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THE CASE FOR VENUE REFORM

INTRODUCTION

Imagine a situation in which Mississippi farmers are threatened with ruin from an infestation of fire ants. Suppose that the farmers want to control the pest with certain chemicals, but need federal government approval to do so. If someone wants to challenge in court the government's action in allowing use of the chemicals on Mississippi land by Mississippi farmers, he would sue in Mississippi. Right? Not necessarily. Under current law, the suit could be brought "in any judicial district in which...the plaintiff resides...." In fact, the Mississippi case was brought and decided more than 900 miles away in the District of Columbia.

The plaintiffs were able to have the United States District Court for the District of Columbia decide the case because of 28 U.S.C. §1391, a federal venue statute. This statute allows a plaintiff who is suing an officer, employee, or agency of the United States to sue in any judicial district in which: (1) a defendent 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.

As a result of this statute, critical cases are being heard and decided in courts far distant from the scene of the controversies. They are, moreover, being heard by judges who often have little appreciation for the local issues involved. The reason for this, it appears, is that plaintiffs shop around for a venue in which they expect to receive the most sympathetic hearing. A study by the Washington-based Capital Legal Foundation, in fact, finds that since 1970, federal courts in the District of Columbia decided almost one-third of 274 federal cases dealing with environmental issues. Involved in the cases as either parties or intervenors were: Environmental Defense Fund, Friends of the Earth,

Natural Resources Defense Council, Sierra Club, the Wilderness Society, the Center for Law and Social Policy, and Citizens for a Better Environment.

These groups frequently resort to litigation in order to pursue environmental goals. The Capital Legal study documents that these groups have used present federal venue guidelines to get into the remarkably sympathetic Washington, D.C. federal bench. Their effort pays off. In D.C. they win a far greater share of cases compared to their suits outside the D.C. circuits. While the environmental groups have won only 41 percent of the cases litigated in federal judicial courts outside of D.C., they have triumphed in 68 percent of their District of Columbia cases. The study finds no "persuasive reason for the magnitude of these differences, except judicial predeliction." The environmentalists clearly have a major ally in D.C. federal courts.

Current venue laws invite and sometimes require plaintiffs to choose the most sympathetic circuit, the District of Columbia. All of the major environmental organizations have lobbying and litigation offices in the District of Columbia. If an environmental issue arises, those groups can rely on the language of subsection (e) of the present statute, and argue that, as plaintiffs residing in the District, they are entitled to sue in the District of Columbia courts. They thereby save time and money, and also, as the Capital Legal study shows, make their points before sympathetic judges.

The data indicate a need for reform to discourage forum shopping. Federal statutes, for example, could be changed by amending 28 U.S.C. §1391 to compel anyone who wants to sue over an environmental issue to bring the case in a judicial district that contains residents directly affected by the outcome of the case. One proposed amendment would add the following to the section quoted earlier:

> Provided that an action may not 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.

There have been moves to make such an amendment part of the upcoming Regulatory Reform Bill (S. 1080). It is also possible that the provisions of the amendment will be introduced as a separate bill. Environmentalists have been fighting the amendment vigorously, while those favoring it have not been very active. Yet if Congress were to amend the venue statute, Capital Legal estimates that between one-half and one-third of the cases environmentalists won in D.C. would have to be brought in another juris-

diction; no more than 15 percent of the D.C. cases analyzed had to have been brought in the D.C. Circuit.

The most candid defense of the present federal venue situation probably has been made by former Sierra Club attorney Joseph Brecher. In a law review article explaining why D.C. is the preferred venue for environmentalists, he writes:

> Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue. An executive or legislative solution is far more satisfactory than a judicial pronouncement in the long run, and political decisions in the conservation arena are largely a function of public pressure. A suit in Washington is certain to receive more extensive coverage by the media than one in the District of Utah, for example. All major newspapers, wire services, and broadcasting networks have Washington bureaus; this is rarely the case in rural areas.
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> Environmental lawyers are often handicapped when a trial is held in a rural problem area. Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D.C. Circuit....
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> A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. Local residents and newspapers are apt to favor projects in their locality, even at the cost of substantial environmental damage, for two reasons. First, large federal landholdings or depressed economic conditions often make the local tax base extremely small. Thus, residents see construction of new projects in terms of upgraded schools, libraries, roads and other public facilities. Second, public leaders in the affected area often support such projects because of the new jobs and economic expansion associated with them. Judges and juries in the affected areas are likely, therefore, to feel the public interest lies in building a project, rather than preserving the environment.[1]

The proposed amendment to §1391 will reduce significantly the special advantages about which Brecher boasts. Its clear language would not allow a specific federal court to accept a case unless the outcome would affect directly the residents of or property in the district in which the court is located. This

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[1] Joseph J. Brecher, "Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers," 2 Ecology Law Quarterly, p. 91, at 93, 94 (1972).

would mean that plaintiffs, U.S. attorneys defending the government, and the cause of action would converge in a convenient location.

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