POSITION PAPER OF THE

LEGISLATION COMMITTEE

DIVISION IV, DISTRICT OF COLUMBIA BAR

REGARDING

S.2419

A BILL TO CHANGE THE VENUE REQUIREMENTS

FOR SUITS AGAINST THE UNITED STATES

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SUMMARY OF THE POSITION PAPER OF THE LEGISLATION COMMITTEE, DIVISION IV, D.C. BAR REGARDING S. 2419, A BILL TO CHANGE THE VENUE REQUIREMENTS FOR SUITS AGAINST THE UNITED STATES

Introduction

The Legislation Committee of Division IV of the D.C. Bar, which is concerned with courts, lawyers and the administration of justice, has studied the issues raised by S. 2419, a bill to modify the existing venue requirements for suits against the United States, codified at 28 U.S.C. § 1391(e), and the statutory provision covering changes of venue, 28 U.S.C. § 1404(a). The bill would change the law to require that cases against the United States be brought where the challenged government action "would substantially affect the residents" and that a change of venue could be sought on the basis that the federal action will have a "substantially greater impact" in another judicial district.

In the attached position paper approved and adopted by the Steering Committee of Division IV, the Committee concludes that S. 2419 should not be enacted. The bill would create logistical and financial burdens, both for private litigants and for the federal government, and would spawn additional threshold litigation concerning venue. These burdens are not justified, because the supporters of the bill have not made a case that the present system has produced abuse of the District of Columbia federal courts to

the detriment of local interests elsewhere. The Committee is of the view that the present system -- providing a choice of forums -- is more appropriate to accommodate the range of interests, including local impact, which are properly relevant to the issue of venue. Less dramatic changes in current law -- such as the state government notice requirements now part of S. 2419, and perhaps clarification of the rights of intervenors -- would satisfy the legitimate concerns raised by the bill's proponents. Finally, the Committee believes that the anti-Washington sentiment which underlies S. 2419 casts unfair and unwarranted aspersions upon the District of Columbia legal community and the federal bench of this city and is an inappropriate basis for the broad-brush changes in venue law reflected in S. 2419.

Discussion

Under current law, the issue of venue is determined on a case-by-case basis, and local interest is considered as one among a range of other factors relating to "practical problems that make a trial of a case easy, expeditious and inexpensive." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). All the factors now taken into account in assessing proper venue should be open for judicial consideration to avoid undue burden and cost for litigants (plaintiffs and the government) in cases where the burden of trying a case outside of Washington would outweigh the burden on those representing local interests

which might result from their participating in a proceeding in a Washington federal court.

Because local impact is a factor for consideration when a change of venue is sought, the present system contains a built-in check on the choice of a non-local forum. Attorneys must and do weigh heavily the local nature of a case in determining where to file it in the first instance, to avoid a costly and time-consuming venue battle.

Washington is often the most convenient and least costly forum for both public-interest and industry plaintiffs, the government and those representing local interests. The government officials responsible for the agency action are usually located here and can be subpoenaed to testify at trial; the relevant documentary evidence, the administrative record, is compiled and found in Washington and can be easily transported to the courthouse; and many public interest groups as well as industry trade associations maintain offices here. Furthermore, the current system requires an affirmative showing that local interests desire to participate before a plaintiff who wishes to litigate in Washington may be forced to incur the additional cost and inconvenience of trying his case in a distant forum.

Statistics maintained by the Administrative Office of the U.S. Courts, the Justice Department and the Council on Environmental Quality all reveal that the District of Columbia federal district courts do not have

a disproportionate share of even federal environmental cases, the category which is apparently of most concern to S. 2419's sponsors, but in fact have a small percentage of all such cases (see statistics cited at pp. 18-19 and Attachment D). Moreover, the particular cases most frequently cited by S. 2419's sponsors do not demonstrate the abuse of which they complain.

By requiring agency cases to be filed outside of Washington, S. 2419 will increase the cost and burden of litigation for both plaintiffs and the government. This is unwarranted because local fact-finding is not necessary or appropriate in most agency cases, which are generally decided on the basis of the administrative record or involve purely legal questions, such as whether an agency has acted within its statutory authority. In those cases where local fact-finding is important, the current law allows transfer to the federal court nearest to the relevant locality.

Besides being a convenient forum, Washington is also an appropriate forum in most agency cases because the issues involved have national implications. If they did not, those issues would not be the subject of federal law. The overwhelming emphasis of S. 2419 on local concerns sends the wrong signal to federal courts everywhere, which must be primarily concerned with the intent of Congress and with establishing consistent, nationwide standards for

federal regulations, and not with the regional desires of any particular group of local citizens.

S. 2419 will engender significant threshold litigation to determine the meaning of its vague operative language and, in turn, the proper venue in particular cases. Such litigation over a procedural matter clogs the courts, greatly delays resolution of cases, and makes litigation more costly. Furthermore, because the standard under S. 2419 is broad and because most federal programs affect a number of jurisdictions, the bill would increase the opportunity for forum shopping.

The proponents of S. 2419 evince a hostility to the Washington legal community which does a disservice to the federal bench and the bar of the District of Columbia and is not an appropriate basis for broad changes in venue laws. The federal courts in the District of Columbia Circuit have through experience developed an expertise in administrative law and the working of agencies. This expertise -- widely recognized by even federal courts elsewhere -- is one factor considered by litigants in deciding on an appropriate venue and enables them to obtain speedy resolution of even complex agency cases. Statistics from the Administrative Office of the United States Courts demonstrate that in most cases litigants get faster case disposition in the District of Columbia federal courts than in other circuits, particularly in the district courts.

The assertion of S. 2419's sponsors that federal judges in Washington are biased in favor of "rabid" environmentalists is not warranted; the practice of the federal courts here to scrutinize closely and vigilantly administrative records to determine if regulations have an adequate basis is commendable and not conduct which evinces a pro-regulation, big-government bias. It is also an approach which benefits all those challenging federal agency actions, whether businesses, public interest groups, or local interests.

The Washington bar also has developed an expertise in administrative law in general and in specific regulated industries in particular. Plaintiffs -- particularly where they are Washington-based -- who choose Washington counsel should not be denied the choice of the Washington federal courts, often a convenient and economic forum for them, because of a hostility to the Washington bar. Indeed, Washington lawyers are unlikely to suffer financially from S. 2419 and like measures; the impact will be on the non-renumerative, pro bono publico aspect of Washington practice. Washington lawyers have an exemplary record in this area, and venue-shifting legislation will make it prohibitively expensive in many instances for them to bring agency cases on behalf of groups and individuals unable to pay for legal services and unable to find elsewhere an equivalent number of counsel willing to invest the

considerable time and effort necessary to litigate these cases without legal fees. While curtailing public interest litigation may be the intent of the sponsors of S. 2419, we believe it is an unworthy motivation that runs counter to the tax-saving policy of private enforcement which Congress has incorporated into many environmental and other laws.

To the extent S. 2419 is a reaction to results reached by the District of Columbia federal courts in particular cases -- and the legislative materials indicate strongly that this is the case -- a broad change in venue law is not a wise or appropriate response. Congress has a much more focused alternative which it has exercised on numerous occasions: amend the substantive federal law to reverse the judicial construction with which it does not agree. This will lead to more considered legislation because the real issues will be squarely faced and debated. Measures like S. 2419, by contrast, create new and sometimes unforeseeable problems without disturbing the judicial precedent really at issue. For example, no analysis has been made of the practical consequences of venue-shifting legislation for federal court caseloads or the litigation process. It may well be that S. 2419 would greatly increase litigation in districts with few federal judges while the District of Columbia federal courts are underutilized.

Less dramatic measures than S. 2419 would avoid such adverse practical consequences of broad venue shifting and could adequately address any shortcomings of the present system of venue in allowing sufficient representation of local interests. For example, a mandatory notice provision for state attorneys general like that now contained in the bill may be appropriate; Congress could also consider clarification of the right of intervenors to move for a change of venue. This approach would insure that states with an interest in agency suits would be in a position to intervene early in the case and move for a transfer, if they so desired, but at the same time preserve the flexible, case-by-case analysis of practical considerations relating to cost and convenience which marks the current law of venue.

Conclusion

For all these reasons, as more fully explained in the accompanying report, the Legislation Committee urges that S. 2419 not be adopted.