ORIGINAL

In the

Supreme Court of the United States

WILLIAM E. COLBY AND
VERNON A. WALTERS,

PETITIONERS,

V.

RODNEY DRIVER, ET AL.,

RESPONDENTS.

No. 78-303

Washington, D. C
November 7, 1979

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WILLIAM E. COLBY and VERNON A. WALTERS, Petitioners,	:	
v.	:	No. 78-303
RODNEY DRIVER, et al., Respondents.	:	

Wednesday, November 7, 1979
Washington, D. C.

The above-entitled matter came on for argument at 1:01 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, 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 H. NEMSER, ESQ., Cadwalader, Wickersham & Taft, One Wall Street, New York, New York 10005; on behalf of the petitioners.

MRS. ELINOR H. STILLMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioners.

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

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Colby and Walters against Driver.

Mr. Nemser, you may proceed whenever you're ready.

ORAL ARGUMENT OF EARL H. NEMSER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Chief Justice Burger pointed out in this morning's arguments that the facts of these cases, the Colby case and the tandem case--the Stafford case this morning--are not the most important elements of the case, because we're dealing with a relatively narrow personal jurisdiction issue.

But I thought I would just briefly give you the jurisdictional facts in the Colby case.

The jurisdictional facts are that Colby has no presence in Rhode Island, and that Walters has no presence in Rhode Island. Colby was Director of Central Intelligence. His office was in Virginia. He resides in Maryland. General Walters was Deputy Director of Central Intelligence. His office was in Virginia. He resided in Virginia. He now resides in Florida.

Judge Pettine found, in the District Court in Rhode Island, that Colby and Walters did not have sufficient presence in that district to satisfy the Rhode Island long arm

statute, which is one of the broad ones that extends personal jurisdiction as far as Fourteenth Amendment due process will permit.

The facts, of course, in Colby involve a mail-opening program, and I think they've adequately been covered.

The--there is one thing this morning that was discussed that I'd like to touch on before I talk about the two points I plan to talk about. And that was, Mr. Justice Stewart, you had a discussion with Mr. Brown, and the question was, what about habeas corpus, and what about Schlanger, and wouldn't you have to--or would you not have to reverse Schlanger if you didn't find for us in this case.

I think you'd have to reverse Schlanger. The argument for not reversing Schlanger would be that, in habeas corpus there is a special jurisdictional section, and the First Circuit held that habeas corpus falls into the otherwise-provided-by-law section in 1391(e).

Well, it does not. I read 2241 at least a dozen times. I just read it again. And I read Strait v. Laird; 2241 does not provide for jurisdiction; it does not provide for the venue. All it says is that the courts can issue the writs within their respective jurisdictions.

QUESTION: Well, "otherwise provided by law" doesn't necessarily mean, otherwise provided by statutory law, does it?

MR. NEMSER: I would presume that that's what Congress would have meant. Now--

QUESTION: And how about the last sentence in footnote four in the Schlanger opinion? I read it this morning; I don't have it in front of me.

MR. NEMSER: That last sentence is, that habeas corpus is like, in all respects, every civil action.

QUESTION: Every civil action generally. So it's the rules of law governing habeas corpus.

MR. NEMSER: Wait a minute. The law governing personal jurisdiction in habeas corpus is set forth in Straight v. Laird, where the Court said, and Mr. Douglass--Justice Douglass wrote, that jurisdiction over the custodian is like any other rule of jurisdiction. You've got to be present, and he cites International Shoe.

QUESTION: Yes, well he also wrote Schlanger, as we know.

MR. NEMSER: He also wrote Schlanger, and in Schlanger what he said was--the interesting thing about it was--he--Schlanger he said the commanding officer, and I'll quote, but he was neither a resident of the Arizona judicial district, nor amenable to its process.

Now if 1391(e) makes federal officials amenable to process all throughout the country, you have to reverse Schlanger.

QUESTION: As you know, I dissented in Schlanger, so that wouldn't bother me.

MR. NEMSER: I know, but I don't know why you dissented, because you didn't file an opinion. You didn't dissent in Straight.

The two points I want to make is: what standard do you have to apply in evaluating this statute? And I say that because of two sources, one, Justice Brandeis' opinion in Robertson, and second, Mr. Chief Justice Burger's opinion in NLRB v. Catholic Bishop of Chicago, the standard is, this statute cannot be interpreted to supply personal jurisdiction over federal officials throughout the United States unless there is clear expression of legislative intent.

That comes from Robertson. The standard from Catholic Bishop is, because there's a substantial constitutional question presented, you can't read the statute to provide jurisdiction unless there's an affirmative intent of Congress clearly expressed.

QUESTION: Well, what's the substantial constitutional question? I mean, this is one country.

MR. NEMSER: This is one country, but personal jurisdiction is no longer, and it has never been held by this Court, to be based solely on territorial power.

QUESTION: The Securities Act provides for nation-wide service of process.

MR. NEMSER: Of course it does, but it's carefully limited. It says, you only have venue where the cause of action arose, where the defendants reside, or where an act took place by a defendant. So it certainly satisfies Fifth Amendment due process, because there's some affiliating circumstances with the district.

And to go to the district when you commit securities fraud for a defendant action doesn't seem to me to place an intolerable burden on the right to defense. To cause Colby to go to San Francisco, Rhode Island, New York, to defend the same action, to bring his witnesses, to go there for depositions, I say, imposes an intolerable burden on his right to defend, his right to be heard.

And in Boddie v. Connecticut, where to get a divorce you had to file a $12 filing fee, this Court held, at a minimum due process--and this isn't Fifth or Fourteenth Amendment--at a minimum due process requires a meaningful opportunity to be heard. And if you don't have the $14 for a filing fee, you don't have that opportunity.

Our client cannot afford to run around the country defending actions because, while they were federal officials, someone has a gripe.

QUESTION: But if Nelson Rockefeller, when he was alive, had been named as a defendant, presumably he could be sued under your interpretation of the statute. He couldn't

certainly raise the "no means" claim.

MR. NEMSER: No, I'm looking at the statute on its face. And I say on its face, to require someone, Nelson Rockefeller or anyone else, to expend such a substantial amount of his assets to travel around the country defending lawsuits, where they didn't ask for it, they didn't step into a district, would place an intolerable burden on that right to defend.

And the Court has never done otherwise. Everytime the Court's been faced with the issue of whether there's been any Fifth Amendment limitation on Congress' power to provide nationwide jurisdiction, they point it out.

In the case before them, well, here there's no intolerable burden. In our case, there is one. And I point out in my supplementary brief that in LeRoi case, just recently decided, in the dissenting opinion--I believe it was written by Mr. Justice White--he said, of course there's nationwide jurisdiction which is constitutional in the federal courts because there's no Fifth Amendment limitation. But what does he cite? No decision from this Court, because there is none. He cites a Seventh Circuit case, the Simmons case, which we discuss, but he doesn't point out there's even a split in the Seventh Circuit. In Metz Apparatewerke, cited in my brief, the Seventh Circuit said, yes, there is a fairness limitation on the exercise of power to--Congressional power to provide

nationwide jurisdiction. And it's fundamental fairness, fair play, similar to the International Shoe standard.

The thing that I believe it would be unconstitutional if you applied it in our case. But I believe there is no question that there's a substantial question raised. Henry Hart, Hart and Wechslerdiscuss it, and say: It's a substantial question. The Fifth Amendment and the Fourteenth Amendment have the same language, due process.

QUESTION: What about this venue situation before 1962, when someone who felt he'd been wronged by government actions and wanted to sue a government official, clearly had to come back to the District of Columbia, or Maryland or Virginia, where that citizen resided, and sue them. Couldn't sue them anywhere else in the United States?

MR. NEMSER: That's right, because only Maryland or D.C. could issue mandamus.

QUESTION: Well, doesn't that suggest the same fairness problem? Here's someone maybe wronged 3,000 miles away?

MR. NEMSER: Unfair to the plaintiff, you mean? Well, due process protects defendants. You shouldn't have your property taken away without due process of law.

QUESTION: Well, it may--the complaint of this person maywell have been that the government agent living in Maryland or Virginia or the District of Columbia took

away his property without due process of law out in the State of Washington.

MR. NEMSER: And it would be fundamentally unfair to make him travel to Washington to prosecute his case as a plaintiff?

QUESTION: It seems to me, that would be as reasonable in argument as the one you're making now.

MR. NEMSER: I think it--I would be sympathetic to his plight, and Congress was. But the question of what due process prevents, in a litigation--in a litigation protection, a litigation setting, it protects defendants.

And it's been pointed out by this Court--

QUESTION: Well, due process is applicable only when we're talking about the jurisdiction of a court. This--we're dealing here with a venue statute.

MR. NEMSER: Well, the question in this case also is whether this statute provides personal jurisdiction. We have a section in our main brief which is devoted to that, and we say, it supplies only venue, not personal jurisdiction.

The question of whether it provides--if it didn't provide personal jurisdiction, we would be out of the case because there'd be no basis to have personal jurisdiction over us. Our argument was discussed in the First Circuit's opinion and rejected.

I believe it is a valid argument. I believe it is

valid because Congress oftentimes provides for service of process. The Federal Rules tell you how to serve process.

But they don't tell you when someone is amenable to service or subject to jurisdiction. That whole area is based on another area of the law: presence, a specific jurisdictional statute. And the Robertson case is instructive there. The court should not interpret a statute to provide in personam jurisdiction, because we have general rules about it, unless--

QUESTION: But as you suggested in your answer to my brother Rehnquist about the securities legislation, venue under those laws must be in several alternative places.

MR. NEMSER: That's right.

QUESTION: But jurisdiction is nationwide, isn't it?

MR. NEMSER: Service of process is nationwide.

QUESTION: And that's personal jurisdiction, that's what we're--

MR. NEMSER: The service of process isn't the same as personal jurisdiction. For example, in New York, the long arm statute--

QUESTION: Jurisdiction is not the same as venue; that was the point of my question.

MR. NEMSER: Right. There are three things we're talking about: service, venue and personal jurisdiction.

The general rule of personal jurisdiction set forth in the Robertson case is that you get sued, defendants get sued where they live, where they're present, where they're found. Robertson said there have been very few departures from this general rule, and they've all been carefully guarded and clearly expressed. And it shouldn't be lightly assumed that Congress intends to depart from long-established policy.

So what do we have to get Congressional intent. Ms. Peterson this morning said we had a lot of discussion about damage actions; we did not. As Justice Stevens pointed out, there's a passing reference in the hearings where four Congressmen were present--just four--where MacGuineas--and if you read the hearings, you could tell this subcommittee did not like MacGuineas. He was bothering them. He told them, you're giving us problems that--the committee said to MacGuineas. you're giving us problems that we don't want to deal with. You're telling us that we're going to go to officials' pocketbooks. We're not dealing with that, and we don't want to do that.

By the way, you're too busy to study this, you tell us, they say in the hearings, you're too busy trying cases. Bring someone else down from Justice to talk to us. They were tired of hearing from him. So what did they do? They put in their committee report the thing that was before

all the congressmen, what was intended by the statute.

What does it say? It's got one theme: These are government suits, suits against the government. It says, it covers suits against government officials that can now be brought only in D.C. Not my case; not the personal damage cases.

Suits to compel a federal officer to perform a duty. Three times it says, suits in essence against the United States. Twice it says, we're talking about suits nominally against officials.

It goes on to say, we're talking about suits against officials as individuals, but when we sue them under the fiction that they're acting as individuals.

And it says, there's no problem in this case--it tells Congress, the committee report--there's no problem, because the government always defends them.

Now, it's incredible to me that it can be suggested that Congress was alerted, in the face of all this--

QUESTION: Right on that very point, government always defends, what would you say today of the application of a statute to a libel action such as Barr v. Matteo, or one of those?

MR. NEMSER: 1391(e) doesn't apply because they're trying to get money out of his pocketbook.

QUESTION: I take it the government would

probably defend the lawsuits.

MR. NEMSER: The government would defend only if it found, A, it was in the interests of the United States to defend them; B, the defendant acted within the scope of his authority; and C, the defendant didn't commit any crime, or there's no criminal investigation.

Now, in a related case, the Blackburn case which Mr. Brown mentioned this morning, had Gray as a defendant, but he was criminally investigated so he paid his own attorney fees.

If the government decides it's no longer in their interest to defend my client, my client will have to pay.

QUESTION: But the letter from Attorney General Katzenbach to the district attorneys sort of assumes that they will be defending these slander-libel type suits against officers, doesn't it?

MR. NEMSER: The Katzenbach memorandum, Katzenbach is not a congressman, he was not a congressman--

QUESTION: I know all that; I'm just going to the one point. That letter, he assumed that those would be in the category ofthat the ngovernment would normally defend.

MR. NEMSER: That memorandum assumed it, and he did not talk about the three exceptions which are in 28 C.F.R. 50.15. It's not regulations; it's just Justice Department policy, which can change tomorrow or the next day.

We submit our case.

MR. CHIEF JUSTICE BURGER: Mrs. Stillman.

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

ON BEHALF OF THE

MRS. STILLMAN: It is beyond dispute that the venue expansion bill that Representative Hamer Budge first introduced in the 86th Congress would not, had it been enacted, cover suits like the one here today.

It applied only to suits against federal officers in their official capacity. And at the opening of the hearings on that bill, in the 86th Congress, Representative Budge described the kinds of suits and the kind of venue problem he was concerned with in terms that clearly exclude the kinds of suits that we have here today.

Respondents contend, and the court below found, that by adding the phrase "under color of legal authority," the committee considering Representative Budge's bill thereby extended the venue provisions to include these types of tort damage suits.

We believe that an examination of the circumstances under which this phrase got added to the legislation, and then emerged in the revised bill, H.R. 12622, that's the subject of the report issued in the 86th Congress, reveals that they are wrong. And we submit that the conclusion derived from this examination of circumstances is confirmed by the

explanation of the phrase in which is supplied in both houses, both House reports, the one issued in the 86th Congress and the one issued in the 87th Congress, and by remarks of Representative Poff, who is a member of the subcommittee that considered that bill in the 86 Congress, and who made remarks in the 87th Congress, when the bill was initially passed by the House, containing this phrase, "under color of legal authority."

And I am going to devote most of my time here to discussing how this phrase got into the bill, and how it's explained in the House reports, and what Congressman Poff said this bill was all about when he explained it to his fellow Congressmen.

As I say, it's important to focus on the original bill in the 89th Congress, because that's where the phrase came in, and that's where some of these troublesome sentences first appeared in that report.

Regarding that original bill, it's true, as Ms. Peterson has said here this morning, that Deputy Attorney General Walsh had written a letter to Congress about that original bill that mentioned only official capacity, and he pointed out that it appeared to cover only mandamus actions. The bill would therefore need nothing, because no court outside the District of Columbia Circuit had mandamus jurisdiction.

He also did mention that there were two categories

of cases involving suits against defendants in their individual capacity as federal officers, in their individual capacity which would not be covered by the bill as drafted. One category of suits were these suits against the individual where you were--you had the legal fiction that the man was acting outside his authority in order to evade the sovereign immunity doctrine.

The other category of suits was--were suits to seek damage from him personally for actions taken ostensibly in the course of his official duties, but which the plaintiff claims are in excess of his official authority.

In the hearings on Representative Budge's bill, MacGuineas reiterated these points. And he again pointed out that one category of these suits involved legal fiction. In view of Representative Budge's opening statement of what he intended the bill to cover, it's quite obvious that the first category of suits, the legal fiction category, had to be covered in order for Representative Budge's bill to do what he wanted it to do, and that was to give review of administrative actions out in the field, against field officers, without having your action foreclosed because the indispensable superior, party superior, was in Washington.

Therefore, if they didn't put something in the bill, the whoe purpose of the bill was going to be undermined.

The phrase, "under color of legal authority," was

suggested by committee counsel Melvin Drabkin, and it's true that he at times in the hearings seemed to distinguish suits--personal suits for personal actions, personal, outside the scope of employment actions, against federal defendants.

But he also said at page 57 of the hearings to MacGuineas, . want the government to be able to retreat behind any artificial concept.

So what he seemed to fear was that something was going on here. If they didn't change it in some way, the government was somehow going to escape review.

And it is true that MacGuineas pointed out that if you added this phrase "under the color of legal authority," there is a danger, the possibility that some court might construe it to cover tort damage suits against federal officials. And he said quite forcefully that this would be grossly unfair to federal officials, because certainly private individuals are not subject to suits in multiple form for torts committed in the course of their employment, and it was unfair to treat federal officials differently, in damage suits.

And slander actions were discussed as a sort of paradigm case of these types of suits that might possibly be covered. However, as soon as he had finished discussing this possibility, the committee chairman and another committee member immediately agreed that it would be unfair. This was Representative Forrester and Representative Poff, and

that's at page 53 of the transcript of hearings.

But the Congressmen reasons to discount MacGuineas' fears that the courts would construe the language to reach the result that they agreed was unfair. First, Judge Albert Maris, who, representing the Judicial Conference, testified really as something of an expert witness; they seemed to treat him as someone who knew how courts might interpret things, and he knew what language should be used to achieve their purposes, he was asked, would it be advisable to add this phrase, "under color of legal authority."

And he said, "I would be very happy to see that, because it would be a way of putting to rest this fictional doctrine and get right down to what is really the fact, reviewing administrative action." That's at page 91 of the transcript of hearings.

Second, they had reason to discount this possibility that MacGuineas was holding out to them because the sponsors of the bill, Henry Budge, disavowed on the record any intent of covering what he called "these slander-type actions." He said, this is not what I have in mind.

And as Justice Stevens has pointed out, that was mainly what they focused on when they were giving examples of what damage actions might possibly be involved.

Third, the House report, issued shortly after these hearings concluded, explained the reason for referring

both the suits against officers acting in their official capacity, and to suits against officers acting under color of legal authority. And that explanation, which is printed at page 37 of our brief, in language that has been quoted this morning by Mr. Nemser, is written in terms that clearly do not refer to these types of suits; they refer clearly to suits in essence against the government, in essence against the United States, suits that involve this legal fiction.

Now, we submit that these factors, these circumstances, would have made the Congressmen feel that perhaps MacGuineas was being unnecessarily finicky, unnecessarily fearful. Clearly, they thought he was there trying to throw out problems to dissuade them from legislating anything; at least they seemed to express that feeling at times.

And both the Senate and the House report, on H.R. 1960 in the 87th Congress, start out describing the purpose of the bill, the bill as a whole, not just the mandamus section but the bill as a whole, as being something that they're passing to facilitate review of administrative actions.

And we submit that damage suits are not what you're talking about when you talk about review of administrative actions.

Congressman Poff made remarks in connections with this bill when it was voted on by the House in the 87th Congress. Now this was when it was first voted on by the House.

There were subsequently some amendments which don't directly affect us here,' and it was then revoted on by the House.

But he was explaining to the Congress that was going to pass on this bill what it meant. And at this time it did contain the phrase, "under color of legal authority."

Representative Poff's remarks, which are printed at Volume 107 of the Congressional Record, page 12157, are cast in terms that refer only to suits that are in essence against the government itself.

He speaks of the balance of convenience between plaintiff and defendant in such suits, and insists that broadening the plaintiffs' options present no problem, because as he observes, there are federal courts, federal attorneys, federal agencies in every quarter of the nation, and that in fact the convenience of the government would be promoted by trying the case in the local district court where the paper is available, the property is accessible, and the witnesses are within reach.

Representative Poff ended his remarks with the following statement: "Our Nation was founded upon a profound respect for the rights of the individual citizen. The government should be willing always to accommodate itself to the preservation of these rights. More particularly, when the government is the party in controversy with the private citizen."

QUESTION: And by the government you mean--that is

meaning the particular governmental official--

MRS. STILLMAN: Yes.

QUESTION: --who has done something that it was thought he should not have done, or she have done.

MRS. STILLMAN: Yes, right. And what you're reviewing is government action. We're not seeking to have some kind of damage compensation for some injury that was done in the past. You're reviewing the action, and generally, you're asking for injunctive relief: Make him stop doing it; don't let him do it again; and getting some ruling on whether it's a legal action or not.

The damage suits here today are not controversies between the government and respondents in these cases. They are suits for damages to be paid out of assets of the individual petitioners.

In this case, Mr. Colby and Mr. Walters, who as it was pointed out, are now private citizens, it is true that they have been supplied with government-paid private counsel, but as noted, that is not assured in all cases. There are these factors that have to be satisfied, that there's a determination that they were acting within the scope of their employment, that there's a determination that it's in the interests of the United States to provide representation to them.

And as far as the private counsel program, private

counsel are paid for when there's some possibility of conflict in representing all of the defendants, or some other problem with arguments that might wish to be raised, or any other factors.

This is not assured at all, because this is subject to annual budgetary appropriations which may or may not come about from year to year. So there simply cannot be any assurance that government representation is always there.

In fact, I think at one point in the transcript, there was some reference to suits against congressmen, and one of the representatives said to MacGuineas, don't you always defend these? And he said, sometimes we do and sometimes we don't.

So it wasn't assured.

It is easy to see in retrospect that greater care might have been taken by Congress to assure that Courts would not construe 1391(e) more broadly than Congress evidently intended. But we submit that the language that Congress did employ, "under color of legal authority," is not in itself so clearly indicative of an attempt to change this historic, defendant-oriented venue rules, that you simply ignore all of these other considerations that I've discussed here.

QUESTION: Mrs. Stillman, has ever--has anyone to your knowledge ever considered the possibility that the language might be descriptive of the character of the

defendant while he's defending the lawsuit?

MRS. STILLMAN: You mean at the time? In other words, referring to his capacity--

QUESTION: In which each defendant is an officer. Now that's no longer true of these people. Or an employee acting either in his official capacity or still acting under color of legal authority in trying to defend the government's actions.

MRS. STILLMAN: That's certainly, Your Honor, I think it's suggestive of an intent to--

QUESTION: If you read it athat way, of course.

MRS. STILLMAN: Right.

QUESTION: Did anybody ever suggest it should be read that way, to your knowledge?

MRS. STILLMAN: Well, I think that the petitioners may have suggested that to the First Circuit. But as I understand Your Honor, that if it's read that way it's clearly suggestive of having some kind of active supervision over their--over what they're doing, and it's suggestive of injunctive relief, certainly. And I think that's a plausible reading of the statute.

QUESTION: Nobody really argues it here. I was just trying to--maybe it's so far out that it doesn't make any sense. But I just wasn't sure.

MRS. STILLMAN: I would never want to resist an

argument that would tend to support the position that we're supporting.

QUESTION: Also, that's dealt with in note 8 of the opinion of the Court of Appeals on page 5 of the Appendix to the Petition.

MRS. STILLMAN: All right, and I'm advised that it's in petitioner's brief at page 5.

In summary, I would just simply like to note that we think that the circumstances that I've noted here really compelling suggest what the congressional purpose was in this statute; and that any memorandum that Attorney General Katzenbach may have written three months later, and certainly the letter of Deputy Attorney General White, which can be read as merely to say, there might be a problem, the courts might construe this this way, you might consider making it more clearly; are not enough to compel the really radical change in venue rules which the construction givento the statute by the respondents and by the court below would effect.

Thank you very much.

MR. CHIEF JUSTICE BURGER: 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:

I am not even going to try to improve upon the very

specific description of the legislative history that Ms. Peterson presented to the Court this morning. I couldn't improve upon it if I did try. I did think it was very precise and persuasive, and presented our perspective in distinction to the opposing side's perspective very well.

What I would like to do is put some--put this case in a concrete context, and discuss some of the pragmatic and policy considerations which I think may properly inform the Court's ultimate decision in the case.

And for that purpose, with your leave, Mr. Chief Justice, I would like to allude briefly to the facts of the Colby case, because I think they dramatize what is at stake here.

This case arose out of the 20-year program of the CIA to open first class mail going to and from the United States and the Soviet Union. It was conducted without consent of any of the correspondents. It was conducted without a warrant ever being issued or applied for. It was, I think it cannot be plainer, illegal and in violation of the Fourth Amendment to the UNited States.

In the course of the program, the CIA opened about 215,000 letters affecting 110,000 individuals, American citizens. In response to that, when the program became known in 1975, this suit was filed in order to vindicate the rights of the persons whose mail was opened and whose constitutional rights

have been so sorely abused by their government, and by the officials who represented the government.

QUESTION: Well, it was said before, maybe the merits really aren't too relevant. But what is the case that holds that there's a plain violation of Fourth Amendment rights here?

MR. WULF: There are two cases. From ex parte Jackson in 1880, I believe, to United States v. Van Lewin which was about ten years ago, both in this case--both in this Court, Your Honor, where it was held that a warrant was required in order to justify opening of first class mail matter.

QUESTION: Was it foreign--first class foreign mail?

MR. WULF: They were both domestic cases, Your Honor.

QUESTION: Because we had case involving foreign mail recently that doesn't really support you very much. I dissented from the case, but--I guess it isn't relevant, but sometimes--

MR. WULF: But there may have been probable--I recollect the case to which you refer, and that was an obscenity case, was it not?

QUESTION: No, we had about mail covers--

QUESTION: Two or three years ago from the Court of Appeals, District of Columbia circuit.

MR. WULF: Sorry; I don't recollect.

QUESTION: That was opening mail at the border.

MR. WULF: Yes. Well, in any case, I think that there would be a very, very strong, indeed, irresistible argument that this program, which in fact included outgoing mail, not only income mail, which I think would change it substantially, was a plain violation of the Fourth Amendment.

The question--

QUESTION: Well, are you suggesting, Mr. Wulf, that there would be no violation in opening at the border?

MR. WULF: No, I think it was a violation both ways, Your Honor; income and outgoing.

The question then becomes whether the citizens whose rights were injured in this case can have a convenient mode of redress for the serious violation--for the serious intrusion upon their constitutional rights.

And the Senate report concerning this statute before us today in fact says that its purpose, in addition to everything else it says, which is in dispute before the Court, this is not in dispute--it says that the purpose of 1391(e) is to provide readily available, inexpensive judicial remedies to the citizen who is aggrieved by the workings of government.

In this particular case, the plaintiffs had two options, apart from the one which we are arguing in support of today. If he cannot bring the action in the district where he lives, where Mr. Driver lives, he would either have to go to

the several districts where the individual defendants reside, or he would have to go to the jurisdiction where the cause of action arose.

As an individual citizen it would be equally burdensome for him to have to travel to New York, where it would appear that the cause of action arose, and even more burdensome to have to travel around the country to find--to file individual suits against the several defendants in this case.

The convenient thing, that condition which would satisfy the stated objective of the Senate in this--in adopting this statute, allows them to file suit conveniently and inexpensively in the jurisdiction where he resides. So that he may easily vindicate the violation of his constitutional and statutory rights.

And that convenience, of course, is one that was explicitly in the minds of Congress when they passed this statute. And that is--those are the interests represented on the plaintiffs' side in this case.

Congress has declared that where government officials violate citizens' rights, that the plaintiffs should be easily able to get judicial vindication.

QUESTION: Now, that's a shorthand summary, I take it, of the first line of venue section we're talking about. Do you think if, in the Stafford case, that if Judge Stafford had not been sued until he had become a judge, but the suit

was based on his activities as a United States attorney, he would have been subject to venue under that section?

MR. WULF: I think so, Your Honor. Because it was our position in the First Circuit that this statute applied so long as the defendant was a serving government official at the time service was made upon him, and that a change in status thereafter was--did not affect the effective jurisdiction that was secured in the first place.

QUESTION: Even though it might be a quite different position that he occupied at the time of service, then relief was sought for his action--remedy on the merits?

MR. WULF: Our position in the First Circuit was that the different position made no difference at all, that it was the question--the only--the determinative question was whether the defendant was a serving government officer at the time process was effectively served upon him.

QUESTION: Well, in the district court, I thought that you successfully made the claim that the test was whether or not he was an officer at the time that the cause of action arose.

MR. WULF: You're quite right; I'm afraid I put that part of the case somewhat out of my mind.

QUESTION: That part was rejected by the Court of Appeals.

MR. WULF: Yes.

QUESTION: And we did not grant certiorari on that question; is that correct?

MR. WULF: Yes, thank you for clarifying that. It was in fact our position that it applies to present and former officials.

It's now our position that it requires it under any circumstances, as long as process was served when the defendant was a serving government official.

To be balanced against the considerations in the plaintiffs' favor in these cases, in order to provide a simple, convenient, and inexpensive means of redress for injured citizens, are the interests of the defendants in this case.

And whether you consider this part of my argument as being in response to Mr. Nenser's constitutional argument, or merely as a--as helping to inform the Court's decision in the statutory interpretation process, it really comes down to the same thing. Because the balance of interests asserted by the defendants in this case are not real.

And they would affect both the--they would affect the due process argument if the Court thinks seriously that there is a due process argument.

But in any case, those interests, as I say, are not real, and are pallid in contrast to the real, palpable interests that are advanced on plaintiffs' behalf in a situation such as this, where a violation of constitutional rights is

concerned.

In the first place, and I think critically, the petitioners and the government would have you think these are just any old defendants.

These are not any old defendants. These are government officials. These are men and women who took an oath when they took office to uphold and defend the constitution of the United States, and not to violate it--the laws and constitution of the United States.

The constitution doesn't apply to private citizens, it only applies to government--

QUESTION: Since when? Since when was that true?

MR. WULF: I'm sorry?

QUESTION: The Constitution applies to everybody in the United States of America.

MR. WULF: It's enforceable--but it's enforceable only against government officials.

QUESTION: Well, not the Fifteenth Amendment, for example.

MR. WULF: The bill of rights, Your Honor; sorry.

The provision--the provisions of the bill of rights which are before the Court today, the Fourth Amendment and the Fifth and Sixth Amendments. And in that sense these defendants are in fact different.

Because they assume the responsibility that private

citizens do not have, and having assumed that responsibility they should be, and can be, in a constitutional and non-constitutional sense, be dealt with differently, because they are different.

That seems to me to be a fundamental conception which the petitioners would have you overlook.

In addition to that, in this, in both of these cases, for the foreseeable future, until the Code of Federal Regulations is amended, there is the additional fact that there is no burden today on these defendants, because of the fact that the government is paying what is the principal, apart from a judgment, in defense of a lawsuit, and that is the fees of attorneys to represent a person who is sued.

QUESTION: But the--any given Attorney General can terminate that arrangement any time he wants, can't he?

MR. WULF: Could, but we're--but this case should be judged by the events and by the situation as it now exists; the provision for--

QUESTION: Well, as far as we know, the Attorney General might do nothing for them after any given day. There have been times when the Attorney General has refused to represent in a setting like this.

MR. WULF: There have been. They have been rare, as far as I know. It seems to me--

QUESTION: There are going to be attorneys' fees,

even if the petitioners prevail here, I take it. Your people will find them in whatever district they are, and they'll have to hire attorneys to fight the lawsuit.

I had understood that argument to be principally the kind of ping-pong effect of having to answer depositions and that sort of thing in a place far from where they resided.

MR. WULF: That's a prospect, of course. As a matter of fact, this suit has been in litigation for--it was filed in 1975, and there have been a lot of court appearances in the district court and Court of Appeals, and I have yet to see a defendant, literally.

So it's been no burden yet. If we get past this argument, and if we prevail, then all of the instances that attend to the litigation process are going to come into being. But even though they may have to travel, in balancing the equities, they may have to travel, they may have to travel to my office if I note the depositions to be taken there.

But the fact is that that might occupy a day of their time, maybe two days, depending on who the individual defendant is. But we all know that it is the cost of attorneys fees that is the great burden in the defense of litigation, and that the time--although if it were going to be a protracted trial elsewhere, that might also occupy some of there time.

But that's not a serious burden, it seems to me.

It's not a serious burden to cast upon individuals who are charged, as they are here, with violating the constitution.

And it's all a balancing process, as we know, and to simplify and make convenient the right of citizens to vindicate their constitutional rights, and to weight that against such relatively insignificant considerations, such as I think a little time--the defendants--

QUESTION: I still don't understand your attorneys' fees argument, because it seems to me that if you lose here, and the statute is construed here the way the Second Circuit construed it, it doesn't mean you can't sue these people. It means that you simply have to sue them somewhere else. And when you sue them somewhere else, they're going to have to retain attorneys where you sue them.

MR. WULF: That's true. The balance of advantage then shifts, Your Honor, because then there'll be a much-increased burden on the plaintiffs.

And although it might not make any difference in this case, since the plaintiffs in fact are being represented at no cost by the ACLU, this really isn't the paradigmatic case. I would ask you to think of a case where--which is a little case--where the ACLU is not representing the plaintiffs, where it's an individual--

QUESTION: I thought you always represented little people?

MR. WULF: Well, in this case, we represent little people, but in large volume.

[Laughter.]

QUESTION: What is new, Mr. Wulf, about the idea that plaintiffs in lawsuits have greater burdens than the defendants at the onset? They have the burden of proof, they have the burden of beginning the litigation; that's always been true, hasn't it?

MR. WULF: I frankly think, Mr. Chief Justice, that this case presents the Court with the question whether in suits by citizens to vindicate violations of constitutional rights, it doesn't want to shift the burden.

And that in the interests of defending the constitution, and in the interests of allowing successful vindication, convenient vindication and inexpensive vindication of the violation of constitutional rights, that the Court ought to construe this statute to serve that purpose.

QUESTION: But under your reading of the venue statute, it wouldn't have to be a constitutional violation--

MR. WULF: No.

QUESTION: --that you could bring the man 2,000 miles for. It could be a statutory violation.

MR. WULF: Yes, well I think it comes to the same thing. A violation may be more profound if it's a constitutional violation, but still, a statutory violation is serious enough

by itself. It--I'm not making any distinction between the two--the two sorts.

Thank you very much.

MR. CHIEF JUSTICE BURGER: I think the time is all consumed.

Thank you, gentlemen. The case is submitted. Thank you, Mrs. Stillman.

(Whereupon, at 1:48 o'clock, p.m., the case in the above-entitled matter was submitted.)