons*, the Court held that the plaintiff had standing to pursue a "*claim* for damages" arising out of the defendants' use of a police chokehold, but lacked standing to

pursue an "injunctive *claim*" challenging the same practice. 461 U.S. 95, 109 (1983) (emphases added). As these cases demonstrate, a "claim" frequently connotes a demand for particular relief, distinct from the set of facts giving rise to it and from related claims arising from those facts.[3]

When §1500 is read, as it must be, in the context of the overall jurisdictional scheme of which it is a part, it is clear that §1500 uses "claim" in that ordinary sense of a demand for particular relief. "[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U.S. 254, 281

[3] *See also Black's Law Dictionary* 282 (9th ed. 2009) (defining "claim," *inter alia*, as "[a] demand for money, property, or a legal remedy to which one asserts a right"; "an interest or remedy recognized at law"). "Claim" may, of course, have other meanings in other contexts. In the modern parlance of claim preclusion, for example, "claim" may refer to "[t]he aggregate of operative facts giving rise to a right enforceable by a court." *Id.* at 281; *see Restatement (Second) of Judgments* §24 cmt. a (1982). This broader definition of "claim," and the modern understanding of claim preclusion with which it is associated, did not gain currency until well after the enactment of §1500's predecessor, *see id.*; 18 Wright & Miller, *Federal Practice and Procedure* §4407 (2d ed. 2002), and the definition does not appear in legal dictionaries of the period; it was not added to *Black's* until 1999. Counts in a complaint asserting different legal bases for relief are also often referred to as "claims." *E.g.*, *Moseley* v. *V Secret Catalogue, Inc.*, 537 U.S. 418, 423-424 (2003) (complaint "contained four separate claims" alleging different theories of trademark infringement and unfair competition). Neither meaning readily fits the historical origin and broader statutory context of §1500. Indeed, in *Keene*, this Court rejected both the argument that "claim" in §1500 imports claim-splitting doctrine and the notion that it connotes a particular legal theory for relief. 508 U.S. at 213-214.

(2003) (plurality). Because §1500 carves out a subset of "claims" that would otherwise be within the CFC's jurisdiction, the word "claim" in §1500 must be read *in pari materia* with the remainder of the jurisdictional scheme. *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes, … it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-565 (1845). Since the court's inception, the "claims" over which the Court of Claims has jurisdiction have been read to mean demands for particular relief—namely, money.

Both the 1855 and 1863 Acts granted the Court of Claims jurisdiction over "claims" against the United States "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." 1855 Act §1, 10 Stat. 612; 1863 Act §2, 12 Stat. 765. Although neither statute expressly limited the relief available to money damages, this Court held that the statute permitted the Court of Claims to entertain only "claims" for money. *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 576 (1868) (Court of Claims' jurisdiction is "confine[d] … to cases in which the petitioner sets up a moneyed demand … from the government"). When Congress enacted §1500's predecessor, therefore, it was already clear that, when used to define the Court of Claims' jurisdiction, "claim" meant a demand for money.

The Tucker Act and Little Tucker Act confirmed this reading. Like its predecessors, the Tucker Act gave the Court of Claims jurisdiction over certain "claims" against the United States. 1887 Act §1, 24

Stat. 505. This Court interpreted the Tucker Act to incorporate the same limitation as its predecessors, holding that, in "the context of the statute," "claims" "may be claims for money only." *United States* v. *Jones*, 131 U.S. 1, 17 (1889). The Little Tucker Act made it even clearer that a "claim" is a demand for money by granting the district courts concurrent jurisdiction "where *the amount of the claim* does not exceed one thousand dollars." 1887 Act §2, 24 Stat. 505 (emphasis added). As *Jones* noted, "[t]his language is properly applicable only to a money claim." 131 U.S. at 19. That historical limitation on the word "claim" still informs the Tucker Act today. *Overall Roofing & Constr. Inc.* v. *United States*, 929 F.2d 687, 689 (Fed. Cir. 1991) ("[T]he word 'claim' carries with it the historical limitation that it must assert a right to presently due money.").[4]

The CFC has thus always been a court of specific and limited jurisdiction—jurisdiction limited not only by subject-matter, but by the kind of relief a plaintiff may seek. Section 1500 must be construed against that backdrop. As the en banc Federal Circuit observed in *Loveladies*: "[U]sing differing relief as a characteristic for distinguishing claims [is] especially appropriate here, because the Court of Federal Claims and its

---

[4] More recently, Congress has empowered the CFC to grant certain equitable relief in limited circumstances. 28 U.S.C. §1491(a)(2) (court may "direct[] restoration to office," "placement in appropriate duty … status," and "correction of applicable records" "as an incident of and collateral to" a money judgment). Except in bid-protest cases, *id.* §1491(b)(2), however, the CFC may still grant equitable relief only incidental to a money judgment. *National Air Traffic Controllers Ass'n* v. *United States*, 160 F.3d 714, 716 (Fed. Cir. 1998).

predecessors have been courts with limited authority to grant relief." 27 F.3d at 1550.

In short, the term "claim" in §1500, as in the remainder of the jurisdictional scheme, necessarily alludes to the particular relief sought. And because §1500 applies only when two suits are "'for or in respect to' the same claim," *Keene*, 508 U.S. at 210, §1500 bars a suit in the CFC only when an action pending in another court seeks the same substantive relief.

2. The Government contends (Br. 16) that §1500 cannot turn on the relief sought because the word "relief" is not in the statute. That misses the point. As demonstrated above, the word "claim" refers to a demand for particular relief.

Rather than addressing the meaning of the key term "claim," the Government relies almost entirely on its construction of the phrase "in respect to," read in isolation from the rest of the statute. It argues (Br. 21) that §1500 precludes CFC jurisdiction even "where the plaintiff's two suits involve *different* claims, so long [as] the suit in the other court is a suit 'in respect to' the plaintiff's claim in the CFC." And it contends (*id.*) that "in respect to" must be read to mean "associated [with] in any way."

That position cannot be squared with *Keene*'s recognition that §1500 "preclud[es] jurisdiction over the claim of a plaintiff with a suit pending in another court 'for or in respect to' *the same claim*," and that the statute "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." 508 U.S. at 210 (emphasis added).

Moreover, the Government's argument fails even on its own terms. "In respect to" has no one fixed

meaning, and does not necessarily mean "associated [with] in any way," however remote. The Government offers no textual, contextual, or purposive justification for such a broad reading of the phrase—it merely asserts that the words "in respect to," standing alone, mandate the most expansive possible reading.

Just as with all statutory language, however, the phrase "in respect to" must be read in context. Indeed, the very decision upon which the Government relies (Br. 21-22) recognized and applied that common-sense principle. *Kosak* v. *United States*, 465 U.S. 848, 853-861 (1984) (while the Court's interpretation was not "ineluctable," reading "arising in respect of" to mean "arising out of" best comported with the statute's structure and purpose).

This Court employed a similar analysis when construing the phrase "relate to" in the preemption clause of ERISA. *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645 (1995). The Court observed that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Id.* at 655. It therefore "look[ed] … to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *id.* at 656, and concluded that the state law in question did not "relate to" a plan under ERISA, even though the law affected insurance coverage choices made by plans, *id.* at 649, 659.

As with the phrase "relate to" in ERISA, reading "in respect to" in §1500 "to extend to the furthest stretch of its indeterminacy" results in an unnatural and strained reading of the statute far removed from

the narrow circumstances that prompted its enactment. Moreover, because the Government's reading "stop[s] nowhere," it admits of no limiting principle that would enable the CFC to discern when it has jurisdiction over a claim. As the Government acknowledges (Br. 45), "'jurisdictional rules should be clear.'" Yet it offers a "rule" that is rife with uncertainty.

Nor is the Government's construction the more natural reading of the statutory text. "In respect to" frequently signifies something far narrower than "associated [with] in any way." Within the Judiciary Code, for example, §1292(d)(2)'s provision for interlocutory appeals from the CFC requires the judge to issue "a statement that a controlling question of law is involved *with respect to* which there is a substantial ground for difference of opinion" (emphasis added). In that context, "with respect to" (a synonym for "in respect to") surely cannot mean "associated with in any way." Rather, a substantial ground for difference of opinion "with respect to" a controlling question of law means a ground for difference of opinion *as to that specific question of law*—not a different, even if related, question. *AD Global Fund, LLC* v. *United States*, 68 Fed. Cl. 663, 665 (2005). Similarly, it is far more natural to read §1500's reference to a "suit" "for or in respect to" a "claim" as this Court read it in *Keene*, to mean a suit seeking to recover *on that specific claim*, not on a different, but somehow "related," claim.

Giving the phrase "in respect to" that more natural construction still allows it a significant function in the statute. As *Keene* explained, "in respect to" clarifies that the statute extends beyond literally identical claims to encompass claims seeking the same substantive relief, but pled on different legal theories or against different federal defendants. 508 U.S. at 213.

3. Finally, the Government contends (Br. 22) that §1500 must be read broadly because "its jurisdictional bar is triggered by '*any* suit or process.'" But the word "any" does not help the Government. It simply means that every pending proceeding that is a "suit or process" "for or in respect to" a "claim" will bar CFC jurisdiction over that claim. The word "any" does nothing to answer the question at issue here—*which* suits are "for or in respect to" a particular claim. As to that question, the Government's position cannot be sustained.

B. The Statute's History And Purpose Support Reading §1500 To Bar Only Suits Seeking The Same Relief

Congress enacted §1500 to prevent claimants from pursuing two suits, one against the United States and one against a U.S. officer or agent, seeking the same relief for the same injury: monetary compensation for their confiscated cotton. As this Court put it, the statute's "declared purpose … 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*." *Matson*, 284 U.S. at 355-356. That is, §1500 "was intended to force an election *where both forums could grant the same relief*, arising from the same operative facts." *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988) (en banc) (emphasis added).

The Government argues (Br. 28-31) that §1500 cannot be so limited because the cotton claimants themselves sought "different" relief in their two suits. According to the Government, the Court of Claims suits were "statutory proceeding[s] to distribute a specific [trust] corpus," while the other suits were tort suits

seeking damages from an individual defendant. But this demonstrates only that the cotton claimants' suits proceeded on different legal theories, *Keene*, 508 U.S. at 212-214, not that they sought different relief. To the contrary, the cotton claimants' suits were "duplicative," *id.* at 206, because they sought the same relief—monetary compensation for the same lost cotton—albeit on different theories and from different defendants.[5]

The Government also argues (Br. 29-31) that the scope of relief available differed in the two fora: A tort suit could recover full compensatory damages, while a suit under CAPA could recover only the sale proceeds, less expenses, held in trust by the Treasury. In fact, the relief available under the tort theories the cotton claimants typically pursued often did not differ greatly from that available under CAPA.[6] More importantly, this argument, too, misses the point: Even if the amount of, or method of calculating, the monetary

[5] The Government similarly contends (Br. 23-24) that §1500 forces a choice between different types of relief because it forced the cotton claimants to choose between defendants. But two suits can seek the same relief even if brought against different defendants. In the case of the cotton claimants, while the legal basis for relief might have differed depending on the defendant, the substantive relief—money for seized cotton—was the same. Likewise, §1500's bar against duplicative suits by a plaintiff and his assignee (*see* Br. 24) merely confirms that §1500 turns on the substantive relief sought, not the parties to the action.

[6] *Compare* CAPA §3, 12 Stat. 820 (damages are "residue of [sale] proceeds, after the deduction of [expenses]"), *with E.E. Bolles Wooden Ware Co.* v. *United States*, 106 U.S. 432, 434 (1882) ("weight of authority" dictates that where conversion is not willful, damages are market value less defendant's expenses in bringing property to market).

award might differ, the damages recoverable in tort and the proceeds recoverable under CAPA were duplicative remedies for the same injury. Section 1500 was addressed to that situation, not to a claimant seeking different, non-duplicative relief in two fora.

Nor is construing §1500 to prohibit only suits seeking the same relief inconsistent with this Court's holding or reasoning in *Keene*, as the Government contends (Br. 33-35). Keene's multiple suits sought the same remedy for the same loss: compensation from the United States for amounts Keene paid to asbestos plaintiffs. 508 U.S. at 203-204. As this Court recognized, *Keene* thus did not present the question whether §1500 bars suits seeking different relief. *Id.* at 212 n.6. Instead, this Court considered whether claims seeking the same relief for the same injury constituted "the same claim" for purposes of §1500 if they were premised on different legal theories. *Id.* at 211-214. In holding that Keene's claims were the same, this Court relied on the original aim of §1500—barring cotton claimants from seeking money compensation for the same cotton based on different legal theories in different courts. *Id.* at 213-214. It also relied on Court of Claims precedent holding that different legal theories did not render claims different for purposes of §1500. *Id.* at 211-212 (citing *British Am. Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 (1939)). Here, both the history and purpose of §1500 and the Court of Claims' longstanding precedent support the conclusion that §1500 does not bar claims for different relief.

C. The Court Of Claims And Its Successors Have Held That §1500 Applies Only To Claims For The Same Relief, And Congress Has Implicitly Ratified That Interpretation

For over fifty years, the Court of Claims and its successors have construed "claim" in §1500 to mean a demand for particular relief. They have thus understood suits seeking *different relief* to be suits "for or in respect to" *different claims*, unaffected by §1500. As *Keene* recognized, 508 U.S. at 210-213, such a well-established judicial interpretation of §1500 is compelling evidence of the statute's meaning, especially where—as here—Congress has since overhauled the statutory scheme without disturbing the court's holding.

The Court of Claims first addressed the question in its 1956 *Casman* decision. Casman alleged that he had been illegally removed from his government job. He sued in the Court of Claims for back pay (money damages that a district court could not grant) and in district court for reinstatement (equitable relief that, at the time, the Court of Claims could not grant). The Court of Claims held that §1500 did not apply because the district court suit was not "for or in respect to" the plaintiff's claim for back pay in the Court of Claims. 135 Ct. Cl. at 650. "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 or the intent of Congress." *Id.*

The Government rejects that common-sense conclusion, contending (Br. 33) that "*Casman* did not purport to interpret Section 1500's statutory text," but "'overr[ode] the words of the section'" based on equitable considerations. To the contrary, "*Casman* and its

progeny reflect a carefully considered interpretation of the statutory term 'claims.'" *Loveladies*, 27 F.3d at 1551. While *Casman* did point out the inequities attendant on the Government's interpretation, it rested its holding on "the language of the statute," understood in light of the statute's history and purpose. 135 Ct. Cl. at 650. The court reasoned that a suit "for or in respect to" a claim is a suit seeking the same relief: "The claim in this case and the relief sought in the district court are entirely different.… Plaintiff does not have pending in any other court a suit 'for or in respect to' his claim for back pay within the meaning of section 1500[.]" *Id.* at 649-650.

The Court of Claims and its successors have "consistently applied" *Casman*'s reading of §1500. *Loveladies*, 27 F.3d at 1550; *see also, e.g., Boston Five Cents Sav. Bank, FSB* v. *United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) ("because different types of relief are sought" in each forum, §1500 does not apply); *Truckee-Carson Irrigation Dist.* v. *United States*, 223 Ct. Cl. 684, 685 (1980) ("It is settled law that §1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment."); *Allied Materials & Equip. Co.* v. *United States*, 210 Ct. Cl. 714, 716 (1976).[7]

---

[7] By contrast, courts have held that §1500 barred suits in the CFC where plaintiffs sought duplicative relief, even if on different legal theories. *In re Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924) (two suits seeking damages for cancellation of same ship-building contracts); *Corona Coal Co.* v. *United States*, 263 U.S. 537, 539-540 (1924) (two suits seeking compensation for Government's alleged underpayment for same coal); *British Am. Tobacco*, 89 Ct. Cl. at 439-440 (two suits on "same claim" for "recovery of the same amount for the same gold bullion").

The lone aberration in this history is *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) (en banc), which purported to reject *Casman* in dicta. This Court declined to endorse *UNR*'s dicta in *Keene*, 508 U.S. at 212 n.6, and it was repudiated by the en banc Federal Circuit just two years later in *Loveladies*, which carefully considered and reaffirmed the validity of the *Casman* rule. 27 F.3d at 1548-1549.

In *Loveladies*, owners of wetlands challenged the Army Corps of Engineers' denial of a fill permit in district court under the APA. While that suit was pending, plaintiffs sued in the CFC seeking just compensation for the Corps' alleged taking of their property. The Federal Circuit held that §1500 did not bar the CFC action because the two suits did not seek the same relief. 27 F.3d at 1548-1551. The court rejected the Government's plea that it "overturn longstanding precedent and adopt … a new definition of 'claims'" under which "claims" are the same whenever they arise from the same "operative facts," "regardless of the type of relief sought." *Id.* at 1552. It noted that such an interpretation of §1500 could "force plaintiffs to forego monetary claims in order to challenge the validity of Government action" or "preclude challenges to the validity of Government action in order to protect a Constitutional claim for compensation." *Id.* at 1556. The court concluded that nothing in §1500's language or history warranted extending it to suits that seek different relief, preventing plaintiffs from obtaining the complete relief to which they are entitled. *Id.*

Congress has implicitly ratified that holding. This Court presumes that Congress is "aware of … earlier judicial interpretations and, in effect, adopt[s] them" when it reenacts or amends a statute without relevant change. *Keene*, 508 U.S. at 212; *see Lorillard* v. *Pons*,

434 U.S. 575, 580-581 (1978). "[T]he claim to adhere to case law is generally powerful once a decision has settled statutory meaning," particularly when many years have passed since the relevant judicial decision "without any action by Congress to modify the statute." *Shepard* v. *United States*, 544 U.S. 13, 23 (2005). *Keene* recognized and applied this principle to §1500, holding that Congress's reenactment of §1500's "claim for or in respect to which" language following the Court of Claims' decision in *British American Tobacco* evinced an implicit adoption of that case's interpretation of §1500. 508 U.S. at 212.

The same is true here. Congress has amended §1500 and the Tucker Act on several occasions since *Casman*, without ever suggesting any disagreement with *Casman*'s holding. In 1972, for example, Congress took action to address wrongful discharge claims like that in *Casman*. Rather than amend §1500 to reverse or narrow *Casman*'s holding, Congress amended the Tucker Act to authorize the Court of Claims to award reinstatement in addition to back pay. Pub. L. No. 92-415, §1, 86 Stat. 652 (codified at 28 U.S.C. §1491(a)(2)). As the Senate Report explained, "limits on the remedies available in the Court of Claims impose[d] unwarranted burdens on the litigant," for whom it was "necessary … to file an additional suit in a Federal district court to obtain reinstatement." S. Rep. No. 92-1066, at 2 (1972). The amendment was required to allow such plaintiffs "to obtain all necessary relief in one action." *Id.* at 1.

In 1982, moreover, Congress undertook a wholesale restructuring of the Court of Claims and its jurisdiction in the Federal Courts Improvement Act. Pub. L. No. 97-164, 96 Stat. 25. The FCIA transferred the appellate functions of the Court of Claims to the newly-

created Court of Appeals for the Federal Circuit, and created the United States Claims Court—now the CFC—to inherit the Court of Claims' trial jurisdiction. *Mitchell*, 463 U.S. at 228 n.33. Even as it overhauled the entire jurisdictional scheme, however, Congress made no substantive change to §1500. Had Congress wanted to correct the settled judicial interpretation of §1500, it surely would have done so then. Because it did not, as *Keene* recognized, the reasonable inference is that Congress was aware of the longstanding interpretation of §1500 and chose not to disturb it.

D. The Government's Reading Of §1500 Would Lead to Absurd And Unjust Results

The Government's construction of §1500 would lead to absurd and inequitable consequences that could not have been contemplated by the Congress that originally enacted the statute and that threaten to undermine the central purpose of the jurisdictional scheme. Such interpretations "are to be avoided if alternative interpretations consistent with the legislative purpose are available," as is true here. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

In particular, the Government's proposed rule would make it impossible for plaintiffs simultaneously to pursue injunctive or other equitable relief from ongoing governmental wrongdoing and money damages for past wrongs. Plaintiffs would be forced to relinquish one remedy or the other, or else to gamble that the first suit will be finally decided before expiration of the limitations period on the other.

Casman and *Loveladies*—both of which the Government asks this Court to overrule—illustrate the point. In *Casman*, the plaintiff's wrongful discharge, if

proven, would have entitled him to both reinstatement and back pay—but he could obtain reinstatement only in district court and back pay only in the Court of Claims. 135 Ct. Cl. at 650. On the Government's theory, §1500 would have required Casman to litigate his claim for reinstatement, including all appeals, to conclusion before he could sue for back pay in the Court of Claims. By that time, however, the Tucker Act statute of limitations could well have run, and because equitable tolling is unavailable in the Tucker Act context, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008), Casman would have lost his claim to back pay. Alternatively, to preserve his back-pay claim, Casman would have had to defer or abandon his claim for reinstatement. As the Court of Claims put it: "'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.'" 135 Ct. Cl. at 650.

Similarly, in *Loveladies*, the plaintiff sought to have agency action set aside under the APA while preserving its ability, in the event the agency action was held valid, to pursue a claim that the action was a taking requiring just compensation. Because only a district court could grant the APA relief Loveladies sought, and only the CFC could order just compensation for a taking, Loveladies was required to proceed in two different courts. Under the Government's view of §1500, Loveladies would have been forced to choose between challenging the legality of the Government's action under the APA and running the risk that the Tucker Act statute of limitations would expire during that litigation, or forgoing its APA challenge to preserve its constitutional entitlement to just compensation. 27 F.3d at 1548-1551. If this Court adopts the Government's view, all regulatory takings plaintiffs who want to challenge

the legality of the Government's conduct will face the same unjust dilemma.

Likewise, in this case, the Nation would be forced to defer or relinquish either its claim to a full pre-liability accounting—an equitable remedy that the Court of Claims has held it cannot grant, *Klamath & Modoc*, 174 Ct. Cl. at 487-488—or its claim to money damages for the Government's mismanagement of its assets—a remedy available only in the CFC, 5 U.S.C. §702.

When §1500 was enacted, its avowed purpose was to require plaintiffs in a discrete class of cases to elect a single forum in which to pursue a money judgment for a single injury. The Government would transform §1500 into a sweeping rule requiring plaintiffs in a large class of cases to elect a single *remedy* even if they require—and would otherwise be entitled to—additional relief to be made whole. That reading of §1500 not only goes far beyond the provision's original purpose, but undermines the principal goal of the multiple statutes enacted since 1868 expanding courts' jurisdiction to award both money damages and equitable relief against the Government.

The Government does not deny that such a result would be anomalous as well as inequitable. Rather, it argues (Br. 5) that courts are not free to engraft an "'exception'" on a statute to "'remove apparent hardship.'" Reading §1500 not to bar plaintiffs from obtaining complete relief does not create an "exception" to the statute, however. Rather, it construes §1500's text according to its ordinary meaning, so as not to thwart Congress's plain design to permit recovery of both money damages and equitable remedies.

The Government contends (Br. 48) that such a reading of §1500 will result in burdensome and duplicative litigation. When a litigant must proceed in two fora to obtain complete relief, however, courts can and do avoid duplicative proceedings by staying one suit while the other goes forward. *Landis* v. *North Am. Co.*, 299 U.S. 248, 254-255 (1936); *Eastern Shawnee Tribe* v. *United States*, 582 F.3d 1306, 1311 (Fed. Cir. 2009) ("the government's interest in avoiding duplicative proceedings" may be addressed by a stay); *Loveladies*, 27 F.3d at 1547 (CFC action stayed pending district court proceeding); *Boston Five Cents*, 864 F.2d at 140 (same). Such an approach would impose little more burden, if any, on the Government than a plaintiff's commencing a CFC suit after his district court suit ends, which the Government admits (Br. 35 n.7) is permissible. In the latter case, however, the statute of limitations would likely extinguish many plaintiffs' CFC claims before they could be brought.

The Government also contends (Br. 41-42) that §1500 should not be read to focus on the relief a plaintiff seeks because it may differ from the relief eventually awarded: "A court … may grant legal damages even if a complaint seeks only equitable relief (and vice versa)." But that is not true in suits against the United States, where, except in tort suits, only the CFC may grant money damages over $10,000, and where only the district courts may grant most forms of equitable relief. A plaintiff seeking both money damages and equitable relief generally will not have the option of bringing all its claims for relief in one court. The Government's claim that, if this Court approves the Court of Appeals' view of §1500, plaintiffs will engage in "strategic manipulation of the pleading process" (Br. 42) is thus entirely unfounded.

E. Sovereign Immunity Principles Do Not Warrant Reading §1500 To Bar Claimants From Obtaining Complete Relief

The Government relies most heavily on its argument (Br. 24-28) that principles of sovereign immunity require its sweeping reading of §1500. But while this Court will not read a statute to waive sovereign immunity unless it is clear that Congress so intended, that canon has no application here.

It is undisputed that the Government has waived its sovereign immunity for suits, like this one, for money damages stemming from breach of its trust obligations to Indian tribes. 28 U.S.C. §§1491, 1505; *Mitchell*, 463 U.S. at 212-216. "If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Id.* at 216. Once the existence of a waiver of immunity has been established, the clear-statement rule of statutory interpretation designed to ensure that Congress does not unknowingly subject the Government to suit is no longer necessary. "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *Block* v. *Neal*, 460 U.S. 289, 298 (1983).[8]

---

[8] By contrast, the decisions on which the Government relies (Br. 25) address the threshold question whether the United States has waived its immunity for a particular cause of action or remedy. *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) (waiver in 5 U.S.C. §702); *United States* v. *Williams*, 514 U.S. 527 (1995) (waiver for tax-refund suits in 28 U.S.C. §1346(a)(1)); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) (waiver for suits seeking monetary relief in 11 U.S.C. §106(c)); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947) (waiver for suits seeking

This Court has thus repeatedly rejected the argument, analogous to the Government's argument here, that the exceptions to the waiver of sovereign immunity in the FTCA must be broadly construed because they "confine[] the scope" (Br. 25) of the Government's consent to suit. Rather, "the proper objective of a court attempting to construe one of the [exceptions] is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak*, 465 U.S. at 853-854 n.9; *see United States* v. *Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1951) ("'Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to th[e] rule (of strict construction) cannot be had in order to enlarge the exceptions.'").

In *Dolan* v. *USPS*, for instance, this Court held that the exception to the FTCA waiver for "loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. §2680(b), did not bar a suit for injuries sustained by tripping on a package. 546 U.S. 481, 483 (1996). The Court recognized that "[i]f considered in isolation, the phrase 'negligent transmission' could

---

interest on unpaid claims in 28 U.S.C. §2516); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (consent to jury trial under ADEA). In such cases, this Court has applied a rule of strict construction to avoid "enlarg[ing]" a waiver of immunity beyond the scope Congress clearly intended. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983); *see Lane* v. *Peña*, 518 U.S. 187, 192 (1996) ("waiver of sovereign immunity must extend unambiguously to … monetary claims" to support money damages award). Because the Government has unambiguously waived immunity from claims for money damages for breach of its trust duties, *Mitchell*, 463 U.S. at 212, those decisions are not relevant here.

embrace … creation of slip-and-fall hazards," but rejected that reading as inconsistent with "the purpose and context of the statute." *Id.* at 486. The Court explained that "this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed.'" *Id.* at 491. "[I]n the FTCA context, … 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 492 (citation omitted).

The same analysis is appropriate here. Like the FTCA, the Tucker Act and Indian Tucker Act "'waive[] the Government's immunity from suit in sweeping language.'" Their broad purpose is to fulfill "'the duty of Government to render prompt justice against itself'" by "'giv[ing] the people of the United States … the right to go into the courts to seek redress against the Government for their grievances.'" *Mitchell*, 463 U.S. at 213-214. Reading §1500 to create the broad exception the Government urges would "'run the risk of defeating th[at] central purpose,'" *Dolan*, 546 U.S. at 492, by denying plaintiffs the ability to obtain the complete relief to which Congress entitled them.

That conclusion is still more appropriate because §1500 is not even an "exception" to the Tucker Act waiver for certain types of claims or certain relief. Section 1500 alters neither the substantive scope of the claims as to which the Tucker Act consents to suit nor the remedy (money damages) to which the Government has agreed to subject itself. It merely carves out of the CFC's jurisdiction suits concededly within the Tucker Act waiver if another suit "for or in respect to" the CFC claim is pending.

As this Court has recognized in similar circumstances, once the Government has waived its immunity, the canon of strict construction does not apply to every rule of jurisdiction or procedure governing the resulting litigation. In *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), for example, this Court addressed the question whether the Tucker Act statute of limitations, 28 U.S.C. §2501, should be construed narrowly in favor of the Government. The Court unanimously rejected the Government's construction of the statute as an "'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than a 'realistic assessment of legislative intent.'" 536 U.S. at 145; *see also Scarborough* v. *Principi*, 541 U.S. 401, 421 (2004) (although Equal Access to Justice Act waives immunity from awards of attorneys' fees, time limitation on fee application is not strictly construed); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990) (declining to construe Title VII statute of limitations narrowly in Government's favor where waiver of immunity was clear); *Mitchell*, 463 U.S. at 218-219 (where Tucker Act has waived immunity, statutes creating substantive right to money damages should not "be construed in the manner appropriate to waivers of sovereign immunity").

In any event, even where the canon of strict construction does apply, it does not justify adopting an interpretation that is implausible in light of text, precedent, and legislative purpose. *United States* v. *Idaho*, 508 U.S. 1, 7 (1993) ("[J]ust as 'we should not take it upon ourselves to extend the waiver beyond that which Congress intended,'" neither "'should we assume the authority to narrow the waiver that Congress intended.'"); *United States* v. *Williams*, 514 U.S. 527, 532-536 (1995) (applying canon of strict construction to interpret waiver

of immunity, but rejecting Government's "strained reading" of the statute in part because it "would leave people in [plaintiff's] position without a remedy"); *id.* at 541 (Scalia, J., concurring) (clear-statement rule does not "require explicit waivers [of immunity] to be given a meaning that is implausible"). The sovereign-immunity canon is but one "tool for interpreting the law, and [this Court] ha[s] never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2019 (2008). Where, as here, the "traditional tools of statutory construction and considerations of stare decisis" point clearly to a particular interpretation of a statute, the canon of strict construction cannot defeat that result. *Id.*

F. The *Tecon* Rule Is Not Before This Court

Finally, the Government's attack (Br. 36-39) on the order-of-filing rule announced in *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), is not properly before this Court. *Tecon* held that, because §1500 applies only when another suit on the same claim is "pending," a district court suit filed *after* a Court of Claims suit has been initiated does not strip the Court of Claims of jurisdiction. *Id.* at 949. As the Government admits (Br. 37 n.8), because the Nation filed its district court suit *before* its CFC suit, the *Tecon* rule "does not directly apply to this case." This Court does not render advisory opinions on questions not presented by the facts of the case before it. *Clinton* v. *Jones*, 520 U.S. 681, 700 & n.33 (1997); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

The Government contends that this Court should nonetheless overrule *Tecon* because it formed part of the Court of Appeals' "*ratio decidendi*." To the contrary,

the Court of Appeals simply applied the construction of §1500 it had already articulated in *Casman* and *Loveladies*, mentioning *Tecon* only in response to the Government's argument that letting the Nation's suit go forward would be bad policy. The *Tecon* rule did not—nor could it—form any part of the Court of Appeals' holding. And it is well-established that this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-298 (1956). As in *Keene*, 508 U.S. at 216, this Court should reject the Government's invitation to reach out to decide a question that is not presented and whose answer has no bearing on the proper outcome of this case.

II. BECAUSE EACH OF THE NATION'S SUITS SEEKS DIFFERENT RELIEF, SECTION 1500 DOES NOT BAR THE NATION'S CFC ACTION

A. Each Complaint Seeks Different Relief To Redress A Different Breach Of Trust

1. Because the Nation's two complaints seek distinct relief to redress distinct breaches of trust, §1500 does not bar the Nation's CFC suit.

In the district court, the Nation seeks a full preliability accounting of the Nation's trust assets, restatement of its accounts, and, if appropriate, other equitable relief incident to the accounting and restatement. Although the complaint recites a number of other breaches of fiduciary duties by way of background, its unmistakable focus is the Government's breach of its duty to provide an accounting.

Count I alleges that the Government has a "duty to provide the Nation with a complete, accurate, and adequate accounting of all property held in trust by the United States for the Nation's benefit," that the

Government has failed to provide such an accounting, and that the Nation is entitled to a declaration delineating the Government's fiduciary duties and declaring that they have been breached. Pet. App. 89a-90a. Count II alleges an entitlement to injunctive relief ordering a complete accounting of all trust assets, restatement of the Nation's trust fund balances in conformity with the accounting, and "any additional equitable relief that may be appropriate (e.g., disgorgement [or] equitable restitution…)," along with an order directing the Government to bring itself into compliance with its fiduciary obligations. *Id.* 91a.

The prayer for relief accordingly requests (1) a declaration "construing the [Government's] trust obligations …, including, but not limited to, the duty to provide a complete, accurate, and adequate accounting of all trust assets"; (2) a declaration that the Government is "in breach of its trust obligations," including "its fiduciary duty to provide a complete, accurate, and adequate accounting"; (3) a declaration that reports the Government has provided to date "do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide"; (4) a declaration "delineating the [Government's] fiduciary duties … with respect to the management and administration of the trust assets"; (5) an order "directing the defendants … to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and … to comply with all other fiduciary duties as determined by this Court"; (6) an order "providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or

an injunction directing the trustee to take action against third parties)"; and (7) an order "requiring the defendants to provide to the Nation all material information regarding the management and administration of the trust assets." *Id.* 91a-93a.

In the CFC complaint, by contrast, the Nation seeks money damages for the Government's failure to manage its assets prudently to obtain the maximum possible return. Count I alleges that the Government "breached its fiduciary duty by failing to lease [mineral rights] for fair market value." It seeks "a money damage award … arising from [the Government's] mismanagement of the Nation's mineral resources." *Id.* 68a-69a. Count II alleges that the Government "breached its fiduciary duty by failing to lease [non-mineral property interests] and grant easements and rights of way for fair market value." It seeks "a money damage award … arising from [the Government's] mismanagement of the non-mineral interests in the Nation's trust land." *Id.* 69a-70a. Count III alleges that, "[i]n breach of its fiduciary duty," the Government "has failed to invest … judgment funds held in trust in a timely manner" and so as "to obtain the maximum investment returns possible," and that "[t]hese breaches of fiduciary duty" have "cause[d] damage to the Nation." *Id.* 70a-71a. Count IV alleges that the Government "breached its fiduciary duty … by holding … cash, in excess of liquidity needs" and "by failing to maximize trust income by prudent investment." It seeks damages due to "the [Government's] breach of fiduciary duties in its management and investment of trust funds." *Id.* 71a-72a.[9]

[9] The Government is incorrect in claiming (Br. 46) that the CFC complaint seeks damages relating to "the government's

The prayer for relief seeks (1) "a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty"; and (2) "a determination of the amount of damages due to the Nation plus interest." *Id.* 72a-73a.

The Nation's two complaints thus seek different relief. In the district court, the Nation seeks an equitable pre-liability accounting, along with a restatement of its account balances if necessary, and any appropriate equitable relief incident to such an accounting and restatement. That is, the Nation seeks an order directing the Government to tell the Nation precisely what it owns, including the funds held in trust, the boundaries of its land, the extent of its mineral and other rights, and the nature and location of any encumbrances on, or leases or permits regarding, those assets. To the extent the accounting reveals any errors in the Government's books, the Nation seeks to have them corrected. If the accounting reveals that assets belonging to the Nation are missing from its trust account, the Nation seeks whatever equitable relief the court deems appropriate, such as equitable restitution of those assets. Finally, the Nation seeks an order delineating the Government's fiduciary obligations and ordering it to fulfill those obligations in the future. In short, the Nation seeks to know what assets it *already owns* and to have its accounts corrected if any of those assets are missing from the trust.

---

trust-account record-keeping." While the complaint states that the Government has not provided an accounting, its four counts allege entitlement to damages based only on the four specific acts of mismanagement identified above.

By contrast, in the CFC the Nation seeks only "money damages" stemming from the Government's failure to act as a prudent manager to obtain the maximum return on the Nation's assets. Pet. App. 58a. That is, the Nation seeks compensation for the loss of income it *never earned*, due to the Government's failure to act as a prudent manager of the trust. Because the district court complaint does not seek *this* relief, it is not a suit "for or in respect to" the Nation's claim in the CFC. That should end the analysis.[10]

2. To resolve this case, it is not necessary for this Court to delineate the precise boundary dividing the district court's jurisdiction from the CFC's. It is sufficient to recognize that the Nation seeks different relief in its two suits.

It is worth noting, however, that the Nation brought its claims in separate suits because, like the plaintiffs in *Casman* and *Loveladies*, it could not obtain complete relief in a single suit. The district court lacks

---

[10] If this Court were to hold that §1500 applies whenever two suits arise out of the same operative facts, whether or not they seek different relief, the Court should remand to permit the Court of Appeals to apply that rule. The Nation argued below that its suits rest on different operative facts: To prove its claim for an accounting, the Nation would have to show that it had a trust relationship with the Government creating a duty to provide an accounting and the Government had failed to provide one; to prove its claim for damages, the Nation would have to show that the Government had breached a trust duty to act as a reasonably prudent manager of the Nation's assets, causing the Nation losses. The Court of Appeals expressly declined to decide whether the suits were based on the same "operative facts." Pet. App. 9a n.1. Should it prove necessary to reach that issue, this Court should remand to permit the Court of Appeals to decide it in the first instance. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

jurisdiction to award the compensatory money damages the Nation seeks in the CFC. 5 U.S.C. §702. Likewise, the Court of Claims and its successors have long held that they lack jurisdiction over the Nation's district court claim for a pre-liability accounting. *Klamath & Modoc Tribes*, 174 Ct. Cl. at 487-491 (Government could not be compelled "to render a general accounting … before its liability is determined" because court's jurisdiction "does not include actions in equity"); *Osage Nation* v. *United States*, 57 Fed. Cl. 392, 393 n.2 (2003) ("[T]his court does not have jurisdiction over claims for a pre-liability accounting."); *Cherokee Nation* v. *United States*, 21 Cl. Ct. 565, 582 (1990) (agreeing with Government that claim for accounting must be dismissed for lack of jurisdiction).

To obtain full relief, therefore, the Nation had no choice but to bring suit in the district court and the CFC—further confirmation that its suits are not the duplicative proceedings at which §1500 aims.[11]

---

[11] Professor Sisk's argument (Sisk Br. 26-27) that the full pre-liability accounting the Nation seeks is properly obtained in the CFC, not the district court, has not been endorsed by the Government. Nor has the Federal Circuit repudiated the holding of *Klamath & Modoc* (notwithstanding the equivocal dicta in *Eastern Shawnee* on which Professor Sisk relies). Contrary to his suggestion, the Remand Act merely authorizes the CFC to "issue orders directing … correction of applicable records" "collateral to [a] judgment" on a claim for damages. 28 U.S.C. §1491(a)(2). It does not expand the CFC's jurisdiction to include claims otherwise outside it. *United States* v. *Testan*, 424 U.S. 392, 404 (1976).

Even if Professor Sisk were correct, however, it would not follow that the Nation's CFC suit should be dismissed. While the Nation takes the position that the district court has jurisdiction to award all the relief the Nation seeks there, that question is not presented here, and Professor Sisk's arguments on the issue are

B. The Relief Sought In The Nation's Two Suits Does Not Overlap

There is no merit to the Government's contention (Br. 43-48) that the relief the Nation seeks in its two complaints overlaps and thus triggers §1500's jurisdictional bar.

1. It is well-settled that the pre-liability accounting the Nation seeks in district court is distinct from any post-liability "accounting in aid of judgment" that the CFC could direct to calculate money damages.

The accounting the Nation seeks in district court is a traditional trust remedy for obtaining information withheld by a trustee. Historically, a beneficiary could seek a full accounting in a court of equity without first having to demonstrate liability or a present entitlement to money. Bogert §142 ("It is not necessary to allege or prove that the trustee is in default or that the petitioner is presently entitled to any trust property."). Beneficiaries are entitled "to receive … the full facts about the course of trust administration," including the "inspection of all books and documents relating to the trust." *Id.* §141. Such an accounting extends to nonmonetary aspects of the trust and ensures that a beneficiary has all the information necessary to protect his

---

beside the point. The limitations on the district court's jurisdiction demonstrate that the Nation could not obtain in a single suit all the relief to which it is entitled and thus illuminate the anomalous consequences that flow from the Government's proposed rule. But that is the extent of their relevance. The question here is whether *the CFC* has jurisdiction over the Nation's suit in the CFC, not whether *the district court* has jurisdiction over the Nation's suit there. (For the same reason, the propriety of the district court's approach to its jurisdiction in *Cobell* v. *Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), is not before this Court.)

rights. *Restatement (Second) of Trusts* §173 cmt. c. (1959); Bogert & Bogert, *The Law of Trusts and Trustees* §861 (2d ed. 1995).

Such a full pre-liability accounting would inform the Nation of the precise metes and bounds of its land; the nature and location of its mineral rights and other rights in natural resources; rights-of-way or other easements burdening its land; the existence and terms of leases, permits, and other transactions the Government has entered into with regard to the Nation's land, mineral estate, and other assets; and the funds collected by the Government as a result of those transactions. It would also inform the Nation of the manner in which its trust funds are invested and the returns those funds are earning.

Because the Nation currently lacks much of this information, it is unable intelligently to exercise its rights with regard to its trust assets. With the benefit of a full accounting, the Nation might choose, for example, to withdraw assets from the Government's management, 25 U.S.C. §4022; to cancel an existing lease, 25 C.F.R. §162.619; or to ask a court of equity to protect future beneficiaries by enjoining a particular action. Thus, far from being "'merely a means to the end of satisfying a claim for the recovery of money'" (Sisk Br. 22), the accounting the Nation seeks in the district court is a means of obtaining *information* regarding the nature, history, and current status of its trust assets. It is an independent, non-monetary remedy that has significant value apart from any monetary relief the Nation might ultimately receive.

As discussed above, the CFC has held that it lacks jurisdiction to entertain a claim for such a pre-liability accounting. The only "accounting" the CFC may direct

is an "accounting in aid of judgment," which, as its name implies, is merely an aid to calculating damages *after* a plaintiff successfully establishes liability. Such an accounting is not properly considered "relief" at all. *Cf. Winthrop Iron Co.* v. *Meeker*, 109 U.S. 180, 183 (1883) (an "accounting ordered … in aid of the execution of the decree" is "no part of the relief prayed for in the bill").

Moreover, any accounting in aid of judgment that the CFC might direct would have a far narrower scope than the pre-liability accounting sought in the district court. An accounting in aid of judgment, by definition, is ancillary to a claim for money damages, and is thus limited to calculating damages for specific, proven breaches of duty. *Pauley Petroleum Inc.* v. *United States*, 591 F.2d 1308, 1315 (Ct. Cl. 1979); *Klamath & Modoc*, 174 Ct. Cl. at 491 (plaintiff must prove its claim before being entitled to "an accounting in aid of … render[ing] a money judgment on that claim"). Here, for instance, if the CFC found the Government liable only for breach of its fiduciary duty as to the Nation's mineral rights, any accounting in aid of judgment would be limited to calculating damages relating to mismanagement of mineral rights. Other vital information regarding the contents, management, and condition of the trust, necessary to protect the Nation's present rights and future interests, would be unavailable.

In short, an equitable accounting provides "*all* information regarding the trust and its execution which may be useful to the beneficiary in protecting his rights." Bogert §141 (emphasis added). An accounting in aid of judgment simply cannot—and does not purport to—include all such information.

2. Likewise, there is no overlap between any equitable monetary relief the district court might award incident to a historical accounting and the compensatory money damages the Nation seeks in the CFC. The district court complaint seeks only "appropriate" equitable relief, such as equitable restitution, ancillary to the accounting. That is, it seeks only restoration of assets to which the Nation already holds beneficial title, but which the accounting reveals are missing from the Nation's trust account. By contrast, in the CFC the Nation seeks only damages as compensation for money that it should have earned, but did not.

It is the substance of the relief requested, rather than its characterization as equitable or legal, specific or substitutionary, that governs the §1500 analysis. Because the relief the Nation requested in the two courts is substantively different, labels matter little.[12]

Nonetheless, "'the time-honored distinction between damages and specific relief,'" *Blue Fox*, 525 U.S. at 262, helps demonstrate why the monetary relief sought in the two complaints is indeed substantively different. "'Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988); *see also Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210-214 (2002); 1 Dobbs, *The Law of Remedies*

[12] The Government's repeated complaints that the Court of Appeals' analysis hinged on the labels "legal" and "equitable" (*e.g.*, Br. 48) are thus ill-taken. The point, as the Court of Appeals made clear, is that regardless of label, the Nation sought *different*, non-duplicative relief in each court. Pet. App. 13a-14a.

§3.1 (2d ed. 1993) ("In its substitutionary character *damages* contrasts with *specific* relief, which 'prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken.'").

The Nation's district court complaint seeks a pre-liability accounting of its trust assets and, if necessary, a restatement of its accounts. It does not request monetary relief except to the extent such relief is "appropriate" to give effect to the accounting and restatement. Pet. App. 92a. Indeed, if the accounting reveals no errors in the Government's bookkeeping, the Nation would not be entitled to *any* monetary relief in the district court. If, on the other hand, the accounting reveals that assets that belong to the Nation do not appear on the books, it may be appropriate to order equitable restitution of those assets. *Great-West*, 534 U.S. at 213 (equitable restitution appropriate "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). Such equitable restitution does not seek "to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. In the district court, therefore, the Nation seeks nothing more than "'the very thing to which [it is] entitled,'" *Blue Fox*, 525 U.S. at 262—an accurate accounting of its assets and, if appropriate, restoration of assets it already owns.[13]

[13] The Government argues (Br. 47) that because the district court complaint seeks an accounting of trust assets "including, but not limited to, funds under the custody and control of the United States" (Pet. App. 92a), the Nation is seeking "unrealized profits"

By contrast, the CFC suit seeks only money damages to compensate the Nation for the income it would have earned but for the Government's breach of its duty prudently to manage and invest the trust assets. *See Blue Fox*, 525 U.S. at 262 ("The term 'money damages' … normally refers to a sum of money used as compensatory relief."). As a substitute for money the Nation should have earned but did not, the damages sought in the CFC are altogether different—in substance as well as in name—from any equitable monetary relief that might be available in district court.

3. In any event, even if there were some small degree of theoretical overlap between the relief sought in the two actions, that should not be dispositive when the gravamen of each complaint is separate and distinct. Courts can avoid duplicative litigation—and ensure that theoretical overlap does not materialize into actual double recovery—by staying one suit while the other proceeds and by application of ordinary principles of comity and preclusion.

In a series of statutes, Congress has broadly waived the United States' sovereign immunity from suit to allow its citizens to obtain redress for government wrongdoing. In doing so, Congress directed plaintiffs to litigate in different courts to obtain different remedies. Nothing in §1500 or the remainder of the jurisdictional scheme suggests that Congress thereby intended to create a trap for the unwary, barring plaintiffs whose pleadings are drafted with less than

---

in the district court as well as the CFC. On the contrary, that language merely makes clear that the Nation is seeking an accounting of *all* its trust assets, including any assets in the hands of third parties.

mathematical precision from the only forum where they can obtain money damages. "'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome'"; rather, "'the purpose of pleading is to facilitate a proper decision on the merits.'" *United States* v. *Hougham*, 364 U.S. 310, 317 (1960). That should be as true in the CFC as in any other court.

This Court long ago rejected "the 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." *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (Holmes, J.). It should not adopt such a reading for the first time here.

CONCLUSION

The Court of Appeals' judgment should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ANNIE L. OWENS
SONYA L. LEBSACK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

KEITH M. HARPER
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
(202) 508-5800

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Ave.
Raleigh, NC 27612
(919) 420-1700

AUGUST 2010

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612, 612

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour; and the said court shall hear and determine 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, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to support the Constitution of the United States, and discharge faithfully the duties of his office.

Act of Mar. 3, 1863, ch. 92, §§1-3, 5, 12 Stat. 765, 765, 766

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate,

two additional judges for the said court, to hold offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justices for said court.

SEC. 2. *And be it further enacted,* That all petitions and bills praying or providing for the satisfaction of private claims against the Government, 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, shall unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, or the court aforesaid.

SEC. 3. *And be it further enacted,* That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and

be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

* * *

SEC. 5. *And be it further enacted*, That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

Act of Mar. 3, 1863, ch. 120, §§1-3, 12 Stat. 820, 820

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any state or territory, or any portion of any state or territory, of the United States, designated as in insurrection against the lawful Government of the United States by the proclamation of the President of July first, eighteen hundred and sixty-two: *Provided*, That such property shall not include any kind

or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war.

SEC. 2. *And be it further enacted,* That any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal states, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the treasury of the United States.

SEC. 3. *And be it further enacted,* That the Secretary of the Treasury may require the special agents appointed under this act to give a bond, with such securities and in such amount as he shall deem necessary, and to require the increase of said amounts, and the strengthening of said security, as circumstances may demand; and he shall also cause a book or books of account to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof. And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and

sale of said property, and any other lawful expenses attending the disposition thereof.

Act of June 25, 1868, ch. 71, §8, 15 Stat. 75, 77

SEC. 8. *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.

1 Rev. Stat. 197, §1067 (2d ed. 1878)

SEC. 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against 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, mediately or immediately, under the authority of the United States.

Act of Mar. 3, 1887, ch. 359, §§1-2, 24 Stat. 505, 505

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dol-

lars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Act of Mar. 3, 1911, ch. 231, §154, 36 Stat. 1087, 1138

SEC. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any [claim] for or in respect to which he or any assignee of his has pending in any other court any suit or process against 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, mediately or immediately under the authority of the United States.

Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C., sec.

250, as amended: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

Act of June 25, 1948, ch. 646, §1500, 62 Stat. 869, 942

§ 1500. Pendency of claims in other courts

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. §1500 (2006). Pendency of claims in other courts

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.