



National Legal Center for the Public Interest

VENUE AT THE CROSSROADS

by
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With an introduction by
Senator Dennis DeConcini

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Professor Steven R. Schlesinger, Editor
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Editor's Preface

The National Legal Center for the Public Interest has undertaken a program the aim of which is to provide policy makers, scholars, and the public with analyses of a number of fundamental issues in which considerations of law and public policy intersect. These analyses are to be written by leading experts in the subject matters under consideration.

As a part of this program, the National Legal Center is pleased to present three contrasting views on the subject of the federal venue rules in those cases in which the United States is a party. Venue relates to the geographic location of the court in which a case is to be litigated.

It will be helpful to the reader if the arguments of the experts are briefly summarized: Senator Paul Laxalt and Linden Kettlewell in their essay argue for change in the venue law on the ground that there has been a significant change in the environment of litigation since 1962, when the last major overhaul of the venue rules was undertaken by the Congress. Specifically, the rise of public interest law groups or firms has tended to move cases from local areas where citizens are directly affected by a decision to a forum which is more convenient for the *groups* in contention; that forum tends to be the District of Columbia. The 1962 reforms, they argue, were aimed in part at bringing a greater number of cases closer to the affected citizenry. This goal, they say, can no longer be accomplished given the strong presence of the public interest law firms; thus the purpose of the 1962 reform has not been realized.

Laxalt and Kettlewell favor trial of the relevant cases in the local areas directly affected on the grounds, among others, that this increases the probability that judges or juries will have an intimate understanding of the facts of the cases, that the parties directly affected will participate in and monitor the cases, and that the public will have confidence in the judicial system. Finally, Laxalt and Kettlewell argue that Congress never intended to give the District of Columbia courts any special jurisdiction over cases with national importance.

Nicholas Yost makes the case against changing the venue rules. He argues that venue involves a variety of different factors, that the venue reformer seeks to make the local interest in a case the sole criterion for determining venue, that local interests are difficult to distinguish in many cases from national interests, and that change in the venue law will lead to less efficient judicial administration. Yost also argues that the District of Columbia federal courts are not overburdened or especially slow; in fact, he argues that they are more efficient than many other district courts.

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Introduction

Dennis DeConcini
United States Senator

I applaud the National Legal Center for the Public Interest for its foresight and dedication in commissioning this monograph on venue and its effect on justice in our Federal courts. Venue is not generally a topic discussed in casual conversation, yet its relevance and impact on our lives is growing and felt daily. Simply put, venue tells us where a case may be filed, assuming jurisdiction exists. Its lineage can be traced to principles embodied in our common law heritage,¹ the Constitution² and the Judiciary Act of 1789.³ How these principles are being practiced is a microcosm of a more visible struggle that is playing itself out in 1980's America as we sort out the role of government and the degree to which the government should allow its operations to be visible to the governed and should invite their participation. To be a part of the growing knowledge and literature on this subject is an honor, and it is my pleasure to be associated with the learned articles that follow.

My initial understanding of venue and its importance to the development and outcome of a case came when I was a law student and then a practicing lawyer in Arizona. I was in law school when Congress enacted the Mandamus and Venue Act of 1962,⁴ which significantly altered the law of venue as it applied to suits against Federal officials, by granting to plaintiffs the right to pursue their causes in district courts other than solely the District Court for the District of Columbia. Prior to this, the lack of mandamus power in the district courts (other than the D.C. court) and the necessity of joinder of key Federal officials located in Washington, D.C. had forced suits against the United States to be filed in the Nation's capital. A substantial burden was thus placed on parties located some geographical distance away; the Congressional action of 1962 opening up the possibility that local issues could be tried before local judges was well received in Arizona and the West. As a lawyer, I saw the beneficial effects not only in the added convenience to Arizona parties

1. 77 Am. Jur. 2d. 833.

2. U.S. Const. Amend. VI, This amendment requires defendants to be tried "by an impartial jury of the state and district wherein the crime shall have been committed."

3. Act of September 24, 1789, §4, 1 Stat. 74-75. This represented the height of bringing justice to the people by requiring each *circuit* court to be composed of two Supreme Court justices and a district judge from the circuit.

4. Pub. L. 87-748, 76 Stat. 244.

and lawyers, but also in the sense of participation by the community it fostered and the understanding and acceptance of decisions that followed.

Following my election to the United States Senate, I was named Chairman of the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary. Among other things, this subcommittee has jurisdiction over Title 28 of the United States Code which encompasses the general provisions on venue. In early 1979, the subject of venue and examples of its abuse by some litigators,⁵ especially public interest law groups focusing on environmental issues and based in Washington, D.C., were brought to my attention. Calls to revise the venue provisions of Federal law came from my colleague Senator Paul Laxalt, Nev.-R, leaders of the Sagebrush Rebellion best exemplified by James G. Watt, then President and Chief Legal Officer of the Mountain States Legal Foundation and currently Secretary of the Interior, and from my constituents who were incensed over what they perceived as an unwarranted intrusion in their rights and property by Federal judges far removed from the situs their rulings primarily affected.

As I noted earlier, their call for action on this specific issue was reflective of a more general "anti-Washington" feeling that was influencing vast portions of the country in the late '70's. Especially, in areas such as Arizona and Nevada where rugged individualism, pride in self-sufficiency, and control of one's destiny are still a prevailing philosophy, the powers seemingly inexorably usurped by the Federal government were a source of much concern. The Federal government was being viewed more and more as a force beyond control and out of touch with their desires and values. Mr. Watt, at hearings on the venue issue was to use terms such as 'foreign' to describe the values of the Eastern courts, and 'colony' to describe the way the people of the West viewed their treatment by the government in Washington.⁶

In response, Senator Laxalt and I each developed and introduced bills to modify the venue laws by creating proper venue only where the impact of the case on the community was substantial, hopefully thereby removing Eastern courts from deciding issues primarily involving the West and which were not nationwide in scope. The Laxalt bill, S.739, had a broad scope requiring all civil cases in which the Federal government is the defendant to be heard in the judicial district in which "a substantial portion of the impact of injury" occurred. My bill, S.1472, was more selective in its target, requiring that environmental cases be heard in the district where the impact was greatest, but it applied to private as well as government cases.

5. Testimony of James G. Watt, Hearing Before Subcommittee on Improvement in Judicial Machinery of the Committee on the Judiciary, United States Senate, 96th. Cong., 2d sess. on S. 739 and S. 1472, Ser. No. 96-78, Feb. 20, 1980 at 22.

6. *Ibid.*

Hearings were held on both bills on February 20, 1980, and the subcommittee received outstanding testimony from a variety of witnesses on all sides of the issue. Additional recommendations were made, and the constructive criticism pointing out errors or oversights in some of our original perceptions and highlighting sections of the legislation that might in themselves lead to more threshold litigation made us rethink our approach. The subcommittee went back to the drafting table and on May 2, 1980, adopted a modified proposal referred to as an original subcommittee bill that reflected a number of the suggestions, particularly those of the Department of Justice. The new bill stressed that adequate notice must be given to "real" parties in interest and modified 28 U.S.C. 1404(a), the district court venue transfer provision, to create a presumption in favor of transfer to a court where "the action might have been brought unless a party shows (A) that substantial hardship or injustice would result from such a transfer, or (B) that the impact of the action, which may include the impact on national policy, is substantially national rather than local in effect or scope."

The original subcommittee bill reflected the following policy conclusions: (1) the traditional right of the plaintiff initially to choose a forum under 28 U.S.C. 1391(e) in an action against the United States should not be disturbed; (2) current statutes specifying venue should not be overturned; (3) the notice and presumption sections of the bill should relate only to local environmental actions where the United States is a defendant; and (4) the notice section should be triggered solely by such actions filed in the United States District Court for the District of Columbia.

On May 7, 1980, the Senate Committee on the Judiciary favorably considered this original subcommittee bill as an amendment to the Regulatory Flexibility and Administrative Reform Act of 1980 (S.2147), which was reported, without objection, by the Committee. The one committee amendment to our original bill which was accepted allowed a rebuttal argument against the "presumption" for transfer if the action was "substantially national rather than local in effect or scope."

On June 24, 1980, the full Committee again met and considered the original subcommittee bill in its own right which was now titled S.3028. It was virtually identical to the language added earlier to the regulatory reform bill except for the definition of "local" and the type of action that might be considered "national." S. 3028 was reported without amendment. As it turned out, no further action was taken in the Senate on either the separate venue bill or the venue-enriched regulatory reform measure, and the issue of venue reform died for the 96th Congress.

As a result of the 1980 elections in which the Republicans gained control of the Senate, Senator Dole of Kansas became the Chairman

of the Improvements Subcommittee (whose name has been changed to the Courts Subcommittee) and I chose to leave that subcommittee to become the ranking member of the Constitution Subcommittee. Although I was no longer a member of the Courts Subcommittee, early in the new Congress I introduced S.50, a bill identical to S.3028 of the previous Congress, in hopes that it would receive early consideration and prompt passage. Several months later, my former colleague on the Improvements Subcommittee, Senator Allan Simpson of Wyoming, introduced S.1107, a venue-shifting bill affecting interests beyond the environment and limited to federal government litigation. Despite the fact that this subcommittee has a membership that at first glance would appear to be sympathetic to venue reform,⁷ no hearings or other action occurred in the subcommittee during 1981. As the 1st session drew to a close, activity in the area of venue reform was firmly on the back burner.

One attempt to add venue as an amendment to another bill, again the regulatory reform bill, was made; on July 17, 1981, the Judiciary Committee considered the 97th Congress' version of regulatory reform, S.1080. At that meeting, I offered the text of S.50 as an amendment but withdrew it at the request of Senators Laxalt, Simpson and Dole, not only to expedite the consideration of S.1080, but also because it appeared that hearings and action by the Courts Subcommittee was imminent. I reserved the right to offer a venue amendment to the regulatory reform bill when it was considered on the floor and this seemed generally satisfactory to the above-mentioned Members.

Regulatory reform legislation is multi-faceted and traditionally jurisdiction over it is given jointly to the Judiciary Committee and the Committee on Government Affairs. Throughout the fall of 1981, these Committees attempted to resolve their differences over what the regulatory reform bill should contain. They succeeded in resolving many of the differences and, on November 30, printed amendment number 640 was proposed by the leaders of the respective Committees as the vehicle that should be the subject of further Senate deliberation on this issue. Because of the lateness in bringing the bill to the floor, it could not be scheduled for action in the remaining weeks of the 1st session.

It is interesting to note in passing that the regulatory reform bill, as reported from the Judiciary Committee in July, contained an amendment to Section 702 of the Administrative Procedures Act that would have dramatically altered the venue monopoly of the District of Columbia Circuit over agency appeals by providing that "Notwithstanding any other provision of law, a petition to review an agency rule may

7. The Courts Subcommittee has four Republican members: Chairman Dole of Kansas, Simpson of Wyoming, Thurmond of South Carolina, and East of North Carolina; it has two Democrats: Heflin of Alabama and Baucus of Montana.

be filed with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located." This would have modified to a large degree the specific venue provisions of the Clean Air Act, the Safe Drinking Water Act and the Noise Control Act. However, this provision was dropped from the version presented to the Senate on November 30.

What will happen during the remainder of the 97th Congress is probably best known by consulting a medieval theologian. I and others supporting venue reform are weighing the chances of successfully adding a venue amendment to the regulatory reform bill on the Senate floor (or on another suitable vehicle) when it comes before the Senate. This will not come about without a fight, and it is probable that some members of the Committee on Environmental and Public Works will oppose venue-shifting amendments and might engage in delaying parliamentary maneuvering. It also appears that, unless an agreement can be reached on how to proceed with the venue issue in connection with S.1080, no time agreement, vital to orderly consideration of that bill, might be reached. No supporter of that reform wants to harm its chances of passage; thus it is possible that, although S.1080 is an ideal vehicle to which to add a venue proposal, the strong forces associated with regulatory reform may well prevail to keep controversial amendments off that bill. If venue is not added to some other bill, it will probably receive consideration in its own right in the Judiciary Committee in late February and be on the Senate calendar by early Spring. Even if the Senate is successful in passing a venue bill, however, chances appear slim of actually getting a new public law dealing with venue, since the House Committee on the Judiciary has never been favorably disposed toward venue reform and would probably assign any Senate initiatives to a place of low priority.

In addition to the question of what the venue law should be, there is a question as to what branch of our government should properly be charged with setting venue standards. Alluding to the importance of Congress taking the lead in this area, the Supreme Court has said that "venue rules nevertheless pose policy considerations which are and which should be weighed by Congress and not by this court." It should be clear that if venue reform is to occur, it will and should be as a result of action by Congress.

I believe that the Court was correct in placing on Congress the burden of resolving policy differences regarding venue. Too often we in Congress complain about the Courts making law and not merely interpreting it; Congress should welcome the opportunity to address this issue which clearly has taken its place among important legal issues of the '80's. We have held hearings on the issue; a number of Members have gained expertise on the issue; it fits with my theory of how a democracy is to function that Congress set the policy in this area. The

alternative to Congressional action is endless complaining about the supposed intent of Congress as deduced by some judge far removed from the legislative arena. I question why environmental groups fight so hard to keep this decision from being made in the political process. Is it a form of elitism that leads them to believe that the American people through their representatives are not capable of arriving at a just decision?

Regardless of what happens legislatively, I hope that the courts have taken cognizance of the debates on venue and have acquired a sensitivity to the depth of feeling on this issue possessed by many people removed from Washington, D.C. Perhaps the next time a transfer motion is made when a case is filed in a forum of dubious propriety the judge will give serious thought to what considerations make up "interests of justice" and include impact and local interest in that list. I want to make clear that my interest and that of my colleagues who share a desire to return matters impacting on particular areas to the courts of those areas is not to influence the final decision of a case; rather, our interest is to enhance the probability that justice will have been done and done in the presence of those most affected. Others have been extremely forthright in spelling out the tactical considerations leading to their decision to file in a particular court in order to affect the outcome of a case.⁸

Courts have long recognized this potential for abuse, if due to forum shopping, cases could be tried far from the location of the controversy on which they are based. The Supreme Court has recognized that ". . . the open door [of venue choice] may admit those who seek not simply justice, but perhaps justice blended with some harassment."⁹

Even if Congress does pass a law to modify venue along the lines that have been discussed, I do not believe that there will be a tremendous difference in the outcome of cases. I continue to have great faith in the independent judiciary of this country and in the integrity of our Federal judges. Combined with their generally high level of expertise, this will continue to mean that we will have decisions rendered along much the same jurisprudential path as we see today. The big difference that will emerge is a satisfaction, although others might say resignation, on the part of truly interested and affected parties that, whatever the decision finally rendered, it was done only after they had an opportunity for input.

Passage of venue-shifting legislation will restore the equilibrium of rights sought to be achieved by the Mandamus and Venue Act of 1962. As the Senate Committee Report accompanying the Act stated:

8. Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 Ecology L.Q. 91.

9. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial process to the convenience of the government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of the Government.¹⁰

If without undue prejudice to cases, cost to the Government, or demands upon our courts we can assure a local forum for local matters, it seems clear that we must do so.

Three decades ago Justice Robert Jackson phrased it well when in *Gulf Oil Corp. v. Gilbert* he stated:

In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.¹¹

This holds true today and represents a principle that cannot be dulled by time. I hope that readers of the articles to come will keep it in mind as they delve into them.

10. Hearing before the Committee on the Judiciary, United States Senate, 87th Cong., 2d sess. on H.R. 1960, Report No. 1992, August 31, 1962 at 3. Also found in Senate Report 1992, 1962 U.S. Congressional Code and Administrative News 2785.

11. *Gulf Oil Corp. v. Gilbert*, *supra* note 9, at 509.

A Return to Traditional Considerations for Determining Venue

United States Senator Paul Laxalt
and
Linden H. Kettlewell

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Our revolution against England in 1776 was predicated on the belief that no person should be subjected to the dictates of a government in which he had no part. Cherishing individual liberty, we established one government "of the people, by the people and for the people." Our Founding Fathers, in an effort to guarantee responsive and responsible governance, installed a three-branch federal government and divided power among those branches in such a manner that none would become pre-eminent. Further, all powers not specifically granted to the federal government were reserved to the states. Finally, representation in the Congress was allotted on the basis of both statehood and population in order to insure that all citizens' votes had equal weight.

In short, we have based our governing system on a concern for the individual. When the federal government becomes unapproachable, or the judicial system inaccessible to the individual citizen who has a real interest at stake, we must carefully examine the cause of that shortcoming. The pattern of litigation brought under 28 U.S.C. 1391(e) has altered significantly since the enactment of that provision. The result has been that the convenience of large public interest groups and public interest law firms is granted more consideration than the interests of aggrieved individuals. This departure from our traditional policy is unacceptable and legislation to remedy the problem should be on the agenda of the Congress.

I. *The 1962 Amendment*

In 1962, the 87th Congress added section (e) to the general venue provisions in 28 U.S.C. 1391.¹ The purpose of the amendment, as stated in accompanying legislative history, was to “make it possible to bring actions against Government officials and agencies in the U.S. district courts outside the District of Columbia.”² Prior to enactment of the amendment, there were specific existing limitations on jurisdiction and venue which prevented district courts other than the U.S. District Court in the District of Columbia from entertaining suits to compel or question actions by the Federal Government.

Judicial review of the actions of a Government official may be obtained through a statutory grant of jurisdiction, or through a nonstatutory remedy. Traditionally, the appropriate remedy in cases where the relief sought is performance by a Government official of a legal duty is the writ of mandamus. U.S. district courts, however, disclaimed the jurisdiction necessary to hear petitions for mandamus. Only the U.S. District Court for the District of Columbia, through an historical accident, claimed that jurisdiction. The District of Columbia is situated on land originally part of the State of Maryland. When the state ceded the land to the nation in 1801, the courts retained the jurisdictional grants contained in state law. Thus, the U.S. District Court of the District of Columbia had the authority to hear petitions of mandamus by reference to the body of law of the State of Maryland. As a result, the D.C. Court was the only inferior Federal court which could compel a Federal official or agency to carry out a legal duty as demanded in a petition of mandamus.

The Congress exhibited a compelling concern for citizen plaintiffs “who seek no more than lawful treatment from their Government.”³ The rationale behind the amendment was clear: suits involving property located outside the District of Columbia, or plaintiffs and witnesses situated elsewhere, or a cause of action clearly arising outside the Washington area should be tried in the forum central to the parties and the issues in the case. In enacting section (e), which governs venue in cases in which the U.S. Government is the defendant,

1. 28 U.S.C. 1391. Venue generally

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

2. Senate Report 1992, 1962 U.S. Congressional Code and Administrative News, 2785.

3. *Id.*

the Congress specifically considered the Government a national entity which could without undue imposition defend itself in any district.

In addition to its consideration of citizen participation and convenience, Congress expressed a concern that an historical accident had, in effect, created a "national court." This was a two-fold problem. First, the decision made by the D.C. court affected the actions of the Federal Government in dealing with citizens across the United States. That court became, to some extent, the arbiter of interpretation and enforcement of the Federal laws. Citizen plaintiffs were compelled to travel to Washington to bring suit against the Federal Government in a federal district court. By virtue of the fact that the D.C. Court alone had the jurisdictional authority to grant relief under a petition for mandamus, it became the authority on interpretation of the duties and responsibilities of Federal officials. Second, because of the singular nature of the authority wielded by this court, it received a disproportionate number of cases as compared with other U.S. district courts. The increased case load inevitably resulted in congestion of the court calendar and delays in the progress of litigation.

By 1962 the situation had deteriorated to the point that citizen plaintiffs were severely hampered in their efforts to receive expeditious and convenient consideration of their cases. The crux of the matter was the practical accessibility of justice. Enactment of section (e) opened the federal district courts across the nation to citizen plaintiffs, reduced the workload of the U.S. District Court in the District of Columbia and provided greater opportunity to bring suits against the Federal Government in forums logically connected with the issues at hand. This change brought venue in cases in which the Federal Government was the defendant into line with venue provisions and practices followed in most other kinds of cases.

Courts and legal scholars define appropriate venue simply by stating that the underlying function of venue "is to afford convenience of trial to the parties."⁴ The U.S. Supreme Court, in *Gulf Oil Corp. v. Gilbert*,⁵ enumerated the factors of public interest which should be weighed in determining the correct venue for an action. These included the ease of access to sources of proof necessary to the case, the availability of witnesses and of compulsory service of process to obtain the testimony of reluctant witnesses, the expense required to obtain willing witnesses, the enforceability of judgment in the case, if one is obtained, and "all other practical problems that make the trial of a case easy, expeditious, and inexpensive." In addition, the Court considered several factors concerning the interest of the community: the possible unfairness of imposing jury duty on citizens of a community which has no real interest in the outcome of the suit, the congestion which can occur when forum shopping results in cases being handled by courts with little relationship to the case, the local interest in having a case with significant local impact tried in the forum which allows the community to monitor the progress of the action, and, in cases brought in federal court under the diversity of citizenship jurisdictional grant, the familiarity of the local court with the applicable state law. Section (e) of 28 U.S.C. 1391, as drafted and passed, was a major step toward making

4. Moore's *Manual of Federal Practice and Procedure*, §7.01, p. 381. See also, Wright, *Law of Federal Courts*, 2nd ed., 1970, at 149.

5. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), 508-509.

general venue considerations applicable to cases against the Federal Government.

II. The Evolution of §1391(e) Litigation: Promoting Whose Convenience?

Twenty years ago, a compelling concern for citizen plaintiffs resulted in legislative amendment to the general venue provisions. During those twenty years, there has been significant change in both the political and legal areas. This change has fostered a new climate for litigation against the Federal Government and the role of the individual citizen plaintiff has diminished. In the early 1970's, following passage of major legislation dealing with consumers, environmental issues, and occupational health and safety, a variety of public interest groups were formed to monitor Federal compliance with the statutes and to provide input into the regulations promulgated to enforce the statutes. These groups have altered significantly the style of litigation against the Federal Government and the beneficial effect of the venue statute governing these actions has been largely negated.

Public interest groups generally have thousands of members nationwide and maintain full-time research and lobbying offices.⁶ Further, many public interest law firms employ a full complement of attorneys, and their work is supplemented by the pro bono work of other attorneys. Because of their size and

6. In testimony presented before the U.S. Senate Judiciary Committee Subcommittee on Improvements in Judicial Machinery, February 20, 1980, the following statements were made regarding the size of certain public interest groups and public interest law firms:

a) Paul Kamenar, representing the Washington Legal Foundation, testified that the Foundation is a non-profit corporation organized for the purpose of engaging in litigation and the administrative process involving matters of the public interest. The Foundation claims a national membership of 75,000.

b) William A. Butler appeared in behalf of the Environmental Defense Fund and the Natural Resources Defense Council. He stated that the Environmental Defense Fund is a non-profit private national organization with more than 45,000 members which provides legal services enabling its members to litigate environmental issues. The Natural Resources Defense Council claims membership numbering in the tens of thousands with offices in Washington, D.C., New York City, and San Francisco.

c) Peter J. Herzberg, representing the Sierra Club Legal Defense Fund, stated that the Fund is a non-profit public interest law firm with offices in Alaska, California, Colorado and the District of Columbia. The organization provides legal services regarding environmental matters to the Sierra Club and other clients.

d) Joel T. Thomas, General Counsel of the National Wildlife Federation, testified that the organization he represents is the largest private conservation organization, with a membership of more than 4.1 million. The Federation maintains a staff of ten attorneys actively engaged in litigation.

e) In hearings on regulatory reform proposals held in the House of Representatives during the 96th Congress (Nov. 13, 1979), Mr. Mark Green, representing Congress Watch and Public Citizen, described it as an organization of 70,000 contributing members which functions as a consumer advocacy group working with Congress and the agencies on consumer, environmental and law reform issues.

financial strength, they are able to conduct protracted litigation. For example, attempts to bar construction of the Tennessee Tombigbee Waterway conducted by public interest law firms involved nine separate suits and necessitated the intervention of the courts from 1972 to 1980. In hearings before the Senate Judiciary Committee held in 1980 on the subject of venue, James Watt, then President and Chief Legal Officer of the Mountain States Legal Foundation, addressed the role of the public interest law firm:

(T)he new ingredient to the judicial arena is the public interest group, or the special interest group. We call groups such as mine public interest groups. There are other groups which are focused narrowly on saving a place or a river or right to work, and so on.

"We come forward to the court and say that the public is the impact. Those x thousand members may not have any idea their interests are impacted, but a public interest group like mine, the Sierra Club, and others, say it is so.

"The question is whether we want to allow public interest groups like the one I represent or these others to exist. I think the answer is clearly yes. I don't like some of the results obtained by some of them, but clearly we have to protect that public interest from the Government, which is irony in itself.⁷

Public interest groups perform a vital role in representing the interests of citizens in specific cases. But to a great extent, the public interest law firms have displaced the individual citizen litigant and a case against the Government is brought for the large group with the goals and convenience of the group given the foremost consideration. The public interest law firm is the necessary party to the suit and determines where the suit will be filed. Venue laws have traditionally been enacted to provide convenience to the parties, in the "interest of justice." The presumption was, however, that all parties with an interest affected by the outcome of the suit would be formally named as parties. With the development of special interest law firms, and with the relaxation of the requirements for standing, the people living and working in the areas affected by the outcome of the suit are not necessarily involved and an essentially local matter is decided by a 'foreign' court.

A recent study of cases brought by public interest law firms over a 10 year period conducted by the Capital Legal Foundation shows that a disproportionate number are instituted in the District of Columbia. The results of this study indicate that, of the 274 cases included in the survey, 85 were decided in courts in the District of Columbia. The cases decided in Washington account for 21 percent of all public interest law firm victories. Moreover, the study demonstrated that although the number of total cases won and lost by these firms is about even, they won 68 percent of the cases litigated in Washington and only 41 percent of those litigated in the other districts. These ratios seem to indicate a sympathetic, and therefore preferred, forum in D.C.⁸ But the raw numbers of cases brought in D.C. and the win-loss ratio relative to the results in other districts are less important than the impact of the outcome of the

7. Federal Venue Statutes, Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, Serial Number 96-78, February 20, 1980, p. 31.

8. Capital Legal Foundation, *Environmental Litigation Study — First Phase Report*, September 17, 1981.

litigation. Relying on sterile numerical data does not accurately portray the magnitude of the problem of forum shopping.

In some significant cases, the 'foreign' court is the U.S. District Court for the District of Columbia. A suit to review the Colorado river basin salinity control and water quality plans was brought in the District of Columbia,⁹ as was a suit challenging the conditions placed on a water supply facility construction grant for a plant in the City of Denver.¹⁰ A suit to challenge the livestock grazing allowances in the eleven western states whose public lands are managed by the Bureau of Land Management was brought in the District of Columbia.¹¹ A landmark case to determine the ownership of all waters arising on federal reserved property in Arizona and Utah was also brought in the D.C. District Court.¹² An action to establish the water rights of the Pyramid Lake Paiute Tribe of Indians to water from a river in northern Nevada was heard in Washington.¹³ In two of these cases, the U.S. Department of Justice moved to transfer the litigation to a more convenient forum, one with more significant contacts with the issues in the case. The motions were denied.

Each of these was an important case involving decisions about the disposition of land and water rights in various states. Each would have a profound impact on the people living in those states. Yet they were brought, and retained, in Washington, D.C. The real parties in interest, those who would drink the water in Denver, or graze their cattle and sheep in Wyoming, or use the down-river flow to farm, were not necessary parties and so had little part to play in the litigation. The statute which was enacted to allow litigation against the Federal Government to be brought, whenever possible, closer to the land, the site of origin of the cause of action and closer to the people affected by the outcome of the suit had allowed an anomalous result. Intended for the convenience of the individual citizen plaintiff, section (e) has become the mechanism promoting the convenience of law firms and lawyers.

III. Current Legislative Proposals

Although serious concern about venue arose as early as 1977, the issue rose to a level of prominence in the 96th Congress. During that Congress, two bills were introduced which sought to amend the provisions for federal appellate courts contained in 28 U.S.C. 2112(a). The general policy premise of both of these bills was that venue is most appropriate in the district in which the impact of the outcome of the suit will be felt. The general focus of venue rules has historically been geographic in nature. Suits were properly brought in the district in which the cause of action arose or the subject matter of the suit was located. Each of these bills reverted to this traditional standard. S.1472, introduced by Senator Dennis DeConcini of Arizona, required environmental

9. *Environmental Defense Fund v. Costle*, 77-1436 (D.D.C. 1977).

10. *National Wildlife Federation v. Andrus*, 78-1522 (D.D.C. 1978).

11. *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974).

12. *Sierra Club v. Andrus*, 78-2213 (D.D.C. 1978).

13. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

cases to be heard in the district in which the environmental impact or injury is the most substantial. That bill stated that, if it could be shown that the case was one of national scope, the proper forum would be the District of Columbia. S.739, introduced by Senator Paul Laxalt of Nevada, required all civil cases in which the Federal Government is the defendant to be heard in the judicial district in which the injury or impact occurred.

In hearings held by the U.S. Senate Judiciary Committee Subcommittee on Improvements in Judicial Machinery, three major objections were voiced against these bills. Opponents of the bills testified that enactment of either bill would limit the number of appropriate forums, and, as a result, make litigation less convenient.¹⁴ Second, they objected to the version offered by Senator DeConcini because it was narrowly aimed at environmental litigation.¹⁵ Finally, opponents of the bills expressed a concern that any change in the venue statutes would result in an increase in threshold litigation required to determine appropriate venue.¹⁶

The trend in legislation has been toward shifting the emphasis in venue determinations from a mechanical test to a consideration of the merits in the individual case. Rather than defining proper venue strictly by making a geographical determination, the venue provisions drafted in the past few years have stressed flexibility designed to serve the convenience of the parties. A major point to be considered, it is argued, should be the protection of the defendant, since he does not control the litigation. In this instance, however, a clear distinction should be made between the citizen defendant and the case in which the U.S. Government is the defendant.

Although flexibility of venue provisions, and liberal transfer criteria, are necessary to balance the interests of the defendant and the plaintiff, the Congress specifically discussed the singular role of the Federal Government as defendant:

(T)hese are actions which are in essence against the United States. The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition.¹⁷

In other words, the care exercised to protect the interests of citizen defendants through the enactment of flexible venue provisions does not seem to be a central concern when the U.S. is the defendant. Thus, the rationale behind increasingly flexible venue statutes is not, in this instance, applicable.

Even the advocates of this new trend toward flexibility in venue would limit the range of forums in which the action should be brought.¹⁸ There is still a concern that the forum chosen have a logical nexus with the action being

14. Federal Venue Statutes, Hearing, *supra* note 7, at pp. 89, 94.

15. *Id.*, p. 98.

16. *Id.*, pp. 92, 94, 97.

17. Senate Report 1992, *supra* at note 2, 2785.

18. D. Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Tex. L. Rev. 392 (1976).

litigated. "Ideally, the location of each trial would optimize the interests of protection of defendant, fairness to plaintiff, speed of trial and availability of witnesses. Barring achievement of this ideal, if liberal transfer statutes can protect the defendant adequately, and modern transportation facilities can minimize evidentiary problems, then it makes sense to give effect to the plaintiff's initial choice of forum, *assuming that he chooses a forum with a logical relation to his claim.*"¹⁹

There is a need for a certain degree of elasticity in venue statutes. Purely mechanical constructions which lead to dismissal of the suit for improper venue, or to cases being heard in courts without any relationship to the action are illogical and argue for allowing maximum flexibility in venue. However, some balance should be found between such liberal interpretation of "convenience of the parties" that any forum is available and mechanical foreclosure of the more practical forum choices. Indeed, flexibility so great that it encourages forum-shopping cannot be in the best interests of any of the litigants.

The original proposal offered by Senator DeConcini, S.1472, was confined to environmental cases. The cases which had initially sparked attention to the current usage of the venue provision in 28 U.S.C. 1391(e) concerned environmental litigation. However, the problem is not one delimited by actions in the environmental area. Objections were made by opponents of the bills to this special treatment of one type of litigation, and of one set of interest groups. William Butler, representing the Environmental Defense Fund and the Natural Resources Defense Council before the Subcommittee on Improvements in Judicial Machinery, specifically elaborated on this concern:

S. 1472 only deals with environmental cases and does not affect litigation on other federal defense suits. However, if, as stated in the *Congressional Record*, one purpose of the bill is to restrict the hearing of such cases to areas where the impact is felt, the bill is inexplicably narrow . . . Why should environmental plaintiffs be treated any differently with regard to venue than other plaintiffs attacking federal administrative action?²⁰

Venue proposals offered in the 97th Congress have eliminated this distinction between environmental suits and other civil suits against the Federal Government. The problem is not one which is limited to a single area of litigation; thus, the solution to the problem should not be unnaturally constricted.

Finally, opponents of this legislation expressed a fear that any change in the venue statute would result in an increase in the amount of "threshold litigation" required to determine proper venue. The term "threshold" has been used interchangeably to describe two separate kinds of litigation. The first is that litigation which inevitably follows the enactment of a new statutory provision. This litigation is designed to test the waters and solidify the meaning of the statute. Words and phrases which have virtually become legal terms of art, or which have been defined elsewhere either by statute or decision, are explicated in light of their inclusion in a new provision. While increasing the level of litigation in an area which has enjoyed relatively little of it is undesirable,

19. *Id.* (Emphasis added).

20. Federal Venue Statutes, Hearing, *supra* note 7, at p. 98.

the actual effect of passage of a new provision is probably over-emphasized. Meticulous drafting, with careful reference to existing case law, should eliminate unnecessary litigation of this kind.

The second kind of "threshold" litigation is that which opponents of this legislation contended will occur at the outset of every suit brought under this section. This contention centered on concern that both S.739 and S.1472 contained terms which would require the parties to make an initial evidentiary presentation, subject to dispute, upon which basis the court would determine whether venue was proper. For example, S.1472 necessitated a separate court determination on whether the suit was "environmental in nature" and whether the case was local or national in scope. As noted previously, these terms have been stricken from current proposals. The language in both bills required the court to find that a "substantial" portion of the impact or injury had occurred in the district in order to establish proper venue.

Although venue has been hotly contested in some suits, it is not generally a major issue. Under current law, in those instances in which venue has been in dispute, courts have been asked to make the determination of proper venue based on statements of facts presented by the parties. These statements have included allegations concerning residence of the parties, "convenience of the parties," access to source material, and other criteria. Judges, acting on this information, make a judgment as to venue. Although the current venue statutes do not include the term "substantial impact" in describing the nexus between the community and the court, in fact courts have looked for precisely this kind of relationship. The interjection of language which codifies traditional venue criteria should not confound either litigators or the courts.

In the 97th Congress, the major objections discussed previously were studied carefully by proponents of venue legislation. The rationale underlying the legislative proposals was re-examined and attention was given to carefully enumerating the goals of the legislation in light of drafting difficulties. The major goal remained constant: flexibility in allowing suits to be brought where it is most convenient for the parties must be balanced against the public interest in having the case heard in the court central to the issues in the case. Given the change in the style of current litigation against the Federal Government, there is a need to provide, directly or indirectly, for participation by the real parties in interest as distinguished from the parties necessary to the suit. Finally, traditional venue considerations should be emphasized so that cases will be brought and decided in courts which have a significant relationship with the case. Rather than continuing the inadvertent "national court" status conferred upon the U.S. District Court for the District of Columbia, the venue provisions governing suits against the United States should encourage suits in districts other than the District of Columbia.

Thirteen drafts were considered before consensus was reached among proponents of venue legislation. The first proposal made a distinction between matters of a local nature and those of a regional nature. Suits brought by the Federal Government to compel or deter activity by citizens, and suits brought to compel action by the Federal Government which had a direct effect within a single state were to be heard in a district court in that state. If the impact of the suit had a direct effect over a region, i.e., a group of ten contiguous states, the suit should be brought in a district court in one of the states in the region which is directly affected. Further, proper venue was limited to the district or

region in which the "real party in interest maintains the facilities or conducts the activities which are the subject of the action."²¹

This draft, with six definitional paragraphs, was offered to establish the conceptual framework of venue legislation. It was, however, prey to the same objections leveled at the proposals offered in the 96th Congress concerning the litigation required to solidify judicially the definitions of terms.

The next series of drafts offered a much more succinct proposal. The initial proposal had been five pages in length. The new draft was three lines long. This draft added a limitation to the language in section (e) which provided that no action could be brought where the plaintiff resides or where the defendant resides unless the relief sought would directly affect the residents of that judicial district. Thus the bare fact of official residence in a district on the part of either the plaintiff, or an agency or official of the government as defendant, would be insufficient to evoke proper venue. There must be more of a relationship between the case and the court. Traditional venue considerations of real convenience to the parties, connection with the community, availability of witnesses and evidentiary material, and familiarity with local customs, influences and law would be weighed in determining whether there is a direct effect on the residents of the district. This draft was a concise, straightforward proposal which met the major goals of the legislative effort outlined above. However, in a case decided by the Seventh Circuit,²² the Court had ruled that the impact on an area required to establish proper venue must be part of the present cause of action, not the impact which may result at the end of a proceeding. This draft, which used language emphasizing the impact of the relief sought in the case, fell afoul of the ruling in that case.

The final series of drafts shifted the definition of impact on residents of a district. These proposals provided that no suit could be brought under section (e) where the plaintiff resides or where the defendant resides unless the government action or failure to act which is the subject of the suit substantially affects the residents of that district. Thus, the subject matter being litigated is the source of the relationship with the community, and therefore, the court.

One final amendment to the proposal was suggested and adopted. This amendment centered on the part of section (e) which allowed venue in any judicial district in which the cause of action arose. One law review article, examining federal venue and the legislative and judicial methods adopted to determine "where the cause of action arose," described "a bewildering array of approaches" to the problem.²³ Courts have rendered differing opinions concerning where the contacts between the court and the case "weigh most heavily,"²⁴ where the place of injury is situated,²⁵ and what the substantive law governing the resolution of the dispute infers about venue.²⁶ Some courts

21. S.1107, 97th Congress, First Session, Committee Print, July 15, 1981, p. 2.

22. *Reuben H. Donnelly Corp. v. F.T.C.*, 580 F.2d. 264 (7th Cir. 1978).

23. D. Wood, *Federal Venue: Locating the Place Where the Claim Arose*, note 18, *supra* at note 18, p. 403.

24. *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968).

25. *Rosen v. Savant Instruments, Inc.*, 264 F. Supp. 232 (E.D.N.Y. 1967).

26. *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970). *M. Dean Kaufman, Inc. v. Warnaco, Inc.*, 299 F. Supp. 722 (D. Conn. 1979).

have, without explanation, simply ruled on venue without looking back.²⁷ In short, the judicial record on the subject of where the cause of action arose is contradictory.

In cases brought under the venue provision in 28 U.S.C. 1391, there are two divergent lines concerning interpretation of where the cause of action arose. One line of cases states that the cause of action in a suit against the Federal Government arises where the action is administratively initiated or the rule or regulation or policy is promulgated.²⁸ Other case law indicates that the cause of action arises where the administrative action, rule, regulation or policy is actively enforced.²⁹ If the impact, or effect, on an area must be part of the present cause of action in order to constitute a valid basis for venue, then it follows that the cause of action arises when and where that impact is felt. In other words, for venue purposes the cause of action should be deemed to arise in the judicial district in which the residents are substantially affected by the Federal Government action or failure to act which is the subject matter of the suit. Language to this effect was added to the final draft proposal. Specifically, the proposed amendment to 28 U.S.C. 1391(e) stated:

(e) A Civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action, *provided, however, that no such action may be brought in a judicial district pursuant to (1) or (4) hereof unless the agency action or failure to act that is the subject of the lawsuit would substantially affect the residents of that judicial district. A cause of action pursuant to (2) hereof shall be deemed to arise in the judicial district or districts in which the residents would be substantially affected by the agency action or failure to act that is the subject of the lawsuit.*

IV. The Need for Legislative Change

As noted above, enactment of section (e) reversed an historical anomaly and opened all district courts in the United States to suits against the Federal Government. In stating the rationale underlying adoption of the proposal, the Congress discussed three major subjects. First, the convenience of the parties would be enhanced by broadening the venue provisions for suits in which the U.S. was a defendant.³⁰ The citizen plaintiff could bring suit in a forum of his choice, rather than being required to travel to Washington to demand the attention of his government. In broadening this provision, Congress anticipated that the courts would rule on venue in these cases using the same criteria used

27. *McCrory Corp. v. Cloth World, Inc.*, 378 F. Supp. 322 (S.D.N.Y. 1974).

28. *Leroy, Attorney General of Idaho v. Great Western United Corp.*, 443 U.S. 173 (1979).

29. *Wren v. Carlson*, 506 F. 2d 131 (D.C. Cir. 1974). *Patmore v. Carlson*, 392 F. Supp. 737 (E.D. Ill. 1957). See also *Lamont v. Haig*, 590 F. 2d 1124 (D.C. Cir. 1978).

30. Senate Report 1992, *supra* at note 2, 2785.

in determining proper venue in most other situations. To be considered were the residence of the plaintiff, the location of any real property involved in the suit, and the place where the cause of action arose. But in allowing suits to be brought in courts outside the District of Columbia, the Congress did not intend to so broaden venue that any court in the U.S. would be available without consideration of its relationship to the case. Language in the legislative history indicates that Congress did not mean any district court with a relationship to the case, *or* the District of Columbia. Suits brought in the District should also meet the test and demonstrate a nexus between the cause of action and the court.

Section (e) was added to the general venue provision of the U.S. Code in an effort to make citizen suits against the government less expensive and less burdensome on the plaintiffs.³¹ Compelling the government to take action prescribed as a preexisting legal duty should not entail an undue burden on the individual bringing the suit.

Finally, Congress anticipated that enactment of section (e) would promote more efficient judicial administration.³² The congestion, and subsequent delay, in the District Court for the District of Columbia would be reduced. Further, cases with problems “which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights” would be heard by judges familiar with them; these are problems “which they can handle expeditiously and intelligently.”³³

These are essentially the concerns which require us to re-examine the practical effect of section (e) today. Since the enactment of this section, the policy considerations have remained constant. However, the climate in which litigation is now brought against the Federal Government has altered considerably. The very people Congress feared were being burdened by an inadvertent, historical occurrence are again left out of the judicial system. The role of the citizen plaintiff has diminished and, increasingly, litigation against the government has been brought by public interest groups and public interest law firms in pursuit of the goals of their organizations. The real parties in interest, those primarily affected by the outcome of the suit, have no formal place in the litigation. Calvin Rampton, former Governor of the State of Utah, described this situation in testimony before the Subcommittee on Improvements in Judicial Machinery:

Though the impact of the litigation is local in nature and in fact may vitally affect the rights of individual citizens specifically rather than the general public interest, the nominal parties to such suits and the ‘necessary’ parties are the executive officers of the federal government having the responsibility in the particular subject matter. Those who are most deeply affected may often have decisions made by the District of Columbia Courts affecting their particular economic or social welfare without even knowing that the litigation is in progress, and if they learn of it, being able to defend their rights only at great inconvenience and expense.³⁴

31. *Id.*

32. *Id.*

33. *Id.*

34. Federal Venue Statutes, Hearing, *supra* note 7, at p. 19.

Before Congress changes the law upon which the progress of litigation depends, there must be compelling reasons directing its action. But when the inequities resulting from the application of the current law rise to a certain level, the Congress should act. Section (e) no longer satisfies the policy considerations prompting its enactment and has, in addition, promoted other problems.

In spite of legislative history to the contrary, and in contradiction of established case law, the District of Columbia district court is still treated as a "national court." The Congress, noting the inadvertent creation of a single federal court to hear mandamus actions, deliberately altered the law in such a manner as to equalize jurisdiction and venue among all district courts. In taking this action, the Congress reasserted the premise of the federal judicial system, i.e., that each and every federal district court is bound by the same grants of authority as well as the same limitations. In short, although the courts in the District of Columbia had retained a special status prior to the enactment of section (e), it was affirmatively removed by that legislation.

All federal district courts are charged with the responsibility of making decisions which have national implications. In a case decided in the U.S. Circuit Court for the District of Columbia in 1974, the court ruled that there is no lower federal trial or appellate court which is more particularly suited than any other to hearing and resolving issues which are national in scope.³⁵ In a later case in which transfer from the District of Columbia to another forum was ordered, the court stated that "(t)o the extent that these cases present a 'national policy issue,' the legal question can be resolved by interpretation of the relevant statutes" and should properly be heard by a federal court with appropriate venue.³⁶ Logically then, neither cases with a multitude of relationships with another district nor cases national in implication should be brought in the District of Columbia barring some other compelling consideration.

Despite the evidence that the Congress did not intend the District of Columbia courts to continue as a national forum, and despite some persuasive judicial rulings on the "national policy" issue, opponents of current venue proposals continue to object to the elimination of what they term "national" lawsuits from consideration by courts in Washington, D.C.³⁷ They continue to subscribe to the theory that the courts in the District of Columbia have a special status, status which is impervious to traditional venue considerations.

In fact, section (e) currently is read to allow suit in any district court with a nexus to the case, or in the District of Columbia. As a result, the court has become a preferred forum for those who are interested not only in a sympathetic court, but also for those who seek the collateral benefits to be obtained from trying a suit in a national media market, with attorneys headquartered in Washington not "handicapped" by trial held in "rural" areas where the "judge or jury trying the case *in the local problem area* is likely to be unsympathetic."³⁸ Under this interpretation of section (e), suits like those

35. *Starnes v. McGuire*, 512 F. 2d 918 (D.C. Cir. 1974).

36. *Southern California Association of Governments v. Kleppe*, 413 F. Supp. 563 (1976).

37. Federal Venue Statutes, Hearing, *supra* note 7, at p. 93.

38. J. Brecher, Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers, 2 Ecology Law Quarterly 91 (1972), pp. 93-94. (emphasis added)

discussed earlier in the article are brought, and retained, in the District of Columbia at the expense of the real parties in interest and in abrogation of the original intent of the Congress in passing section (e).

When suit is brought in a district which has a connection with the subject matter of the lawsuit, those parties who have an interest in the outcome of the suit, but who may not have been served as necessary parties, have a greater opportunity to receive actual notice of the proceeding. The action will receive local media attention, will probably be discussed in passing by members of the Bar familiar with the local court calendars and by citizens who have a direct interest in the subject matter. The community is much more likely to be aware of an injunctive action filed to halt motorboating on a local lake over the Fourth of July weekend which is filed in the local district court than one which is filed in the District of Columbia, 2300 miles away.³⁹

In addition, when more people are aware of the initiation of a suit, there is a greater likelihood that interested parties will have timely opportunity to intervene. Thus, the court will hear aspects of the dispute presented by parties whose interests may diverge from the interests of the Government defendant, or the organization plaintiff. With the greatest amount of information about the issues in the case, the court can make the most intelligent decision.

It is still a common goal of venue provisions to have the suit heard in court where the parties can most conveniently litigate. However, rather than reading this in a purely mechanical fashion, the court should give consideration to all parties including the real parties in interest. Venue has rested in great part on the convenience of the parties because it has been assumed that justice is better served when litigation is conducted with a minimum amount of difficulty in presentation of evidence and in access to witnesses and with minimum expense incurred by the parties to the suit. As discussed earlier, consideration usually given to protection of the defendant, who has not had the opportunity to select the forum, is of lesser importance in cases where the defendant is the U.S. government.

Under current practice, the convenience of the citizen plaintiff has been subordinated to the convenience of the attorneys and the law firms. This is particularly ironic in view of testimony presented to the Senate which describes multi-office legal groups, with thousands of dues-paying members and a treasury to support litigation efforts. To argue that the convenience of a national organization should be given more weight than venue criteria which have been used in courts for many years and which are designed to place litigation where there is a relationship with the court is to force an illogical conclusion. Further, it is a conclusion which is in direct contravention of the intent of Congress in enacting section (e).

Actions should be conducted close to the relevant events and complaint giving rise to the suit. In a case in which suit was brought to recover damages allegedly flowing from deployment and utilization for law enforcement purposes of army and air force personnel on a South Dakota Indian reservation, the court ruled that the place where the claim arose is the "situs of events important to the case." "(W)here 'the claim arose' should in our view be ascertained by advertence to events having operative significance in the case, and a

39. *Defenders of Wildlife v. Andrus*, 78-1332, 455 F. Supp. 466 (D.D.C. 1978).

commonsense appraisal of the implications of those events for accessibility to witnesses and records."⁴⁰

The fact that some portion of the action by the Federal Government which is the subject matter of the suit may have occurred in Washington should not, in itself, establish venue in the District of Columbia. The relationship with the District Court should be substantial. To exact a less demanding standard for establishing venue in the District of Columbia technically permits any suit against the government to be tried in the District. When the Congress broadened the venue provisions in 1962, they anticipated use of typical venue criteria in cases against the U.S. Government. A miniscule relationship with the D.C. court counteracted by substantial impact in another jurisdiction does not meet the test which states that the claim arose at the situs of events important to the case.

Knowledge of local customs, influences, conditions and history facilitates expeditious and intelligent handling of the case. Each district court is able to give a competent rendering on the points of law involved in a case. In that sense, each court in the nation is able to decide a case. But occasionally it is essential to have a more intimate understanding of the facts surrounding the case. Briefing papers are designed to provide the court with a concise statement of the facts of the case. But each brief is also designed to present the point of view of the party offering the brief and may not include the information necessary to provide a complete understanding of the situation. For example, in the instance in which the subject matter of the lawsuit is the recreational use of a body of water in northern Nevada, it may be pertinent to consider that it is the only body of water of any size for over 300 miles and that it is the sole recreational water of any size in that quarter of the state.⁴¹ In a case which determines the validity of the livestock grazing conditions set for federal lands by the Bureau of Land Management, it may be relevant to consider whether grazing land is available which is not federally owned land, the extent to which federal land is used to graze the livestock, the size of the herds and the impact of livestock-grazing conditions on the local economy as well as on the environment.⁴² It is one thing to read facts stated in a brief. It is another to have a working familiarity with the factors which will play a significant role in determining the final effect of the judgment.

Accessibility to the judicial system, and the opportunity to monitor the progress of litigation important to the community, increase the level of confidence in the system. In cases brought far from the area in which the cause arose, or the impact of the decision will be felt, there is little chance for the real parties in interest to follow the progress of the litigation. Unless a case evokes local interest, there is little news coverage of the case on a regular basis. The case, when brought in a foreign forum, is decided and the people interested in the outcome must read the opinion after the fact. This fosters a growing distrust of the plaintiffs, the Government and the judicial system. In cases in which the eventual outcome is unpalatable to some in the community, a continual information flow about the facts in the case, the manner in which the case is

40. *Lamont v. Haig*, *supra* note 29, p. 1134.

41. *Defenders of Wildlife v. Andrus*, *supra* note 37.

42. *Natural Resources Defense Council v. Morton*, *supra* note 11.

presented and the arguments offered by both sides may ameliorate the initial negative impact of the decision.

Part of the strength of our judicial system lies in the confidence in that system expressed by the citizens. When all sides of the dispute are presented, and the fullest possible consideration is given to all relevant factors, acceptance of the decision of the court comes more easily. When, however, many people feel they have been effectively denied their "day in court," resentment and distrust undermine the willingness to accept adverse decisions made by the courts. Finally, full confidence in the fairness of the judicial system reduces the likelihood that adverse decisions will be appealed, or that actions of a similar nature will be brought in other forums in an attempt to discredit the judgment in whole or in part.

Venue provisions should not be so broad as to encourage forum shopping. Whether the object of carefully selecting a forum is to obtain the maximum possible national publicity for a cause, or to influence the outcome of a case by finding a sympathetic court, the underlying premise behind venue is ignored. In order for venue to be proper, the subject matter of the action must bear a reasonable relationship to the court in which it is heard. Thus the venue statute should not be so broadly drafted, or so liberally construed, as to allow a miniscule relationship with a district to suffice in establishing venue. Although the trend has been toward opening the choices for available forums, too wide an interpretation logically results in the technical elimination of venue as a legal requirement for properly bringing suit.

Finally, the general venue proposals offered in the 96th and 97th Congresses do not attempt to supercede the specific venue provisions contained in certain organic statutes. Section (e) applies only in those cases in which the Federal Government is the defendant and which are not expressly covered by a more specific statute. Some statutes, and the cases which are brought under them, require the unique expertise of a certain court. In those instances in which Congress has excepted a statute from inclusion in the general venue law, careful consideration should be given on an individual basis to amending those provisions.

V. Summary

Briefly, the 97th Congress altered the venue provision in 28 U.S.C. 1391 to achieve three goals: citizens bringing suits against the Federal Government should not be forced to litigate legitimate claims at great expense and inconvenience; all federal district courts in the United States should be open to suits brought against the government; and, the congestion and delay in the courts in the District of Columbia should be diminished by expanding the number of forums in which actions against the Federal Government could be brought. The Congress at that time anticipated that the courts would, in cases brought under section (e), adopt traditional venue criteria for determining whether venue was proper in a given district. These criteria include a nexus with the community in which the suit is litigated, and consider the residences of the plaintiff and the defendant, the access to witnesses and evidentiary materials, and the interest the community may have in the outcome of the suit. The anomaly of a national court would be removed and suits petitioning the

government would be heard in the district in which the impact of the government action, and the impact of the judicial decision, would be felt. Further, the real parties in interest, the individual citizens, would have convenient access to the judicial system in which their rights are being litigated.

Unfortunately, the style of litigation against the government has changed markedly since the adoption of section (e). Citizen plaintiffs, and the real parties in interest, have an increasingly diminished role while national public interest law firms control major litigation. The courts in the District of Columbia are still treated as a national judicial forum and the delay and congestion in those courts which concerned the Congress 20 years ago has continued. 28 U.S.C. 1391(e) no longer achieves the purposes for which it was enacted.

But we have not changed our goals. We still strive to make justice accessible to those whose rights and interests are at stake. We continue to disavow the special status of the courts of the District of Columbia as "national courts." In almost every other area of litigation, we adhere to the traditional considerations which have governed the determination of proper venue. Thus, the time is ripe for careful reconsideration of the continued efficacy of section (e).

In his opening statement in hearings on the subject of venue held during the 96th Congress, Chairman of the Subcommittee on Improvements in Judicial Machinery Dennis DeConcini succinctly stated the foundation of our re-examination of the general venue provisions in the U.S. Code:

Those who would argue that the law is the law no matter where or who decides it neither understand the nature and organization of the Federal judiciary nor do they appreciate the realities of legal decisions. Issues are not self-evident. If they were, there would be no need for judges. But because they are not, we depend upon a highly skilled and unbiased judicial system to render decisions. Those decisions will, nonetheless, reflect the knowledge, experiences, and context of the judge and the jury.⁴³

Our government is a federal system which cherishes the rights and privileges accorded to the individual citizen. The social, cultural, historical and geographical differences which characterize our nation have contributed to the development of a flexible, accessible government. Provisions of the law which diminish the role of the individual citizen and result in a disaffection with the administrative or judicial system should be studied and revised. Section (e) is such a provision.

43. Federal Venue Statutes, Hearing, *supra* note 7, p. 2.

Present Venue Provisions — Flexibility v. Inconvenience

Nicholas C. Yost

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Conclusion

*Appendix A — Drafting Suggestions**Appendix B — 28 U.S.C. 1391**Introduction*

The proponents of legislation to shift venue to the locality where the effects of a lawsuit are most directly felt assert that holding a trial where the most affected people can see justice being done gives those citizens a greater feeling of participation in their government and promotes respect for it. The opponents of such proposals contend that when plaintiffs, defendants, their lawyers, the administrative record, and any witnesses are located in one place, judicial efficiency and the convenience of the parties make that place the most appropriate site for a trial.

Both sides, I believe, are right. Fostering the trust of people in a locality that justice is being done and providing a forum for the conduct of litigation that is convenient to those involved in it are both legitimate and wise objects of public policy.

Under existing law, both these factors are considered in selecting the place where a trial will be held. Under the venue shift proposals, only the one factor, proximity to the locality, would be considered. The venue shift proposals would be a legislative mandate for inflexibility, and would be, I submit, a mistake.

I shall in this essay first examine the existing venue and transfer provisions and how they operate. I will then turn to the arguments presented by the proponents of venue shift proposals and examine their merits, and will conclude by going into the reasons against such a venue shift.*

A. The Evolution and Operation of Present Venue and Transfer Provisions

1. The Evolution of Venue

a. What is Venue?

Venue relates to the place where a matter is to be tried, not whether it is to be tried, which is a question of jurisdiction. Originally venue had been the servant of the court's convenience and was designed to assure the availability of jurors who knew the facts of the case.¹ Over a period of time, this focus shifted from the court to the litigants, such that in the late 1930s the Supreme Court was able to say that "the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition."²

*A separate appendix (App. A) discusses drafting problems.

1. Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Tex. L.R. 392, 393 (1976).
2. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939); see Wood, *supra*, note 1, at 393.

b. Modern Venue Law³

The Federal venue statutes were consolidated in 1948.⁴ Thereafter, this basic section, 28 U.S.C. 1391, has been amended several times—each time to broaden the venue requirements and remove impediments to aggrieved parties' pursuit of justice in the courts.⁵ These various amendments broadened citizens' ability to sue Federal officials (discussed below),⁶ broadened the ability to sue with respect to tort claims concerning automobiles,⁷ broadened the ability to sue with respect to both diversity and non-diversity cases generally,⁸ permitted joinder of Federal and non-Federal defendants in the same venue,⁹ and broadened the ability of a citizen to sue a foreign state.¹⁰

Each of these amendments over the past third of a century was designed to open the doors of courts to citizens, to allow allegedly aggrieved plaintiffs to bring lawsuits in places convenient to them as long as they were not inconvenient to others.

c. Venue in Suits Against Federal Officials

The subject of this article, venue where the defendant is the United States or its officials, has followed a parallel but distinct course. A bit of background is necessary to understand where we are today.

For most of American history, until the early 1960s, suits against Federal officials to compel them to do things could *only* be brought in the nation's capital. There were two reasons for this restrictive and distinctly inconvenient rule.¹¹ First, the United States District Court for the District of Columbia was

3. Generally see: Cates, *Venue in Corporate Suits Against Federal Agencies and Officers*, 60 Minn. L. Rev. 81 (1975); Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221 (1977); Haworth, *Modest Proposals to Smooth the Track for the Race to the Courthouse*, 48 Geo. Wash. L. Rev. 211 (Jan. 1980); Wood, *Federal Venue*, *supra*, note 1; Note, *Proper Venue for an Action When At Least One Defendant Is An Officer or Employee of the Federal Government*, 57 Minn. L. Rev. 1005 (Apr. 1973); Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 Harv. L. Rev. 1735 (June, 1980).
4. 28 U.S.C. 1391. 62 Stat. 935, June 25, 1948. See Reviser's Note in West's Annotated Code. While this section is the general venue statute, there are numerous instances where Congress has provided special venue provisions for limited categories of cases. See: Moore, *Federal Practice*, para. 0.144[14.-17]; Note, *Venue for Judicial Review*, *supra*, note 3 at 1737-1738.
5. Pub. L. 87-748 (1962), Pub. L. 88-234 (1963), Pub. L. 89-714 (1966), Pub. L. 94-574 (1976), and Pub. L. 94-583 (1976).
6. Pub. L. 87-748. See Moore, *Federal Practice*, para. 0.142[7].
7. Pub. L. 88-234.
8. Pub. L. 89-714.
9. Pub. L. 94-574.
10. Pub. L. 94-5983.
11. *Natural Resources Defense Council v. Tennessee Valley Authority*, 459 F. 2d 255, 258 (2d Cir. 1972); see *Blackburn v. Goodwin*, 608 F.2d 919, 922 (2d Cir., 1979); *Liberation News Service v. Eastland*, 426 F.2d 1379, 1383 (2d Cir. 1970); also see *Stafford v. Briggs*, 444 U.S. 527 533-534, 63 L. Ed. 2d 1, 100 S. Ct. 774 (1980); Cates, *Venue in Corporate Suits*, *supra*, note 3, at 83-85, 92; Note,

the only District Court which had jurisdiction to issue writs of mandamus to compel Federal officials to perform nondiscretionary duties (i.e., to make them obey the law). This historical anomaly was unintended but significant. As the Supreme Court found in the "venerable decision"¹² of *McIntyre v. Wood*, Congress had not given any District Court mandamus authority,¹³ but as the Court ruled a quarter century later, when Maryland ceded the District of Columbia to the United States, the District Court obtained not only Congressionally authorized powers but also retained whatever powers the court enjoyed under the common law of Maryland at the time of cession.¹⁴ That authority included mandamus jurisdiction.¹⁵ For suits where mandamus afforded the appropriate remedy, plaintiffs were forced to journey to the District of Columbia.

The second reason for suits' gravitation to the nation's capital related to jurisdiction over particular Federal officials. Assuming the relief sought was injunctive rather than by way of mandamus, the plaintiff still had to join as defendant any Federal official who was an indispensable party. In many cases, the regional official's superior officer was such an indispensable party and he resided officially in Washington and could only be sued there.¹⁶ This doctrine of the "indispensible superior," coupled with the restrictions on mandamus authority, forced plaintiffs aggrieved by Federal action to come to Washington to sue their government. These problems were particularly acute in the West, where Federal ownership of substantial portions of the land provided the occasion for much litigation, clearly inconvenient for those living on or near the lands.¹⁷ In Wright's words of summary, "These archaic doctrines often burdened litigants challenging the federal government, . . ."¹⁸

After a century and a half of forcing plaintiffs into inconvenient forums, Congress responded by enacting the Mandamus and Venue Act of 1962,¹⁹ which successfully cured the two problems which had occasioned its passage. The first part gave the mandamus jurisdiction to all District Courts that had hitherto been the monopoly of the District of Columbia's court.²⁰ The second

Proper Venue for an Action, supra, note 3, at 1006-10087, 1112; Prepared Statement of Paul D. Kamenar, in *Federal Venue Statutes*, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 96th Cong., 2d Sess. on S.739 and S.1472, Ser. No. 96-78, Feb. 20, 1980, at 36 (hereinafter "Hearings"); Statement of Gordon H. DePaoli in *Id.*, at 40.

12. *N.R.D.C. v. T.V.A.*, *supra*, note 11, at 258.

13. *McIntyre v. Wood*, 11 U.S. (7 Cranch) 504, 3 L. Ed. 420 (1813).

14. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 9 L. Ed. 1181 (1838).

15. *Ibid.*

16. *N.R.D.C. v. T.V.A.*, *supra*, note 11, at 258.

17. *Ibid.* The Western lands issue has properly been called "the paradigm of the 1962 legislation," described *infra*, designed to cure the problem. *Liberation News Service v. Eastland, supra*, note 11, at 1384. Also see *Stafford v. Briggs, supra*, note 11, at 534; Wright, Miller, and Cooper, *Federal Practice and Procedure*, sec. 3815.

18. Wright et al, *supra*, note 17, sec. 3815.

19. Pub. L. 87-748, 76 Stat. 244.

20. 28 U.S.C. 1361.

part set out four possible forums in which Federal officials might be sued: (1) where a defendant in the action resides, or (2) where the cause of action arose, or (3) where any real property involved in the action is situated, or (4) where the plaintiff resides if no real property is involved in the action.²¹ These venue provisions were coupled with a nationwide service of process by mail upon Federal officials to remedy the problem of the indispensable superior.²²

The subsection mentioning Federal officials, 28 U.S.C. 1391(e), was amended once more in 1976 to make clear that when a suit was brought against Federal officials in a place proper under this subsection, non-Federal defendants might be joined if under other provisions of law venue was also proper as to them.²³ This amendment too was occasioned by Western public lands problems.²⁴ In many controversies involving such lands three parties are involved: the official, the successful applicant, and the unsuccessful applicant.²⁵ Another situation which may involve a non-Federal defendant along with a Federal one is in which relief is sought against Federal and State officers cooperating in a regulatory or enforcement program.²⁶ The 1976 amendment makes clear that such joinder is proper.

Section 1391(e)* now reads as follows:

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

2. How Venue Selection and Transfer is Designed to Work

a. Venue Selection

How does venue selection now work? Basically, plaintiff brings a suit in any forum permitted by 1391 or some other statute. If a defendant is dissatisfied with a plaintiff's choice of forum, defendant moves under 1404(a) to change venue "for the convenience of parties and witnesses, in the interest of justice"

21. 28 U.S.C. 1391(e).

22. *Ibid*; see Cates, *supra*, note 3, at 90-91.

23. Pub. L. 94-574, 90 Stat. 2721; *Blackburn v. Goodwin*, *supra*, note 11, at 924; see Cates, *supra*, note 11, at 925.

24. *Blackburn v. Goodwin*, *supra*, note 11, at 925.

25. *Ibid*.

26. *Ibid*.

*The whole of 28 U.S.C. 1391 appears as Appendix B to this article.

to another court where it might have been brought in the first place (i.e., in one of the forums authorized by 1391 or a specific venue statute). So, within the venue choices afforded by Congress, the party allegedly aggrieved gets first choice of forums subject to another party's objection and the court's decision.

What is to be considered? Justice Jackson, writing for the Court in the leading case of *Gulf Oil Corp. v. Gilbert*, noted that general venue statutes

are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under a temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.²⁷

Many jurisdictions have met the problem of misuse of venue by investing courts with a direction to change the place of trial on various grounds, "such as the convenience of witnesses and the ends of justice. [Footnote omitted.]"²⁸ The problem, Jackson continued,

is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it. [Footnote omitted.]

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses. [Footnote omitted.]

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. [Footnote omitted.] But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home

27. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

28. *Ibid.*

with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.²⁹

Absent unusual circumstance, courts have not exercised their inherent power to transfer so as to disturb a party's choice of forum.³⁰ Indeed plaintiff is not required to include in his complaint an allegation showing proper venue. Venue involves a privilege personal to one defending a claim and is waived in the absence of timely objection.³¹ It should be noted, of course, that in cases involving multiple defendants, venue must be proper against each.³²

Of all the factors in venue selection, convenience of the parties has traditionally been most critical.³³ This is said by some courts not to include the convenience of counsel nor that of expert witnesses, but if convenience of counsel relates directly to the cost of litigation, it becomes a factor to consider.³⁴ Others have suggested in the review of administrative action that the convenience of counsel becomes, in the absence of witnesses, the only convenience factor.³⁵ In the case of review of administrative actions when there is no fact-finding, the convenience of witnesses generally ceases to be an issue.³⁶

b. Sec. 1391(e)

With respect to suits against Federal officials, the general venue statute as discussed above allows plaintiff to choose among such of the four statutory options as may be applicable to him:

- (1) where a defendant resides;
- (2) where the cause of action arises;
- (e) where any real property involved in the action is situated; or
- (4) where the plaintiff resides if no real property is involved.³⁷

29. *Id.*, at 507-509.

30. *Id.*, at 508; *Tenneco Oil Co. v. E.P.A.*, 592 F.2d 897, 900 (5th Cir. 1979); see *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, *supra*, note 2, at 168.

31. Moore, *Federal Practice*, para 0.140[1.4]. See Statement of Gordon H. De Paoli in Hearings, *supra*, note 11, at 29, 45; Statement of Paul D. Kamenar, *Id.*, at 39. The law has been aptly described as "Congress' policy of balancing the plaintiff's right to choose the place to bring litigation and the defendant's right not to litigate in an unreasonably inconvenient forum." Statement of William A. Butler, *Id.*, at 89.

32. *Lamont v. Haig*, 590 F.2d 1124, 1129 (D.C.Cir. 1978).

33. *Cochran v. Iowa Beef Producers*, 596 F.2d 254, 261 (8th Cir. 1979), *cert. den.* 442 U.S. 921, 61 L.Ed.2d 290, 99 S.Ct. 2848; See *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, *supra*, note 2, at 168. Note that both the general venue transfer provisions for district courts (28 U.S.C. 1404) and for courts of appeals (28 U.S.C. 2112(a)) refer to the "convenience of parties" and the "interest of justice" as criteria for transfers of venue.

34. *Blumenthal v. Management Assistance, Inc.*, 480 F. Supp. 470, 474 (N.D.Ill. 1979).

35. *United Steelworkers v. Marshall*, 592 F.2d 693, 697 (3rd Cir. 1979); see Note, *Venue for Judicial Review*, *supra*, note 3, at 1739.

36. Note, *Venue for Judicial Review*, *supra*, note 3, at 1738-1739.

37. 28 U.S.C. 1391(e).

The cases have tightened the contours of possible applicability of the section. It does not apply to officials of a locally-based Federal corporation (TVA),³⁸ nor does it extend habeas corpus jurisdiction.³⁹ It does not apply to former Federal officials,⁴⁰ to members or employees of the legislative branch⁴¹ or to members of the Judicial Ethics Committee.⁴² The Supreme Court, in holding that 1391(e) does not apply to suits for money damages against Federal officials in their individual capacities, also read into the reference to "civil actions" in that section the limitation to actions in the nature of mandamus which appears in 28 U.S.C. 1361 (the mandamus provision that was the other section of the Mandamus and Venue Act of 1962).⁴³

Subsections (1), (3), and (4) of 1391(e), relating respectively to the residence of the defendant, the location of real property, and the residence of the plaintiff, do not, for the purposes of the pending legislation, provide severe problems of construction. But Subsec. 1391(e)(2) does. It provides that venue may be where "the cause of action arose." In Moore's tart comment, "Nothing in the legislative history suggests what the draftsmen thought about the question of where it is that a 'cause of action' arises."⁴⁴ As a result, one Court of Appeals was able to conclude that: "[F]ederal courts have used a number of different approaches in determining the place where 'the cause of action arose.'"⁴⁵ One commenter, while noting that it is "impossible to describe the present state of the law under section 1391(e)(2),"⁴⁶ does conclude that most of the recent decisions on this "knotty problem" assume that "the locus of some wrongful act" rather than "the locus of injury" determines where a cause of action arises.⁴⁷ This construction assumes particular significance in that some of the venue shift proposals would apply to suits under 1391(e)(1) and (4) but not (2). With the focus on defendant's wrongful act, the commenter concludes: "Since most official action by the federal government occurs at the capital, venue under section 1391(e)(2) would lie almost invariably in the District of Columbia."⁴⁸

38. *N.R.D.C. v. T.V.A.*, *supra*, note 11, at 1391.

39. *Schlanger v. Seamans*, 401 U.S. 487, 490, n.4, 28 L.Ed.2d 251, 91 S.Ct. 995, *reh. den.* 402 U.S. 990, 29 L.Ed.2d 156, 91 S.Ct. 1871 (1971).

40. *Lamont v. Haig*, *supra*, note 32, at 1311.

41. *Liberation News Service v. Eastland*, *supra*, note 11, at 1385.

42. *Duplantier v. United States*, 480 F. Supp. 40, 45 (E.D.La. 1979), *aff'd* 606 F.2d 654, 664 (5th Cir. 1979), *reh. den.* 608 F.2d 1373 (5th Cir. 1979).

43. *Stafford v. Briggs*, *supra*, note 11, at 535-536.

44. Moore, *Federal Practice*, para 0.142 [5.-2].

45. *Reuben H. Donnelly Corp. v. F.T.C.*, 580 F.2d 264, 268 (7th Cir. 1978).

46. Cates, *supra*, note 3, at 118.

47. *Id.*, at 117. The commenter's preference is to follow the position of the American Law Institute and provide that the cause of action may arise in more than one place. *Id.*, at 120-121.

48. *Id.*, at 119. There has been discussion of curing the defects in the draft legislation alluded to in the text by inserting some intent language in the legislative history. The problem with such an approach is that the "cause of action" language goes back to 1962, and it is not within the power of present-day legislators retroactively to supply the legislative intent behind a 1962 law.

Sections 1391(a) and (b), the diversity and nondiversity venue provisions, both permit venue in the district "in which the claim arose." Wright suggests that there is no difference between the "claim" and the "cause of action."⁴⁹ Moore is described by one Court of Appeal as having "examined extensively the use of the phrase 'where the claim arose' and has discerned no general agreement on its meaning in any context."⁵⁰ Some courts have described both a "weight of the contacts" test and a "place of injury" test,⁵¹ while others have added a third rule—where a substantial part of the events or omissions giving rise to the claim occurred.⁵²

c. Sec. 1391(b)

Until 1962 and passage of the Mandamus and Venue Act, suits against the government were brought under 28 U.S.C. 1391(b), the venue provision relating to other than diversity actions.⁵³ The section then provided for suits in the "district where all defendants reside."⁵⁴ It has since been amended also to allow venue in the district "in which the claim arose."⁵⁵

The enactment of 1391(e) in 1962 diminished the attractiveness of 1391(b) in that (e) provided everything that (b) did as well as additional options for venue and nationwide service of process on Federal defendants. However, enactment of 1391(e) does not appear to have terminated the applicability of (b). If for some reason 1391(e) were inapplicable, plaintiff could bring suit under 1391(b).⁵⁶

Again, at least one of the proposals⁵⁷ to amend 1391(e) would in part miss its mark by failure to amend 1391(b). As is the case with the proposal's failure to amend 1391(e)(2), the defect could not be remedied by legislative history in that the relevant amendment was added in 1962, and it is now a bit late to provide legislative history for that enactment. Of course, a plaintiff bringing suit under 1391(b) would forfeit 1391(e)'s authorization for nationwide service of process.

49. Wright, Miller, and Cooper, *Federal Practice and Procedure*, sec. 3815.
50. *Lamont v. Haig*, *supra*, note 32, at 1133, n. 54. Moore says, "[T]here is no reliable touchstone as to the meaning of 'where the claim arose' as this term is used in the 1966 amendments." Moore, *Federal Practice*, para. 0.142 [5.2].
51. See *Glendale Federal Savings and Loan Association v. Fox*, 481 F. Supp. 616, 623 (D.C.Cal. 1979).
52. See *Cochran v. Iowa Beef Producers*, *supra*, note 33, at 260-261. This third test is the one proposed by the American Law Institute. See *Lamont v. Haig*, *supra*, note 32, at 1134.
53. Cates, *supra*, note 3, at 83.
54. *Ibid.*
55. Act of Oct. 5, 1966, Pub. L. No. 87-748.
56. Cates, *supra*, note 3, at 92. The particular reason cited for such inapplicability in Cates' example, the possible inability of a plaintiff to join a private defendant with a federal defendant under 1391(e), was cured by the 1976 amendment to 1391(e). Pub. L. 94-574. (See discussion at para. A(1)(c), *supra*.) However, the basic rationale for turning to 1391(b) should 1391(e) be unavailable remains. See *Kletschka v. Driver*, 411 F.2d 436, 442 (2d Cir. 1969), where venue was held to be proper under both 1391(b) and (e).
57. See discussion under para. A(4), *infra*.

d. Secs. 1404(a) and 2112(a)

When a defendant is dissatisfied with the venue chosen by the plaintiff, the defendant is free under 28 U.S.C. 1404(a) to move to change that venue for the convenience of the parties and in the interest of justice. The purpose of the section is to prevent the waste of time, energy and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense.⁵⁸ One court summarized relevant criteria as follows: (1) convenience of the parties; (2) convenience of fact witnesses; (3) availability of process to compel the presence of relevant witnesses; (4) cost of obtaining the presence of witnesses; (5) access to proof; (6) calendar congestion; (7) where the relevant events took place; and (8) the interests of justice in general.⁵⁹ Once a matter is transferred, the court to which the matter has been transferred may decide to send it back again.⁶⁰

Title 28 U.S.C. 2112(a) has comparable provisions regarding the Courts of Appeals for those sorts of administrative agency review which are by statute filed directly in the Court of Appeals.⁶¹ Reviews of administrative orders in the Courts of Appeals, which are more apt to affect more parties than most District Court reviews of administrative actions, have led to problems with multiple lawsuits on the same issue. While the usual rule of deference to whichever lawsuit is filed first appears on its face to make sense,⁶² it has led to

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58. *Van Dusen v. Barrack*, 376 U.S. 612, 616, 11 L.Ed.2d 945, 84 S.Ct. 805 (1964); *National Surety Corp. v. Robert M. Barton Corp.*, 484 F.Supp. 222, 223-226 (W.D.Okla. 1979). There seems to be some division of authority as to whether an intervenor must raise an objection to venue promptly or waive it (*T.W.A. v. C.A.B.*, 339 F.2d 56, 64 (2d Cir. 1964), *cert. den.* 382 U.S. 42, 86 S.Ct. 40, 15 L. Ed.2d 82) or whether an intervenor may not raise such an objection at all (*Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 8 E.R.C. 2162 (N.D.Ill. 1976)). See Hearings, *supra*, note 11, at 45 (inaccurately citing the *T.W.A.* case, *supra*) and 87-88
59. *Car-Freshner Corp. v. Auto Aid Manufacturing Corp.*, 438 F. Supp. 82, 85 (N.D.N.Y. 1977); see *National Wildlife Federation v. Alexander*, 458 F.Supp. 29, 30-31 (D.D.C. 1978); *NAACP v. Levi*, 418 F. Supp. 1109, 1113 (D.D.C. 1976); *Southern California Association of Governments v. Kleppe*, 413 F. Supp. 563, 567 (D.D.C. 1976).
60. *Union Tank Leasehold Building v. Dupont Glore Forgan*, 494 F. Supp. 514, 515-516 (S.D.N.Y. 1980); *Buhl v. Jeffes*, 435 F. Supp. 1149 (M.D.Pa. 1977).
61. See *American Public Gas Association v. F.P.C.*, 555 F. 2d 852, 856-859 (D.C.Cir 1976). Also see *Peabody Coal Co. v. E.P.A.*, 522 F. 2d 1152, 1153-1154 (8th Cir. 1975), where plaintiff, a Delaware Corporation headquartered in Missouri which conducted business in twelve states including Colorado, brought suit to review E.P.A.'s approval of Colorado's Federal Water Pollution Control Act permit program. Plaintiff brought its action in the Eighth Circuit (covering Missouri) but was transferred to the Tenth Circuit (covering Colorado), the court stating that the effect would be felt there and most interested people were there.
62. *A.C.L.U. v. F.C.C.*, 486 F.2d 411 (D.C.Cir. 1973). Multiple cases arising out of the same administrative action can occur in trial as well as appellate courts. In *General Electric Co. v. F.T.C.*, 411 F. Supp. 1004 (N.D.N.Y. 1976), the F.T.C. had brought an enforcement action against the companies in the District of Columbia. The companies tried to bring an action in another court to have the F.T.C.'s order declared invalid.

an unbecoming "race to the courthouse" aimed at beating other litigants by minutes or even seconds.⁶³ One such case involved petitions for review of a Federal Power Commission action in the Third, Fifth, Ninth, Tenth, and D.C. Circuits, with the actions in the Fifth and D.C. Circuits simultaneous.⁶⁴ The D.C. Circuit examined the relevant factors before deciding to retain the case in the jurisdiction where all parties had participated in the FPC proceeding, where much of the specialized oil and gas bar was located, and where consumer, industry, and petitioning Member of Congress were all located.⁶⁵

Another complex multiple lawsuit case involved the Natural Resources Defense Council's challenge to certain actions of the Environmental Protection Agency relating to air quality. Since the implementation plans of all states were involved, NRDC attempted to protect itself by simultaneously filing in all eleven circuits and seeking transfer to the District of Columbia Circuit.⁶⁶ Five circuits transferred their cases to D.C. and five stayed proceedings pending the outcome in D.C.⁶⁷

Yet another complex matter involved challenges to E.P.A.'s regulations concerning no significant deterioration of air quality. Petitions were filed first in the Sixth Circuit by industry, second in the District of Columbia Circuit by environmentalists, and thereafter in the Fifth, Seventh, Ninth, and Tenth Circuits. The Fifth and Ninth transferred to the Sixth. The Seventh and Tenth transferred their cases to D.C. Then the Sixth transferred all its cases to D.C. on the grounds that the issues were national in scope and because the EPA action had been taken pursuant to a District of Columbia Court order.⁶⁸

Perhaps the ultimate comeuppance to litigants seeking the most favorable forum involved industry and labor challenges to OSHA's proposed lead standard. The Steelworkers' Union filed in the Third Circuit at essentially the same time. Both petitions were sent to be heard in the District of Columbia Circuit, a court selected by neither party.⁶⁹

3. How Existing Venue and Transfer Provisions Work in Fact

a. The Justice Department Evaluation: "Adequate and Just"

The Justice Department testified in the hearings on the venue shift proposals that "the present venue statute is working in an adequate and just manner."⁷⁰ The Department continued: "There are not an inordinate number of cases tried in the District of Columbia and the Department of Justice makes an

63. Note, *Venue for Judicial Review*, *supra*, note 3, at 1742.

64. *American Public Gas Association v. F.P.C.*, *supra*, note 61, at 856-857.

65. *Id.*, at 857.

66. Currie, *Judicial Review Under Federal Pollution Laws*, *supra*, note 3, at 1263-1268.

67. *Ibid.*, see *N.R.D.C. v. E.P.A.*, 465 F.2d 492 (1st Cir. 1972); *N.R.D.C. v. E.P.A.*, 475 F.2d 968, 969 (D.C.Cir. 1973).

68. *Dayton Power and Light Co. v. E.P.A.*, 520 F.2d 703, 707-708 (6th Cir. 1975).

69. *United Steelworkers v. Marshall*, *supra*, note 35, at 696-698.

70. Testimony of John Vance Hughes, Department of Justice, Hearings, *supra*, note 11, at 100; also see Statement of Assistant Attorney General James W. Moorman, *Id.*, at 106.

effort to transfer cases to a local forum when the issues are ones which could be better handled there."⁷¹

b. Experience With the Cases

A sampling of lawsuits where venue shifts have been requested will give a picture of the sorts of cases that may be affected by the proposed venue shift legislation. In *National Association for the Advancement of Colored People v. Levi*⁷² plaintiffs sued Federal officials for failure properly to investigate the case of a black citizen shot to death while in the custody of Arkansas law enforcement officials. Suit was brought in the District of Columbia. The United States sought to transfer the case to Arkansas, but was unsuccessful.

*Lamont v. Haig*⁷³ involved a suit by Indians against former Federal officials arising out of Wounded Knee. Plaintiffs brought suit in Washington. The District Court dismissed the case for want of venue. The appellate court then remanded the matter to the lower court to determine where the acts complained of actually took place as a basis for settling venue in either the District of Columbia or in the District of South Dakota.

A unique example involved a United States Senator's suit to stop FAA officials from searching him before getting on airplanes.⁷⁴ He alleged that he could not bring the suit in his own state because he had had a say in the selection of judges there. He therefore brought suit in a state with no obvious connection to any part of the actions complained of, and the case was transferred to the District of Columbia.

None will doubt that plaintiffs do choose to bring lawsuits in forums where they believe their chances of prevailing are enhanced.⁷⁵ When Dow Chemical USA sued the Consumer Product Safety Commission over its regulations of substances suspected of causing cancer, it chose to bring suit in the Western District of Louisiana. As mentioned earlier,⁷⁷ the Steelworkers' Union attacked OSHA's national lead standard in Philadelphia while the lead industry attacked it in New Orleans. Both were disappointed to find the two matters transferred to the Nation's capital. What is important about the issue of plaintiffs' forum shopping, whether in fact a problem or not,⁷⁸ is that it applies to venue generally and not just to suits against the Federal government allegedly brought to excess in the seat of that government.⁷⁹

71. Hughes testimony, *Id.*, at 100; see Moorman statement, *Id.*, at 106. See discussion in para. B(1) and (2), *infra*, concerning the number of cases.

72. *N.A.A.C.P. v. Levi*, *supra*, note 59, at 1113.

73. *Lamont v. Haig*, *supra*, note 32.

74. *Hartke v. F.A.A.*, 369 F. Supp. 741 (E.D.N.Y. 1973).

75. See Note, *Venue for Judicial Review*, *supra*, note 3, at 1740.

76. *Dow Chemical USA v. Consumer Product Safety Commission*, 459 F. Supp. 378 (W.D.La. 1978).

77. *Supra*, note 69.

78. Note, *Proper Venue for an Action*, *supra*, note 3. The principle of forum non conveniens embodied in the venue statute is designed as a protection against forum shopping. *Id.*, at 1033.

79. The reader should note that when multiple suits involving common questions of fact are filed in multiple District Courts, a statutory mechanism exists for a

The proponents of a venue switch rely on seven cases to substantiate the need for the legislation.⁸⁰

*NRDC v. Hughes*⁸¹ involved the application of the National Environmental Policy Act's environmental impact statement requirement to the Federal Coal Leasing Program. A national policy was involved.

*Sierra Club v. Andrus*⁸² was a case dealing with Federal reserved water rights in southern Utah and northern Arizona.

*EDF v. Costle*⁸³ involved a suit concerning water quality in the Colorado River. The attorneys general of seven basin states intervened in this case, as did the Mountain States Legal Foundation. Their motion and that of the United States to transfer venue was denied.

*National Wildlife Federation v. Andrus*⁸⁴ was a case involving a water project to provide water for the Denver area. The Justice Department's motion to change venue from the District of Columbia to Denver was denied.

*Pyramid Lake Paiute Tribe of Indians v. Morton*⁸⁵ involved an action brought by an Indian tribe against the Secretary of the Interior challenging water allocation in Nevada. Related litigation had been initiated by the Federal government in the U.S. Supreme Court and was also pending in Nevada.

*Defenders of Wildlife v. Andrus*⁸⁶ dealt with a challenge to the Department of the Interior's permitting of power boating in a National Wildlife Refuge in Nevada. The State of Nevada intervened and sought unsuccessfully to have the matter transferred to Nevada. U.S. Assistant Attorney General James Moorman thereafter testified that "intense local interest might have been better satisfied had the case been tried where the impact occurred."⁸⁷

judicial panel on multidistrict litigation to transfer and consolidate these proceedings. 28 U.S.C. 1407.

80. See statements of Sen. Orrin G. Hatch, former Governor Calvin L. Rampton, James G. Watt, and Gordon H. DePaoli in Hearings, *supra*, note 11, at 15-16, 20, 23-24, 27-28, 32-35, 42-43.
81. 437 F. Supp. 981 (D.D.C. 1977), mod. 454 F. Supp. 148 (D.D.C. 1978); see Hearings, *supra*, note 11, at 15-17, 20, 23. See letters of John D. Leshy and James W. Moorman, *Id.*, at 110-113.
82. No. 78-2213 (D.D.C. 1978); see Hearings, *supra*, note 11, at 20, 23, 34. One witness at the Senate Hearings was informed that Mountain States Legal Foundation was a party in this suit, but did not move for a change of venue from the District of Columbia. *Id.*, at 85.
83. 12 E.R.C. 1001 (D.D.C. 1977), aff'd 12 E.R.C. 1255 (D.C.Cir. 1978); see Hearings, *supra*, note 11, at 20, 23, 34. Also see Statement of James W. Moorman, *Id.*, at 108.
84. No. 78-1522 (D.D.C. 1978); see Hearings, *supra*, note 11 at 34, 36. Also see Statement of James W. Moorman, *Id.*, at 108. I might note that the subject of this suit was also the subject of a referral to the Council on Environmental Quality in the Executive Office of the President under sec. 309 of the Clean Air Act as an environmentally unsatisfactory Federal action. 42 U.S.C. 7609. This referral process has been used sixteen times between enactment of the Clean Air Act in 1970 and 1981.
85. 354 F. Supp. 252 (D.D.C. 1973); see Hearings, *supra*, note 11, at 27-28, 42-43.
86. 455 F. Supp. 466 (D.D.C. 1978); see Hearings, *supra*, note 11, at 33, 43. Also see Statement of James W. Moorman, *Id.*, at 105.
87. Hearings, *supra*, note 11, at 105.

*NRDC v. Morton*⁸⁸ involved the Bureau of Land Management's compliance with the National Environmental Policy Act with respect to its grazing policies on national resource lands in eleven Western states.

In four of the seven cases (*NRDC v. Hughes*, *Sierra Club v. Andrus*, *Pyramid Lake Paiute Tribe v. Mortin*, and *NRDC v. Morton*) the records either affirmatively show that nobody made any motion to transfer the cases to a local district, or fail to show that any such motion was made.⁸⁹ It appears that in only three cases was such a motion made and denied.

The opponents of the venue switch legislation counter with their lists of cases showing that present venue and venue transfer provisions are generally working well.

*Southern California Association of Governments v. Kleppe*⁹⁰ dealt with Federal oil leasing off the California coast. Over the objection of the local governments and of the State of California, which had chosen to bring the lawsuit in the Nation's capital, the D.C. District Court granted the Justice Department's motion to transfer venue to the Central District of California.

A case involving the Wando River port terminal in South Carolina, *National Wildlife Federation v. Alexander*,⁹¹ was, over the objection of plaintiffs, transferred from the District of Columbia to South Carolina.

*Canal Authority of the State of Florida v. Callaway*⁹² dealt with the Cross Florida Barge Canal. Suits were filed in both the District of Columbia and in Florida and were consolidated in the latter locale.

One noted case, *Environmental Defense Fund v. Tennessee Valley Authority*,⁹³ the Tellico dam case, was twice transferred from the District of Columbia to the Northern District of Alabama and thence to the Eastern District of Tennessee.

Another case involving the same agency, *NRDC v. TVA*,⁹⁴ was initially brought in the Southern District of New York but also ended up in the Eastern District of Tennessee.

Another environmental case that was transferred from the District of Columbia to the affected locale was the litigation dealing with the Tennessee-Tombigbee waterway.⁹⁵ The 1404 motion was made by an intervenor.

88. 388 F. Supp. 829 (D.D.C. 1974); see Hearings, *supra*, note 11, at 34.

89. See notes 80-88, *supra*.

90. 413 F. Supp. 563 (D.D.C. 1973); see Hearings, *supra*, note 11, at 89, 90, 95-96. (The author was an attorney for the State of California with some involvement in this proceeding.)

91. 458 F. Supp. 29, 30-31 (D.D.C. 1978); see Hearings, *supra*, note 11, at 90.

92. 489 F.2d 567 (5th Cir. 1974); see Hearings, *supra*, note 11, at 90.

93. 468 F.2d 1164 (6th Cir. 1972); see Hearings, *supra*, note 11 at 90.

94. 459 F.2d 252 (2d Cir. 1972); see Hearings, *supra*, note 11, at 90.

95. *E.D.F. v. Hoffman*, D.C. Civil Action 76-2204 (Nov. 30, 1976), transferred to Northern District of Mississippi, Civil Action 77-53-K (Sept. 7, 1977); see Hearings, *supra*, note 11, at 89. In addition to the cases discussed above, the opponents of the venue shift legislation point to a series of cases where the courts of the District of Columbia have transferred cases where most witnesses live in another locale (e.g., *Starnes v. McGuire*, 512 F.2d 918 (D.C.Cir. 1974); *Wren v. Carlson*, 506 F.2d 131 (D.C.Cir. 1974)); where the controversy was local (e.g., *Municipal Distributors' Group v. F.P.C.*, 459 F.2d 1367 (D.C.Cir. 1972); *Preuss*

In a more recent case, the District Court for the District of Columbia drew a distinction between cases of essentially local impact and those which were national in scope and which reach beyond any particular locality's interests. This court, in *National Preservation Law Center v. Landrieu*,⁹⁶ transferred a challenge to a HUD-financed convention center in Charleston alleged to be impairing an historical area to the District Court for South Carolina.

What can be extracted from the cases cited by both proponents and opponents of venue shift legislation? Basically the courts appear to weigh the relevant factors of convenience of the parties and the competing national and local considerations. While reasonable people can find (and indeed the proponents have found three) cases where a motion was made and denied to transfer venue in suits against the Federal government from the Nation's capital to an affected district and they disagree with the judge's balancing, this hardly rises to a need for revamping America's venue laws.⁹⁷

4. The Venue Shift Proposals

The bills which have been introduced in the 97th Session differ considerably. Senator Simpson's S.1107 takes nine pages to attempt to shift venue in local cases to the locality.⁹⁸ This bill provides that suits of all sorts brought by or against the United States which will have a "direct effect" in one to ten states are to be litigated where the "real party in interest" (defined as a non-Federal party who will be "directly affected") "maintains the facilities or conducts the activities which are the subject of the action" or where the challenged Federal action will "affect the use of any public or private property." Service is to be made upon the Attorney General of affected states, and "the real party in interest" is given authority to intervene. Comparable provisions relate to the Court of Appeals' direct review of some administrative actions.

Senator DeConcini's S.50 takes a less drastic cut at existing law.⁹⁹ His bill provides that when an action under 1391(e) is brought in the District Court for the District of Columbia "that may be an action of a local environmental nature," notice is to be given the attorneys general of relevant states. Section

v. Udall, 359 F.2d 615 (D.C.Cir. 1963); *Norair Engineering Associates v. Noland Co.*, 365 F.Supp. 740 (D.D.C. 1973)); and in the interests of judicial economy (e.g., *Celanese Corp. v. F.E.A.*, 410 F.Supp. 571 (D.D.C. 1976)). Statement of William A. Butler, Hearings, *supra*, note 11, at 89; also Statement of Peter J. Herzberg, *Id.*, at 95-96.

96. 14 E.R.C. 1262, 10 E.L.R. 20292 (D.D.C. 1980).

97. In testimony on Sen. DeConcini's proposal Assistant Attorney General Moorman noted that the bill "addressed what you saw as a problem" and that indeed "there is a small problem in the area." But, he suggested, the bill goes "too far in the other direction." Hearings, *supra*, note 11, at 103; *see id.*, at 105.

98. S.1107, 97th Congress, 1st Session, introduced May 5, 1981. Senator Simpson as joined by Senators Laxalt, Thurmond, Dole, and Hatch as coauthors. *Ibid.* See 127 Cong. Rec. S4386-8 (daily ed. May 5, 1981). My references are to the July 15, committee print which replaced the wording of the bill as originally introduced.

99. S.50, 97th Cong., 1st Ses., as introduced January 6, 1981. *See* Sen. DeConcini's explanation of the background of the bill at 127 Cong. Rec. S97-98 (daily ed. January 6, 1981).

1404, the change of venue provision, is then amended to make “primarily local or regional impact” a factor to consider in venue changes. The section is further amended to provide that if the court determines the action to be “of a local environmental nature” it “shall” transfer the action to the local district court unless (A) “substantial hardship or injustice would result” or (B) the “impact of the action . . . is substantially national rather than local. . .” The bill also provides that, under the section which provides for change of venue in actions commenced in a Court of Appeals, 28 U.S.C. 2112(a), local or regional impact is also to be considered.

The third proposal, an untitled draft said to have originated in the Justice Department, has a certain surface simplicity which cloaks its defects.¹⁰⁰ The bill amends 1391(e) to provide that an action may not be brought where the defendant or the plaintiff resides “unless the relief sought will directly affect the residents of that judicial district.”

B. *The Arguments of the Proponents of Venue Shift Do Not Stand Up*

What arguments do the proponents of a venue shift give for their proposals and what basis do those arguments have in fact?

1. The Argument that Most Litigation Against the United States is Tried in the District of Columbia is Not Supported by a Scintilla of Evidence
 - a. The Proponents’ Erroneous Contention—That “Most” Litigation Against the U.S., Particularly Involving the Environment, is Brought in the District of Columbia

A leading proponent of the venue switch legislation, Senator Paul Laxalt, has said that “most cases” filed against the United States, particularly those involving environmental issues, are tried in the District of Columbia (1979)¹⁰¹ and that “most cases” involving the Federal government as a party are filed in the District of Columbia, often involving environmental laws (1981).¹⁰² Both statements are completely without factual foundation.

- b. The Facts: Very Little Litigation Against The United States is Brought in the District of Columbia and Very Little of That is Environmental

100. The proposal is entitled “Proposed Amendment to 28 U.S.C. 1391.” See *Legal Times of Washington*, Sept. 28, 1981, Vol. IV, No. 17, p. 1. Three other bills have been introduced in the House which have not been actively considered. H.R.294, introduced by Rep. Hansen of Idaho, and H.R.1075, introduced by Rep. Hinson of Mississippi (since resigned), provide that actions shall be brought in districts in which “substantial portion of the impact or injury” exists, subject to transfer for the convenience of parties and witnesses. Comparable provisions would be enacted for the Courts of Appeals. Representative Hansen also introduced H.R.754, which says environmental litigation (defined by reference to one law and a number of subject areas) shall be brought where a substantial portion of the alleged injury or impact occurs.

101. 125 Cong. Rec. S.3188 (daily ed. Mar. 22, 1979).

102. 127 Cong. Rec. S.4388 (daily ed. May 5, 1981).

i. Fact: Of Civil Litigation to Which the U.S. is a Party, About 3% is Brought in the District of Columbia

According to the Administrative Office of the Courts, of the 63,628 civil cases commenced in District Courts in 1980 to which the United States was a party, 2,228 were commenced in the District of Columbia.¹⁰³ This is a smaller number than the filings in any other circuit.¹⁰⁴ The figures for total cases pending are similar. Of 68,679 civil cases pending nationwide as of June 30, 1980, to which the United States was a party, 1,482 were in the District of Columbia.¹⁰⁵ Again, this is a smaller number than were pending in any other circuit.¹⁰⁶

ii. Fact: Of Civil Litigation to Which the U.S. is a Party About 1% is Environmental

The United States was a party in 63,628 civil cases commenced in District Courts in 1980.¹⁰⁷ Of those, 26,835 were brought under statutes, with the United States as plaintiff in 8,600 cases and defendant in 18,235.¹⁰⁸ (The non-statutory cases included such matters as contracts (the largest segment by far), tort, and real property.¹⁰⁹) Of these, 457 were environmental matters, in which the United States was plaintiff in 256 cases and was defendant in 201 cases.¹¹⁰ In brief, less than 1% (to be precise .716%) of the cases to which the United States is a party are environmental cases. Of the purely statutory actions in which the United States is a defendant, environmental matters account for just over 1% (1.102% to be exact).

iii. Fact: Of Environmental Litigation to Which the U.S. is a Party About 7% is Brought in the District of Columbia

With respect to environmental suits only, of those filed in District Court approximately 7% are filed in the District of Columbia.¹¹¹ Of the 519 environmental cases filed in District Courts in the 12 month period ending June 30, 1978, only 37 were brought in the District of Columbia.¹¹² The figures for the following year were 30 out of 559.¹¹³ According to Justice Department figures, of 649 cases in the Civil Division relating to environmental matters, 25 were pending in Washington.¹¹⁴

103. *Annual Report of the Director of the Administrative Office of the United States Courts, 1980*, Table C 3, p. 376. The report does not break down the filings in specific districts to include a category of environmental matters.

104. *Id.*, at Table C 3, pp. 376-381.

105. *Id.*, at Table C 3 A, p. 392.

106. *Id.*, at Table C 3 A, pp. 382-397. In percentage terms the figure for suits filed is between 3 and 4%. The figure for suits pending is between 2 and 3%.

107. *Id.*, at Table C 3, p. 376.

108. *Id.*, at Table C 2, p. 374.

109. *Id.*, at Table C 3, p. 376.

110. *Id.*, at Table C 2, p. 374.

111. Remarks of Sen DeConcini, 125 Cong. Rec. S9126 (daily ed. July 10, 1979). Also see Statement of Moorman, Hearings, *supra*, note 11, p. 106.

112. *Ibid.*

113. Statement of Sen DeConcini, Hearings, *supra*, note 11, at 101.

114. Statement of Moorman, *Id.*, at 106.

With respect to one environmental law, the National Environmental Policy Act, comprehensive figures from the Council on Environmental Quality covering all NEPA litigation from enactment (January 1, 1970) through December 31, 1977 show that of 950 NEPA lawsuits that had then been filed, 131 or 13.7% had been filed in the District of Columbia.¹¹⁵ Of the 339 NEPA cases which the General Litigation Section of the Land and Natural Resources Section of the Justice Department had pending in September, 1979, 37 were filed in the U.S. District Court for the District of Columbia.¹¹⁶

CEQ further broke down the 131 cases that had been filed in the capital. Of these, 39 (4.1% of the total number of NEPA suits) involved rulemaking of nationwide application; 29 (3%) involved impacts in and about the District of Columbia; 8 (0.9%) were transferred to other districts; 6 (0.6%) involved environmental issues affecting a multi-state region of the United States; 4 (0.4%) involved Federal actions outside the United States; and 45 (4.7%) involved environmental issues or impacts "occurring in localities outside and arguably unrelated to the District of Columbia."¹¹⁷ Of those 45 cases, 25 were initiated by citizens or environmental groups; 9 were initiated by business or industry; 9 were initiated by State and local governments; and 2 were brought by unions or employees.¹¹⁸ Since it is the environmentalists' suits that the proponents of venue switch cite, it seems that their concern is prompted by an extraordinarily small number of cases. With respect to NEPA, it is between 2 and 3% of the cases. For this they would drastically modify the general venue statutes of the United States.

The figures for proceedings for direct reviews of administrative actions involving the environment in the Court of Appeals show a larger, but still modest, percentage initiated in the Court of Appeals for the District of Columbia. This is because Congress has provided that review of national regulations under several environmental laws must be brought in the District of Columbia Circuit.¹¹⁹ Of 155 cases filed in the Courts of Appeals for review of orders of EPA during the 12 month period ending June 30, 1978, 33 were filed in the District of Columbia.¹²⁰ During the following year the figure were 95 out of 257 cases brought in the Courts of Appeal.¹²¹

In brief, apart from the Congressional determination to have certain national regulations reviewed in one court, Senator DeConcini was accurate in saying that his bill, limited to environmental transfers (described at para. A(4))

115. Letter from Gus Speth, Chairman, Council on Environmental Quality, to Senator DeConcini, Hearings, *supra*, note 11, at 135-137. C.E.Q. maintains a computer inventory of all NEPA litigation ever filed.

116. Statement of Moorman, Hearings, *supra*, note 11, at 106.

117. Letter from Speth, Hearings, *supra*, note 11, at 137.

118. *Ibid.*

119. Statement of Richard Stoll, Hearings, *supra*, note 11, at 102. Congress has provided that review of national regulations under the Clean Air Act, the Safe Drinking Water Act, the Noise Control Act, and the Resource Conservation and Recovery Act must be in the D.C. Circuit. *Ibid.*

120. Remarks of Sen. DeConcini, 125 Cong. Rec. S.9126 (daily ed. July 10, 1979); Hearings, *supra*, note 11, at 106.

121. Statement by Sen. DeConcini, Hearings, *supra*, note 11, at 101.

will not radically alter existing practice.¹²² Very few environmental cases against the government are brought in the District of Columbia, and most of those that are should be. By way of contrast, the proposals to alter venue statutes generally, aimed at a miniscule number of cases which arguably should have been tried in other districts, would radically alter existing practice for all sorts of lawsuits.

2. The Argument That the Courts in the Nation's Capital are Overburdened and Slower Than Other Courts is Wrong

a. Burden

i. The Proponents' Erroneous Contention—That the D.C. Courts Are Overburdened

To quote from a dialogue between Senator Laxalt and the lead proponent of the venue shift legislation, James Watt:

Senator Laxalt. [W]e are constantly impressed, . . . by how overburdened the courts are in the District on both the trial and appellate levels. We would be serving them to some extent by relieving them of some of that burden and sending it out into the respective States.

Mr. Watt. That is right.¹²³

ii. Fact: District Court Judges in the District of Columbia Are Less Burdened Than the National Average

Given different numbers of cases and different numbers of judges in each District Court, one who would examine the burden should look to the number of cases per judge on the individual court. The national average shows a total of 381 filings per judge for District Courts nationwide for the year ending June 30, 1980.¹²⁴ There were 279 filings per judge for the District of Columbia during that time.¹²⁵ Weighted to account for complexity,¹²⁶ there were 358 filings per judgeship for all districts and 357 for the District of Columbia.¹²⁷

b. Delay

i. The Proponents' Erroneous Contention—That the District of Columbia Courts Are Slow and Cause Delays

One of the proponents of the venue shift legislation testified that "there is a concentration of these Federal actions in the District of Columbia and substantial delays result."¹²⁸

122. Remarks of Sen. DeConcini, 125 Cong. Rec. S9126 (daily ed. July 10, 1979).

123. Hearings, *supra*, note 11, at 32; also see Statement of Haggard, *Id.*, at 53.

124. *Annual Report of the Director of the Administrative Office of the United States Courts, 1980, supra*, note 103, at Table X-1, p. 621.

125. *Ibid.*

126. Weighted filings take into account the difficulty of the case and are computed according to the 1979 District Court Time Study conducted by the Federal Judicial Center. *Id.*, at Table X-1, p. 622.

127. *Id.*, at Table X-1, p. 621. The District Courts in the Ninth Circuit run from a low of 228 to a high of 483. In the Tenth they run from 283 to 462. *Id.*, at 622.

128. Testimony of Jerry L. Haggard, Hearings, *supra*, note 11, at 47. See *Id.*, at 53.

ii. Fact: The Federal District Court in the Nation's Capital Moves
Faster Than the Federal District Courts Nationwide

The United States District Court for the District of Columbia handles its cases more expeditiously than do most District Courts. The median time interval for District Courts' disposing of cases (from filing to termination) is 8 months.¹²⁹ In the Nation's capital it is only 6 months.¹³⁰ By way of comparison, in the two Western circuits, the 9th and 10th, the District Courts' median is 7 months.¹³¹ With respect to the districts of the principal proponents of the venue switch legislation, the median time is 9 months in Arizona, 10 months in Nevada, and 7 months in Wyoming.¹³² In every case the citizens of those States could get prompter justice in the District Court in the nation's capital than in the Federal Court in their own State.

iii. Fact: The U.S. Court of Appeals in the Nation's Capital Moves
Faster Than the Courts of Appeals in the Two Western Circuits

The time intervals for the Court of Appeals for the District of Columbia are not as impressive as those of the District Court, but they still hold their own with the other circuits. The median time interval from filing a notice of appeal to final disposition of that appeal is 10.8 months for the U.S. Courts of Appeals generally.¹³³ For the District of Columbia Circuit it is 13.6 months, below the national median but above the median for the two Western circuits.¹³⁴ The median for the Ninth Circuit (Sen. DeConcini's and Sen. Laxalt's circuit) is 20.8 months and for the Tenth (Sen. Simpson's) 14.8.¹³⁵

In brief, the thought that the courts of the Nation's capital are so overloaded or have such a backlog that matters should be switched out to other courts is a myth. The District Court for the District of Columbia acts more promptly than most U.S. District Courts. The Court of Appeals for the District of Columbia acts somewhat less rapidly than the national mean, but still more rapidly than the two Western circuits which are offered as the forums to which more litigation should be shifted.

129. *Annual Report, supra*, note 103, at Table C 5, p. 393.

130. *Ibid.*

131. *Id.*, At Table C 5, p. 396.

132. *Ibid.*

133. *Id.*, at Table B 4, p. 363.

134. *Ibid.*

135. *Ibid.* With respect to civil cases only the medians from filing the notice of appeal to final disposition are: all circuits — 11.6 months; D.C. Circuit — 14.0 months; 9th Circuit — 26.9 months; 10th Circuit — 12.6 months. *Ibid.* With respect to administrative agency cases only the medians from filing a complete record to final disposition are: all circuits — 11.8 months; D.C. Circuit — 14.0 months; 9th Circuit — 16.5 months; 10th Circuit — 14.0 months. *Id.*, at 364.

Taking a composite figure combining trial and appellate courts, the median time intervals from filing in lower courts to final disposition in appellate courts are (for all cases): all circuits — 24.9 months; D.C. Circuit — 25.6 months; 9th Circuit — 32.7 months; 10th Circuit — 23.6 months. With respect to civil cases only the figures are: all circuits — 30.6 months; D.C. Circuit — 27.5 months; 9th Circuit — 42.3 months; 10th Circuit — 26.0 months. *Id.*, at 363.

3. The Argument That Characterizes Citizens' Ability to Sue Federal Officials in the Nation's Capital as "Elitist" is Itself Poppycock

a. Watt: Washington and "Elite Wisdom"

James Watt testified in favor of the venue shift proposals that the "thought that the District of Columbia courts are better than the rest smacks of elitism and it is just not true."¹³⁶ He went on to say "I am proud of our western judges and hold them up to anybody else."¹³⁷ Continuing, Watt said that "just because you come to Washington does not give you an elite wisdom."¹³⁸ True enough, but Watt misses the point. Nobody (or at least not I, a fellow Westerner) is arguing that judges in the District of Columbia are "better" than their counterparts in San Francisco or Denver.¹³⁹ What is being asserted is that some lawsuits against the Federal government involve issues of national interest and that it is not inappropriate that they be tried in the Nation's capital.

b. Washington Is Our Nation's Capital

Whether the proponents of venue switch like it or not, Washington is our Nation's capital. In the words of the Constitution, it is "the Seat of the Government of the United States."¹⁴⁰

i. The Responsible Federal Officials are in Washington

The District of Columbia is the seat of the Congress, the Supreme Court, and of the Executive Branch. The heads of all Departments and major agencies are in Washington. All the Assistant Secretaries and the like who do much of the actual decisionmaking and who would be expected to testify in a review of the decisions should such testimony be necessary are also in Washington.

ii. The Nation's Private Interests Are Represented in Washington

Because Washington is the Nation's capital and because ready access to legislators and decisionmakers is in Washington, the private sector is also exceedingly well represented in that city. The industry trade groups who lobby the Congress and get to know the officials of the Executive branch are there. Labor organizations are headquartered in Washington. The public interest community, whether working for civil rights, consumer interests, deregulation, environmental goals, disarmament or rearmament, are all present in Washington. So are their lawyers. In brief, the Nation's contending interest groups are well represented in the Nation's capital. When one or another of them sues the United States, it is often not illogical that such a suit be permitted in the capital.

136. Testimony of James G. Watt, Hearings, *supra*, note 11, at 31.

137. *Ibid.*

138. *Ibid.*

139. However, I think that a reasonable case may be made that experience with the workings of the Federal Government gives a feel for how things operate which makes it easier for a judge to cut to the heart of how decisions are really being made in administrative agencies.

140. United States Constitution, Art. 1, sec. 8, cl. 17.

iii. As a Result Washington is Often the Most Convenient Place to Sue the Government

As the Court of Appeals for the District of Columbia Circuit put it in one case:

The Commission is situated in Washington. The parties before us often come to Washington, at least by counsel, to participate in Commission proceedings, as they have done in the proceedings with which we are presently concerned. Much of the specialized oil and gas bar is concentrated here, and industry representatives not based here are continually in attendance. Moreover, the petitioning Members of Congress are located in the Washington metropolitan area. The convenience of the parties could hardly be as well served by venue elsewhere.¹⁴¹

Suits are brought against Federal officials by public interest organizations in the Nation's capital because they have offices in the capital and it is cheaper to take the subway to the courthouse than to fly, perhaps with witnesses and files, to Denver or San Francisco, remaining or returning there for pre-trial motions, trial, and appeals.

Until 1962 citizens could not bring suit against the United States anywhere but in the capital. For good reason those provisions were expanded to permit a broader choice of venue.¹⁴² The present venue shift proposals would go to the

141. *American Public Gas Association v. F.P.C.*, *supra*, note 61, at 857. Though the facts outlined made venue appropriate in the District of Columbia Circuit in that case, the court is hardly eager for increased cases. Despite the willingness of other Courts of Appeals to transfer cases to the District of Columbia Circuit because the latter court is handling a case with some commonality of background (*United Steelworkers v. Marshall*, *supra*, note 35, at 696-698), the D.C. Circuit is quick to decline the theory of specialization of courts, pointing out that it chooses judges to hear cases by lot and not by expertise. (*Public Service Commission for the State of New York v. F.P.C.*, 472 F.2d 1270, 1273 (D.C. Cir. 1972)).

One recent "study" attempts to find other reasons for cases being tried in the District of Columbia. A memorandum dated Sept. 17, 1981, from the Capital Legal Foundation, entitled *Environmental Litigation Study — First Phase Report*, purports to examine the issue whether the choice of forum in environmental litigation is outcome determinative. The survey is a totally inadequate job. The person conducting it managed to cut the sample down to 274 federal cases over a 10 year period. If one takes the approximate number of civil environmental cases listed by the Administrative Office of the Courts to which the United States is a party (a distinct limiting factor) — about 4 or 500 a year — and multiplies this by 10 years, environmental litigation to which the United States is a party alone comes to about 4 or 5000 cases. The surveyor has taken, inexplicably, as the sample 5 - 6% of this incomplete number. Such a sample is worthless.

142. One commenter has suggested that the existing system is biased in favor of those resisting government regulation. Note, *Venue for Judicial Review*, *supra*, note 3, at 1742. Although the remark was made in terms of review in the Courts of Appeals, I think it generally applicable. The author says that by permitting review of administrative action to be lodged in the forum most likely to be hostile to the regulatory agency, the current system works to the disadvantage of those the regulatory process was meant to protect. *Ibid.* The author notes that although consumer, environmental, and labor organizations frequently forum shop for proregulation courts, the disparity in resources between them and the regulated interests favors the latter. *Id.*, at 1742, n.38.

opposite extreme and provide that such suits may never be brought in the capital.¹⁴³ Such a proposal does not make good sense.

4. The Argument that “Eastern” Judges Should Not Decide “Western” Cases is a Mixed Bag

a. Watt: Sagebrush Rebellion and “Foreign” Judges

A third reason given by the proponents seems to me a mix of political posturing and responsive government—the charge that distant judges either do not understand or are perceived by local people as not understanding their local problems. The position was stated in purest form by James Watt. The members of the Senate Committee, Watt told them, are aware of “the brewing sagebrush rebellion.”¹⁴⁴ He described the “rebellion” as a “reaction by the western people to the continued Federal government domination and control of the vast public lands of the West.”¹⁴⁵ The venue switch legislation is needed, he argued “to address one of the major causes of the sagebrush rebellion.”¹⁴⁶ Those in the West were “being treated like colonies.”¹⁴⁷ What he described as “‘Foreigners’—bureaucrats who seem to be out of control” are making decisions affecting the West.¹⁴⁸ “[W]e find,” he continued, “that eastern judges—judges who are ‘foreign’ to many values of the West—are making decisions which control our destiny. . . .”¹⁴⁹ Lawsuits “are brought to eastern courts,” Watt says, principally the District Court for the District of Columbia, because those bringing the suits “feel they can best realize their objectives by using a Federal judge who has not had the experience of living or practicing law in the West.”¹⁵⁰ He goes on to conclude that the “‘real parties in interest’—the people living and working in the affected areas—are not necessarily involved and a ‘foreign’ judge is making decisions on matters that a local judge should be acting upon.”¹⁵¹

143. It should be remembered that the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit are not “local” courts comparable to a State court system. They are the Federal courts of the Nation’s capital. There is a separate court system, headed by a court confusingly titled the District of Columbia Court of Appeals, which performs the “local” tasks and which is comparable to a State court system. District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358, sec. 111, Title I, 84 Stat 475 et seq., See Moore, *Federal Practice*, para. 0.144 [2.-1].

144. Testimony of James G. Watt, Hearings, *supra*, note 11, at 22; also see *Id.*, at 33-34.

145. *Ibid.*

146. *Ibid.*

147. *Ibid.*

148. *Ibid.*

149. *Ibid.*

150. *Ibid.* Also see the remarks of Sen. Laxalt that “there is little confidence in the West involving matters affecting us in the legal system here in the District.” *Id.*, at 5.

151. *Id.*, at 22.

b. Laxalt: Judges Should Take Into Account "Public Sentiment"

A related argument was made by Senator Paul Laxalt in introducing his venue shift bill in 1979. "Requiring that such cases be heard in the circuit where the injury is situated," he argued, "*should also result in decisions taking into account the public sentiment* to some degree. . ." [Emphasis added.]¹⁵² Quite apart from the propriety of a judge sworn to uphold the law basing his decision, even in part, on "public sentiment," the remark does illustrate the very real feelings of inability to control events which many Americans feel and which Westerners feel especially with respect to Federal decisionmaking.¹⁵³

c. Visible Decisionmaking is Part of, But Not the Only Ingredient of, Good Government

This in turn gets to what appears to me a valid undercurrent to the proponents' argument—that visible decisionmaking accessible to affected people is good government.¹⁵⁴ The Department of Justice, in saying that there was a

152. Remarks of Sen. Laxalt, 125 Cong. Rec. S3188 (daily ed. March 22, 1979). The Senator may have had second thoughts about the propriety of judges basing their decisions on "public sentiment." In 1981 he made essentially the same speech in favor of Senator Simpson's venue shift proposal that he had made in favor of his own bill in 1979, but deleted the reference to taking into account "public sentiment." The pertinent paragraphs are quoted:

Sen. Laxalt in 1979:

"The bill also uses the same standard for appeals from agency proceedings, many of which are now also filed in the District of Columbia. Requiring that such cases be heard in the circuit where the injury is situated *should also result in decisions taking into account the public sentiment* to some degree, and using the established case of law of the circuit rather than that of Washington, D.C. Usually the precedent in one of the other circuits will more nearly reflect local customs and local law, whereas the precedent in the District of Columbia circuit more precisely reflects the attitudes of the Federal Government." 125 Cong. Rec. S3188 (daily ed. Mar. 22, 1979). (Emphasis added.)

Sen. Laxalt in 1981:

"The bill provides the same standard for appeals from agency decisions, many of which are now routinely filed in Washington, D.C. Usually, the established law in a circuit reflects the local customs, local laws, and special local considerations, whereas the precedent in the District of Columbia circuit mirrors the attitudes of the Federal Government." 127 Cong. Rec. S4388 (daily ed. May 5, 1981).

153. Having been involved in State Government in California for almost 12 years I suspect the Western feelings with respect to the Federal role are not confined to the development and user interests with which some of the proponents of this legislation are identified. James Watt has voiced the frustration of mining, grazing, oil, and timber interests in the West over Federal decisionmaking with respect to the public lands they perceive as theirs rather than all Americans'. However, a very different group, Western environmentalists, often see the Federal role as imposing decisions upon their part of the country which imperil the values they cherish. Look, for example, at the opposition to MX basing in Nevada and Utah or to the almost unanimous California opposition to Federal permission of oil leasing in hitherto unspoiled areas of the outer continental shelf.

154. See: Hearings, *supra*, note 11, at 5, 22, 27, 33, 35, 39, 47, and 48.

“limited” problem (but one “which can be addressed by measures less sweeping” than the pending proposals), quoted from the Supreme Court:

In some cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.¹⁵⁵

The Supreme Court’s statement, which represents the present law of the land, is to me good law and wise policy. Visible, responsive government is good government and is essential in a democratic system. The fault of the venue proponents is not their voicing of this concern, which I share, but their absolute exclusion of all other factors from the process of selecting venue.

C. The Venue Shift Proposals Would Not Be in the Public Interest

1. Trying to Devise a Universal Rule to Separate “Local” Cases From “National” Cases is Bound To Fail

a. “Local” Parks, Monuments and Forests May Be of Concern to All the People of the Nation

It is extraordinarily difficult to separate that which is of local interest from that of national concern. The Statue of Liberty is not the property of the people of Manhattan, as the Grand Canyon is not reserved to Arizonans. Yosemite National Park belongs as much to the citizens of the District of Columbia as to those of California, as Californians are fully as much the proprietors of the White House as are District of Columbians. The national interest may override the local interest with respect to an activity in the locality. For instance, the national interest in preserving a unique American species, the redwood tree, led to the creation by Congress of the Redwood National Park, despite the reluctance and even opposition of many local inhabitants. One may ask who is most “directly affected” by the Forest Service’s stewardship over the National Forest lands at Lake Tahoe, the thousands who live in the Tahoe basin or the tens of thousands who come from Northern California to ski, swim, hike, gamble and otherwise enjoy themselves at the lake. Similar questions might be asked with respect to the Atlantans who visit Great Smokey National Park, the Texans who ski in National Forests in Colorado, and the Coloradoans who visit the natural treasures of southern Utah. Are those who live near a National Wildlife Refuge the ones most affected by its operation, or are those who live elsewhere and watch or hunt the birds that migrate through the refuge? I do not ask these questions necessarily to provide answers, but only to suggest that they are difficult questions not easily segregated into “national” and “local” compartments and with respect to which it is not always obvious who is “directly affected.”

155. *Gulf Oil Corp. v. Gilbert*, *supra*, note 27, at 509, quoted in Statement of Moorman, Hearings, *supra*, note 11, at 105.

b. "Local" Cases May Establish National Precedents Whose Effects Far Transcend the Local Effects

It is difficult, particularly in a developing field such as environmental law, to separate cases of national impact from those of local impact, in part because a case which appears on its face to be quite local in effect may set a nationwide precedent whose importance far transcends the factual situation which presented the occasion for judicial action.

*Marbury v. Madison*¹⁵⁶ is not remembered for the impact on one would-be office seeker but for the precedent it set concerning the role of the courts. The significance of *Brown v. Board of Education of Topeka*¹⁵⁷ was not confined to the desegregation of the schools of Topeka, Kansas.

Within the area of environmental law, the opinion of the Court of Appeals for the District of Columbia Circuit in the *Calvert Cliffs* case¹⁵⁸ arose out of the siting of one power plant in Maryland, but its significance lies in the rigorous procedural safeguards under NEPA which the courts would require of all Federal agencies acting everywhere in the nation. The famed "Monongahela" decision¹⁵⁹ of a District Court in West Virginia interpreted the Organic Act of 1897 so as to curtail the practice of clearcutting in national forests. The decision had immense ramifications nationwide and did much to shape subsequent legislation by Congress. One of these two ostensibly "local" but in fact "national" cases arose through the Federal court system of the Nation's capital and one through the Federal courts in the immediately affected locale. The point is not that one can do a better job than the other, but that cases which seem to be local may be national and that there may be interested persons apart from those in a locality whose concerns, costs, and conveniences should be part of a venue determination.

Somewhat paradoxically it was James Watt, then President of the Mountain States Legal Foundation, who testified at the hearings on the venue shift proposals concerning the importance of public interest groups formed to pursue cases which had the potential for broad impacts on the public. "Only recently," he testified, "have special interest or public interest law groups been created to take broad public issues to the courts for resolution."¹⁶⁰

He said:

As you point out, the new ingredient to the judicial arena is the public interest group, or the special interest group. We call groups such as mine public interest groups. There are other groups which are focused narrowly on saving a place or a river or right to work, and so on.

We come forward to the court and say that the public is the impact. [Sic.] Those x thousand members may not have any idea their interests are impacted, but a public interest group like mine, the Sierra Club, and others, say it is so.

156. *Marbury v. Madison*, 1 Cranch 137 (1803).

157. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954).

158. *Calvert Cliffs Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (D.C.Cir. 1971).

159. *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*, 367 F. Supp. 422 (N.D. W.Va. 1973), aff'd 522 F.2d 945 (4th Cir. 1975).

160. Statement of James G. Watt, Hearings, *supra*, note 11, at 33.

The question is whether we want to allow public interest groups like the one I represent or these others to exist. I think the answer is clearly yes. I don't like some of the results obtained by some of them but clearly we have to protect that public interest from the Government, which is irony in itself. It is terrible to be in that position.¹⁶¹

c. The Supreme Court Does Not Review All Local Cases

There is a tension between the consistent national approach of centralized decisionmaking and the locally responsive but nationally inconsistent approach of a more decentralized review process. By way of example, with respect to air quality, Congress has provided for review in the D.C. Circuit of certain administrative actions which are national in scope, while assigning review of regional matters to circuits in the regions.¹⁶² This sounds simple enough, but the rub comes with what to do with the identical question simultaneously presented in each circuit. Should the question be considered national or regional? To centralize review may require cases to be split (since purely regional reviews may also be filed).¹⁶³ To decentralize review will result in a multiplicity of cases in what are now twelve circuits.¹⁶⁴ Moreover, though the Supreme Court may benefit from the views of multiple lower court decisions¹⁶⁵ and indeed, such review of conflicts is what the Supreme Court is for,¹⁶⁶ in fact the Supreme Court does not review a substantial number of cases involving direct conflicts between the circuits.¹⁶⁷ We are left with the same national law imposing different obligations on similarly situated Americans who live in different circuits.

2. The Venue Shift Proposals Will Invite Threshold Litigation

Any proposal involving an other than simple initial determination of where venue may be invites threshold litigation. A system such as the present one, with multiple venue possibilities, diminishes the chances of such litigation. The

161. *Id.*, at 31. Watt also testified:

Because the requirements for standing have been considerably broadened by the courts, these special interest and public interest legal groups have been allowed to bring suits to challenge government actions dealing with people and places, even though the moving party is only generally affected. In spite of the injustices created, we believe that the broadening of the definition of standing is good. Without the broader definition allowing court action, the bureaucracy, which in too many instances is unchecked, would have even greater latitude in limiting the freedoms of Americans.

The public interest must be protected and the courts can be used to check the excess activities of the bureaucrats. *Id.*, at 33. Also see *Id.*, at 22-23.

162. See, *N.R.D.C. v. E.P.A.*, *supra*, note 67, at 494; Statement of Guy G. Gelbron, in Hearings, *supra*, note 11, at 59.
163. See Currie, *Judicial Review Under Federal Pollution Laws*, *supra*, note 3 at 1268.
164. See *Ibid.*
165. Statement of Guy G. Gelbron, in Hearings, *supra*, note 11, at 59.
166. *Public Service Commission v. F.P.C.*, *supra*, note 141, at 1273.
167. Note, *Venue for Judicial Review of Administrative Actions*, *supra*, note 3, at 1741. A study of the Supreme Court's 1971 and 1972 terms found that the Court refused review of forty-five to forty-eight cases each term in which there were direct conflicts between circuits. *Ibid.*

more complex the scheme and the narrower the options, the more nonproductive threshold litigation there will be.¹⁶⁸

3. The Venue Shift Proposals Will Lead to More Litigation

In addition to threshold litigation preceding the trial of substantive issues, the venue shift proposals will increase the number of cases generally. Assume a Federal agency adopts a nationwide rule which affected corporations throughout the country believe to be illegal. Instead of being able to join and sue the agency in the Nation's capital, they may all have to bring separate suits in separate districts where they can show they are "directly affected" by the outcome.¹⁶⁹

4. The Venue Shift Proposals May Whipsaw Plaintiffs Out of Court Entirely

Any reduction in the number of permissible venues for trying a case also increases the chances of whipsawing a plaintiff out of a forum. If, for instance, a Federal defendant must be sued under an amended 1391(e) where direct effects are felt, but a non-Federal defendant must be sued under 1391(b) in some other district, plaintiff is left without a forum in which to try his case.

To use quite a different example, if the United States Government were to propose an action which would endanger the continued existence of the polar bear, where would venue lie? Under an effect based amendment to 1391(e), it may lie nowhere. The polar bear inhabits no judicial district.

In yet another example, the Justice Department in warning that the venue shift bills may force venue into a district which would not have jurisdiction¹⁷⁰ suggested the following possibility:

[I]f this legislation were enacted, venue would lie in some cases, only in a district which would not have jurisdiction. Let me give you an example. A company in State X produces a toxic air emission which is carried entirely into State Y. All the impact is in Y. Venue under either S. 739 or S. 1472 is there. But the company does no business in State Y. If State Y's long-arm statutes were insufficient to bring the company under its jurisdiction, then the case could not be brought in either state because there would be no jurisdiction in State Y and no proper venue in State X.¹⁷¹

5. The Venue Shift Proposals Will Raise Costs So As to Diminish Citizen Access to Courts

The venue shift legislation would so raise costs as to reduce citizen access to courts.¹⁷² National organizations typically have Washington offices. They may

168. See Statement of Andrew Sacks and Charles Halpern, Hearings, *supra*, note 11, at 64-65, 74-75.

169. Statement of William A. Butler, *Id.*, at 93.

170. Hearings, *Id.*, at 100, 106.

171. *Id.*, at 107.

172. Statement of Andrew Sacks and Charles Halpern, *Id.*, at 71; Statement of William A. Butler, *Id.*, at 79. Butler testified that the Environmental Defense Fund, a public interest organization, has been involved in cases requiring an im-

or may not have them elsewhere in the country. Forcing an organization which has as a primary purpose overseeing the Federal government's activities in the areas of its concern to litigate far from its offices can in fact drive it from the courtroom.

James G. Watt, when President of the Mountain States Legal Foundation, testified to this precise problem in reverse. "The cost in coming back here is tremendous in trying to protect the interest of the Western States in eastern courts."¹⁷³ When asked by Senator Laxalt whether anybody had broken out the cost, Watt replied, "I have not quantified those figures but they must be tremendous."¹⁷⁴ Needless to say, the expenses of an organization in the Nation's capital trying a case in the West are of the same order of magnitude as those of the Western organization trying a case in the capital. I say this to belittle neither organization's case. Trying matters of national concern is an expensive business, but may also be in the public interest. Under present law such cost factors for both sides are rightly considered by a judge in determining appropriate venue.¹⁷⁵ The venue shift proposal is designed to end this balance. It says, in the broad category of cases covered, the Eastern lawyer must always pay to travel West, but the Western lawyer need never pay to travel East. That is unfair.

Conclusion

The development of venue legislation has been a history of opening doors to give citizens their day in court. The proposed legislation would close them. Present law recognizes a variety of factors relevant to where a case is tried, the convenience of and expenses to the parties as well as local interests in a case. This is as it should be. All are relevant factors in the selection of a forum. The proposed legislation would end this flexibility and substitute a rigid rule designed to make one factor, local interest, the only factor in venue selection. To those sensitive to the variety of factors traditionally relevant to the selection of a forum, the proposals offend against good sense.

pact statement for various actions affecting American Micronesia. If they had to litigate the case in American Samoa, rather than "within approximately 10 blocks of the Interior Department where the decisions had all been made," they would have been unable to bring the lawsuit. *Ibid.*

173. Statement of James G. Watt, *Id.*, at 24.

174. *Ibid.*

175. See note 34, *supra*.

APPENDIX A

Drafting Suggestions

As is evident in the essay, I do not believe the case has been made for the venue shift legislation. I further believe that no case has been made for singling out environmental litigation for venue shift treatment. However, should the Congress decide that such legislation is warranted, I venture the following suggestions as guides to draftspersons.

Venue Selection Should Respond to the Variety of Factors That Have Traditionally Influenced Choice of Venue

Any legislation should remain responsive to the variety of factors that have come through the development of the common law to determine the place where trials are held. (See para. A(1)(a).)

Venue Should Not Have To Be Argued in Every Case

The mechanics of venue selection should be such that parties do not have to argue about it before every trial. Venue is, after all, not an issue in most cases. A statute should not make an issue where there is none. There are essentially two ways of accomplishing this. The first is a rigid rule. If there is no discretion, venue does not become an issue. The rigid rule approach suffers the major fault of excluding from consideration the variables that experience has taught us to be appropriate factors in a wise system of administering justice. The second approach is the one we have now — basically allowing the plaintiff to choose among statutorily defined forums subject to the defendant's objection. (A judge is not the appropriate initial selector because we would have to figure out what judge, and, if that were done, we would be forcing the judge to make a decision in every case which would invite instead of deter argument.)

What then does this mean in terms of drafting for one who would avoid rigidity but make forum selection more responsive to local concerns? It means that instead of imposing a rigid rule through 1391 on forum selection, the forum transfer provisions of 1404 should be made more responsive to local considerations. The prospect of transfer under 1404 will then influence the plaintiff's initial selection of forum under 1391.

Venue Selection Should Be Simple

Sen. Simpson's bill frankly gives me the heebeegeebees. (See note 98.) I have drafted, defended, attacked, and interpreted enough statutory language to believe that any bill that takes nine pages to say you should bring local actions locally has to be a litigator's delight and a judge's horror.

Further, the vague language that has characterized the venue shift proposals has to be avoided if litigation over it is to be avoided. (See Hearings, at 35, 45, 93, 115.)

Any Bill Should Accomplish Its Intended Purpose

As explained in the text I believe there is a substantial likelihood that the draft "Proposed Amendment to 28 U.S.C. 1391" currently under discussion (see note 100 and accompanying text) fails to achieve its purported goals for two reasons:

1. While amending 1391(e), the bill leaves undisturbed 1391(b), the section under which plaintiffs previously sued the government in the District of Columbia. (See notes 56 and 57 and accompanying text.)

2. While applying to 1391(e)(1) and (4), the bill leaves undisturbed 1391(e)(2), and it appears probable that causes of action against the government often arise in the capital. (See note 48 and accompanying text.)

In brief, the bill, though on its face attractively simple, will not achieve its presumed purposes.

The Drafters Should Know the Consequences of Their Drafting

Frankly, nobody knows what the implications of a broad venue shift bill would be for all the types of cases included within the 99% of the civil actions to which the United States is a party which are not environmental. (see para. B(1)(b)(ii)). Even such a proponent of venue shift as James Watt testified that a broad venue shift bill "may create problems because it is so general and broad in application." (Hearings, at 36.) "Frankly," he continued, "I have not thought through the potential situations which might be affected by the all-inclusive nature of the bill." (*Ibid.*) In the words of the Administrative Office of the United States Courts, "At present there is no way to determine what effect a broad amendment to the general venue statutes . . . would have upon caseloads and litigation processes." (*Id.*, at 114.) Any amendment such as Senator Simpson's or the draft "Proposed Amendment" (see notes 98 and 100 and accompanying text) should not be enacted until somebody figures out what their unintended consequences include.

Responding to Local Interest While Retaining Flexibility

If legislation were enacted, it seems to me three elements would achieve the end of responding to local interest while retaining flexibility in forum selection.

1. Requiring notice to the Attorneys General of affected states so they can, if they wish, assert the interests of their citizens. This concept received broad support in the hearings. (Hearings, at 35 (Watt), 46, 10, 207 (Moorman); also see 76.)*

*By way of example of such a proposal, one might look at California's Code of Civil Procedure sec. 389.6 (which I drafted, State Senator (now Congressman) Bob Lagomarsino authored, and Governor Reagan signed (in 1971)):

2. Insuring that intervenors are not precluded from moving in a timely fashion to transfer venue. (1404(a).)

3. Listing local interest as an explicit consideration in the venue transfer provision. (1404(a).)

APPENDIX B

28 U.S.C. 1391

§1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be

“§389.6 Alleging pollution or adverse environmental effects; copy of pleading to attorney general; time

In any action brought by any party for relief of any nature other than solely for money damages where a pleading alleges facts or issues concerning alleged pollution or adverse environmental effects which could affect the public generally, the party filing the pleading shall furnish a copy to the Attorney General of the State of California. Such copy shall be furnished by the party filing the pleading within 10 days after filing.”

The purpose of that section, as is the purpose of the notice provisions now under discussion, was to notify the Attorney General so he could determine whether the public interest warranted his intervening in the case.

made by certified mail beyond the territorial limits of the district in which the action is brought:

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Venue and the Sagebrush Rebellion

David P. Currie

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I. *The Problem Perceived*

It is highly unusual for venue problems to capture the public imagination. Unlike laws relating to such great issues as racial equality and occupational safety, venue provisions do not prescribe rules to govern the conduct of citizens in their everyday activities; they do not even resolve the important question whether a dispute is to be settled in a federal rather than in a state court. It is the humble office of venue provisions to allocate the cases that are within federal judicial authority among the federal courts in various parts of the country.

The goal in drafting venue statutes is to make this allocation both fairly and efficiently, and this has generally been thought to require that the forum have some connection either with the parties or with the matter it is asked to decide. The basic venue provision in force today, for example, provides for suit in the district "in which the claim arose," or "where all defendants reside," or (in certain cases) "where all plaintiffs . . . reside."¹ Unfortunately, however, there is a great variety of venue provisions for various sorts of controversies, and there seems to be little rhyme or reason for many of the discrepancies.²

The bills that are the subject of the present inquiry do not attempt to reformulate the venue laws in general. Like much other proposed legislation, they are a limited response to a perceived problem. Senator DeConcini succinctly stated the essence of the concern that lies behind the various bills: "local Federal courts . . . are the proper forums to deal with issues that affect particular localities."³ This sounds like a principle capable of broad application.

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1. 28 U.S.C. §1391(a), (b).
 2. *E.g.*, 28 U.S.C. §§1400(a) (copyright actions "in the district in which the defendant or his agent resides or may be found"), 1400(b) (patent infringement suits "where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business").
 3. Hearings on Federal Venue Statutes, S. 739 and S. 1472, before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong., 2d Sess. (hereafter "Hearings"), p. 1 (1980).

Yet because the issue has been perceived only in certain contexts, the remedy proposed is limited to certain classes of cases. Senator Laxalt's initial bill⁴ applies only to actions against the Federal Government or its officers or agencies, Senator Simpson's⁵ to certain cases filed by or against the Government, and Senator DeConcini's two bills⁶ only to "environmental" cases.

The basic present provision for venue in district court actions against the Government is 28 U.S.C. §1391(e), which allows suit "in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action." It will be observed that this statute gives the plaintiff in many cases a choice among as many as three possible forums, and that it is basically similar to the general provision for private litigation paraphrased at the outset of this discussion.⁷ Some provisions in the bills we are considering also apply to proceedings in the courts of appeals seeking review of federal agency action. The current venue provisions governing such proceedings, many of which are also environmental cases, vary widely and are scattered throughout the United States Code.⁸

The problem, as the sponsors of the present bills see it, is that under the current provisions too many cases that have nothing to do with the District of Columbia are being decided there, either because the relevant statute expressly makes the District a proper venue,⁹ or because Washington as home office of many federal agencies is the place where "a defendant in the action resides" under §1391(e). One example repeatedly invoked in the hearings was the *Ruby Lake* case, in which a court in the District of Columbia enjoined motorboating on a lake in Nevada.¹⁰

Proponents of the bills have advanced a number of arguments against trying such cases in the District of Columbia. There is a fear that distant judges may not understand the case: "their understanding of and appreciation for local conditions is both limited and academic."¹¹ There is concern that affected people may not have a chance to be heard: "citizens with a real interest in par-

4. S. 739, 96th Cong., 1st Sess. (1979). H.R. 294, 97th Cong., 1st Sess. (1981), introduced by Rep. Hansen, is substantially similar to S. 739.

5. S. 1107, 97th Cong., 1st Sess. (1981).

6. S. 1472, 96th Cong., 1st Sess. (1979); S. 50, 97th Cong., 1st Sess. (1981). H.R. 754, 97th Cong., 1st Sess. (1981), also introduced by Rep. Hansen, is substantially similar to S. 1472.

7. Section 1391(e) is the product of a 1962 reform designed to permit litigation of suits of Government officers outside the District of Columbia. See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962).

8. See, e.g., 28 U.S.C. §2343 (NRC, ICC, FMC and certain other orders reviewable where "the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit"); 33 U.S.C. §1369(b)(1) (Federal Water Pollution Control Act: in the circuit where the objecting party "resides or transacts such business"); 42 U.S.C. §7607(b)(1) (Clean Air Act: certain actions in the District of Columbia, others in "the appropriate circuit").

9. E.g., 28 U.S.C. §2343, *supra* note 8.

10. *Defenders of Wildlife v. Andrus*, 455 F. Supp. 445 (D.D.C. 1978). See, e.g., Hearings, pp. 6 (Sen. Laxalt), 43 (Mr. DePaoli).

11. Hearings, p. 2 (Sen. DeConcini).

participating in such litigation are often foreclosed from such participation, often because they are unaware of the particular case."¹² There is concern for the convenience of the participants: "it is a tremendous expense for our citizens of Utah to come here, to the District of Columbia, and have to testify in court"¹³ There is talk of relieving the burden on courts in the District: "we are constantly impressed . . . by how overburdened the courts are in the District on both the trial and appellate levels. We would be serving them to some extent by relieving them of some of that burden and sending it out into the respective States."¹⁴ These concrete concerns are supplemented by a more intangible desire for self-determination: "we of the west believe that in too many instances our States are being treated like colonies. 'Foreigners' . . . are making the decisions affecting the land, water, and resources which are the foundation of wealth for the West and indeed in many respects the Nation."¹⁵ Finally, despite disclaimers of an intention to affect the results of the cases,¹⁶ it is clear that sponsors are concerned that present law encourages shopping for a forum whose judges are favorably disposed toward the plaintiffs' cause; frequent references were made at the hearings to an article urging environmental advocates for that reason to litigate whenever possible in the District of Columbia.¹⁷

These arguments are indeed those typically aired in connection with determining the proper venue.¹⁸ What is unusual is the context in which these arguments are being made. Normally the focus is on the interests of the parties to the litigation: The plaintiff should be allowed to file in a forum appropriate from his point of view, the defendant should not be subjected to undue inconvenience. The present bills, however, attempt to preclude a choice of forum that may be agreeable to both the plaintiff and the Government, and to do so on the basis of the interests of persons not parties to the original litigation: the residents of the affected communities.

Nevertheless the concerns underlying these bills are not to be lightly dismissed. The typical case envisioned by the proponents is a three-cornered controversy in which conservationists challenge a Government decision to permit some private activity arguably damaging to the environment, such as motor-boating in a wildlife preserve or the construction of a new power plant. Though the Government officer or agency may be the sole original defendant, the interests of motor boat owners and power-plant builders are plainly affected, and they often may intervene as parties.¹⁹ It seems entirely fitting that

12. *Id.*, p. 4 (Sen. Dole).

13. *Id.*, p. 14 (Sen. Hatch).

14. *Id.*, p. 32 (Sen. Laxalt).

15. *Id.*, p. 22 (Mr. Watt).

16. *E.g., id.* at 6 (Sen. Laxalt).

17. *See, e.g., id.* at 2-3 (Sen. DeConcini, quoting Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 *Ecol.L.Q.* 91, 94 (1972): "Few circuits are as understanding of the conservationist cause . . . as the D.C. Circuit. . . . A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view.")

18. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

19. *Fed.R.Civ.P.* 24(a), (b).

their interests should be weighed in determining where the proceeding is to be conducted.

Opponents of the bills argue that in many arguably "local" cases the District of Columbia is an appropriate forum, and they also contend that some of the asserted problems do not properly relate to venue at all. "Just because a suit is litigated in a nearby district or circuit does not mean local interests will be aware of the suit or have the opportunity to participate meaningfully . . ."; if interested parties are denied notice or the right to intervene, notice and intervention "should be the problem[s] addressed and not venue."²⁰ Witness convenience is of no moment in the many cases involving review based upon an agency record, for "[t]here are no witnesses required."²¹ Private litigants and their attorneys as well as government agencies often have their offices in Washington, and the cost of litigation elsewhere could be prohibitive: If it had been necessary to litigate about an environmental-impact statement affecting Micronesia "in the far Pacific rather than Washington, D.C., within approximately 10 blocks of the Interior Department where the decisions had all been made, we undoubtedly would not have been able to do it."²² Finally, opponents stressed the experience of the District of Columbia courts in deciding administrative issues²³ and downplayed the relevance of the judge's knowledge of local conditions: "The case must be decided on the basis of the evidence presented. It would be improper for a Federal judge to take into account local opinion or sentiment."²⁴

There is much force in several of these observations. Reasonable people will doubtless disagree, however, about the relative importance of the interests of the original parties as compared with those of other affected persons in the local community; and there is an appeal to the position that local matters ought to be litigated locally. From the lawyer's perspective the most interesting questions are whether that goal can be achieved without imposing disproportionate administrative costs on the judicial system, and whether the bills we are considering are well designed to achieve their purpose.

II. *The Solutions Proposed*

I. S. 739 and H.R. 294. Senator Laxalt's original 1979 bill, of which Representative Hansen's 1981 bill is largely a copy, would amend three sections of the Judicial Code²⁵ to provide that proceedings challenging Government action "in which it is determined that a substantial portion of the impact or injury is in one or more judicial districts [or circuits] . . . shall be brought" in one of them.²⁶

20. Hearings, pp. 66-67 (Mr. Sacks).

21. *Id.* at 66 (Mr. Sacks).

22. *Id.* at 79 (Mr. Butler).

23. *Id.* at 80 (Mr. Butler).

24. *Id.* at 66 (Mr. Sacks).

25. 28 U.S.C. §§1391(e), 2112(a), and 2343.

26. More specifically, this requirement would apply under §1391(e) to any "civil action" in a district court "in which a defendant is an officer or employee of the

These bills have the advantage of comprehensiveness and relative simplicity. By using the language of existing provisions to define the cases to which they apply and by including all suits against Government officers and agencies,²⁷ they avoid some of the difficult definitional problems presented by alternative proposals considered below. By extending beyond environmental cases, they attempt to deal with the perceived problem in its entire theoretical scope rather than merely with the symptoms so far observed. The critical language is mercifully brief: When "a substantial portion of the impact or injury" occurs in "one or more" districts or circuits, the action must be brought there. Unfortunately, however, the brevity of this language is not matched by its clarity; I fear it would create significant problems of interpretation. There are three major sources of uncertainty: the terms "impact or injury," the reference to "a substantial portion" of that impact or injury, and the requirement that that portion occur in "one or more" districts or circuits.²⁸

The terms "impact" and "injury" were chosen in preference to the familiar clause "where the cause of action arose" in order to avoid decisions interpreting that language to indicate the place the defendant acted²⁹ rather than where the consequences of the action are felt. References to the place of injury or impact are common enough in state longarm statutes providing for personal jurisdiction over outside actors causing local effects;³⁰ but unfortunately it may be more difficult to identify the relevant "impact" in many proceedings challenging federal actions than in a typical products-liability suit. The denial of a permit to construct a power plant in Arizona obviously will have an impact in that State; but it will arguably have an impact as well in every State where the power company does business, where its customers or investors live, and where the pollutants the plant would have emitted would have traveled.

United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States", unless "otherwise provided by law"; to court of appeals proceedings seeking review of the six categories of federal administrative orders listed in §2342; and under §2112(a) to "all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers."

27. It would be desirable, however, to add a provision expressly repealing, by section number, all contrary provisions now applicable to review of specific agency actions, in order to avoid confusing the litigants. *See TAN 45-46 infra.*
28. Two minor problems can be easily corrected. The bills refer to the "impact or injury" without an antecedent; evidently the impact or injury resulting from the action challenged is meant, and qualifying language should be added. The uncertain significance of the requirement of a "determin[ation]" that the statutory conditions are met was pointed out in the hearings (p. 45 (Mr. DePaoli)), and it has properly been omitted from the Hansen bill. That bill also contains two substantial typographical errors; the operative language respecting §§2343 and 2112 has been omitted.
29. *E.g., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). *See Hearings*, p. 8 (Mr. Rampton).
30. *E.g., N.Y.C.P.L.R. §302(a)(3)* ("a tortious act without the state causing injury to person or property within the state"). *See cases discussed in R. Cramton, D. Currie, & H. Kay, Conflict of Laws: Cases — Comments — Questions*, 564-66 (3d ed. 1981).

The decision to open a single national park to mining or logging arguably has an impact on potential tourists in every district, and indeed on the economy of the whole nation as well as on future national park policy in general. It seems likely that those who drafted the bills had a narrower conception of "impact" in mind, but the vagueness of the term invites threshold litigation.

The reference to a "substantial portion" of the impact or injury may reduce the importance of a definition of "impact," but it raises additional questions of its own that were adverted to in the hearings.³¹ On its face a "substantial" portion may include any portion that is significant, but the context suggests the bills were meant to reach only those cases whose impact is essentially local. It would appear more accurate to refer to districts or circuits in which the impact is "concentrated" or "centered," or where the "principal" impact or a "disproportionate" impact is felt, if that is in fact what is intended; but any of these formulations would itself confront the courts with difficult and unfortunate line-drawing problems. For one thing, an action of purely local applicability may raise issues whose nationwide significance for later cases is more important than its immediate local effect.

Somewhat less imprecise is the Clean Air Act's distinction between "nationally applicable" and "locally or regionally applicable" action,³² which also has the virtue of being already in effect under that statute; if at all possible it would seem desirable to avoid using new and unfamiliar terms. Unhappily the Clean Air Act formulation is more helpful for determining when District of Columbia review is proper than for locating the desirable forum when it is not. For the latter purpose that statute refers unsatisfyingly to "the appropriate circuit," leaving the courts essentially without a venue provision;³³ it would be necessary in the Laxalt and Hansen bills to use some such formulation as the district or circuit to which the challenged action applies. Moreover, even the Clean Air Act terms are ambiguous with respect to actions that are stated in general terms but that apply to activities conducted only in a few states, such as silver mining.³⁴ It might therefore be best for the sake of administrability to limit any new venue provision to cases involving actions that on their face are of less than nationwide applicability.³⁵

Finally, although the background of the controversy suggests that the intention was to alter the venue only of those actions whose impact is substantially local, the reference to "one or more" districts or circuits is not well tailored to express this idea. Literally, actions of nationwide applicability also have a substantial portion of their impact in "one or more" districts or circuits, that is to say, in this country. Any attempt to cure the difficulty by employing narrower language seems likely to be either highly arbitrary (e.g., "no more than

31. P. 91 (Mr. Butler).

32. 42 U.S.C. §7607(b)(1).

33. See Currie, *Judicial Review Under Federal Pollution Laws*, 62 *la.L.Rev.* 1221, 1261-69 (1977).

34. The same problem arises under the Administrative Procedure Act's publication requirement for actions "of general applicability," 5 U.S.C. §552(a)(1)(D).

35. One disadvantage of this formulation is that it would give the EPA considerable power to determine the forum by its choice of terminology. It would be even worse if litigants had to make empirical investigations of the geographic scope of the affected activity in order to decide where to file suit.

ten districts or two circuits”) or so vague as to promote undesirable litigation (e.g., “only a few districts or circuits”). One could avoid the problem by broadening the bills to require that *any* governmental action having a substantial impact in this country be challenged where it has such a substantial impact. However, this would significantly broaden present venue requirements for actions of nationwide applicability, at the inconvenience of parties and witnesses—and that is surely not a goal of the present proposal.

These difficulties arise from the effort to draft a single provision to cover a large variety of cases. One could draft precise enough provisions for narrower classes of cases: Actions applicable to a specific parcel of federal land shall be litigated where the land is located, challenges to permit decisions where the activity for which the permit was sought is to be carried out. If there is to be a single provision, perhaps the best bet would be to provide for review of “actions that on their face are of less than nationwide applicability” in “a district or circuit to which they apply”; in my examples it should be clear that the challenged actions apply only to the power plant and the national park, even though they may have significant impact elsewhere. Yet I remain uneasy about any attempt at generalization; it is hard to be sure that any such formulation would prove free of litigation-provoking ambiguity. Moreover, the very comprehensiveness of the proposal, which helps to reduce uncertainty in its application, raises another red flag. The language is so broad that the bills appear to embrace not only the three-cornered situations that gave rise to the legislator’s concern but also standard challenges to Government action by the party directly regulated, such as orders of the Federal Trade Commission. It seems risky to undertake such a sweeping change without closer consideration of its ramifications.

The final difficulty with the Laxalt and Hansen bills was also pointed out during the hearings,³⁶ and it may be the most serious. Venue limitations are generally designed for the convenience of the defendant, and they are normally enforced only if the defendant chooses to enforce them.³⁷ Indeed there is authority that an intervenor has no right to object to venue.³⁸ Yet the whole basis of the bills is that a forum that is satisfactory to both of the original parties—conservationists and Government—may be inappropriate from the standpoint of the affected community. Unless a provision is inserted permitting intervenors to raise the venue question, or requiring the court to do so on its own, the bill seems destined not to serve its intended purpose.³⁹

36. Hearings, pp. 45-46 (Mr. DePaoli).

37. See Fed.R.Civ.P. 12(h)(1).

38. *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56, 63-64 (2d Cir. 1974).

39. Both bills would also amend 28 U.S.C. §2112(a) so as not to require the courts of appeals to transfer cases to the circuit in which administrative action was first challenged unless “the parties are unable to agree” on a single forum. That “the parties” include intervenors should be made clear if the bills’ purposes are to be fulfilled. Moreover, consolidation of related cases serves the interests of judicial economy as well as those of the parties; arguably it should not be left entirely to the litigants. The Hansen bill, evidently in response to objections at the hearing, would also mitigate the rigidity of the new provision for local venue by permitting transfer of district court cases to any district that would have been proper before the proposed amendment.

2. *S. 1472 and H.R. 754*. Senator DeConcini's original bill, substantially reproduced by Representative Hansen, would require all actions arising under Acts of Congress "relating to environmental quality," and all "appeals from reviewable agency actions, decisions, or orders" under those statutes, "in which [the issue raised or] the impact or injury alleged is less than nationwide in scope," to be brought in the district or circuit "[in which such issue arises or] in which a substantial portion of the alleged impact or injury occurs."⁴⁰ "Inconsistent" or "contrary" provisions found elsewhere would be "supersede[d] . . . to the extent" they "differ[ed]" from the new provisions.⁴¹

The philosophy behind these bills parallels that of the bills already considered, but their scope is different. While the Laxalt bill applies to all actions against Government officers, it does not apply to private litigation at all; the DeConcini bill applies to private as well as Government cases, but only to "environmental" litigation. The Laxalt approach seems in this respect preferable. First, there seems no reason to think the problem of three-cornered litigation is limited to environmental problems; the paradigm fits whenever a citizen challenges governmental action directed at third parties. Conversely, there seems little reason to expect community interests to go unrepresented in private environmental litigation; it is in the interests of the litigants to demonstrate the benefits and costs to all concerned. Moreover, the clause limiting the provision to cases under statutes "relating to environmental quality" seems likely to generate a welter of additional problems of interpretation. Several examples of "environmental" laws are listed, but with one exception even they are described by subject-matter rather than by title: "the National Environmental Policy Act, . . . any Act of Congress pertaining to land management, wildlife protection, energy conservation, or air, water, hazardous or solid waste, pesticide, radiation, toxic substances, or noise pollution, [or relating to nonstatutory Federal water rights]."⁴² Does every statute qualify that contains an incidental reference to any of these topics, or whose effectuation will have an impact on them, or do only those qualify whose principal focus is environmental? Is the Occupational Safety and Health Act a statute "relating to environmental quality"? Is the Federal Power Act? Is every statute authorizing the construction of a dam that arguably *damages* the environment? The only safe way to describe the reach of the venue provision would be to name the statutes to which it applies, and that would risk inadvertent omissions. It seems preferable to drop the artificial limitation to "environmental" cases altogether.

The chosen forum is described in the DeConcini bill much as in the Laxalt bill: the district (or circuit) "in which such issue arises or in which a substantial portion of the alleged impact or injury occurs." I have already explored the interpretive problems posed by the reference to the place where "a substantial portion" of the "impact or injury" occurs, and the additional reference to the place "in which such issue arises" compounds the difficulty. It is by no means obvious that, as may have been intended, an issue "arises" at the place where the impact of an action is felt rather than where the action is taken. Indeed the

40. The bracketed terms are omitted from the later Hansen bill.

41. Like the Laxalt bill, S. 1472 and H.R. 754 do not provide that an intervenor or judge may raise the venue question.

42. The bracketed language appears only in the Hansen bill.

latter reading is suggested both by the analogy of decisions defining where a "cause of action arose"⁴³ and by the fact that the "issue" provision would be redundant if interpreted to refer to the place where the action had its impact. Yet a reference to where the Government acted would make the District of Columbia a proper forum in many of these cases, and that was what these bills were designed to change.

Further problems are raised by the clause providing that the new venue provision applies only if "the issues raised or the impact or injury alleged is less than nationwide in scope." I have suggested above that a great many actions of local applicability may have nationwide "impact"; the term seems poorly chosen both because of its ambiguity and because it can be so broadly interpreted as to cripple the purpose of the bill. The latter objection applies equally to the Laxalt bill's additional exception for nationwide "issue[s]," for a legal question that applies to cases throughout the country often arises in a case dealing with a single permit or parcel of land.⁴⁴ Moreover, the bill does not say what is to be done if the case presents both local and national issues; is the local or the national issue to determine the forum, or is the case to be inefficiently divided between two courts?⁴⁵ The later Hansen bill, in response to these criticisms, omits both references to nationwide issues; but it does nothing to alleviate the burden of defining an impact or injury "less than nationwide in scope."

There are additional problems with the DeConcini bill and its more recent House counterpart. For one thing, the general reference to repeal of "inconsistent" or "contrary" venue provisions is a trap for the unwary. It seems unfair to leave obsolete venue provisions in scores of substantive statutes, where lawyers will be misled into assuming they are still law; Congress should repeal by section number all inconsistent provisions.⁴⁶ Finally, as was pointed out in the hearings,⁴⁷ there is no present assurance that the forum prescribed by the DeConcini bill will always be one in which the defendant can be personally served, for in most private actions service of process outside the State in which the case is filed depends upon state law.⁴⁸ To avoid the risk of leaving some plaintiffs with no place to sue at all, the bill should be amended to provide, as §1391(e) now does for suits against government officers, for nationwide service.⁴⁹

43. See n. 29 *supra*.

44. See Hearings, p. 28 (Mr. DePaoli).

45. See *id.* at 79 (Mr. Butler). Cf. Currie, *supra* note 33, 62 *Ia.L.Rev.* at 1267.

46. See Hearings, p. 54 (Mr. Haggard).

47. *Id.*, p. 107 (Mr. Moorman).

48. Fed.R.Civ.P. 4(e), (f).

49. Other difficulties with the language can be easily cured. Both bills prescribe that "appeals from reviewable agency actions . . . shall be taken to the court of appeals" for a particular circuit. Not only is the term "appeal" unusual in the context of administrative review, but in isolation the section could be read to transfer review of many environmental decisions from the district courts to the court of appeals, which is hardly within the drafters' purpose. "Petitions seeking court of appeals review of agency actions" would appear to come closer to describing the proceedings covered without affecting either the reviewability of orders or the distribution of power between appellate and district courts.

In short, the first DeConcini bill shares all the litigation-provoking ambiguities of the original Laxalt bill, and it adds several more of its own—without, so far as I can tell, any significant countervailing advantages.

3. S. 50. Also sponsored by Senator DeConcini, this bill too is largely limited to “environmental” cases, and its central purpose is again to keep what are described as “local” or “regional” cases out of the District of Columbia. The technique employed in this bill differs from that of those discussed above: Its central provision requires transfer to the designated forum rather than limiting initial venue. In light of 28 U.S.C. §1406(a), which authorizes transfer as an alternative to dismissal when the initial venue is improper, it seems to make little difference whether the new provisions operate by limiting venue or by requiring transfer.⁵⁰

The transfer bill shares with the first DeConcini bill the troublesome reference to “Act[s] of Congress relating to environmental quality.”⁵¹ The problematic descriptions of local proceedings and of the appropriate district have been altered in terminology but probably not in substance: An action is “of a local . . . nature” if it “primarily affects local or regional interests in one or more contiguous judicial districts other than the district in which the action was originally filed,” and it is to a district “primarily affect[ed]” that the case is to be transferred. “Primarily” seems a more accurate characterization of the apparent purpose than “substantial portion” in the earlier bills, but it invites considerable litigation of its own; the analogous reference to a corporation’s “principal” place of business for diversity-of-citizenship purposes has proved quite troublesome to administer.⁵² The requirement that the affected districts be “contiguous” appears to make the District of Columbia an appropriate forum for actions affecting both Alaska and one other western State, though such a case would seem to fit the policies requiring a regional forum.⁵³ Moreover, in an effort at compromise, the bill does not require transfer if it is shown “that substantial hardship or injustice would result” or “that the impact of the action, which may include the impact on national policy, is substantially national rather than local in effect or scope.”⁵⁴ These exceptions portend a rich harvest of essentially wasteful litigation and seem to

50. An earlier version of this bill was favorably reported by the Judiciary Committee in August, 1980. See S. Rep. No. 96-892 (1980), on S. 3028, 96th Cong., 2d Sess.

51. The illustrative list has been contracted, without appearing to narrow the reach of the provision; and statutes relating to “water rights” have been included.

52. 28 U.S.C. §1332(c). See the cases discussed in D. Currie, *Federal Courts* 483-89 (2d ed. 1975). The problem of deciding which districts an action “affects” parallels those of determining where its “impact” or “injury” occurs.

53. The committee report on the 1980 version of this bill, however, attempts to explain that “contiguous” does not mean what it says: “The meaning of ‘contiguous,’ however, is not meant to be applied so literally as to preclude, for example, application of the presumption and notice sections of the bill in a situation where all elements of an action of a ‘local environmental nature’ are present except that one of the involved judicial districts clearly related to the action is not literally contiguous to the other local judicial districts.” S. Rep. No. 96-892 (1980), p. 8.

54. Essentially these provisions incorporate the Department of Justice’s suggestion that there should be a rebuttable presumption in favor of a local forum. See Hearings, p. 108 (Mr. Moorman).

reintroduce in even fuzzier form the earlier DeConcini bill's unfortunate limitation to issues of less than nationwide scope.

The transfer bill has additional distinguishing features. Its mandatory transfer provision applies only to cases filed in the district courts, not to those in the courts of appeals, in partial response to the argument that local witnesses are not relevant when agency action is reviewed on the agency record. Moreover, it applies only to actions "brought under section 1391(e)," and hence only to actions against government officers for which venue is not "otherwise provided by law."⁵⁵ On the other hand, the transfer bill is the first to deal with the objection that the earlier proposals were inadequate because the Government could waive venue: The court is to order transfer "upon motion of a party or an intervenor or upon its own motion. . . ."

In summary, the transfer bill reflects a more sophisticated approach to the perceived problem than its predecessors. It limits the remedy in general to those cases in which the problem is likely to be most acute; it contains a safety valve for cases in which the District of Columbia is actually the best forum; and it assures that the interests underlying the proposal will be considered even if the Government does not choose to assert them. Nevertheless, one wonders whether the benefits of enacting such a provision would justify the costs of administering it. To avoid rigidity, the bill creates new and perplexing threshold issues that may consume considerable effort; and in the end the bill leaves the definition of the appropriate forum to the same "foreign" judges to whose judgment the bill's proponents are unwilling to entrust the decision whether or not to transfer cases under present law "for the convenience of parties and witnesses, in the interest of justice."⁵⁶

4. *S. 1107*. The most recent of the bills on the present subject, S. 1107 was submitted by Senator Simpson for himself and for Senators Laxalt, Thurmond, Dole, and Hatch in May, 1981. Like the other bills, it is designed to require local determination of local controversies; like the first two proposals discussed, it would do this by limiting initial venue rather than by requiring transfer; like the Laxalt bill, it applies only to Government litigation and is not limited to environmental cases.⁵⁷

55. See S. Rep. No. 96-892 (1980), p. 7.

56. 28 U.S.C. §1404(a). S. 50 would also amend existing discretionary transfer provisions both in §1404(a) and in §2112(a) to make clear that the judge may take into account "the primarily local or regional impact" of an action or proceeding. This amendment would make explicit what seems already implicit in the statutory references to convenience and "the interest of justice," and it seems essentially harmless except as a precedent for encumbering the statutes with other arguably unnecessary examples of factors relevant to the "interest of justice." The bill would also require notice to the Attorney General of any State primarily affected in any District of Columbia action under §1391(e) that "may be . . . of a local environmental nature." This is a direct attempt to deal with one of the sponsors' concerns that was essentially unrelated to venue, and the effort is to be applauded. The mechanics of the proposal may deserve further study. The "may be" language bids fair to raise additional threshold problems, and how the notice requirement is to be called to the court's attention seems less than clear.

57. There is an exception for "any civil action filed to enforce any provision of any civil rights laws of the United States." Just what constitutes a "civil rights" law may be subject to some dispute. Cf. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (construing 28 U.S.C. §1343(4)).

The Simpson bill would amend §1391 to require that all "local" or "regional" civil actions brought by the Government "to compel a defendant to take, or refrain from taking any action that will have a direct effect within a single State or group of not more than ten contiguous States," or brought by a "non-Federal real party in interest to compel the United States, or any agency thereof, to take or refrain from taking" any action with such direct effects, be litigated where "the non-Federal real party in interest maintains the facilities or conducts the activities which are the subject of the action," or where the action in question "will affect the use of any public or private property. . . ." "Local" and "regional" are defined with apparent redundancy to refer to actions "directly affect[ing]" a single State or "not more than ten contiguous" ones; a "non-Federal real party in interest" is someone outside the Government "directly affected" by the action in question; "directly affected" means the State or enterprise "required to bear the principal portion of the financial cost of complying" with the action in question or the place where "the public or private property that is the subject of the Federal action is located. . . ."⁵⁸

It seems reasonably clear, after careful study of its complexities, that the Simpson bill does not deal at all with the three-party situations that promoted the lawmakers' original concern. It seems to be restricted to controversies between the Government and the polluter or resource user himself—the person against whom the Government proceeds or who seeks to avoid bearing the "financial cost" of Government action. Why the sponsors wish particularly to limit venue in this sort of proceeding I do not know. As it stands, the bill must thus be viewed not as a substitute for but as a supplement to the other three bills, and in that light it seems especially unfortunate that its terminology differs so markedly from that of the others; litigants and courts ought at least to be spared the necessity of wrestling with more than one new set of ambiguities.

Indeed the Simpson bill, despite or perhaps because of intricate efforts at definition, contains its fair share of unfortunate ambiguities. The term "directly affected" is required to do double duty in defining both the "local" or "regional" case and the "real party in interest," and the definition is ill-suited to the task. On the one hand the location of the affected property seems quite irrelevant to determining who is the real party in interest; on the other, where the affected party "bear[s] . . . the . . . cost of complying" may depend on the irrelevant question of how it goes about paying its bills. The references to "principal portion" and to "financial cost" invite litigation. The provisions specifying the appropriate forum once the section is determined to apply seem much closer to the heart of the matter, and much easier to understand: Suit is to be brought at the site of the "facilities," "activities," or "property" in issue. This formula should be built into the test for determining the applicability of the provision as well, and the whole section should be greatly simplified and extended to include the cases covered by the other bills: "Any action respecting activities conducted, facilities maintained, or property situated within a single State or group of not more than ten contiguous States

58. The bill also requires notice to the Attorney General of each State "in which the action could have been brought" and avoids the troublesome "may be" language of the second DeConcini bill.

shall be brought only in a district in which the activities in question are conducted, the facilities maintained, or the property situated."⁵⁹

Conclusion

In summary, while I have some sympathy for the sponsors' desire that local cases be locally determined in the absence of special circumstances, I am quite pessimistic as to the possibility of achieving the goal without imposing on the courts and the litigants the essentially wasteful burden of an extensive trial to determine the appropriate place of trial. If legislation is to be adopted, every effort should first be made to make the necessary determinations as automatic as possible, and the fear that a considerable burden may be unavoidable makes it desirable to ask whether the perceived problem is really so serious as to justify the expense and inconvenience of administering a new venue provision.

It cannot be too often emphasized that we are not talking about changing the substantive law governing environmental controversies or government litigation; we are concerned merely with the place of trial. I do not mean to belittle the importance of the forum in determining how a case will be decided; both the jury system and the existence of the federal courts are premised in substantial part on the perception that different people may administer the same law in different ways. Yet the alternative arbiters with whom we are presently concerned are all federal judges; even discounting the unifying force of periodic Supreme Court review, there seems no institutional reason to predict substantial divergencies in the attitudes of these judges on a simple geographical basis over any considerable period of time. Indeed the experience of the Fifth Circuit in the great racial controversies of the past decades suggests that purely regional attitudes sometimes play a smaller part in federal-court decisions than might abstractly have been anticipated. Thus while the exuberant claims a single conservationist made for the District of Columbia courts provided irresistible propaganda for Senator DeConcini, the scope of the risk should not be exaggerated; and in fact the proponents of the bills basically disavowed any intention to affect the outcome of litigation.

The concerns actually emphasized by the proponents are of a less pressing nature, and some of them can be dealt with by measures less costly to ad-

59. Even such a reworking would not cure all the difficulties with the Simpson bill. For one thing, it is unclear whether the bill applies to administrative-review cases filed in the courts of appeals. The context suggests it does not, for the bill is phrased as an amendment to §1391, which otherwise deals only with district courts; and the term "action," here exclusively used, is not the usual label for proceedings in appellate courts. On the other hand, the venue provision itself prescribes without explanation that the "action[s]" in question shall be litigated in "the district or circuit" where the relevant activities are conducted. Moreover, the bill may not wholly eliminate the danger that the parties may frustrate the wishes of the affected community, which supposedly is the basis for the entire bill; for in providing that the determination of "local or regional nature" be made "on the motion of any party" it does not say explicitly that the issue may be raised by intervenors after joining the case, and it does not direct the court to raise the issue on its own motion.

minister than changes in the venue provisions. Notice problems can be solved simply by requiring notice, and the denial of intervention by appeal to enforce the adequate provisions of the current rule. Witness convenience is irrelevant not only in the courts of appeals but also in the district court cases that must be resolved on the basis of agency records. In the many cases in which the records, lawyers, and relevant officials are to be found in Washington, overall convenience may sometimes be best served by proceedings there. Knowledge of local conditions is useable only to the extent it is spread upon the record, and the experience of District of Columbia courts in deciding numerous administrative cases gives them an advantage in understanding technical substantive and procedural administrative law. Existing transfer provisions allow District of Columbia judges to avoid determining cases that do not belong there, and there is evidence that they are being used.⁶⁰ The percentage of relevant cases filed in the district does not seem extraordinarily high; according to Senator DeConcini only 30 of 559 district-court environmental cases were filed there in fiscal 1979.⁶¹ Only a few examples of inappropriate venue were cited at the hearings. One that was heavily relied upon, an action to require the adoption of regulations to protect visibility under the Clean Air Act,⁶² had a direct impact at least upon all 32 States containing substantial large national parks and other mandatory Class I areas;⁶³ it was plainly not of only local significance and would probably not have qualified for exclusive local decision under most of the bills under consideration.

There are more modest proposals that might alleviate the perceived problem at a lower cost. One would be to amend §1404(a) to provide explicitly that intervenors may request a change of venue;⁶⁴ another would be to repeal some of the many provisions providing for *exclusive* review of certain administrative actions in the District of Columbia.⁶⁵ If the sponsors persist in believing it also desirable to eliminate in "local" cases the *option* of suing in Washington, it seems safest to approach the question statute by statute so as to avoid generalizations that may give rise to excessive threshold litigation.⁶⁶ If a general provision is to be enacted, it seems least dangerous to phrase it in terms similar to those I suggested in discussing the Simpson bill: district court proceedings challenging Government actions expressly directed to activities (of third parties?) in no more than ten States shall in the absence of substantial

60. See Hearings, p. 96 (Mr. Herzberg).

61. *Id.* at 101. In contrast, 95 of 257 petitions seeking court of appeals review of EPA decisions were filed in the District of Columbia Circuit. These were basically record appeals, and many were filed pursuant to provisions *requiring* review in that circuit. See, *id.* at 101-02 (Sen. DeConcini and Mr. Stoll).

62. See Hearings, pp. 50-51 (Mr. Gelbron).

63. See, *id.* at 61-62 (EPA list).

64. Two witnesses testified that intervenors can and often do request and obtain transfer under present law. Hearings at 87-88 (Mr. Thomas and Mr. Butler).

65. See, e.g., 42 U.S.C. §7607(b)(1) (Clean Air Act).

66. For example, permit decisions under the Clean Water Act might be made reviewable only where the activity or facility in question is located.

hardship be transferred to a district in which the activity is to be conducted. It seems by no means clear, however, that the benefits of any such effort justify its administrative costs.⁶⁷

67. Varying degrees of reservations based on the burdens the bills would impose have been expressed by the Council of the Administrative Law Section of the American Bar Association (June 1, 1980); by the Federal Court Committee of the New York City Bar Association (Oct. 31, 1980); and by a draft staff memorandum of the Administrative Conference of the United States (*see* letter of Richard K. Berg to Patti Saris, Esq., Counsel to Senate Judiciary Comm., Feb. 19, 1980).

Text of Venue Amendment
by U.S. Senator Dennis DeConcini
As It Appeared in the
CONGRESSIONAL RECORD,
February 9, 1982

Regulatory Reform Act

Amendment No. 1267

(Ordered to be printed and lie on the table).

Mr. DECONCINI (for himself, Mr. SIMPSON, Mr. HATCH, and Mr. ZORINSKY) submitted an amendment intended to be proposed by them to the bill (S. 1080) to amend the Administrative Procedures Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs: to provide for a periodic review of regulations, and for other purposes.

Mr. DECONCINI. Mr. President, I am today submitting as a printed amendment to S. 1080 language to amend various venue statutes of the United States Code. Through these amendments I hope to put in place the principle that cases involving the Federal Government or agency rulings should be heard in a locale where there is a significant impact and not in a forum far removed from where the impact of a decision will be felt.

I, together with several of my distinguished colleagues on the Committee on the Judiciary such as Senators LAXALT, SIMPSON, and HATCH, have had a great interest in this subject matter for the past several years since some egregious examples of forum shopping came to our attention. During the past Congress, hearings were held on bills introduced by Senator LAXALT and myself before the Courts Subcommittee. The result was S. 3023 of the 96th Congress which was approved by the Judiciary Committee but never brought before the full Senate. The language of this amendment includes major portions of that bill and extends its application to other than simply environmental matters. For instance, much of the seminal work on the 28 U.S.C. 1391(e) district court amendments, was done by Senator SIMPSON and with his approval and cosponsorship has been added to the venue revision encompassed by the amendment.

Within the past decade we have witnessed a growing disillusionment with the concentration of power in our Federal Government in Washington. A part of this feeling has been the consequence of actions taken by judges in the Federal courts of the District of Columbia in cases which had little or no impact on the residents of Washington, but which deeply affected the lives of citizens living thousands of miles away from the Capital. In many of our States, these judges are viewed as just another extension of the Federal Government, and their rulings are viewed suspiciously as just another attempt by the Federal Government to intrude upon the lives of the people. I know

that the people of Arizona or Nevada would feel much better and have a much greater sense of participating in our Government's workings if it were judges in those States, or the ninth circuit, that were making the decisions that affected their lives, particularly in those situations where they are the only people affected.

I hope to receive the support of all of my colleagues who believe that their district of circuit court judges are equally as competent to hear cases and render justice as are judges of the District of Columbia; I hope to receive support from all those who believe that democracy is best served by facilitating the participation of the people affected by actions of their Government; I hope to receive the support of all those who do not want to place their constituents in the difficult position of possibly being forced into a distant forum, such as the District of Columbia, to adjudicate their grievances against the Government. This amendment will complete the effort begun two decades ago in the *Mandamus and Venue Act of 1962* to return justice to the people and not force them to come to Washington, D.C. This amendment will return the wheels of justice to the four corners of the country and dissolve Washington, D.C., courts as the hub of litigation affecting people and interests far removed from the Nation's Capital when there is no significant impact on the people of the District.

Special interest groups that have made Washington, D.C., the center for their operations will not be pleased at the thought of having to go to those parts of the country where the results of their litigation will have a great impact, but I believe it will be educational for them to realize the great plurality of feelings that exist west of the Potomac. Whereas, it may be slightly more inconvenient for lawyers of these special interest groups to litigate a case in Cheyenne, Wyo., that must be balanced against the greater convenience that will obtain for the attorneys of Wyoming and the greater opportunity to observe the workings of justice that will be available to the people of that State.

I have shared the language of this amendment with many interested parties and many valid suggestions for change have resulted. I hope by having the amendment printed and a detailed explanation of my fears and reasoning placed in the CONGRESSIONAL RECORD that further perfecting suggestions will come to my attention so that when S. 1080 is raised this amendment will have reached a point of technical and policy perfection to allow its ready adoption by this body.

I ask unanimous consent that my amendment be printed in the RECORD.

There being no objection, the amendment was ordered to be printed in the RECORD, as follows:

Amendment No. 1267

On page 39, strike lines 9 through 13, and insert in lieu thereof the following:

(3) Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to a system of random selection pursuant to paragraph (1), may, in the interests of justice, transfer such proceeding to any other court of appeals and shall, upon motion by any party thereto, transfer such proceeding to the court of appeals for a circuit in which the action under review would have a substantially greater impact, unless the interests of justice require the court to—

(A) retain such proceedings, or

(B) transfer the proceedings to a circuit other than one in which the impact would be substantially greater.

(4) Notwithstanding any other provision of law, a petition for review of any agency rule reviewable directly in a circuit court of appeals may be filed in the judicial circuit in which the person seeking review resides or has its principal place of business.

On page 39, after line 25, insert the following:

(c)(1) Section 1391 of title 28, United States Code, is amended—

(A) by amending subsection (e) to read as follows:

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought only in a judicial district in which—

(1) a defendant in the action resides;

(2) the cause of action arose;

(3) any real property involved in the action is situated; or

(4) the plaintiff resides if no real property is involved in the action,

except that no such action may be brought in a judicial district pursuant to paragraph (1) or (4) hereof unless the agency action or failure to act that is the subject of the lawsuit would substantially affect the residents of that judicial district. A cause of action pursuant to paragraph (2) hereof shall be deemed to arise in the judicial district or districts in which the residents would be substantially affected by the agency action or failure to act that is the subject of the lawsuit; and*

(B) by adding at the end thereof the following:

(g)(1) In any action brought in the United States District Court for the District of Columbia under subsection (e) that may be an action of a local environmental nature as defined in paragraph (3) of this subsection, the plaintiff shall, at the time the action is filed—

(A) forward a copy of the complaint to the attorney general of each State in which a judicial district described in paragraph (3) of this subsection is located, subject to the limitation provided in paragraph (2); and

(B) file a statement with the clerk of the court indicating compliance with the requirements of subparagraph (A).

(2) The provisions of paragraph (1)(A) do not require the plaintiff to forward a copy of the complaint to more than five State attorneys general.

(3) An action is an action of a local environmental nature if—

(A) the action primarily affects local or regional interests in one or more contiguous judicial districts other than the district in which the action was originally filed; and

(B) the action arises under any Act of Congress pertaining to wildlife, public lands, water rights, or any other Act of Congress relating to environmental quality.

(4) Compliance with this subsection does not constitute an admission by the plaintiff that the action is an action of a local environmental nature as defined in paragraph (3) of this subsection. Failure to comply with this subsection may be cause, in the discretion of the court, for appropriate sanctions, including dismissal of the action without prejudice.

(2) Nothing in the amendments made by paragraph (1) of this subsection shall be construed to affect venue in an action relating to civil rights.

(3) Section 1404 of title 28, United States Code, is amended—

(1) in subsection (a) by inserting before the period the following: “, except that the court shall transfer actions described in subsection (e) of this section in accordance with that subsection”; and

(2) by inserting at the end thereof the following:

(e) In any civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or the defendant is an agency of the United States, or the United States, a

district court shall, upon motion of any party thereto, transfer the action to a district or division, where the action might have been brought, and in which the action would have a substantially greater impact, unless the interests of justice require the court to—

- (1) retain the action, or
- (2) transfer the action to a district or division other than one in which the impact would be substantially greater.

***Note:** The last paragraph of existing Section 1391(e) will be added to the amendment.