ORIGINAL

In the

Supreme Court of the United States

WILLIAM E. COLBY AND VERNON A. WALTERS,

PETITIONER,

V.

RODNEY D. DRIVER, ET AL.,

RESPONDENTS.

No. 78-303

Washington, D. C.
April 24, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM E. COLBY AND VERNON A. WALTERS, Petitioners,	:	
v.	:	No. 78-303
RODNEY D. DRIVER, ET AL., Respondents.	:	

Washington, D. C.

Tuesday, April 24, 1979

The above-entitled matter came on for argument at 2:20 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:

EARL HAROLD NEMSER, ESQ., Cadwalader, Wickersham & Taft, One Wall Street, New York, New York 10005; on behalf of the Petitioners

ELINOR H. STILLMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae

MELVIN L. WULF, ESQ., Clark, Wulf, Levine & Peratis, 113 University Place, New York, New York 10003; on behalf of the Respondents

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 78-303, Colby and Walters v. Driver, et al.

Mr. Nemser, I believe you can proceed whenever you are ready.

ORAL ARGUMENT OF EARL HAROLD NEMSER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I just want to pick up for a minute, since we are talking about really the same issued, from what Ms. Peterson just mentioned. She talked about that one sentence from the legislative history which Mr. Brown referred to. I don't want the Court to be misled by the sentence because the First Circuit was misled by it and the District Court was misled by it, so let's read it.

It says the venue problem also arises in damage actions against federal officials. What was the venue problem? The venue problem was that certain suits were limited to the District of Columbia only. Right above that sentence, it says the problem of venue in actions against government officials arises when the action must be brought against the official in the District of Columbia, and the report says that venue problem also arises in suits against federal officials for damages.

So, to understand what Congress meant, we've got to say, "Think. Where did that venue problem arise in suits against Federal officials for damages?" Only in one type of damage action; that type of damage action which was in the nature of mandamus and which sought to compel payment of money.

This Court referred to 1391(e) in South Carolina against Katzenbach, I believe, and it said when you serve Federal officials, you could now sue them outside of Washington, D.C., and in a footnote it said, "See Stroud v. Benson." Stroud v. Benson was just that kind of damage action. It sought to compel a payment in the nature of mandamus from a Federal official and that damage action was, at the time this act was enacted, limited to Section 1391(e). And I think we had a serious problem that the First Circuit and respondents read this one sentence in isolation and did not read it in the context of the whole committee report.

QUESTION: Mr. Nemser, before you leave it, is that whole paragraph quoted in some of these papers? I seen to have missed it.

MR. NEMSER: Well, the respondents quoted it about every ten pages.

QUESTION: But the whole thing was read. Where is that quoted?

MR. NEMSER: Well, the House report is attached to

our surpetition, if you have that. It will appear at page 92-A of our surpetition. If you look just at the paragraph above that, there is the venue problem we were talking about.

QUESTION: Thank you.

MR. NEMSER: I just want to spend another minute on the clear wording of the statute which Mr. Justice Stewart raised some question about.

QUESTION: Before you go on, you said 92-A of your cert petition. I'm not so sure that that has what I thought Mr. Justice Stevens was inquiring about.

MR. NEMSER: Second to the bottom paragraph.

QUESTION: Well, it does not purport to be quoted, does it?

MR. NEMSER: Well, that is it, quoted; yes.

QUESTION: This is all quoted from 90-A onward --

MR. NEMSER: Verbatim, yes.

MR. NEMSER: The House report begins on page 89-A, which is Appendix E.

The plain wording of the statute in our view covers only actions in the nature of mandamus. When you sue a Federal official in a civil action, acting in his official capacity or under color of law, he is acting; he is acting like an official and you need mandamus to force him to act correctly or an injunction to stop him from acting improperly. If you need to sue him for damages, he has already acted; he acted a

long time ago, and now you want to get damages.

If Congress wanted to include damage actions, it would have left out the phrase, "acting in his official capacity or under color of legal authority," and it would have just said a civil action in which a defendant is an officer, employee or an agency of the United States.

QUESTION: It is that disjunctive phrase that you stated kind of sotto voce upon which reliance is had, or under color of legal authority?

MR. NEMSER: Yes. Take a look at what the House report said about that. It was very specific; the Senate report I think had the same language.

QUESTION: Where do we take a look at it?

QUESTION: Give us the page.

MR. NEMSER: I am taking a look at it.

Page 94-A of the cert petition:"By including the officer or employee both in his official capacity and acting under color of legal authority, the committee intends to make 1391(e) applicable to those cases where an action may be brought against an officer or employee in his official capacity," and then we say, "What else did it intend to do?"

QUESTION: You left out the "not only."

MR. NEMSER: "Not only." Now I say, it intends to include also those cases where the action is nominally brought against the official in his individual capacity, even though

he was acting within the apparent scope of his authority, and then it says, "These cases are in essence against the United States."

The Driver case against Colby is not nominally against Colby. It is not nominally against Walters. They are not in essence against the United States. They are in essence against Colby's pocketbook and Walters' pocketbook.

QUESTION: You said what they are basically is the old Custis Lee Mansion type of case where you sue the official but what you really want to do is avoid sovereign immunity?

MR. NEMSER: That is exactly what the committee reports indicate that was in mind, and they could not have meant that these types of action were in mind. Well, for one reason is that they did not exist then. But there is not one mention of it.

And if this is to be the most radical departure from our rules of in personum jurisdiction, and if Congress intended to do this, there would have been a loud cry in 1962 and we would all have known about it. It would have been clearly expressed.

QUESTION: There might not have been a loud cry, if you are correct in your submission that these cases were very rare in 1962.

MR. NEMSER: I guess that is right. I guess since they did not exist, we really would not have even known it.

That means Congress had to have been legislating in this area without knowledge of it, and that brings us to the questions raised in NLRB v. the Catholic bishop of Chicago recently, Swade v. Pressley. Do we have a substantial constitutional issue that must be avoided?

I think I have shown the statute susceptible to two fair readings, at least.

QUESTION: Is not the last sentence of that 94-A paragraph somewhat important here? There is no intention, this is the committee speaking, I take it, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

MR. NEMSER: And if you go back to, I guess, ex parte Young, where they have the famous language, "When an official acts beyond the scope of his authority he is stripped of his official capacity. He is acting like an individual." In trying to get damage from him, you are trying to get damages against him as a private person. I think that language is important. I think it is very important.

QUESTION: Mr. Nemser, you suggested earlier that if your opponent was correct, the Congress would have simply omitted the words "acting in his official capacity."

MR. NEMSER: As a suggestion --

QUESTION: But had they admitted entirely, then this would have applied to private litigation against a person who happens to be an officer of the United States --

MR. NEMSER: When you sue William Colby as Director of Central Intelligence, you sue him as an official. When you sue --

QUESTION: No, but the statutory language as you suggested it would simply read, "a civil act in which a defendant is an officer or an employee" -- say William Colby happened to be sued because he did not make his mortgage payments or something like that. The statute would then apply to that situation?

MR. NEMSER: I do not think it would have been read that way. I think it would have been read --

QUESTION: Well, I mean, it is arguable that at least this language was included to avoid that reading.

MR. NEMSER: Judge Pettine said that one thing every court has been unanimous about is that the statute is not clear in its face. I do not have a suggestion better than the one I gave you. Maybe they should have said in mandamus suits; I do not know. I think they struggled.

Pettine [illegible]t clear in its face; the First Circuit said the legislative history, at best, was ambiguous. So where do you go from there when you have Justice Brandeis saying you have got to clearly express exceptions from our general rules of in personum jurisdiction.

To interpret Section 1391(e) this way, I want to spend a few minutes on the constitutional issue. It would be the most radical departure from our traditions of in

personum jurisdiction, it would subject Colby and Walters to jurisdiction in Hawaii and Alaska, in every State of the country, even though they have had no contact whatsoever with those forums, without regard to the question of whether or not --

QUESTION: Congress has that power, if it wants to.

MR. NEMSER: Well, I do not think this court ever said Congress had that power. It does not have that power. It has that power in special cases --

QUESTION: Congress does not have power over the jurisdiction of Federal courts?

MR. NEMSER: Congress has power to define the jurisdiction of Federal courts. Our question is, what limitations does the Fifth Amendment impose on the exercise of that power? If that power is to be exercised, in a manner which places an intolerable burden --

QUESTION: I do not think you need to continue. You do not attack it on that basis, do you?

MR. NEMSER: I do.

QUESTION: You say it is unconstitutional?

MR. NEMSER: I do.

QUESTION: You still do?

MR. NEMSER: I still do.

This Court has never addressed it. In Tole v. Spray we were talking about whether foreign attachment could be issued against a non-U.S. domiciliary. In Union Pacific

Railroad, a hundred years before Shaffer v. Heitner and just after Pennoyer, we are talking about whether in one case the attorney general could bring a suit against the railroad. In Mississippi v. Murphy we are talking about whether someone could be sued in the Northern District rather than in the Southern District of Mississippi.

We think that Justice Marshall's decision in Shaffer took care of Pennoyer, put to rest forever, and said that terrirorial power which the United States has over all of us is no longer essential and sufficient for the exercise of jurisdiction. Now we have got to measure jurisdiction by traditional notions of fair play and substantial justice, and we say that to make Colby and Walters travel to Rhode Island to defend this suit would violate those principles and raise serious constitutional issues, and because it would impose an intolerable burden on the right to defend, the right addressed in Boddie v. Connecticut, it would in fact violate Fifth Amendment due process in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Stillman.

ORAL ARGUMENT OF MRS. ELINOR H. STILLMAN, ESQ.,

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MRS. STILLMAN: Mr. Chief Justice, may it please the Court, at the outset perhaps I should make clear this does not go to the merits of the issue, but the United States is paying for private counsel for the petitioners in this

case, but there is no guarantee that the United States will always do that. In fact, there are some policy guidelines that the Department of Justice has issued that can be found in 28 CFR 50.15, and Section A(2) says:

"Upon receipt of the agency's notification of request for counsel, the Civil Division will determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation is in the interest of the United States." And these people have no guarantee that that determination is going to be made in their favor, or that future attorneys general will continue the policy, or that Congress will not enact some law that would prevent it.

I would like to begin with Schlanger, because we believe that this Court has in Schlanger determined that the phrase "civil actions" in the statute does not shut us out on this issue. In Schlanger, the Court did have certain important parts of the legislative history before it because in Footnote 4 it cites both the House report and the Senate report. I am talking about House Report 536 and Senate Report 1692, and both of those contain this famous sentence we have all been discussing here about venue problems in suits for damages, and the Senate report contains Deputy Attorney General White's letter that the court below relied on and that respondents rely on, and that did not prevent this Court in Schlanger from saying, not respecting that habeas corpus could be

considered a civil action and says it applies to civil actions, we are not going to assume that Congress made this sweeping change in habeas corpus venue.

Now, with respect to the question which I believe Mr. Justice Stewart said when Haemer Budge was mentioned, is that not just the genesis of this legislation and did not the Congress actually enact the statute later in 1972, do we not have to look to the intent of Congress at that time.

I think the 1960 hearings and what Haemer Budge and his colleagues on that committee intended are very important because, for one thing, the famous sentence we are talking about here appeared in the House Report 1936, the first House report that was issued right after those hearings in that session of Congress, and that report evidently comes out of what the committee learned in the course of the hearings, determined in the course of the hearings.

If you go to the hearings, you will find -- the transcripts of the hearings -- you will find references to damage actions in the very early pages of the hearings, there is some sort of casual references to suits against Congressmen for slander and suits against postmen who slap housewives while they are delivering the mail, and so on. But as the hearings started to close, after they have heard the testimony of Judge Albert Marris and the testimony of the Justice Department representative and have considered all the problems

that they need to deal with here, Congressman Budge said at the very close of the hearing, "People keep coming back to these slander type actions." This is page 102 of the transcript. "People keep coming back to these slander type actions and that's not what I had in mind at all." He says what he did have in mind was review of administrative action, that the person out in Idaho can get that review without coming to the District of Columbia, and when he spoke of his Idaho constituent who had this problem that he wanted to remedy by this act, Congressman Budge said, "This is a constituent who wants to sue the Federal officer in charge out there, and he can't sue the Federal officer in charge out there because, the reason he can't is, if he tried to sue him in mandamus, of course, only the District of Columbia circuit had mandamus jurisdiction at that time." And if the suit somehow escapes classification as a mandamus action, perhaps it is viewed simply as an injunction, enjoining him from doing something, the Federal official in charge out in Idaho could simply say, "Well, I am carrying out the orders of my superior in Washington." This would raise the indispensable party problem and the suit would be dismissed in Idaho.

Of course, if --

QUESTION: -- was it not, where they dismissed the action against the FBI resident agent in the District of Illinois because the attorney general was regarded as an in-

indispensable party?

MRS. STILLMAN: Exactly. That is what happened in Stroud v. Benson, also. This court's decision in Williams v. Fanning did not solve the problem.

But of course, if the citizen out in Idaho had wanted to sue that Federal officer in damages, in the type of damage suit that had arisen before this act was passed, these were typically trespass actions, ejectment actions, false imprisonment. They were commonlaw torts. Nothing would keep him from suing him in the State Court of Idaho in which the case might be removed to Federal court. In fact, many of the damage actions that respondents cite in their brief were brought exactly this way. U.S. v. Lee that they cite was brought in the circuit county courts of Virginia and moved to the Federal court.

So that cannot have been the problem that Representative Budge was concerned with. Also in the hearings despite these early references to slander type actions and postmen slapping the housewife, Representative Dowdy who earlier had in a sort of moment of, I think, irritation at the Justice Department witness said, "Well, maybe we want to cover all types of actions," later on Justice Dowdy being more fully advised said, "I don't have in consideration that what we have in mind here is money damage type suits."

Now, the question then I think is very clear from reading these hearings that what these congressmen intended

was not the type of suit which the respondents have brought here or the type of damage suits that existed against Federal officials at that time. The question then is, did that intent carry over when Congress passed the mandamus and venue statute in 1962.

Now, the House report in 1962 that contains that sentence that was in the earlier report is just sort of verbatim carried over from the earlier report. There is no evidence that somebody sat down and thought about what that sentence meant, any more than they thought -- they carried over the report in toto.

I might say that the hearings throw some light on that sentence, however, because at page 87 of the transcript somebody brings up the question of money damages -- Judge Marris is testifying at that point, and he said, "Well, there are some old damage type actions, they are suits against collectors." And he said you pretend you are suing the collector individually but in fact he has recruitment from the United States if he has just and reasonable cause. It is possible that the person who was directed to draw up this House report, wanting to make sure that he includes in the report everything that has come up in the hearings, which Congress has not said, which the congressmen have not indicated that they did not want to cover, saw that remark and said the venue problem may arise sometimes in suits for damages. It is not --

QUESTION: You are making a pretty strong case for not paying too much attention to legislative history.

MRS. STILLMAN: Well, I think it is --

QUESTION: I am not sure which is your objective.

MRS. STILLMAN: Well, I think, Your Honor, that is an explanation for that sentence, and it is an explanation for the sentence which suits our understanding of the statute, that it refers to damage type actions which, as Mr. Nemser said, are in essence against the United States, and not the damage type actions which we have in this case which do not employ a fiction and which are not in essence against the United States.

Now, turning to the phrase, "under color of legal authority," this also came up during the hearings and it was first raised by committee counsel Drabkin. Later on it was picked up by Representative Poff, because they had been raising the problem of well, what do you do if the officers are named individually, and Poff said why don't we use this phrase, and Judge Maris again said yes, use that phrase, that is a good phrase, because let us get down to what we are really doing here, reviewing administrative action.

If they included that phrase they would also cover those actions in which you named the Federal officer, pretended to be suing him individually, but what you were doing was using the fiction of ex parte Young, the fiction which the Larson court said was a way of getting around sovereign

immunity, but you were still essentially reviewing action of the Federal officer in not suing him for damages, you were going after equitable relief.

And as Mr. Nemser has pointed out, the phrase "under color of legal authority" is specifically explained in the later House report. They said what they meant by it. What they meant by it is what we say it means and we see no reason that the court should adopt a contrary reading of it.

Now, concerning Mr. Justice White's letter, the court below and the respondents assume that that letter is essentially an ungranted request for a change in statute with respect to damage actions. I do not think that is a fair reading of the letter. The letter says there would be less confusion if you did not use that language. You could make it absolutely unmistakable that money damage suits against officers are not included, but the letter goes on to say that this, we assume, is in accord with the purpose of the committee, of the Congress.

Now, I think Mr. Justice White had the better of the argument. It may be th ^ the Congress kept the phrases in by pride of authorship or whatever other reason, and I think Mr. Justice White, then Deputy Attorney General White, had the better of the argument about what would have made the statute absolutely clear. But he was not -- you cannot read that letter to mean that he was asking them to make a change which they then refused to make.

Now, as to the memorandum by Attorney General Katzenbach, that is a memorandum which of course is not part of legislative history. It went out after the statute had passed. It went out under his name, it was a 7 page memorandum that went out to the various offices of U.S. attorneys explaining the author of the memorandum's view of what the statute meant. There is no blinking the fact that it says it covers libel and slander actions, and we think it is wrong. that the legislative history is powerful evidence otherwise --

QUESTION: That is the memorandum referred to in Footnote 34 of your amicus brief?

MRS. STILLMAN: Yes, Your Honor.

QUESTION: And which you say at the conclusion that the best explanation of this memorandum is that it is wrong?

MRS. STILLMAN: Yes, yes, Your Honor. But it is not part of the legislative history and it simply does not have the same weight. If Attorney General Katzenbach had included that in a letter to the Congress before the act was passed and said, this is what we assume what you are trying to do, and we do not want you to do it, and Congress had then passed the act, I think we would not be here today.

But that is not what happened.

QUESTION: I would be surprised if you were not.

MRS. STILLMAN: Well --

QUESTION: What category do you put the President's observations about the bill?

MRS. STILLMAN: Well, the President --

QUESTION: You put it in as an appendix to your brief, as I recall.

QUESTION: It is on page 48.

MRS. STILLMAN: Yes. I think that indicates the understanding of the President and his advisers that what he was signing was a bill which extended to other District Courts the jurisdiction heretofore enjoyed solely by the District Court of the District of Columbia. I think he assumes, as we say the reports read, that this bill including the venue section is only concerned with the types of suits which could formerly have been brought in the District of Columbia.

Now, something has also been said about the letter that Lawrence Walsh, Deputy Attorney Walsh wrote to the committee. This was very early. I think you have to put that in perspective. Deputy Attorney General Walsh had before him to comment on at that time the original bill, H.R. 10089, which spoke only to suing officers in their official capacity and did not extend mandamus jurisdiction and had no subject matter of extension. He

just remarks on the bill, well, it looks to me as if this bill won't do what you want it to do because it won't extend mandamus jurisdiction. He also observed that it wouldn't cover the two types of suits which could then be brought against federal officers individually, one of which was damage suits, the other of which were injunction suits where you are naming individually to get around sovereign immunity. He said I assume this is not the committee's concern. In fact, he was wrong about the second category, but he was right about the first category as the subsequent hearings and the explanation of the phrase "under color of legal authority" in the House report.

So to put a lot of weight on what he says in that letter, operating at the very beginning of the process, or to interpret it as showing that somehow the government was arguing with them at that point and asking them not to include money damage suits I think would put an improper interpretation on that particular bit of legislative history.

I think, in summing up, we submit that construing a federal statute such as this involves more than looking at its words and consulting a dictionary. This Court has said in cases such as American Trucking Association, such as Train v. Colorado Public Interest Research

Group, that it is not going to stop at language which upon superficial examination might tend to go in favor of one party.

Each statute has a history and the plain meaning doctrine is not a warrant for disregarding what that history tells us. We submit that what the history of 1391(e) tells us, seeing it in its entirety and not as a source of extractable fragments, is clear. Congress wanted to make it possible for the aggrieved citizen in Idaho to challenge actions of his government without going to the District of Columbia to do so, to litigate his rights under the Taylor Grazing Act or to compel the Forest Service officer to issue a permit to him out there if it was the duty of the officer to do so.

The judgments should be reversed. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Wulf.

ORAL ARGUMENT OF MELVIN L. WULF, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The argument has been proceeding in a very abstract kind of way and I would like to introduce a little concreteness to it for a moment, if I may. I want to remind the Court what this suit is about and what the issues and problems are confronting the plaintiffs.

The suit grows out of a massive twenty-year program by the Central Intelligence Agency to secretly open first class mail sent to and from the United States. And from 1953 until 1973, in the course of implementing that program, the Central Intelligence Agency, their officials and officers opened about 215,000 pieces of first class mail.

QUESTION: You say to and from the United States. I suppose there is a great deal more than 250,000 letters over even a year, wouldn't there be?

MR. WULF: There are many more.

QUESTION: This was focused in certain places, was it?

MR. WULF: They were letters going to and from the Soviet Union predominantly, Your Honor, yes -- 215,000 letters in the course of twenty years, no warrant, no permission, no consent, flagrantly in violation of the Constitution, twenty years of lawless conduct, no question about it, established beyond per adventure in the Church committee report and in the Rockefeller committee report.

What this suit -- this suit was filed on behalf of a class of people whose mail was opened for the purpose of compensating them for the flagrant violation of their constitutional rights, the violation of the Fourth Amendment and also to deter hopefully repetition of this same

kind of flagrantly lawless conduct by these defendants in the future or by their successors.

The question in this case then, as it arises in this so very abstract context, has a very concrete foundation to it, and the question is whether the parties who were injured in this constitutionally fundamental way may seek vindication conveniently in a place in a jurisdiction of their selection, in the jurisdiction where they reside, or whether vindication of their rights is to be made difficult, difficult by requiring them to chase defendants all around the country and try to track down those who they believe were responsible for the violation of their constitutional rights.

QUESTION: Do you think this process could be followed constitutionally during wartime?

MR. WULF: Opening the mail?

QUESTION: Yes.

MR. WULF: It was done during the Second World War and I think the conditions would be so different that there might well be an argument for it, but it has no application at all in the context of this CIA program which was not conducted during wartime, and which has been conceded by the United States, in fact, illegal and in violation of the Constitution.

QUESTION: My inquiry on this was to further ask

what provision of the Constitution if, as you imply, it might be valid in wartime, what provision of the Constitution would render it valid during wartime and render it invalid --

MR. WULF: It might be that people wouldn't object, that there might be consent, Your Honor.

QUESTION: But that is not a constitutional --

MR. WULF: But there is no consent in this case.

QUESTION: But that is not a constitutional proposition.

MR. WULF: The war power might justify it, Your Honor. But still it has no application here because there was no war under way and this Court said in Ex Parte Jackson over a hundred years ago and reaffirmed here in United States v. Van Luan several years ago, that opening mail without a warrant is a violation of the Fourth Amendment. This was not a wartime situation.

QUESTION: Mr. Wulf, 1391(b), as I understand it, would not require you to follow the defendants to where they live, you could have sued where the claim arose.

MR. WULF: Could have done that, Your Honor, and that raises the question about the kind of case that this is. This is a big case. This is a case which is being prosecuted on the plaintiffs' side by the ACLU with no expense to the parties, the party plaintiffs, and it is

being prosecuted and being defended on the defendants' side by the United States at no expense to the defendants. It is perfectly true that in this case we might have brought this action where the cause of action arose, although I am sure the defendants would find some objection to that also. That would have been in the Eastern District of New York where the program was largely implemented. But this is not the paradigmatic case. This is a big case.

I would pose to the Court, the paradigmatic case, even the small case, where the plaintiff has much less of a chance, where his constitutional rights were violated --

QUESTION: You keep saying big case. Why did you bring it in a small state?

MR. WULF: Well --

QUESTION: It is the smallest, isn't it?

MR. WULF: The actual answer is, if you want an actual answer, is that the first complaint that we received was from Dr. Rodney Driver who lived in Rhode Island and we decided to bring it there. We did not think it was an inhospitable forum, as a matter of fact. But the case I put is the smallest case where a plaintiff is on his own and where expense and convenience is very critical to him. If he has to go to New York, if Mr. Driver had to come down and litigate this in New York all by himself at his own expense, from Rhode Island, it is

unlikely that he would do it.

QUESTION: Well, your venue statutes are traditionally defendant oriented in civil cases, aren't they? It seems to me that both sides argue here on the basis of kind of special circumstances that should be read one way or another. I don't think we can take the fact that it is a small case or a big case or that the government is paying somebody's expenses is really controlling of the meaning of 1391(e). Do you?

MR. WULF: You are quite right, of course, that venue statutes are traditionally drawn to assist defendants. In this case, Congress expressly said that the purpose of this one was to assist plaintiffs. The Senate report says that the purpose of 1391(e) is "to provide readily available inexpensive judicial remedies for the citizen who is aggrieved by the workings of government." In these kinds of cases, where it was the government on one side inflicting injury on citizens and residents on the other side, Congress made this conscious determination that it was going to shift the balance of convenience where venue and jurisdiction was concerned and was going to simplify the process for the plaintiffs and impose what additional burdens might be necessary upon the defendants.

QUESTION: But don't you think the reading given it in Schlanger v. Seamans was such a shift, although it

doesn't shift it enough for you?

MR. WULF: Well, I think Schlanger is wrong. There is another explanation for Schlanger, too, because the statute, 1391(e) does of course say that it applies except as otherwise provided by law. There is a very long -- it doesn't say by statute, it says by law. There is a very long tradition in habeas corpus, of course, for hundreds and hundreds of years, back I am sure to England. The habeas jurisdiction lies only where the petitioner is held in custody and that is as otherwise provided by law. So there are many aspects of civil procedure which do not apply to habeas proceedings because if they are special -- because of their special characteristics, this is just another example.

QUESTION: The venue statute was changed in the last twenty or twenty-five years to make it -- you have to go back for the sentencing judge rather than where the custodian is for federal habeas, don't you?

MR. WULF: That is the --

QUESTION: No, that is 2255.

MR. WULF: 2255, where federal prisoners are concerned.

QUESTION: Yes.

MR. WULF: And this Court upheld that and is a departure from traditional habeas practice, but it was

made explicit by Congress, an explicit change by Congress. There is no explicit change here in 1391 making it applicable to habeas and prior practice and tradition controls. If that is not sufficient explanation, then it is wrong and ought to be changed in this action.

QUESTION: You don't mean the decision in Schlanger is necesarily wrong, you are talking about the accuracy of that footnote?

MR. WULF: The footnote, yes.

QUESTION: If the footnote is wrong, you have to decide the case the other way.

MR. WULF: No, because --

QUESTION: Because if 1391(e) applied --

QUESTION: No, because of his first explanation.

MR. WULF: Habeas is a --

QUESTION: Oh, I see.

MR. WULF: I am not going to review the whole legislative history, I assure you. I do want to say that we continue to place confidence in that reference in the committee reports which refers to the venue problem also rises in action against the government official seeking damages from him for actions which are claimed to be without legal authority but taken in the course of performing his duty.

Mr. Nemser would have you relate that very

intimately to the preceding paragraph, but I can split hairs as well as the next lawyer, and there has been much of that today. It doesn't say the same venue problem, it doesn't say that venue problem, it says the venue problem. That is a different venue problem and it refers explicitly -- I withdraw explicitly -- arguably to the problem before us today.

I think the use of the phrase "under color of legal authority" is very telling in support of our argument because that is, of course, the expression always used to impose personal liability upon government officials when they violate constitutional rights under the Civil Rights Act and elsewhere.

The 1960 subcommittee hearings, I am quick to confess, can be read and are being read by both sides for their own support. I think there is sufficient reference in there by various Congressmen to indicate an interest in simplifying the process whereby plaintiffs, injured citizens can seek vindication of injuries inflicted upon them by government officials to support our position.

I think those letters by Mr. Justice White when he was Deputy Attorney General and the other two Deputy Attorney Generals are very influential because they are contemporaneous. They show what was in the minds of those members of the Department of Justice who were at the time

concerned with what this meant.

QUESTION: But they weren't passing any legislation.

MR. WULF: I'm sorry?

QUESTION: They weren't passing any legislation.

MR. WULF: They were asking that it be changed and it was not changed, Your Honor. That is --

QUESTION: Well, they weren't passing legislation.

MR. WULF: They surely were not, but they were trying to --

QUESTION: So the Attorney General after the Act was passed had no place in legislative history. Correct?

MR. WULF: Correct, but it certainly shows what he thought it meant.

QUESTION: Do you have a hypothesis, Mr. Wulf, as to what was in President Kennedy's mind or in the mind of the person who wrote his statement at the signing day?

MR. WULF: I don't, really. I think that whoever it was that had him -- it may have been -- I can't remember whether it was Mr. Katzenbach or Justice White who might have submitted that to him, but I just don't know. He was obviously trying to make a case.

QUESTION: It is an elusive enough subject for lawyers, and is there a reasonable basis for a presumption that President Kennedy didn't sit down with his pen and

think this whole thing up on his own?

MR. WULF: I think we can assume that he did not think it up on his own or think of it at all perhaps.

QUESTION: On the basis of then Deputy Attorney General Katzenbach's note to the Director of the Bureau of the Budget, whose name in those days was Bell, saying accordingly we suggest that the President may wish to issue an announcement at the time he signs the bill making it clear that he considers the limited purpose controlling. That is on page 48 of the government's brief, indicating pretty definitely where the President's statement came from.

MR. WULF: You just can't change the legislative history and the legislative intent. There can be a kind of statement of hope perhaps, but --

QUESTION: Well, all it shows is that we have legislative history which is perhaps more confused than usual, is it not unreasonable --

MR. WULF: There is some confusion there and some conflict there surely, and one would be less than frank if one didn't admit it. That is why -- but there is enough on our side I believe to support our reading of the statute as a very, very reasonable interpretation of what we propose to the Court. But I think that that also can be informed by the Court's interpretation -- that the

Court's interpretation can be informed by the beneficial purpose which 1391(e) will perform if it is read as we propose that it be read, and that of course is to simplify the process whereby citizens and residents of the United States can increase the quality of their access to the courts in order to have their rights vindicated. And Congress, as I read a moment ago, said that one of the purposes of this was to facilitate, was to simplify that particular process. And it is important it seems to me to serve that purpose here, because what we have is a direct clash -- this isn't a case between opposing private parties. It applies in cases where government officials are charged with official misconduct. The court can decide whether it wants to make it easier or harder for a -- it can partially base its decision in this case, its construction of the statute on whether it wants to make it easier or harder for plaintiffs to get the kind of recompense which they are seeking in this case. And that, of course, goes to the constitutional issue, too, as Mr. Nemser argues, that this is essentially a balancing of the equities.

I do not think myself that -- I think the equities are all with the plaintiffs in these kinds of cases and that the defendants are not being treated unfairly if you do read this statute as we propose it be read, and the

reason is that thsse defendants are not your rul-of-the-mill private party defendants.

QUESTION: Well, do you have any doubt about the constitutionality of this statute that would require any defendants sued in the United States District Court to be sued where Congress provided?

MR. WULF: I have no doubt at all in my mind.

QUESTION: So long as it is inside the United States.

MR. WULF: Yes, that is where the United States District Courts are. But should the Court or any of its members have any doubt, I would simply say that when a public official, when an individual chooses to become a public official, he chooses to occupy high office, he takes an oath to uphold and defend the Constitution and then is charged with violating that high oath, as they are in this case, that they have assumed the risk, if you will, of being sued one place or another, wherever it is that their official misconduct inflicted the particular injury. And it is not unfair, and, of course, it is not particularly unfair in this case because the greatest burden of litigation for any of us is the cost of attorney fees, the cost of counseling and all of the opinions in this case --

QUESTION: Have you ever paid a judgment recently?

MR. WULF: The will be a judgment against them

whether they are assued around the corner from where they live or whether they are sued 500 miles away. That doesn't make any difference. The question is the additional expense of trying to avoid that. And it can often, as we know, cost more to avoid it than the judgment would have cost them in the long run.

QUESTION: But they are going to have to pay attorney fees wherever they are sued.

MR. WULF: These defendants are not paying a cent in attorney fees, have not paid a cent in attorney fees and, as far as I can tell, will not pay a cent in attorney fees.

QUESTION: I don't see how your argument cut ones way or the other.

MR. WULF: Well, what I am saying is there is no great burden on them in being sued elsewhere, some place else than where they live. That is what I am saying.

QUESTION: That is because of the present policy of the Executive Branch of government, at least inferentially endorsed by the Appropriations Committees, but that policy might change.

MR. WULF: It might be changed, but --

QUESTION: The Department of Justice has had a variable policy on representing committees of the Congress, for example. Sometimes they do and sometimes they don't represent them.

MR. WULF: It could be changed. As Ms. Peterson says, it has been the policy for a hundred years. If they are paying the defendants' expenses in this case, Your Honor, I can't think of a case where they wouldn't pay them because this is a case -- to go off the record for a moment -- in drawing upon the Church committee report and the other official reports, we know this program went on, we know a lot of these people were involved in it, and still they are paying the fees. So if they are paying it here, as I say, it seems to me they would pay it in any other case. So it is not unfair to them.

QUESTION: Mr. Wulf, the main objection in venue, I suppose, if you are going to have a long trial and you live in California and are sued in New York, you have got to spend a couple of weeks in New York during the trial and that is sort of an inconvenience if you are in business in California. That is why the defendants are interested in being sued in their residence, is not to have to spend a lot of time and money to be elsewhere litigating. I don't think attorney fees, judgments or anything, it is just where you are going to have this trial.

MR. WULF: A couple of weeks inconvenience to stand trial --

QUESTION: The whole purpose of venue is to vindicate that very interest. That's why we have venue

statutes. We don't just say sue anybody wherever you feel like it.

MR. WULF: YOu are quite right, Your Honor. Of course, on the other hand, if we serve the defendants' interests here, we have to disserve the plaintiffs' interests and I think that this was a statute which was intended to serve the plaintiffs' interests and to put the defendants to the necessary inconvenience that might flow because of their assumption of special responsibility as government officials.

QUESTION: But there are always more burdend on the moving party, the initiating party than on the responding party in terms of burden of proof and a whole lot of other things, are't there? The party who initiates carries a large burden of proof, expense, the whole -- these things aren't really, except the venue aspect, who is paying the defendants' fees and who will pay the judgment perhaps is really not relevant to the basic issue here, is it?

MR. WULF: I think it has some bearing on it, Your Honor, yes, certainly as to the constitutional argument because I think that the weight of the burden can determine whether a particular practice is fair or not fair. Here the burden I think is minimal.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further? You have --

ORAL ARGUMENT OF EARL HAROLD NEMSER, ESQ.,

ON BEHALF OF THE PETITIONERS--REBUTTAL

MR. NEMSER: I would just like to point out one thing that Mr. Driver would find it so burdensome to move. He did sue in the Eastern District of New York under the Federal Tort Claims Act for the same facts and did get recovery, so it wasn't so tough for Mr. Driver.

Insofar as the acts of the petitioners in this case, I hesitate to go into the facts but Mr. Wulf went beyond the record. We know from the Rockefeller Commission report and the Senate subcommittee report that Walters didn't know about the mail intercept program until it was ended, and Colby is the one who stopped it and he knew about it a week before he stopped it. And to make people travel around the country because they stopped a program because Rodney Driver wants to bring them all up in front of Judge Pettine in Rhode Island seems to be not to be the purpose of this statute.

And on attorney fees, they are not all being paid. Patrick Gray is being sued in New York as an official, and he is not being paid. And if you act beyond the color of your authority, you can't be paid by the United States. The regulations provide for that, and

that is what Mr. Wulf alleges in this case.

Thank you.

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

(Whereupon, at 3:09 o'clock p.m., the case in the above-entitled matter was submitted.)

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