



## Recommendation 82-3

### **Federal Venue Provisions Applicable to Suits Against the Government**

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(Adopted June 18, 1982)

(a) This recommendation responds to proposals to amend statutes that govern venue in actions against the United States, its agencies, and its officials. It calls for two limited changes: (1) amendment of the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a change of venue, and (2) addition of a provision requiring that, when an action against the government is brought in the District Court for the District of Columbia that may have a particular impact on residents of one or more states, notice be given to the attorneys general of any such states. Otherwise, it urges rejection of proposals to make the extent of local impact determinative of proper venue.

(b) The present venue statute governing most district court actions against the United States, its officers, or agencies is 28 U.S.C. 1391(e). Section 1391(e) permits suit in any district in which (1) a defendant resides, (2) the cause of action arose, (3) real property involved in the action is situated, or (4) the plaintiff resides, if no real property is involved. Under 28 U.S.C. 1404(a) a district court may transfer any civil action to any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice \* \* \*."

(c) The present venue requirements governing agency review proceedings in the courts of appeals are found in particular statutes, generally a section of the substantive statute under which the agency is acting. Most such statutes include the District of Columbia Circuit as one of the available forums; some statutes designate that circuit as the exclusive forum.<sup>1</sup>

(d) Section 1391(e) applies to all sorts of actions, including actions for money damages. The concern of those making the current proposals is not with damage actions but with nonstatutory review proceedings, typically actions for declaratory judgments, injunctions, or

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<sup>1</sup> ACUS has previously addressed the advisability of direct review in the courts of appeals in Recommendation 75-3 (choice of forum for judicial review of administrative action). Court of appeals venue provisions in the Clean Air Act and Federal Water Pollution Control Act were addressed in Recommendation 76-4 (national standards should be reviewed exclusively in the D.C. Circuit; rules affecting single states or facilities should be reviewed in the local circuit). "Races" to the courts of appeals were addressed in Recommendation 80-5.



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mandamus. More particularly their concern is with only some of those cases, often environmental cases, that involve projects, people, or resources of particular states or regions.

(e) Those advocating modifications of the venue laws believe that too many of such "local" suits against the government are heard in the courts of the District of Columbia and that the judges of those courts do not have the "feel" for local affairs that judges on the scene have. Proponents are mostly from the western states, and they emphasize how different are the arid, relatively undeveloped West and its problems from the East and its problems. They argue that the convenience of locally affected citizens and their perception that distant district judges are out of touch with local concerns should be important factors in determining venue. Therefore, they propose amending sections 1391 and 1404 to limit venue to the judicial district in which the residents would be most affected by the agency action or inaction that is the subject of the lawsuit. Similarly, they propose new statutory provisions governing court-of-appeals venue that would create new rights to obtain transfers to a circuit in which the impact of the suit is greater and would also eliminate all provisions for exclusive review in the District of Columbia Circuit.

(f) Cross-the-board attempts to restrict the choice of forum presented by the current venue laws are unnecessary and unwise. The number of suits against the government filed in the District of Columbia has not been disproportionate, and we believe that such suits have been transferred when appropriate. The current flexible venue statutes minimize threshold litigation, whereas the proposed modifications would involve costly preliminary determinations concerning the substantiality and location of impact. Many, probably most, of the cases with which the proposals are concerned are heard on agency records without the taking of testimony. Considerations of convenience to the parties (which in such cases really means counsel) and of the location of the agency record often favor venue in the District of Columbia. Changes of venue may be obtained under 28 U.S.C. 1404, which provides that transfers to an alternate forum may be obtained "for the convenience of parties and witnesses, in the interest of justice." Where the convenience of locally-based parties or witnesses is a significant consideration, or the interests of justice otherwise indicate that the case should be tried in the local jurisdiction, courts have appropriately permitted transfer. There is no suggestion that intervention is not allowed when requested. To ensure that affected persons are aware of suits filed in the District of Columbia, a simple notice requirement is all that is needed. Furthermore, to remove any doubt that intervenors may request a change of venue, explicit language to that effect can be added to 28 U.S.C. 1404.



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(g) With respect to venue in the courts of appeals, the need for authoritative determinations on nationally applicable statutes or regulations may argue for exclusive review in the District of Columbia Circuit. (See Recommendation 76-4: “Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act.”) However, Congress should review all such existing provisions to decide on a statute-by-statute basis whether such exclusivity is warranted.

(h) There is no question that some proponents of changes in the venue laws believe that the place of hearing is likely to affect the outcome and believe further that courts of “local” districts will be more sympathetic than the courts of the District of Columbia to the local interests for which they profess to speak. No doubt, some of the opponents of such changes perceive an advantage to their interests in their ability to sue in the District of Columbia.

The Conference is aware from its consideration of the race-to-the-courthouse recommendation (Recommendation 80-5) that lawyers do act on perceptions of advantage based on venue even within a single United States court system and a single body of federal law. The Conference cannot deny the existence or the importance of the perception of advantage to a party from the choice of one court over another. We suggest, however, that, to the extent that the concern of proponents is actually with the terms and construction of certain federal statutes, the proper objective should be the forthright amendment of the statutes, not manipulation of the law of venue in order to achieve more favorable construction.

Traditionally, one has been able to sue the government at its seat. Indeed, it took the mandamus and venue statute of 1962, which added section 1391(e) to the Code, to provide a solid basis for suing the government elsewhere. Perceived differences in the predilections of particular courts, which are likely to be transient if they exist at all, are not a reason for departing from our tradition.

There may be particular statutory contexts in which local considerations are so likely to predominate in a certain category of suits against the government, that such suits should be heard in local districts. Thus, while this recommendation opposes across-the-board restrictions on venue choices, the Conference does not oppose the reexamination of the allowable venue of proceedings to review agency actions under particular statutes.



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### Recommendation

(1) Congress should not amend the statutes governing venue in district court actions against the United States, its agencies, or its officials, 28 U.S.C. 1391(e), 1404(a), or the statute governing direct review of agency orders in the courts of appeals, 28 U.S.C. 2112(a), to make the extent of local impact determinative of proper venue.

(2) Congress should add a new subsection (g) to 28 U.S.C. 1391 to provide that plaintiffs filing actions in the United States District Court for the District of Columbia against the United States, its agencies, or its officials that may have a particular impact on the residents of other districts be required to notify the attorneys general of the states containing such districts.

(3) Congress should amend the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a transfer.

(4) Congress should review existing statutes providing for review of federal agency orders or regulations exclusively in the District of Columbia Circuit to ensure that, in each statute, considerations of the need for authoritative determinations on nationally applicable requirements outweigh the benefits of providing litigants with a choice of forums for challenging agency action. Pending such a review, however, Congress should not enact legislation overriding all exclusive venue provisions.

### Citations:

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**Note:** Legislation opposed by the Conference in this recommendation was not enacted by the Congress.



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### **Separate Statement of Members Barnes, C. M. Butler III, D'Agostino, Fowler, Hakola, Horowitz, Knapp, Matheson, Miller, Morris, Oliver, Pressly, Rose, Sasseville, Schmults, Loren A. Smith, Tidwell, Twine, Williamson, and Liaison Representative Fergenson**

We oppose that portion of the recommendation which rejects local impact as a factor in determining proper venue. In our view, consideration of local impact is germane to determining the proper venue of a suit, and a motion to amend the recommendation to provide for the consideration of local impact in the transfer of venue statute (28 U.S.C. 1404(a)) failed at the plenary session by only two votes. While we disagree with the Conference's recommendation on this issue, we join in the Conference's endorsement of related legislation to require that notice be given to the attorney general of any state containing districts that may be impacted by pending litigation against the United States and to expand 28 U.S.C. 1404(a) to permit an intervenor to request a transfer.

Our belief that local impact ought to be a significant factor in locating federal litigation is grounded in the basic principle that justice is more likely to be achieved when its search is conducted close to the people most affected by the outcome of the proceedings. This is a vast country with people proud of the freedom that unites us, and possessed of a determined commitment to the uniqueness of where they live. The people in the West or the South do not want different law than the rest of the country; they do seek judgment by men and women who adjudicate as neighbors, who bring the wisdom of place and experience to their deliberations. Returning venue to judicial districts whose citizens are affected by litigation does not guarantee certain results; it does guarantee that affected citizens will more likely perceive the judicial process as fair and responsive to their interests.

During the debate supporters of the recommendation claimed to be disturbed at the renascent provincialism they linked with the venue changing proposals. We do not believe that the merit of the local impact issue should be obscured by dismissing its proponents as provincial, or observing, as does the preamble, that those who favor venue changing legislation are from the "arid, relatively undeveloped West." Indeed, one could as easily speculate that those who would do all in their power to keep the locus of federal judicial decisionmaking in the District of Columbia are motivated by "provincial" concerns such as protecting the turf of the D.C. bar which might be threatened by enactment of venue changing proposals. Rather, the issue as we see it is whether the people's opportunity to participate in and observe the litigation which will affect their lives deserves to be balanced against other interests of the parties. We think it does.



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While the recommendation's preamble does not explore the substantive concerns raised above, it does hypothesize some consequences of venue changing proposals such as the possibility of added pre-trial expenses necessitated by additional venue challenges and an observation that any changes will not improve the present situation since most suits are transferred where appropriate. We disagree with these conclusions. Cases where venue did not coincide with substantial local impacts and ones where transfer requests were denied are referred to in Senator Laxalt's and Linden Kettlewell's article "A Return to Traditional Considerations for Determining Venue," at pp. 17-18, *Venue At The Crossroads*, February 1982, National Legal Center for the Public Interest. Even an opponent of the pending S. 2419 to amend the basic venue statute—Nicholas C. Yost, also a contributor to *Venue At The Crossroads*—concedes that transfers from Washington to affected localities have been denied in some specific instances. (*Id.* at p. 45.)

It is also not readily apparent how venue challenges will prolong litigation or significantly increase costs. Normal pre-trial procedures can resolve venue challenges expeditiously, and appeals to venue decisions must be made immediately and through writs of mandamus. Since decisions on venue under section 1404(a) are to the court's sound discretion, it would be most unusual to find many such decisions reversed.

Since the pending venue changing legislation seeks to strike a balance between considerations of substantial local impact and other "interests of justice," the recommendation's admonishment that "local impact" considerations not be determinative unfortunately fails to confront the present proposals or state of congressional debate. In dissenting from the recommendation's failure to approve local impact as an appropriate consideration in establishing proper venue, we hope that Congress will proceed to favorable consideration of S. 2419 and the principles it advances. We believe, with the sponsors of S. 2419, that justice is well served when it is conducted closest to those citizens substantially affected by the court's decision.

### **Separate Statement of R. Tenney Johnson**

I join members Barnes, *et al.*, in dissenting from this recommendation as it is presently drafted, but for reasons that to some extent differ. While I agree that Congress should not amend the law to make local impact *determinative* of proper venue, I do not agree that a plaintiff should be required to notify attorneys general of states in which an action may have a



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particular impact. Such a requirement, because of its vague parameters, would quickly lead to giving notice to all fifty attorneys general in every case.

More importantly, I believe that local impact should be a *possible* basis for transfer of venue, just as the convenience of the parties or witnesses currently is a basis for, but not determinative of, such a transfer. In other words, the decision should still be left to the court's discretion, but the law should provide that consideration of the local nature of the action's impacts is appropriate in reaching a decision.

I cannot, on the other hand, explicitly endorse S. 2419's venue provisions, since it would *prohibit* venue in the district where the defendant or plaintiff resides unless the action would substantially affect the residents of that district, and thus would not permit the balancing of local interests with other interests.