In the

Supreme Court of the United States

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH, AND CLAUDE MEADOW,

PETITIONERS

V.

JOHN BRIGGS, ET AL.,

RESPONDENTS

No. 77-1546

Washington, D. C.
November 7, 1979

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v. : No. 77-1546

JOHN BRIGGS, et al., Respondents

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

The above-entitled matter came on for argument at 11:01 o'clock, a.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DORIS PETERSON, ESQ., c/o Center for Constitutional Rights, 853 Broadway, New York, N.Y. 10003; on behalf of the respondents.

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

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 77-1546, Stafford against Briggs.

Mr. Brown, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER MEGAREE BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case, Stafford against Briggs, in tandem with Colby v. Driver, the next case to be heard, was argued here last April 24. And on May 4, this Court placed it on the calendar for reargument now.

Very briefly, this is a case on writ of certiorari to review the judgment of the District of Columbia circuit. Colby is on writ of certiorari to review the judgment of the First Circuit.

In both cases, the same precise issue is presented: Did Congress intend, in enacting the Mandamus and Venue Act of 1962 to grant to the district court national, nationwide personal jurisdiction over federal officials sued for money damages in their pocketbooks for acts allegedly performed under cover of law.

In other words, did Congress intend back in 1962 that federal officials can be sued not only, in essence, against

the United States, administrative actions, judicial review of those involving the interests of the United States; but also, as respondents claim, in essence against their own pocketbooks; in any court of the country, regardless of where the harried official works or lives; a burden never before imposed on the citizenry?

Did Congress intend this discrimination against federal employees?

Now, Stafford against Briggs is a Bivens type action, civil rights tort alleging unconstitutional acts. All of the alleged acts took place in Florida.

Plaintiffs chose to bring their suit in the District of Columbia, seeking $1.5 million from the private assets of four individuals who were, or are, federal employees.

Plaintiffs' counsel acknowledged that this case was brought in the District of Columbia after shopping for the most favorable forum. Similarly, Mr. Wulf, in his oral argument on April 24, conceded that Rhode Island was selected because, quote, we did not think it was an inhospitable forum, as a matter of fact, period, end quote.

Who are the defendants in Stafford against Briggs? It would be helpful to put this in perspective. First is petitioner William Stafford, then United States Attorney for the Northern District of Florida, now a United States District Judge in the Northern District of Florida.

Petitioner Carrouth: an Assistant U.S. Attorney in the Northern District of Florida, now in private practice in Florida.

Petitioner Meadow: a special agent of the FBI stationed in Florida, still working in Florida.

So all of the petitioners have roots in Florida; they're not floating public officials. And--

QUESTION: Mr. Brown?

MR. BROWN: Yes?

QUESTION: Has there been any development in the lower courts since the original argument?

MR. BROWN: Yes, I understand that the case is proceeding against a non-petitioner named Guy Goodwin. He is a U.S. prosecutor in the Department of Justice, and I've been told on the telephone that there has been discovery in that case.

QUESTION: Is that as far as the Goodwin case has progressed?

MR. BROWN: Yes, Your Honor. I think it's important to note that nothing has been tried on the merits in Stafford against Briggs.

Now--

QUESTION: No, I'm speaking of the Goodwin case, Blackburn against Goodwin.

MR. BROWN: Oh, in Blackburn against Goodwin, that's

the same buffetted Goodwin, he's being sued up in New York. And he's--

QUESTION: Has the Second Circuit ruled?

MR. BROWN: The Second Circuit ruled on September 10. They decided to write after there was this reargument, and they held that 1391(e), which is the second section of the Mandamus and Venue Act, did not apply to Bivens type actions, and that the actions, in order for the statute to apply, had to be, in essence, against the United States.

And it's not in essence against the United States to sue Goodwin in his pocketbook.

QUESTION: Does that case help your side or not?

MR. BROWN: Your Honor, it's--that panel came down with a decision which, in an articulate and well presented way, was the argument that I tried to make on April 24.

QUESTION: But you haven't filed it in a supplemental brief?

MR. BROWN: Yes, Your Honor, we did file one in this term, a supplemental brief, in which, if you look at it, you'll find that it's nothing more than making Exhibit A the opinion of the Second Circuit panel, which was Smith, Mansfield--

QUESTION: I take it I do have it.

MR. BROWN: --and Mulligan.

I might say a word about that, that the writer of the decision was Dean of Fordham Law School.

Just one second on who the plaintiffs are....

QUESTION: That's better credentials than being a Judge in the Second Circuit?

MR. BROWN: Well, he has both.

Plaintiffs were anti-war demonstrators. They were called before a grand jury in Florida. None of these plaintiffs in Stafford below reside in the District of Columbia. They were indicted for conspiracy. Their case became known as the Gainesville Eight, and each was acquitted.

Their complaint is that Goodwin somehow did a little dissembling before they went to the grand jury, even though they were acquitted, and that this violated their constitutional rights, and that therefore--therefore Stafford and Carrouth and Meadow, who didn't say anything, have to come to the District of Columbia under this Mandamus and Venue Act misuse, and defend themselves for months and months and months, even though they're resident in Florida, and even though they could not, under normal and regular procedures, applicable to all citizens, be sued in the District of Columbia.

And I think it's significant that we're not here saying, public officials cannot be sued for wrongful acts under color of law. We say that they can be, and in this particular place, the place to sue then is in Florida, and that's where the respondents concede they could have sued all of them in Florida.

So it's not a problem of multiplicity of suits, et cetera, et cetera; they can sue them in Florida.

Now, the District of Columbia Circuit determined that notwithstanding that the second section of the Mandamus and Venue Act does give personal jurisdiction over these Florida residents, and this is the question before this Court at this time.

My argument is a simple one. It's one point common to petitioners in this case and in the tandem Colby case, and that is, that the statute involved here simply does not apply to respondent suits against federal officials' pocketbooks. It wasn't intended to do that. There is nothing in the purpose, the history, of the statute to show that that was so.

Specifically that section was not intended by Congress to supply jurisdiction and venue in tort suits; and certainly not in Bivens type actions which, in 1962, were not heard of, and it was nine years later--it was on June 21, 1971, that Mr. Justice Brennan's decision came down in Bivens, and it was new law and new application.

So the basic reasons that I believe the First Circuit and the D.C. Circuit have made a mistake, and that the Second Circuit is correct, is, A, the purpose of the statute is a single-theme purpose, and it doesn't include suing people for a million and a half in their pocketbooks, public officials, or a billion dollars in Rhode Island, where none of

them have ever been, against their pocketbooks, in Rhode Island in Colby.

And the history of the statute makes clear that it wasn't intended to apply to pocketbook suits.

And we also take the position that the language of the statute, that is, the Mandamus and Venue Act of 1962, the statute at large, that, read as a whole, as it must be, shows that this is--in the nature of a mandamus suit, it involves "in essence against the United States," and it doesn't involve Bivens type tort actions, pocketbook suits.

So that, when the statute is read in its full context, with realization of its purpose, and in the light of its legislative history, it becomes clear that Congress did not direct or intend a coverage of the Bivens type of actions.

Now, in Blackburn, I would like to point out one thing about Blackburn internally. Mr. Justice Rehnquist's question about Mr. Goodwin. Mr. Goodwin resides in Washington, D.C. He's sued by the civil rights bar in the Southern District of New York in Blackburn. He's also sued in another case there called Cole, and they treated them together. But he's sued twice, hit twice, like a shuttlecock, in New York.

Now, the District Court made a holding, which was not appealed, that there wasn't the slightest evidence connecting Goodwin to a conspiracy as alleged in New York. No evidence, no threshold evidence; therefore, the long arm

statute, he held, goes out.

However, the District Court Judge Haight found that 1391(e) did give the jurisdiction. Now there's the abuse. Not the slightest evidence under the long arm statute, but ah-hah, 1391(e), somehow or another, because perhaps of the climate of thinking today, can reach out and bring Goodwin in and make him go through motions to dismiss, discovery motions, and a harrassed life.

Now, it was that holding of the district court on 1391(e) that the panel reversed. They argued in March; they came down September 10 with their opinion, which is Exhibit A.

Now, I say that there are several things that show that pocketbook suits are not included by the intention of Congress in 1962.

The first is that Section 1391(e), which is found codified in the venue part of the federal rules, that that isn't the whole statute. The respondents pretend that it is separate, distinct, and that it was intended to be separate and distinct, but it was not. You look at the bill, boom-boom, Section 1, Section 2; you look at the Act, Section 1, Section 2; you look at the preferred sources, the reports of the House, the reports of the Senate, and they say, clearly, they're together, they're companion, one implements the other; they go together; the language of the second section reflects the language of the first section; the first section leads to the

second section.

As a matter of fact, without the second section, you couldn't operate the first section. They go together like a horse and carriage. And that was the holding of the Second Circuit, that it must be read together. And that wasn't the first time that a reputable court found that it had to be read together; Judge Friendly in Liberation News, in examining the history said, read it together. He said it, in haec verba, in Natural Resources Council against TVA, he said it has to be read together.

The Second Circuit has had some experience with the statute, and has seen the efforts of certain advocates to expand it to cover whatever situation arises. But I think it's important to note that it isn't just Judge Friendly in the Second Circuit that's examined this statute. It isn't Judge Mulligan that has examined this statute.

Also examining this statute has been this Court. And it's in the same year that this Court decided Bivens, and prior to that, this Court decided Schlanger against Seamans. And again there was--that was a habeas corpus action. The locale was Arizona. The young man seeking habeas corpus was in Arizona. The only problem was, and it's stated quite clearly by this Court--Mr. Justice Douglas --the sole question in the case is whether the district court for the district of Arizona had jurisdiction to entertain on the merits petitioner's

application for a writ of habeas corpus.

Now, Mr. Justice Douglas said that it was--unless the custodian, the necessary party, in other words, was within the jurisdiction of Arizona, they couldn't entertain the petition.

All right. The custodian was in Georgia. The superior officers, also alleged necessary parties, are in the District of Columbia. And it was argued, and Mr. Mel Wulf was a friend of the Court--more a friend of Mr. Schlanger--they argued that if the normal jurisdiction would not stretch to cover the custodians on some kind of Strait against Laird notion; that if it wouldn't stretch, then use 1391(e), and that's where the discovery was made that 1391(e) is a pretty good idea to grab jurisdiction over public officials.

And at that time, Mr. Justice Douglas held that the lack of jurisdiction was fatal, and that the 1391(e) would not apply.

Why wouldn't 1391(e) apply? This Court, with the Chief Justice sitting, Black, Brennan, White, Marshall and Blackmun joined Harlan, Jay and Kirkland in the result; Stewart, Jay dissented, without opinion. Mr. Justice Douglas said that 1391(a) was enacted to broaden the venue of civil actions which could have previously been brought only in the District of Columbia--only could have been brought in the District of Columbia.

Now, the Stafford case could not have been brought in the District of Columbia. Tort actions in 1962 and before could have been brought anywhere; they were not restricted. And that is a limitation on the kind of cases that can be used. And it also shows that 1391(e), as a venue statute, is not--does not cover all civil actions.

QUESTION: Well, there's another very good explanation why 1391(e) wasn't applicable in the Schlanger case, and that is, that 1391(e) by its own terms provides this venue, as it says, except as otherwise provided by law. And in the habeas corpus, it's limited by law to the venue of the custodial officer, isn't it?

MR. BROWN: But that isn't--doesn't make the difference, because the question is whether a government official--that would be the custodian--who was a government official, United States official, whether he could be reached in Georgia, or whether the Secretary of the Air Force could be reached in Washington, D.C. And it found that it did not, and that quotation of footnote 4 doesn't go to exceptions. It flatly states that, after looking at the history, that it doesn't apply to those suits that could not be brought in the District of Columbia, and that is significant. In fact, that is the recurrent theme going through the preferred sources, the Senate report and the House report.

I think that if you look at the purpose of this

legislation, you will see that it doesn't provide for pocket-book suits, whether they be for $1.5 million or $1 billion or $100,000. Take the House and Senate reports; both state what the purpose is. And I think everybody seems to jump over it, but it's important.

It says, the purpose of this bill--bill--is to make it possible to bring actions against government officials and agencies in U.S. District Courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the United States District Court for the District of Columbia.

Now, I also want to call Your Honors attention, in connectionwith purpose, to the House report that states unequivocally that the purpose of Section 1391(e), that's the second section, the purpose of 1391(e) was, quote, similar to that of--and then end quote--Section 1361, which is the first section. And then the report says--and I think it's highly significant, and this is at the Colby petition 91A--that the new venue provision was, and now I'm quoting, designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia, simply because Washington is the official residence of the officer or agency sued.

Now, what we have here is respondents and the court below turning the statute upside down. Instead of using the

statute to bring a suit locally, which could formerly have been brought only in Washington, D.C., respondents seek to bring an action in Washington, D.C., which could only have been brought locally.

MR. CHIEF JUSTICE BURGER: Mr. Peterson.

ORAL ARGUMENT OF DORIS PETERSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This is a civil rights damage action for perjury and conspiracy to cover up and commit perjury. It is not merely that the petitioners and Mr. Goodwin are charged with dissembling.

QUESTION: Well, the merits of this case aren't before us at all, are they?

MS. PETERSON: No--

QUESTION: The merits of this case aren't before us?

MS. PETERSON: No, Mr. Justice Stewart, the merits are not before the Court at this time.

QUESTION: For these purposes, it could be seven different kinds of an action, could it not?

MS. PETERSON: I'm sorry, Mr. Chief Justice?

QUESTION: It could be seven other different kinds of actions for the purposes of the legal question that's here?

MS. PETERSON: Yes.

As this Court has already been told, the significant development in this case since the last argument was the opinion of the Second Circuit in the Blackburn case.

Petitioners rely most heavily on that decision, but in a way, respondents rely on it also. We rely upon it as making absolutely clear the importance of considering the entire legislative history, and not merely part of it, in determining the scope of Section 1391(e).

For the only way the Second Circuit could have ruled as it did was by ignoring critical parts of the legislative history; that is the only way that one can conclude that Section 1391(e) does not encompass damages.

This Court is aware of the fact that three deputy attorney generals and a Justice Department spokesman addressed the--expressed themselves on the damage action issue. Three of them told Congress before the law was passed; and that Congress, interacting with and responding to the Department, selectively either adopted suggestions from the Department of Justice, changing the wording of one or the other of the statutes before it, or rejected the Department's suggestion.

The Justice Department was in repeated contact with Congress, trying to get Congress to exclude damage actions. What the representatives of the Department of Justice said, and the Congressional reaction thereto, is essential for a

meaningful analysis of Congress' intent, because their statements to Congress show that Congress was made fully aware of the damage issue while it was considering the proposed bill, and that Congress was fully aware that the proposed bill covered damage actions.

The Department of Justice tried to get Congress not to include damage action. It told Congress how to avoid covering damage action; what language to use to avoid damage actions. At least twice, Congress rejected the Department of Justice warnings about proposed language, and employed language that clearly covered damage actions.

Now we have the Second Circuit opinion, without a word, literally without a word, about the communications from the three deputy attorney generals. This is not applying legislative history--it is burying it.

That is what the Second Circuit did, and that is what petitioners would have this Court do.

An interesting thing about the Second Circuit opinion is that it noted that the Department of Justice representative, Mr.MacGuineas, had warned Congress at the hearings not to cover damage actions.

He did indeed. But the Second Circuit fails to mention that, after that warning, after Mr.MacGuineas told them that if they use the language, "under color of law," that they would be covering out-of-pocket suits, the bill was

redrafted by the House committee, and that exact language was inserted.

We start with the statute which, on its face, covers our case. A civil action certainly includes a damage action. Reading Section 1391(e) in terms of its legislative history does not mean reading the legislative history selectively, to ignore all of the portions of the legislative history which establish that Congress intended to cover damage actions, when it chose language for the statute that encompassed damage action, and which it had been told encompassed damage actions.

We--

QUESTION: Miss Peterson, you're of course defending the decision of the Court of Appeals for the District of Columbia circuit.

Do you think the First Circuit, which is the next case, likewise read the statute literally on its face? Do you think the First Circuit and District of Columbia Circuit's decisions are exactly alike?

MS. PETERSON: I think that there are slight differences between them, but I think that they both read the statute together with the legislative history.

Of course, the First Circuit had the benefit of the hearing, which the District of Columbia Circuit didn't have. Also, the First Circuit had the benefit of Mr. Katzenbach's

memorandum, which the District of Columbia Circuit didn't have, because neither of them had been revealed until after the District of Columbia decision.

QUESTION: I'm not quite clear, when you said the D.C. Circuit did not have the benefit of them, can you tell us why?

MS. PETERSON: Yes. Mr. Chief Justice, the--at the time of the argument and the decision before the District of Columbia circuit, no one knew of the availability of those hearings. The Justice Department presented them to the First Circuit about--I believe it was about three weeks before the argument in the Driver case, now the Colby case. Also the Katzenbach memorandum was presented at that time.

The Justice Department was in there representing petitioners, and they made a petition for rehearing to the D.C. Circuit, in which they lodged with the court the Katzenbach memorandum. They did not lodge the hearings. So the D.C. Circuit never saw those two documents.

QUESTION: But the First Circuit did exclude former officials, and the face of the statute would include them, would it not?

MS.PETERSON: Yes. We did not in this case have the issue of former officials. So that aspect--

QUESTION: I realize that.

MS. PETERSON: Yes.

QUESTION: But what I'm trying to suggest is that the First Circuit did not read the statute literally, like you say the District of Columbia should have and did.

MS. PETERSON: They excluded former officials, that's correct, and of course the Court did not grant cert on that issue.

QUESTION: Doesn't that have some bearing on whether damage actions were included? What was the Court's purpose in excising out, excluding, the former officials? Was it because there wasn't anything they could do in terms of mandamus-type relief or injunctive relief?

MS. PETERSON: The former officials were excluded, I believe, because they felt they were not included in the legislative history. But even a literal reading might exclude them. Because it says, "is an official." And all of our people were officials at the time that we brought this action; two of them have since transferred into other jobs. One is a United States District Judge. But they were officials. And it says--

QUESTION: Was the present tense the pivot on which the First Circuit excluded former officials?

MS. PETERSON: Yes, it--

QUESTION: The present participle, acting.

MS. PETERSON: Yes, at this point, the D.C. Circuit in another case, has also excluded former officials. But it

believes that--

QUESTION: Well, it's a little unfair to challenge you about the First Circuit, because you're not defending that position, you're--

MS. PETERSON: Yes.

QUESTION: --defending this--

MS. PETERSON: Oh--I'm sorry Mr. Justice Blackmun--I also have not worked on the issue of former officials, and have not really thought through that issue because of the fact that the Court did not grant cert on the issue.

If you want my opinion on that, I think former officials--

QUESTION: No, the significance of Mr. Justice Rehnquist's was, was literalism applied to the statute by the two circuits?

MS. PETERSON: Yes, but the statute does say, "is an official."

Reading Section 1391(e) in terms of its legislative history does not mean reading the legislative history selectively to ignore those portions of the legislative history that establish that Congress chose language for this statute that encompassed damage actions, and which, it had been told, would not encompass damage actions.

The Justice Department communications are vital to an understanding of the evolution of the law, because they

reveal that Congress was made aware of the damage actions, and deliberately acted to cover such suits in the language it selected, and in the language it rejected.

Obviously--

QUESTION: It could have eliminated that with just a few words, couldn't it?

MS. PETERSON: Yes, it could have, Mr. Chief Justice. It could have said--

QUESTION: Perhaps--

MS. PETERSON: --"except in damage actions." After it became aware of the problem. There was--

QUESTION: Well, it cuts the other way, too. The Congress could have made it expressly to include damage actions; it could have made it to include all types of actions, could it not?

MS. PETERSON: Yes, but Congress chose words for that statute which are the same as the words Congress chose for 1391(a) and (b), for example, which says, all civil actions. And "all civil actions," in those two statutes, clearly encompasses damage action.

And then when Congress got to 1361, it chose different language. It said, "in mandamus type actions." So Congress knew how to exclude damage actions if it wanted to. It knew how to draw a narrow statute. And it had warnings about the language, the warnings in the White letter, which

made a suggestion as to what language to use that would exclude damage actions.

And it's clear that Congress did not select that language. It chose language that the Justice Department spokesperson had told them would cover out-of-pocket cases. Obviously, respondents are not relying on the Katzenbach memorandum, standing alone. However, it was a culmination of--

QUESTION: The Katzenbach memorandum came after the statute was enacted, didn't it?

MS. PETERSON: Yes, it did, Mr. Justice Stewart. It came shortly after--

QUESTION: Shortly afterward.

MS. PETERSON: --the statute was enacted.

But the Katzenbach memorandum is a culmination of the interaction of Congress and the Department of Justice over the legislation during a period of 2-1/2 years. It was a final acknowledgement, by the Department of Justice, that it had failed in this Congress not to cover damage actions, and that a law had been passed which encompassed such actions.

On page 2--this is the memorandum--on page 2 of the memorandum, we have the President signing statement. This memorandum was sent to all the U.S. Attorneys around the country. It was divided into two sections. After setting forth what the statute--the two statutes were that were passed, and the signing statement, the first section deals

with the question of Section 1361 and how it only applies to ministerial duties, and does not apply to discretionary acts.

Then starting on page 6, it deals with Section 1391(e) and venue questions. And on page 7 is the acknowledgement that 1391(e) covers suits for damages against Federal officials, out-of-their-pocket suit. They were talking in this memorandum about libel and slander suits, because that's the kind of suit that Congress was concerned about. That's the kind of suits that were being talked about at the hearings. And that's the kind of suits that were available at that time.

QUESTION: The--in this case, do the plaintiffs live in the District of Columbia?

MS. PETERSON: None of the plaintiffs live in the District of Columbia.

QUESTION: So under which criterion of the statute was this suit brought?

MS. PETERSON: Where a defendant lives. Defendant Goodwin lived in the District of--

QUESTION: A defendant in the action?

MS. PETERSON: A defendant, yes.

QUESTION: And--I see.

MS. PETERSON: And in response to Mr. Justice Blackmun's earlier question, the case against defendant Goodwin is proceeding in the District of Columbia; depositions and discoveries have been done in that case in both the District of

Columbia and in Florida, and the case is nearing trial.

That is--

QUESTION: The statute was amended in 1976, was it not?

MS. PETERSON: Yes, sir.

QUESTION: Most importantly, to provide for service upon additional persons, but also--and I'm reading now from the First Circuit opinion in Driver against Helms case--"each" was changed to "a".

Which "each", do you remember?

MS. PETERSON: It used to be that each defendant was a federal officer. And several courts had interpreted that to mean that if you had nonfederal officials as defendants, you couldn't use the statute. And it was amended so that you could have non-federal officials as defendants, but you could use the special service provisions to get jurisdiction over the non-federal official.

QUESTION: So it's the first line of the first sentence of the statute that was amended?

MS. PETERSON: Yes.

QUESTION: Civil action in which each defendant is an officer, was changed to, a civil action in which a defendant is an officer?

MS. PETERSON: That's correct. And then there was the provision about how you serve--

QUESTION: Then the added provision?

MS. PETERSON: Yes.

QUESTION: Yes.

MS. PETERSON: It's interesting, because at the time of that amendment, three different statutes were amended. Congress was not dealing with only one statute; they were dealing with a variety of statutes. And it shows how the legislative history of more than one statute can be dealt with in one report.

And it--down here, the legislative history of 1361 and 1391 are dealt with in the same three reports, two from the House and one from the Senate. But it is possible to go through and find the themes of the difference between when they were talking about mandamus-type actions, which overlap both statutes, and when they were talking about damage actions, which dealt with only 1391(e).

And there is legislative history on both. And what the petitioners are trying to get us to do is to read 1391(e) as if it is encompassed by 1361, as if 1361 is referred to in the statute.

The Congress had a variety of purposes, and when Mr. Brown read to you some of their purposes, he read them inserting--without actually saying it--as if Congress was saying, only for this purpose. But the "only" was not in there.

Right before the law was passed, Senator Mansfield put the Senate report into the Congressional Record, and he talks about the purposes of this bill. And one of the purposes is damage action. The paragraph about damage action against officials is in all three reports.

QUESTION: The--Judge Mulligan's opinion in the Second Circuit inserted the word "only," too, didn't it?

MS. PETERSON: Yes, he did. But it was not in the material he was inserting it from. It's the way you have to read it--

QUESTION: Yes.

MS. PETERSON: --in order to include damage actions.

QUESTION: Looking at the intent of Congress in 1961 or whenever it was, doesn't the fact that the original bill included the word "each," and therefore contained the requirement that all defendants be government officials, lend some support to the notion that they were primarily thinking in terms of action which are, in substance, against the government?

Damage action would be more likely to be one that could have multiple defendants, some private, some public, wouldn't it?

MS. PETERSON: I think what they were--I don't think they really thought through the problem of third party defendants, because that would go against all the discussion that was before them about the damage actions. And what they

they were trying to do was to encompass into one suit all the various complaints that citizens might have because of the misworkings of government.

QUESTION: Well, they talk about two different kinds of damage actions that I remember, at any rate. One is the postman who goes home at night and gets into an automobile accident; and they clearly don't want to include that. And that's not under color of law. And the other is the libel and slander. And in that context, there would be at least a greater likelihood of private defendants being involved if you have say, you know, a libel slander that's republished and so forth, you'd have multiple defendants; but they didn't include the multiple defendants, which is sort of strange to me.

MS. PETERSON: I found no evidence in the legislative history that that problem was ever brought to their attention. And I think maybe if at the time of the legislation--

QUESTION: There really is not a great deal of discussion of private damage. There is reference to it, you're right. But there really isn't much discussion of this precise problem that I can find.

There is discussion of the facts of a damage action. And those two examples that I found. But do they discuss any other examples?

MS. PETERSON: Yes. There are about five crucial exampleswhich I can run through for you very briefly.

One, there was a letter from Deputy Attorney General Walsh--

QUESTION: No, I mean any other kinds of damage actions other than the postman case or the libel and slander case.

MS. PETERSON: I think it was a libel and slander type of case they were primarily concerned with. Because Barr v. Matteo--

QUESTION: Right.

MS. PETERSON: --had recently come down, and they were concerned with where the line was going to be drawn. You could bring those cases--

QUESTION: And Katzenbach couldn't defend these on the grounds of immunity or something, right. But they don't discuss any other kinds of damage actions other than those two that I noticed. Now maybe I'm just really inquiring as to whether I missed anything on that.

MS. PETERSON: No, I think all the concentration at that time was on the libel and the slander actions. Though--

QUESTION: Ms. Peterson, you mentioned a moment ago in response toa question from Justice Stevens a letter from Deputy Attorney General Walsh. And you've also relied in your briefs on a letter from Deputy Attorney General White,

and referred, I think, to a letter--a comment from Deputy Attorney General Katzenbach.

Did this bill have its genesis over a period of years? Because I take it the three Deputy Attorney Generals weren't all in office at the same time.

QUESTION: No, that's correct. It was first introduced in 1958, and no action was taken on it. Then it was reintroduced in 1960,and they had the House hearings on it. Finally it--the--then it was redrafted after the warning and with the language, and passed in that form by the House. Then it was essentially the Senate who solicited the comments from then-Deputy Attorney General White, who had replaced Mr. Walsh. And he sent in his comment at that point. A few months later, the Senate amended it on the basis of Mr. White's comments. And by that point, Deputy Attorney General Katzenbach was in office, and he wrote two letters to the House managers with his comments on it. His comments were only addressed to 1361. And then it was passed in 1962.

QUESTION: And then Deputy Attorney General Katzenbach wrote that memorandum to the district attorneys, right?

MS. PETERSON: And in between, a few days after he wrote to the floor managers of the House, he wrote to the President, suggesting that the President issue the signing statement. And as we now know, he sent him the very statement that the President actually issued.

QUESTION: And then he did, after the statute was enacted, sent another memo around, didn't he?

MS. PETERSON: Yes. Then he sent a memorandum to all U.S. Attorneys. The sequence of this shows the last communication we had from the Department of Justice about the damage issue is in the White letter, in which he tells them how to avoid damage actions, and they do not follow his advice, but leave the statute broad.

Then, as Deputy Attorney General Katzenbach got involved, it was clear that the problem that the Department of Justice was concerned about was a problem which had been raised in Mr. White's letter to them, which was the problem where Mr. White talked about the potential constitutional problem of separation of powers.

It was of great moment to the Department of Justice, this separation of powers problem, because they were talking about the exercise of discretion, and courts telling federal officials how to exercise their discretion. And this is in connection with 1361.

QUESTION: Ms. Peterson, particularly since this is re-argument, and we're talking just about two or three sentences, I know it can be repetitious, let me ask you about the first line of the first sentence of (e) with regard to the Defendant Stafford.

And "(e)" reads, a civil action in which each

defendant is an officer or employee of the United States, or any agency thereof, acting in his official capacity or under color of legal authority.

Now, Mr. Stafford--the grievance you have against Stafford, is when he was U.S. Attorney, is it not?

MS. PETERSON: That's correct.

QUESTION: Now, when you sued him, was he U.S. Attorney, or a U.S. District Judge?

MS. PETERSON: No, Mr. Justice Rehnquist, he was U.S. Attorney at the time. All of the defendants at the time that we sued them were still acting as officers of the United States.

QUESTION: In the capacity--in which they had been acting at the time that you claimed they violated your rights?

MS. PETERSON: Yes, all the petitioners were still in that capacity.

I want to very briefly run through the five steps in the legislative process which we feel are crucial to an understanding that damage actions were covered.

First there was a letter from Deputy Attorney General Walsh, which brought the damage action issue to the attention of Congress. He--

QUESTION: That was a previous coverage, wasn't it?

MS. PETERSON: Yes.

QUESTION: Yes.

MS. PETERSON: He didn't--

QUESTION: That was a previous Congress, wasn't it?

MS. PETERSON: Yes. That was the--

QUESTION: Yes. It was not the Congress that enacted this legislation?

MS. PETERSON: It was in 1960. That letter was in the hands of the House Judiciary Committee when it had its hearing. And he referred to the existence of damage actions; he didn't talk about what kind of damage actions, I don't know if he was talking about libel and slander. It appeared that he was talking about more than--different types of damage actions than just libel and slander, but he didn't specify. But he said that there were damage actions against federal officials for acts beyond the scope of their authority.

Then we had the transcripts of the hearings in which damage actions are talked about. Then we have Mr. MacGuineas telling them not to use "under color of law", because that will be out-of-the-pocket.

Then we have the House Committee redrafting the bill, putting in the language; and we also at that time, the House Committee did a report and talked about the problem, and suits against the federal officials seeking damages from them--not from the government, but from them. And that paragraph is included in all the reports.

Then we have the letter from Deputy Attorney General White, suggesting the language that they should use, alternative language that would avoid damage actions.

And finally, after the law is passed, we have the Katzenbach memorandum acknowledging that damage actions are covered.

QUESTION: Could you have sued Stafford under this--in this district after he became a district judge? Given the contents of your allegations on the merits?

MS. PETERSON: Could we sue him in the District of Columbia?

QUESTION: Yes.

MS. PETERSON: Not under the--I don't believe under the present interpretation of the law by the District of Columbia, that we could.

QUESTION: Because he's a former--

MS. PETERSON: Because then he'd be a former official.

QUESTION: Although he's a present official. He's certainly an officer of the United States, he's a United States District Judge.

MS. PETERSON: But he was not--would no longer be occupying the same office. But--

QUESTION: But the statute doesn't say, occupy the same office.

MS. PETERSON: I believe that that is one of the

issues that the Court didn't grant cert on, or was a hole left open in the Driver case. And we haven't had that issue in our case, but perhaps Mr. Wulf can address it.

Our position is that there isn't any inconsistency in the legislative history between the two lines of legislative history. In many respects, they are dealing with the two separate statutes, claims of confusion, meaninglessness, inconsistency, or whatever adjective is used, come only when one tries to brush off legislative history about damage actions, and ignore the fact that Congress was dealing with two separate issues, and two separate statutes at the same time.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Brown?

MR. BROWN: May I, Your Honor? Just a moment.

REBUTTAL ARGUMENT OF PETER M. BROWN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BROWN: The answer to Mr. Justice Rehnquist's question to Ms. Peterson is, no, could not bring, before 1962, an action of this kind.

QUESTION: And, in fact, if he'd been promoted from Deputy Attorney General, what would be the situation? If the suit was originally for actions as Deputy Attorney General, and later he'd been promoted? Would that be the same as going over to a district judgeship for these purposes?

MR. BROWN: Well, if the question is, before 1962, before 1962 actions in the nature of mandamus would have to be brought in the District of Columbia. If the action was a pocketbook case, a tort action, it would be brought locally.

QUESTION: But I mean after 1962.

MR. BROWN: After 1962, you cannot reach the petitioners in the District of Columbia; you cannot. Except if this Court upholds the D.C. Circuit.

QUESTION: But if you read the language literally, and uphold the D.C. Circuit, you can reach someone who has been promoted to an entirely different federal office.

MR. BROWN: You could arguably come to such a conclusion.

I would just like to point out that Ms. Peterson talks about unpreferred sources. Unpreferred sources--what the Department of Justice may have said or may not have said, they're not legislators. And what Katzenbach said afterwards, if he did say it, if he did write that memorandum, if he did sign it--I see no signature, I don't know who wrote the Katzenbach memorandum after the legislation was enacted.

These are unpreferred sources. The real source is the latest report, the Senate report. If Ms. Peterson had looked at the Senate report, she would see that on page 2785, which is also sometimes said to be page 1, purpose is written out.

And it says, "The purpose of this bill," comma, "as amended," is to make possible to bring actions against government officials and agencies in the United States District Courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the Unite d States District Court for the District of Columbia.

It's nothing else: That is the purpose of the bill - and of the statute.

And her suit does not come within that purpose. She also does not read to you from a preferred source where the Senate report is important because it came out just before the enactment, just a matter of weeks before the enactment. And it says: The bill, comma, as amended. And I want to point out that it was amended many times, and it goes back to the gestation period of five years. And this is the latest preferred source.

It says, the bill, as amended, is intended to facilitate review by the federal courts of administrative action, period.

Now, what has the Bivens-type action of these petitioners, none of whom live in the District of Columbia, and are trying to bring some people up from Florida to sue them in their pocket books for a million point five, what does that have to do with an administrative action?

If it honestly and truly is an administrative, it is, in essence, against the United States, and they may not dip in petitioners' pockets for their second mortgage and their tuition savings bank account.

They have to make up their minds. This is an administrative review, Mandamus and Venue Act, and nothing more. And the effort to extend it to pocketbook suits is an effort to put federal employees in a special disadvantaged class. It's to discriminate against them as you discriminate against nobody else in the United States.

Pick out the federal employees, and you say to them, "You can be sued in Nome; you can be sued in Maine; you can be sued anytime any plaintiff wants to sue you. And you have to go there. You have to bring your witnesses there. You have to bring your documents there. And if you're totally innocent, assuming, you will have two years of the worst years of your life."

And not only that, but you're sued in a multiplicity of suits. Colby, a resident of Maryland, sued in Washington, D.C., New York, Rhode Island. Kipperman v. McCone in California, he's sued. All on the same fact situation: mail opening. This is what happens; buffeted around.

Goodwin, you mentioned him, sued in New York, sued in Washington, D.C.

Now, the White letter--the White letter, Ms.

Peterson told this Court, left the statute broad after he wrote it. That's not so.

He said, it should be in the nature of mandamus to be limited. After that, it was amended. It was amended to be in the nature of mandamus. Under color of law, if you read the--

MR. CHIEF JUSTICE BURGER: I think your time has expired, Mr. Brown.

MR. BROWN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 12:01 o'clock, p.m., the case in the above-entitled matter was submitted.]