ORIGINAL

In the

Supreme Court of the United States

WILLIAM H. STAFFORD, JR., ET AL.,

PETITIONER,

V.

JOHNBRIGGS, ET AL.,

RESPONDENTS.

No. 77-1546

Washington, D. C.
April 24, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM H. STAFFORD, JR., ET AL., Petitioners,	:	
v.	:	No. 77-1546
JOHN BRIGGS, ET AL., Respondents.	:	

Washington, D. C.

Tuesday, April 24, 1979

The above-entitled matter came on for argument at 1:16 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PETER MEGARGEE BROWN, ESQ., Cadwalader, Wickersham & Taft, One Wall Street, New York, New York 10005; on behalf of the Petitioners

DORIS PETERSON, ESQ., Center for Constitutional Rights, 853 Broadway, New York, New York 10003; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1546, Stafford v. Briggs.

Mr. Brown, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PETER MEGARGEE BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BROWN: Mr. Chief Justice, and may it please the Court:

This is a case on writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia. This case and Colby v. Driver, set in argument in tandem, both involved the question did Congress intend in the enactment of the Mandamus and Venue Act of 1962 to grant United States District Courts nationwide personal jurisdiction over federal officers and employees in their private individual capacities, that is in essence against them for acts allegedly performed under color of law. This is a civil rights tort action brought in the District of Columbia alleging unconstitutional acts and seeking money damages from the pocketbooks of four individuals who were and are federal employees. All wrongful acts alleged took place in Florida.

The defendants below are petitioner Stafford, a United States Attorney in the Northern District of

Florida, now a United States District Judge in the Northern District of Florida; petitioner Carrouth, an Assistant United States Attorney in the Northern District of Florida, now in private practice in Florida; Meadow, a federal FBI agent stationed then and now in the Northern District of Florida; and Goodwin, a Trial Attorney with the United States Department of Justice in Washington, D. C. The plaintiffs are ten individuals called to testify before a grand jury in Tallahassee, Florida, in 1972. A majority of the plaintiffs reside in Florida. None of the plaintiffs reside in the District of Columbia. Eight of the plaintiffs were indicted in Florida for conspiracy to riot. After trial, each was acquitted. They became knwon in the press as the Gainesville Eight.

Goodwin, who is not a petitioner here, was a prosecutor appointed as special attorney to act in Florida in connection with this investigation in Florida and the trial in Florida out of which this case arose. Now, the complaint below alleges -- and there has been no trial on this issue -- the complaint alleges that Goodwin lied when examined in the course of the grand jury proceedings by the presiding judge in connection with the presence of government informants among the subpoenaed witnesses in connection with this investigation.

Now, the complaint alleges that the petitioners

knew and remained silent with regard to this alleged perjury and this constituted a conspiracy against the constitutional rights of the plaintiffs. The plaintiffs here ask damages of $1.5 million out of the pockets of the petitioners. They also ask for some declaratory rights and seek the appointment of a special prosecutor to bring indictments against petitioners and Goodwin.

The petitioners, have no affiliation with the District of Columbia, moved to dismiss for insufficiency of personal jurisdiction, insufficiency of process, improper venue, and ultimately for a transfer of venue to Florida. The District Court judge denied the transfer of the case to Florida but granted the motion to dismiss. The Circuit Court, the District of Columbia Circuit Court reversed and denied the hearing. It held that the petitioners were subject to the District of Columbia court solely because of the use by the plaintiffs of the Mandamus and Venue Act of 1962, more precisely, 1391(e).

The court below determined in effect that --

QUESTION: You say 1391(e) is more precisely the Mandamus and Venue Act. Actually, the Mandamus and Venue Act in the statutes at large appears as two sections, doesn't it, one creating section 1361 and the other creating section 1391(e)?

MR. BROWN: Yes, Mr. Justice Rehnquist, that

is quite right. The Mandamus and Venue Act of 1962 is comprised of 1361 which grants the mandamus writ to the District Court and as an adjunct and to be read with it and as a part of it is section 2, which is 1391(e), and the legislative intent was that section 2 would have as its purpose the same purpose as the first section. They would be read together, and Judge Friendly, in Natural Resources v. TVA, said they must be read together, the statute as a whole, and that is absolutely correct.

QUESTION: When you say the legislative intent was, it is a little bit hard to get your version of the legislative intent out of the language of 1391(e).

MR. BROWN: Well, 1391(e) is cast in terms of mandamus. It provides an officer who is, it provides who is acting, is acting. It doesn't say who was acting. It deals with on-going present conduct. It isn't a model of clarity, Your Honor, but it does have language in it that has the cast of mandamus and was intended so by the Congress in promulgating it.

QUESTION: Except in the Act, in one section they use the word "mandamus," in 1361, and in 1391(e) they use the word "civil action."

MR. BROWN: Well, if they are read together, it isn't necessary to be repetitive. It is cast in terms of mandamus and mandamus, in promulgating it they stated

that it would be read with the same purpose as mandamus. And the whole history, both the purpose and the history indicates that they were meant to be read together, and if read together they become into perspective.

Our petition was granted on January 15. At the same time, the Colby v. Driver petition, a petition that I also filed, to the Court of Appeals for the First Circuit was granted, raising for review the same statutory issues involving venue and jurisdiction. And to avoid duplication with the tandem case and with the permission of the Court, I will make the thrust of my very brief argument one point common to both cases and that is that the statute simply does not apply to respondent's suit against federal officers and employees pocketbooks.

My partner, Mr. Nemser, in the second case will focus on the dual process point. Now, basically, if Your Honors please, it is the language, the purpose and the history of the statute involved here that demonstrate that Congress did not intend its application to suits for money judgment against federal officers and employees.

When the statute is read in its full context, with realization of its purpose, a narrow limited purpose, and in light of its legislative history, it becomes clear that Congress did not direct nor intend coverage of personal tort damage actions as the kind of suit brought

below.

As a matter of fact, the suit that is brought below by respondents didn't exist in 1962 and it wasn't established, this Bivens-tyee action, until nine years later, in 1971. Now, the respondents in the court below misinterpret the language, purpose and history of the statute as an unprecedented break with the past. In proper perspective, the statute is not a sweeping general expansion of venue and jurisdiction. Their interpretation which was embraced by the court below would allow federal employees to become virtual shuttlecocks to be hit repeatedly in personal damage suits, in scattered forums throughout the country so long as the acts complained of were alleged to have been performed under color of legal authority.

QUESTION: Is there any recognized procedure pretrial to challenge the substance of the claim for relief other than summary judgment or motion to dismiss on the basis that the venue is improper?

MR. BROWN: Well, those come to mind, what Your Honor has mentioned, but in cases that I have been familiar with where 1391 has been used and it has been used at least 17 times, as we put in our appendix, once you are hit with a 1391(e) you are going to be in pain and suffering and in danger of ultimate difficulties for

a long time before you can extricate yourself even on a motion for summary judgment.

QUESTION: You would at least have to come into the district selected by the plaintiffs to file a motion for summary judgment or for improper --

MR. BROWN: Yes. I can give Your Honor an example that I think is valid. A non-petitioner here who is a defendant below was named Goodwin. I also represent him where he has been hit as a shuttlecock in New York City. He is sued twice there, not on the same fact situation but he is sort of a target because he is a government prosecutor, and in those cases the long arm statute was declared by the District Court Judge not to be applicable because there wasn't enough evidence at the threshold to give jurisdiction under the long arm statute, but Judge Hait in the Southern District of New York held that 1391(e) without such evidence was sufficient and he has held there in those cases because of that.

QUESTION: And so if he is to argue that the claim on its merits is frivolous or doesn't state a claim for relief, he must at least go to the district which the plaintiffs have chosen and make that argument?

MR. BROWN: He will have to go to Nome, he will have to go to Portland, he will have to go to

Albuquerque, and many people think that a government official is only sued once even if it is the same facts, but in the tandem case, take Colby, for example, he was hit as a shuttlecock in Washington, D. C., he lives in Maryland, he was hit in Rhode Island in Driver v. Helms, in a billion dollar case against him. He was hit in San Francisco in Kipperman v. McCone, and it was only because after two years we were able to persuade Judge Renshaw that 1391(e) didn't apply to money damage suits out of the pocketbooks of government officials, it is a different kind of a suit. So it can be difficult where you are hit repeatedly with an easy statute.

Now, the tradition has always been that defendants, whether they are government officials or not, that they are sued where they live, where they are found and that is true of all of us. We are sued that way, by seizing on a mandamus type action statute in 1962, the civil rights bar here is attempting to hit government officials throughout the country in forums where -- and this is significant -- in forums where there is no contact, either no contact where the action did not arise. The statute is -- that is 1391(e), the venue section is drafted in such a way that wherever a plaintiff goes he may bring a 1391 action.

Take Colby. In Colby, the plaintiffs, one of

them lived in Rhode Island, nothing else happened in Rhode Island. The mail openings didn't happen in Rhode Island. The defendant has never been in Rhode Island and there are 25 of them.

QUESTION: None of the defendants lived in Rhode Island?

MR. BROWN: None of the defendants were in Rhode Island. This is a misuse and a misconstruction of a statute that was meant to apply to judicial review actions, administrative actions, where an historic anomaly caused them to be brought up to 1962 only in the District of Columbia and --

QUESTION: I have another problem.

MR. BROWN: Yes, Mr. Justice Marshall?

QUESTION: Back in the good old days when you got onto the government official, they would move. Wasn't it law for that purpose, too?

MR. BROWN: Well --

QUESTION: I am not talking about the out of pocket, I mean when you want to bring mandamus against him, he was gone.

MR. BROWN: The judicial review would make it possible to bring judicial review in a mandamus type action in every District Court after 1962, and we are not quarreling with that.

QUESTION: You don't object to that?

MR. BROWN: We don't object to that at all. There is good reason, Mr. Justice Marshall, and let me state the reason and I think it is factual and it goes to the root of this case.

Hamer Budge was a Congressman from Idaho. His constituents complained that they could not bring an action for judicial review in connection with land rights, grazing rights, wool rights, mineral rights, and because even though they had -- the plaintiff was there, the local government official was there, the witnesses were in Idaho and the documents were -- they had to go to Washington, D. C. because of this novel, and he thought that was an outrage and he was right, it was an outrage. So Hamer Budge came to Washington and he went before this commiteee and it is on the first pages of the hearings -- the court below didn't have the benefits of the hearings, but Your Honors have the benefits of these hearings. In the first pages, he says let me tell you what my problem is. We need judicial review out west, a thousand miles away, and we can't get any justice. Because if you say to us, bring all those witnesses and bring all those documents and bring all those officials to Washington, then we don't do it and we lose our day in court.

QUESTION: That may be, and I assume it is, all very true so far as the historic genesis of this legislation goes, but the question is what does the legislation as enacted, not by Hamer Budget but by the entire Congress, both houses of Congress, the House and the Senate, what does it provide? And 1391(e) seems by its literal terms to go considerably further than Hamer Budge's original proposal, doesn't it?

MR. BROWN: Well, I think that that was his intention and I think that his intention --

QUESTION: I assume that that was his intention.

MR. BROWN: Mr. Justice Stewart, this is not the first time that 1391(e) has been before this Court. This Court in Schlanger v. Seamans in 1971 examined the history of this statute and found that it was not literal, you didn't follow every word of the statute, that you look to the mischief at which it was directed, and there it was found not to apply to habeas corpus actions. And Mr. Justice Douglas said explicitly at that time that 1391(e) was to broaden venue in those civil actions that were restricted prior to 1962 to the District of Columbia.

QUESTION: Didn't the President have something to say after the bill was passed and he signed it -- of course, the President can't make legislative history and he can't make a statute mean anything that the words do

not mean, but when he signed the bill he made a statement that this related to actions in the nature of mandamus.

MR. BROWN: He did.

QUESTION: Now, I suppose there are a lot of slips between the time the statute was first introduced and the time when the President signs it, but at least that suggests what the President thought he was signing.

MR. BROWN: Mr. Chief Justice, that is very valid. In the nature of mandamus was that request to have the President do that, was done because of the fear of the Deputy Attorney General at that time that there might conceivably be a misinterpretation of its narrow limits and I think with hindsight that that was present. But the cases have determined that it is limited to these kinds of cases, mandamus type, and I think it is interesting that in 1976, the only time I know that Congress reviewed the Mandamus and Venue Act, that there it stated in the hearings and the reports that it was limited to mandamus type actions. It said that, it was limited to judicial review.

Now, the Second Circuit has also had occasion to review 1391(e) and Judge Friendly in Natural Resources v. TVA found that TVA and its officials in an injunctive action was not within the ambit of the statute. Judge Friendly said that this particular statute was not the

kind of a text that could be parsed with the aid of a grammer and dictionary but, rather, what should be looked to was what was the mischief it tried to cure and what it was trying to cure here was to allow judicial review actions, mandamus type actions in the District Courts outside the District of Columbia.

Now, this action brought by the respondents could not have been brought in the District of Columbia and was not in any way restricted. Tort damage actions against public officials were never limited to the District of Columbia. That is a ridiculous position and it doesn't fit.

What must be done here is to examine the context of the reports. They are preferred source. In the context, it is clear that the problems related to providing judicial review actions, of eliminating the problem of indispensable parties, of allowing venue where there were actions against officials in connection with their duties. There were no personal jurisdiction problems and there were no problems of any kind in connection with a tort action against an official.

I submit to the Court that in 1962 actions of this kind I said didn't exist, they weren't established until 1971. But actions against public officials for wrongdoing to a citizen were suable. They were rare

because of the high immunity, official immunity. The recovery was not always successful. But from Little v. Barreme, in 1804, to Yaselli v. Goff, Barr v. Matteo, Howard v. Lyons, these cases all sued usually in the state courts but sometimes transferred to the federal courts, but there were these suits but they were not restricted to the District of Columbia. They were not mandamus actions.

QUESTION: Both Howard and Barr were diversity cases, weren't they? Perhaps Barr was a District of Columbia general jurisdiction, but Howard v. Lyons was diversity, wasn't it?

MR. BROWN: Howard was. That was in the Massachusetts District Court, Howard v. Lyons, decided by Mr. Justice Harlan the same day as Barr v. Matteo, but it was diversity. I was simply showing that you did not have a jurisdiction problem and you did not have a venue problem, you did not have a service problem if you are suing in the kind of cases that the respondents are suing in, which are tort actions, even jumping over the fact that Bivens type actions didn't exist at the time.

I submit that a fair reading of the preferred source, the House reports and the Senate reports on this bill show that these were in essence against the United

States. That was the keynote, and it was not in essence against an individual. There is a sentence, and this is the heart of the respondents' case, there is a sentence that you will find in the middle of the House report and you will find it in the middle of the Senate report, and that sentence says -- it talks about damage actions against officials, and I submit that it involves the venue problem that the committees were discussing, and if you read the prior paragraph just once, and if you read the paragraph after that, you will see that what was being discussed there was the kind of an action which was brought before 1962 very often and that is an action for damages against a government official in his individual capacity to circumvent what remained of the sovereign immunity, and that it didn't come out of his own pocket. He was named. It was a fiction. But I assure you that it is no fiction to be sued in one of these tort actions that respondents have brought, where your mortgage is up for grabs, where you have to go all over the country to defend yourself and your personal reputation. It is this type of pain and suffering that is entirely different than if you have a mandamus type action where you might not even appear in court, it goes in on affidavits and it is a question of government policy and if you change jobs, the next fellow has to follow the new rules

if there are new rules. But when you --

QUESTION: Are you saying, Mr. Brown, that the heart of the respondents' case are those two rather errant sentences in the committee reports of the two houses of Congress, or rather isn't the heart of the respondents' case the plain language of the statute as well as what the Deputy Attorney General of the United States told the committees the statute meant?

MR. BROWN: Which Deputy Attorney General?

QUESTION: The three of them.

MR. BROWN: Well, I don't agree, Mr. Justice Stewart, that --

QUESTION: Lawrence Walsh, Aaron White and Nicholas Katzenbach.

MR. BROWN: Deputy Atrorney General Walsh I submit was merely relating what kind of actions could be brought. He was making no recommendations.

QUESTION: And how about Deputy Attorney General White?

MR. BROWN: Fairly read -- and I read it again last night -- fairly read, that letter of Deputy Attorney General White says that it is the understanding of the sponsors that they did not intend a money judgment action against officials.

QUESTION: And if they enacted this legislation--

MR. BROWN: And this legislation does not as it is written -- I am talking about the language of 1391(e) and also of 1361, the whole statute, I don't believe that that language does give the right to sue public officials in their pocketbooks in every District Court from one end of the country to another.

QUESTION: Are you quoting the Deputy Attorney General or are you speaking now?

MR. BROWN: That is the way I interpret it. What they were doing, viewed fairly at the time, they were trying to be helpful and they weren't making recommendations, and I think if they recommend a certain procedure that isn't followed, that doesn't mean necessarily that that is an agreement. These were slender readings to turn over and revolutionize what has been a rule of this Court for 200 years, since 1789 it has been --

MR. CHIEF JUSTICE BURGER: Your time is expired.

MR. BROWN: Thank you, Your Honor.

QUESTION: Mr. Brown, before you sit down, I was called out for a few minutes, you may have covered it then, but did you comment on the '76 amendment?

MR. BROWN: Yes, Your Honor. The '76 amendment was -- they found a difficulty in connection with the 1962 law and that is that in a judicial review type of action, sometimes you had to bring in someone who was not a United

States official, you had to bring in a state agency or you had to bring in, if you had a land action in Idaho --

QUESTION: I understand all that, but where does it leave you, with the '76 amendment?

MR. BROWN: Well, the '76 amendment in reviewing the mandamus Act of '62 said that it was limited to mandamus type actions, judicial review actions, and that is what it said. It said nothing else. And there is nothing I submit in the -- my final remark, there is nothing about personal tort actions in these reports and there is nothing about civil rights. There is a lot about land rights and grazing rights, but nothing about civil rights.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Brown.

Mr. Peterson.

ORAL ARGUMENT OF DORIS PETERSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. PETERSON: Mr. Chief Justice, and may it please the Court:

This case is a civil damage action against four federal officials. They are charged with a conspiracy to deny plaintiffs' constitutional rights by a course of conduct which included commission of perjury and the cover-up thereof. This case was filed in the United States District Court for the District of Columbia, the district where defendant Goodwin resides. He was served personally

in that district.

The three petitioners here reside in Florida. They are charged as co-conspirators. They are --

QUESTION: It could have been filed anywhere in any district in which any of the plaintiffs resided, could it not?

MS. PETERSON: If there is more real property involved in --

QUESTION: And I take it there is no real property?

MS. PETERSON: No, Mr. Justice Rehnquist. That is one of the four places that Congress provided for, where the plaintiffs reside, where the defendant resides, where the real property is, or where the cause of action arose.

The three defendants or the petitioners here are also federal officials. They resided in Florida where they were served by certified mail pursuant to the provisions of 28 U.S.C. 1391(e). It provided in relevant part at the time that this action was filed a civil action in which each defendant is an officer or employee of the United States, acting in his official capacity or under color of legal authority, may be brought in any judicial district in which a defendant in the action resides. It also provided that the delivery of the summons

and complaint to the officer may be made by certified mail beyond the territorial limits of the District Court in which the action is filed. This case fits exactly within the statute. It is a civil action in which each defendant at the time he committed the acts complained of was --

QUESTION: But, Ms. Peterson, the statute doesn't contain that language "at the time he committed the acts complained of."

MS. PETERSON: No, Mr. Justice --

QUESTION: You are showing where it went right within the language of the statute, then you interpolated language which would have made it read exactly as you say, but it does not appear in the statute.

MS. PETERSON: The statute --

QUESTION: It doesn't say "at the time of his conduct," it says "is at the time of the action."

MS. PETERSON: Mr. Justice Stevens, it says "acting in an official capacity or under" --

QUESTION: Well, are any of these people acting in official capacity at any time since the litigation started?

MS. PETERSON: They have all continued to act in their official capacity and we are suing them both in their official capacity and in --

QUESTION: I thought one of these defendants

was a judge now.

MS. PETERSON: Well --

QUESTION: Are you suing him as a judge?

MS. PETERSON: But he was still the United States prosecutor at the time the suit was filed.

QUESTION: I see.

MS. PETERSON: They were all in those same positions at that time.

QUESTION: I see.

MS. PETERSON: The other jobs that they have are jobs that they have taken subsequently. Mr. Carrouth, one of the petitioners, left government service and is now in private practice, but at the time we served him --

QUESTION: I see-

MS. PETERSON: -- he was the Assistant U.S. Attorney.

QUESTION: That responds to my question.

QUESTION: Did you also say the statute said "each defendant"?

MS. PETERSON: It said "each defendant," Your Honor, at the time that we filed this suit. It was amended in 1976. You will see that in the footnote to the statute in our brief. In 1976, they changed it to "a defendant," because some courts were interpreting it to mean that if there were non-federal officials as defendants, 1391(e)

would not apply.

This action was brought in the District of Columbia where defendant Goodwin resides, as the statute allows us to do. We served the petitioners by certified mail. As the court below properly found, the statutory mandate covers this case.

What this case is about is that, despite the clear language of the statute, the petitioners asked the court to read the words "a civil action" as meaning a civil action other than the damage action, a flaw in the petitioners' argument is not only that it ignores the statutory language but also that it is inconsistent with the legislative history. The legislative --

QUESTION: Ms. Peterson, what do you do with Footnote 4 in Schlanger v. Seamans which seems to suggest that perhaps a literal application is not required, where it says this section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia? Now, certainly previously this was an action which could have been brought outside the District of Columbia, i.e., under ghe general venue statute where all the defendants resided.

MS. PETERSON: Mr. Justice Rehnquist, that goes to the confusion which comes when you try to follow the petitioners' approach, because two statutes were enacted

at the same time, 1361 and 1391(e). The part about previously brought only in the District of Columbia refers to 1361, which was a subject matter jurisdiction statute.

QUESTION: Then it was this Court that was confused in Schlanger v. Seamans, I take it.

MS. PETERSON: Let me explain that case a little further, because --

QUESTION: Well, I am curious just about what you do with that sentence in the footnote which doesn't refer to 1361 but refers to 1391(e).

MS. PETERSON: Yes. In the first place, this Court did not have the advantage of briefing on the legislative history of that statute. There is one small paragraph in the government brief on the legislative history, and it is just a reference to the House report. There is nothing else in any of the briefs in Schlanger about the legislative history of this statute. Furthermore --

QUESTION: So you say the Court was simply wrong in Schlanger?

MS. PETERSON: I also believe that habeas is a different proceeding. If you go on with that footnote --

QUESTION: I know, but that sentence isn't addressed to habeas, it is addressed to the purpose for which 1391(e) was passed.

MS. PETERSON: Yes, but the Court did not have the advantage of many of the documents which have sine become available which were not available at the time, things like the hearings were not yet typed up and --

QUESTION: So you say it was mistaken. I mean, it has certainly been mistaken plenty of times before.

MS. PETERSON: Well, as a matter of fact, in Monell last year, this Court reexamined the history of a statute where it had more material available to it, and I think that if the Court finds that inconsistent with the approach that we take, they should reexamine it in view of the totality of the legislative history which is now available. Also the --

QUESTION: Well, the material was always there. It was nothing new.

MS. PETERSON: Mr. Justice Blackmun, the memorandum from the Department of Justice, Nicholas D. B. Katzenbach's memorandum was not available until after the decision in our case when it was submitted as part of -- it was lodged with the court as part of a petition for rehearing. The hearings below had never been published and they were also made available after the decision in our case, about three weeks before the decision -- the argument before the First Circuit in the Driver case.

QUESTION: How about President Kennedy's

opinion of what the statute was meant to be, was that available?

MS. PETERSON: Which opinion, Your Honor?

QUESTION: The opinion that Mr. Kennedy, President Kennedy, the late President Kennedy expressed the day he signed the bill. He said it was mandamus.

MS. PETERSON: Yes. As to that, that incidentally was recommended by the same Mr. Katzenbach who wrote the memorandum which said that damage actions were covered, and he did that because if you read the legislative history carefully you will see that the Justice Department was very concerned that 1361 would be interpreted to involve the discretionary acts of high-level Cabinet officials and they didn't want it so interpreted, so they wanted to be sure that it would not include more subject matter jurisdiction. 1361 is a subject matter statute. 1391(e) deals with problems of venue and personal jurisdiction.

QUESTION: So you say President Kennedy's signing statement is perfectly consistent with your position?

MS. PETERSON: Yes, it is consistent with our position. If it weren't, it wouldn't affect the legislative history.

QUESTION: Well, that is something I am not at all sure you are right about, because the President is a

part of the legislative process, just the way Congress is. In other words, a bill can't become law without his signature, any more than it can by passage of both houses. And if houses of Congress by reports can make legislative history, why can't the President by a signing statement make it?

MS. PETERSON: I don't think Presidents have a thing called the item veto. I think a President has various options. One is to sign legislation, two is to veto it -- three, he can veto it and send it back and say I will sign it in this fashion, but I don't think it is important as far as our position is concerned, because I think what President Kennedy said is perfectly consistent with the purposes that we are suggesting here. There were several purposes to the bill, some related to 1361 and some related to 1391(e), and in order to make all of it consistent you have to look at all of these purposes, otherwise you get in the position that the petitioners are, wanting us to ignore certain parts of the legislative history and saying that they are confusing or this part of it is wrong. But --

QUESTION: Ms. Peterson, could we go back to Schlanger v. Seamans for a moment. Now, you suggest that the language in the footnote was more or less inadvertent, but the holding in the case was that the Air Force officer

could not bring a habeas corpus proceeding in the district in which his claim arose. His contract for enlistment had been breached or something. And if a habeas corpus proceeding is a civil action within the meaning of 1391(e), he should have been permitted to bring that action. So don't you either have to say we should overrule that decision or continue to accept habeas corpuses not being the kind of civil actions that the statute refers to?

MS. PETERSON: Mr. Justice Douglas, who wrote that opinion, went on in the footnote to note that habeas is a unique proceeding. He cited the Harris case.

QUESTION: Correct.

MS. PETERSON: He said that ordinary civil rules do not apply in habeas and also that it was a jurisdictional matter which is controlled by 27 U.S.C. 2241 --

QUESTION: But he did say and you apparently accept that part of the opinion that a habeas proceeding is not a civil action within the meaning of 1931(e) --

MS. PETERSON: Yes.

QUESTION: -- although literally it would appear to be.

MS. PETERSON: Yes.

QUESTION: You have therefore acknowledged, it would seem to me, that this section cannot be read in its full literal scope.

MS. PETERSON: Well, Your Honor --

QUESTION: And as soon as you acknowledge that, then you say, well, what else should be left out, isn't it conceivable that Congress did not intend to include damage action?

MS. PETERSON: There is a provision in the statute, in 1391(e), except as otherwise provided by law, and we maintain that habeas is as otherwise provided by law. It is provided in the habeas statute which limits jurisdiction of District Courts in habeas proceedings, and therefore it is consistent to maintain the Schlanger footnote. The Court doesn't have to overrule it if it doesn't want to, can still take the position which we are asking for here which is that in ordinary civil proceedings that 1391(e) applies without restrictions.

QUESTION: But the habeas language isn't limiting language. There is another statute describing the district in which it may be brought, and that is an otherwise authorized place to bring it. Isn't it also true that there is other statutory language which authorizes this action to be brought? In other words, isn't there another section of the venue action which would say this action could be brought where the cause of action arose or where all the plaintiffs reside?

MS. PETERSON: The diversity section -- the

federal question section --

QUESTION: Correct.

MS. PETERSON: -- which has long applied, yes, and it could have been brought under that only under that section we could not have gotten a personal jurisdiction over the defendants and we needed 1391(e) and its provisions for personal service, the paragraph we could serve them by certified mail in order to get personal jurisdiction over the Florida defendants in the suit.

QUESTION: Well, you could have served them where the claim arose.

MS. PETERSON: Yes. The defendants in this case, all of them, including Defendant Goodwin, moved for a change of venue to Florida. They made a 1404(a) motion and the District Court denied thatmotion. That is a motion in the interest of justice, and he looked at the equities in the case and denied the motion for a change of venue and we are now actively litigating this suit in the District Court against Defendant Goodwin. We are in the process of discovery.

QUESTION: But I thought you said you had to have 1391(e) in order to get any sort of venue or jurisdiction over these people.

MS. PETERSON: Not over Defendant Goodwin. We could have sued him totally without 1391(e) in the District

of Columbia.

QUESTION: And you could have sued all of them in the District of Florida, the Northern District of Florida.

MS. PETERSON: Well, one of them is a federal district judge now and they are very influential in their community. Congress gave plaintiffs a choice of forum. We chose a neutral forum in which to bring this suit and we are suing in the District of Columbia.

QUESTION: Well, if Congress gave it to you, you are certainly entitled to it, but I don't see how your argument that you had to have this in order to get any sort of a lawsuit follows from that.

MS. PETERSON: I'm sorry, Mr. Justice Rehnquist, if I gave that impression I did not mean that we could not have brought a suit in Florida. We could have sued the defendants in Florida. We chose to use the choice of forum which Congress gave to citizens when they are litigating for abuse of government power by government officials. Congress gave citizens that choice. That is why they passed this statute. That is what the legislative history is for.

QUESTION: Don't you think that Hamer Budge would have been quite satisfied to be able to sue a government defendant in the district where the claim arose, that

his people out in Idaho wouldn't have to come back here to Washington, they could have sued out in Idaho if that is where the government action took place?

MS. PETERSON: Congressman Budge had one intention when he introduced this statute, but Congressman Budge was only one of the Congress people in the whole process. Of course, the bill that he introduced would not have permitted this suit, but the bill went through an evolutionary change in the course of its legislative history. We set out on page 62 of our brief the changes that were made after the hearings, after Mr. MacGuineas told them that if they added the "under color of law" language, it would mean that the defendant would pay out of his own pocket, and after being warned about that and told that that is what it would mean, they added that language and --

QUESTION: Your emphasis on the Congressman who introduced it brings up again to my mind that President Kennedy, as all Presidents, is one of the essential components of the legislative process and he added to the confusion perhaps by saying what he thought he was signing that day. Now, if he was mistaken, of course, what he signed is more important than what he thought he was signing, but it is an element in the total legislative history, is it not?

MS. PETERSON: Mr. Chief Justice, he was talking

about the subject matter jurisdiction of courts, and we do not maintain that 1391(e) added to the subject matter jurisdiction of the courts. Also Deputy Attorney General White, in his letter you will see when he talks about 1391(e), that section of the bill, he says it deals with an entirely different subject, different from 1361, from the first section of the bill which became 1361.

QUESTION: Perhaps he and Mr. Kennedy didn't get on the same wave length at some point.

MS. PETERSON: The purposes of --

QUESTION: Deputy Attorney General White said the purpose -- after saying it is an entirely different subject, went on to say that the purpose of this section of the bill is to have officers who live in the Capital -- that's Washington -- subject to suits throughout the country to the extent that they cannot be sued in the District. That doesn't fit your case. That is what Byron White said in that letter, pages 9a and 10a of your --

MS. PETERSON: The second paragraph there, Your Honor?

QUESTION: The one that begins on the bottom of 9a, right after the language you read, that is an entirely different subject, the next sentence is, after exhausting remedies, "To challenge the legality of that decision,

the officer residing in Washington must be sued in Washington. The purpose of this section of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District." I don't understand how that helps you.

MS. PETERSON: Except that there were several purposes and this is one --

QUESTION: This is the one that the Deputy Attorney General had inmind when he said it was entirely different from section 1, at least that is what his letter said.

MS. PETERSON: He says it is generally made by an official residing in the District of Columbia, but in passing this legislation Congress was concerned with citizens all over the country and wherever the decisions were being made and that the citizen would have the choice, they would make government officials amenable in four different places.

On page 11a, if you will go on, Your Honor, it says, "The pending bill will place venue in any judicial district 'wherein the plaintiff resides.'" And he was concerned about such a general granted venue and he made some recommendations as to how the plaintiff's choice should be limited. Congress listened to him and they

narrowed it and they did not allow it to be wherever the plaintiff resided. They only allowed it to be where the plaintiff resided if no real property was involved. They were listening very carefully to the opinions that were coming from the Department of Justice and responded to them, but they did not react to the opinion from Deputy Attorney General White that they should tie this into the Administrative Procedure Act in order to eliminate money damages. We get back to the question which was raised earlier by Mr. Justice Rehnquist and by Mr. Justice Stewart about the difference in the wording of the two bills, the two sections of the bills --

QUESTION: The petitioner doesn't disagree with you on that. I understand the petitioner says you can sue but you can't sue his pocketbook. You can sue him for mandamus or for anything else that doesn't involve his money.

MS. PETERSON: But the bill does not put in the restriction that limits suits and eliminates suits out of his pocketbook. As a matter of fact, Congress was warned as to what the --

QUESTION: Do you think Congress really intended that this group of people should be the only people in the world or in the United States that can be sued any place?

MS. PETERSON: This group of people are in a unique situation and one of the things --

QUESTION: Do you think Congress meant that?

MS. PETERSON: -- one of the things --

QUESTION: Do you think Congress meant that?

MS. PETERSON: Yes, Mr. Justice Marshall.

QUESTION: Of course you do.

MR. PETERSON: One of the things which Congress considered was that there would be free representation in these cases, that the Department of Justice was all over the country and would be defending these suits, which they had been doing in this suit.

QUESTION: Are they defending this suit?

MS. PETERSON: Yes, they --

QUESTION: Are they defending this suit?

MS. PETERSON: Mr. Justice Marshall --

QUESTION: Are they paying for this suit?

MS. PETERSON: Mr. Justice Marshall --

QUESTION: Are they paying the counsel fees in this case?

MS. PETERSON: Yes, they are. The Justice Department attorneys acted in this suit up until the point where a petition --

QUESTION: My question was now. I don't care about -- I said are they, that means now.

MS. PETERSON: Yes.

QUESTION: Are they now paying the lawyers in this case?

MS. PETERSON: Yes, Mr. Justice Marshall.

QUESTION: For this action? Are they paying Mr. Brown right now?

MS. PETERSON: Yes, they are, Mr. Justice Marshall. They are paying his fees and expenses, as they do in all of these cases when government officials are sued out of their pocket for acts that are beyond the scope of their duties but in connection with their office. Now, the government official gets sued privately for private acts, they don't represent him.

QUESTION: Will the government pay the judgment if there is one?

MS. PETERSON: I'm sorry?

QUESTION: Will the government pay the judgment if there is one?

MS. PETERSON: That is down the road, but we are suing to obtain a judgment from the defendants individually out of their pockets.

QUESTION: I thought so. That is what I thought.

MS. PETERSON: Yes. There is a series of events in the legislative history, five crucial events which are all set forth in our brief and which I do not have time

to go through. There is the first letter from the Department of Justice making Congress aware of the problem. There is the harings in which damage actions were extensively discussed. They were very concerned about damage actions because Barr v. Matteo had just come down, and though it talked about a scope of immunity, it talked about also the outer perimeters of it, and they knew that there could be such suits beyond the perimeters and also -- then there was a redrafted bill in which they added the very language which they were warned about, the "under color of law" language, and they put in the House report that the problem arises in damage actions seeking damages from him, from the government official, not from the government but from him for actions which are claimed to be beyond the scope of the authority.

Then there was the second Department of Justice letter from then Deputy Attorney General Byron White, and the Senate report which put in again that paragraph about seeking damages from him, from the government official, and then we got the Department of Justice acknowledgement that damage actions were covered written by the then Deputy Attorney General Katzenbach, who also advised the President to issue that statement so as to be sure that the powers of the Cabinet were not interfered with.

We will not have time to deal with the issue as to personal jurisdiction. On that issue, I would just like to say very briefly that we have got personal jurisdiction by a combination of two things, Rule 4-F which permits service beyond the territorial limits of a state when a statute so authorizes it, and 1391(e) is a statute which authorizes it.

We also will not deal with the petitioners' due process claims. I just want to say on that that the government has conceded that the court below was right on this issue and the petitioners have conceded that this Court's decisions in the International Shoe Company line of cases do not apply to the extraterritorial -- those cases which deal with the extraterritorial assertion of powers by states beyond its borders are not applicable here, where Congress is using its power within the continental limits of the United States. Congress has legislated to allow service of process on a nationwide basis as is done in other statutes --

QUESTION: Well, it could do it in Hawaii, too, couldn't it?

MS. PETERSON: Yes, in Hawaii and in Alaska, but they are now states of the Union and --

QUESTION: I thought you said the continental limits.

MS. PETERSON: I did, Your Honor, and it was an error. I include within that all states. It does not apply in the Canal Zone, there has been an interpretation to that effect. This Court has recognized it in Mississippi Publishing Corp., United States v. Union Pacific Railroad, Robertson and Toland, that nationwide service of process is something that Congress can authorize and Congress did here, and we submit that the petitioners' argument about fair play and substantial justice do not rise to the level of a constitutional argument.

Here in Shaffer, what is discussed there relates to the fairness of exercise of power by a particular sovereign and here the sovereign is exercizing its power.

The petitioners are complaining about the great burden of litigating, but they have been represented either by the Department of Justice or by free counsel since this litigation began, and petitioners have not yet once had to appear in a court proceeding.

And in response to Mr. Justice Rehnquist's question earlier about what they can do pretrial, they can make a motion for a change of venue and have that considered --

QUESTION: But they have at least got to come down into the place where the plaintiffs picked to make their initial motion.

MS. PETERSON: No, the Department of Justice does it for them in these cases.

QUESTION: But there is nothing in the statute that says the Department of Justice shall or will.

MS. PETERSON: At the hearings, the Department of Justice representative assured Congr-ss that free representation has been provided in these beyond scope suits to government officials for over a hundred years and they have been continuing to give the representation.

QUESTION: Another Attorney General could change that policy at will.

MS. PETERSON: Yes, and Congress can decide to change the statute, too. That can be another debate between the Department of Justice and Congress. But at the moment Congress has decided that suits against government officials are possible in these four places.

QUESTION: How relevant is it to the reading of this statute whether or not the government is going to provide the counsel and defense expenses? Is that controlling?

MS. PETERSON: Mr. Chief Justice, would you repeat that question, please?

QUESTION: Is it controlling whether the government is going to provide the representation?

MS. PETERSON: No, I don't think it is controlling.

I think what is controlling is what Congress did.

QUESTION: It might mitigate the hardship argument but it doesn't have anything to do with the meaning of the statute, does it?

MS. PETERSON: No, it doesn't.

QUESTION: Ms. Peterson, may I ask one other question to be sure I haven't missed something. The language that you stress -- and it is important language, of course -- is to seek damages from him personally for actions taken, and that appeared in Deputy Attorney General Walsh's letter which in turn was included as part of an exhibit to the committee reports, as I understand it. Was it otherwise used? Did the committee itself use that language independently of quoting Walsh's letter?

MS. PETERSON: Yes, it was in all three bills. There were two House bills --

QUESTION: I know there were.

MS. PETERSON: -- two House reports, I'm sorry, two House reports.

QUESTION: Independently of being quoted, having the letter as a whole quoted --

MS. PETERSON: Yes, within all of the reports themselves there is a paragraph which says the venue problem also arises in an action against a government official seeking damages from him for actions which are claimed

to be without legal authority but which were taken by the official in the course of performing his duties. And that paragraph was left in the Senate report, it was in both House reports, and Senator Mansfield inserted it in the Congressional Record at the time that the bill was passed. There was no question that Congress clearly knew that damage actions were within the coverage of the bill. They were told that by the White letter right before the bill was passed, and they chose not to limit the statute and tie it into the Administrative Procedure Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, counsel. The case is submitted.

(Whereupon, at 2:19 o'clock p.m., the case in the above-entitled matter was concluded.)

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