FEDERAL VENUE FOR ALIENS: THE PRESUMPTION OF NONRESIDENCY

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.[1]
>
> Elihu Root, 1910.

The concept of a world where aliens and citizens are treated equally before the law is a noble one. Long after Secretary of State Root's observation, the United Nations was created and it formulated a commitment to the ideal of equal access to the courts of a country for citizen and alien alike, as set forth in article 7 of the Universal Declaration of Human Rights.[2] The problem of enforcing such a provision should not obscure the fact that every member nation of the United Nations has undertaken the duty to adhere to the letter and spirit of this law.[3]

The United States of America joined in this pledge and has generally treated aliens well with respect to their comparative rights before the courts of this country.[4] However, aliens do not enjoy equal rights under the federal venue law, Title 28 U.S.C. section 1391(d): "An alien may be sued in any district."[5] Section 1391(d) contrasts sharply with the general venue laws applicable to citizens of the United States: section 1391(a), "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose;"[6] and section 1391 (b), "A civil action

1. *The Basis of Protection to Citizens Residing Abroad*, 4 PROC. AM. J. INT'L L. 16, 21 (1910).

2. G.A. Res. 216, U.N. Doc. A/810 at 79 (1948).

3. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 34 (1950); J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 13 (1970).

4. Golomb, *Recognition of Foreign Money Judgments: A Goal-oriented Approach*, 43 ST. JOHN'S L. REV. 604, 607 (1969). The author states that courts in the United States generally give better recognition to foreign judgments than that given by other countries, with the exception of England.

5. 28 U.S.C. § 1391(d) (1970).

6. 28 U.S.C. § 1391(a) (1970).

wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."[7] The different standards applied to aliens and citizens under the federal venue laws do not reflect an abandonment of the commitment made in the Universal Declaration of Human Rights, but the United States has an obligation to fulfill the goals of the Declaration to the best of its ability and the present venue standards reflect less than a total commitment in that respect.

The United States has made an international commitment to improvement of the human condition by virtue of its membership in the United Nations organization and our courts have played a role in this commitment. The United Nations had just begun to function when the United States Supreme Court handed down its decision in *Oyama v. California* which struck down California's Alien Land Law.[8] Specific reference was made by the Court to the role which the United Nations would play in the operation of our municipal law: "this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all . . . ."[9]

The United States would be remiss in establishing a standard of treatment toward aliens without considering its international obligations and there is certainly a valid question as to whether section 1391(d) violates existing agreements. In its Treaties of Friendship, Commerce and Navigation with Japan[10] and Germany,[11] the United States specifically committed itself to provide "national treatment" in regard to access to its courts for Japanese and German nationals when they are within its borders.[12] National treatment is defined in both treaties as "treatment accorded within the territories of a Party upon terms no less favorable than

7. 28 U.S.C. § 1391(b) (1970).

8. 332 U.S. 633 (1948).

9. *Id.* at 673.

10. Treaty of Friendship, Commerce, and Navigation with Japan, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Treaty of Friendship with Japan].

11. Treaty of Friendship, Commerce, and Navigation with Germany, October 29, 1954, 7 U.S.T. 1839; T.I.A.S. No. 3593 [hereinafter cited as Treaty of Friendship with Germany].

12. Treaty of Friendship with Japan, art. IV, para. 1; Treaty of Friendship with Germany, art. VI, para. 1.

the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."[13] It is the thesis of this Comment that section 1391(d) falls short of the "national treatment" standard and is not consistent with article 7 of the Universal Declaration of Human Rights.

I. 28 U.S.C. § 1391 (d) APPLIED: POTENTIAL PROBLEMS

The federal venue law applicable to aliens[14] differs greatly from the general venue restrictions.[15] For example, in a case where federal jurisdiction is based solely upon diversity of citizenship, a United States citizen who is a citizen and resident of California can sue a United States citizen who is a citizen and resident of New York in the California federal district court where plaintiff resides, in the New York federal district court where defendant resides, or where the claim arose.[16] If the New York defendant happened to be an alien, the California citizen could lay the venue in any district of the United States.[17] On the other hand, if the alien sought to sue the United States citizen, he would be limited to two places: in the federal district in the state where the defendant-citizen resides (in this example California), or, where the claim arose.[18]

Practically speaking, section 1391(d) means an alien may be sued in any district where valid service of process can be made upon him.[19] Thus, the possibility of discrimination arises when an alien is served with process while temporarily in a state other than the state in which he resides when a federal action has been filed in that state. Venue could be properly laid in Alaska on the alien resident of New York because an alien may be sued in any district.[20] Since the Alaska federal district court would have subject matter jurisdiction, the alien would be bound to respond or risk a default judgment provided venue was laid there and he was served there. However, a United States citizen would not have to

13. Treaty of Friendship with Japan, art. XXII, para. 1; Treaty of Friendship with Germany, art. XXV, para. 1.

14. 28 U.S.C. § 1391(d) (1970).

15. 28 U.S.C. § 1391(a) (1970); 28 U.S.C. § 1391(b) (1948).

16. 28 U.S.C. § 1391(a) (1970).

17. 28 U.S.C. § 1391(d) (1970).

18. 28 U.S.C. § 1391(b) (1970).

19. *In re* Hohorst, 150 U.S. 653 (1893); Best v. Great Northern Ry. Co., 243 F. 789 (D. Mont. 1917).

20. 28 U.S.C. § 1391(d) (1970).

suffer the consequence of defending a suit away from his residence and not in the district where the claim arose or where the plaintiff resided, since he would be protected by section 1391(a) provided he made a timely objection to the improper venue.[21] The alien would be entitled to use section 1404(a) of the federal change of venue statute[22] under the above circumstances, but this would still necessitate the hardship of responding to plaintiff's suit in the distant forum. The mere fact that an alien might have a remedy does not justify the continued existence of a discriminatory law.

It is interesting to note that section 1391(d) coupled with section 1404(a) creates the possibility of reverse discrimination against United States citizens. Section 1404(a) provides for transfer to a more convenient forum in "any other district or division where it might have been brought."[23] Since an alien can be sued in any district, he would appear to be within his rights in seeking transfer to any federal district. Thus, the California citizen who sued him in Alaska might be forced to respond in Maine or Florida if the alien was successful in having the case transferred. It seems only fair that an alien should be able to make full use of his rights under section 1404(a) if the United States citizen can take unfair advantage of an alien's predicament under section 1391(d). This alternative would never be necessary, however, if resident aliens were not arbitrarily discriminated against under section 1391(d).

Section 1391(d) embodies the long-standing rule in the United States that an alien is presumed not to reside in any district for venue purposes.[24] Since venue was based upon citizenship or residence,[25] it was concluded that aliens could be sued wherever valid service of process could be made.[26] This has been the weight of authority and was so recognized when section 1391(d) was enacted in 1948. This basic theory was also reinforced by the fact that prior to 1948 the federal statute for suits based upon diversity of citizenship did not provide for suits involving aliens.[27]

---

21. FED. R. CIV. P. 12(h)(1).

22. 28 U.S.C. § 1404(a) (1970).

23. *Id.*

24. Prudencio v. Hanselmann, 178 F. Supp. 887 (D. Minn. 1959); Best v. Great Northern Ry. Co., 243 F. 789 (D. Mont. 1917).

25. Act of September 24, 1789, ch. 20, para. 11, 1 Stat. 73, 79.

26. *In re* Hohorst, 150 U.S. 653 (1893); Best v. Great Northern Ry. Co., 243 F. 789 (D. Mont. 1917).

27. Act of March 3, 1887, ch. 373, para. 1, 24 Stat. 552-53, "[W]here the

For those aliens who are in the United States briefly and do not maintain a residence here, the present venue statute may be appropriate. However, if the goal of equal protection for all before the law is to be achieved, venue should be restricted even where nonresident aliens are concerned. For example, a more reasonable law could provide that non-resident alien defendants are subject to suit only where the claim arose or where the plaintiff resides. However, there is no valid governmental interest for permitting venue to be laid in any district when an alien has actually established a residence in the United States. It seems logical and necessary, therefore, to differentiate between venue requirements for resident and non-resident aliens. This would not be a major problem since it merely involves proof of residence.

II. THE BRUNETTE DECISION: PERPETUATION OF THE PRESUMPTION

In the recent case of *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*,[28] the United States Supreme Court echoed the line of decisions based upon the presumption that aliens do not reside in any district for venue purposes. A British Columbia corporation was charged with patent infringement in the United States District Court of Oregon by an Alabama corporation doing business in Oregon. The complaint was dismissed on the ground of improper venue.[29] The District Court determined that section 1400(b) of the United States Code[30] was the exclusive provision governing venue in patent infringement litigation. Section 1400(b) provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.[31]

The Canadian corporation did not "reside" in Oregon because section 1400(b) makes the residence of a corporation its place of

---

jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant . . . ."

28. 406 U.S. 706 (1972).

29. Brunette Machine Works Ltd. v. Kockum Industries Inc., Civil No. 69-42 (D. Ore. Feb. 20, 1969).

30. 28 U.S.C. § 1400(b) (1948).

31. *Id.*

incorporation; nor did the defendant have a regular place of business in Oregon even though the infringements were claimed to have occurred there. The United States Court of Appeals for the Ninth Circuit reversed the District Court on appeal[32] by holding that section 1391(d) applies to aliens in all cases.

The Supreme Court affirmed the Circuit Court opinion and cited the development of federal alien venue law in rendering its decision.[33] Section 1391(d) has its origins in the Judiciary Act of 1789[34] which implied that aliens would be subject to suit in any district. Although the general venue provisions referred to "inhabitants," this was not meant to include aliens.[35] The Judiciary Act was later revised in 1875 and the word "person" was substituted for "inhabitant."[36] Several years later *In re Hohorst*[37] held that this revision was not meant to be a substantive change of the law and, therefore, aliens were not brought within the general venue provisions. The Supreme Court based its decision on the presumption which remains the law today, that aliens do not reside in any district for venue purposes.

It is difficult to avoid the conclusion that the Court in *Hohorst* was well aware of the deficiencies inherent in the presumption that aliens do not reside in any district of the United States. Even more significant is the fact that *Hohorst* was recently examined by the Court in *Brunette* and the presumption was again given endorsement. The Court in *Brunette* cited two reasons which were the basis of the decision in *Hohorst*; the second indicates the point that both courts must have been aware of the inaccuracy of their presumption.

> Second, and perhaps more important, to hold the venue statutes applicable to suits against aliens would be in effect to oust the federal courts of jurisdiction in most cases, because the general venue provisions were framed with reference to the defendant's place of residence or citizenship,

---

32. 442 F.2d 420 (9th Cir. 1971).

33. 406 U.S. 706 (1972).

34. Act of September 24, 1789, ch. 20, para. 11, 1 Stat. 73, 79: "[N]o civil suit shall be brought . . . against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found. . . ."

35. *In re* Hohorst, 150 U.S. 653, 659-62 (1893).

36. Act of March 3, 1875, ch. 137, para. 1, 18 Stat. 470.

37. 150 U.S. 653 (1893).

and an alien defendant is by definition a citizen of no district.[38]

The significance of this statement is that while the general venue provisions were said to be based upon either the defendant's place of residence or citizenship, the Court then stated merely that an alien is by definition a "citizen" of no district, conspicuously failing to indicate whether or not and alien may be a "resident" of any district.

The Court's language in *Hohorst* indicates that it may have chosen to sidestep a very difficult question when rendering its decision. In *Brunette*, the Court failed to criticize the faultiness of the *Hohorst* logic. Section 1391(d) may have been appropriate for the circumstances in *Brunette* but this does not excuse the present Court for failing to confront the problem and for endorsing such an inaccurate presumption. The language in *Brunette* implicitly recognized the need to distinguish between resident and nonresident aliens in federal venue cases.

The Court in *Brunette* offered a somewhat paradoxical rationale for its adoption of the reasoning in the *Hohorst* decision: "the venue provisions are designed not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum."[39] According to the Court's language, given the presumption that aliens do not reside in any district, the law must be that aliens can be sued in any district or else federal courts will lose jurisdiction. It is submitted that to require an alien resident to respond in any district at the whim of the plaintiff fails to consider the "convenience" of the alien.

III. CONSTITUTIONALITY OF SECTION 1391(d)

Although the fourteenth amendment does not apply to federal statutes, the federal government is not allowed to discriminate merely because it is not bound by an equal protection clause.[40] The Supreme Court focused upon the fact that the fifth amendment lacks an equal protection clause in *Bolling v. Sharpe*,[41] which struck down the District of Columbia's public

38. Brunette Machine Works, Ltd. v. Kockum Industries Inc., 406 U.S. 706, 709 (1972).

39. *Id.* at 710.

40. Bolling v. Sharpe, 347 U.S. 497 (1954).

41. *Id.*

school segregation, where it stated that "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."[42] The Court went on to say:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection" of the laws is a more explicit safeguard of prohibited unfairness than "due process of law", and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[43]

In accordance with the reasoning in *Bolling*, the same standards applied in state cases involving the fourteenth amendment equal protection clause should be carried over to federal equal protection problems and, specifically, to the statute under discussion, section 1391(d).

In the recent United States Supreme Court case of *Graham v. Richardson*,[44] the Court considered an Arizona welfare statute which conditioned benefits on United States citizenship, or fifteen years residence in the United States. For the first time, the Court applied strict judicial scrutiny to alien rights based upon the "inherently suspect"[45] nature of the classification in holding that the statute violated the fourteenth amendment equal protection clause.[46] Thus, aliens joined company with such other subjects of classification as race and poverty under this high standard of review. It is significant to note that the Court could have decided the case on the grounds that the statute violated the fundamental right to travel[47] in that it tended to influence aliens against moving to Arizona. Instead, the Court chose to confront the classification and held that classifications based upon alienage are inherently suspect.

Now that classifications affecting aliens are inherently suspect, the question remains whether there is a compelling govern-

42. *Id.* at 500.
43. *Id.* at 499.
44. 403 U.S. 365 (1971).
45. Bolling v. Sharpe, 347 U.S. 497 (1954).
46. Graham v. Richardson, 403 U.S. 365 (1971).
47. United States v. Guest, 383 U.S. 745, 757-58 (1966).

mental interest which could justify the continued existence of section 1391(d). This path of logic leads back to the presumption that aliens do not reside in any district for venue purposes. Until this presumption is discarded, it will remain as the justification for section 1391(d) and, presumably, the "compelling state interest" standard will be satisfied.

IV. CONCLUSION

The present federal policy toward alien venue is based upon a presumption which has withstood challenges throughout the history of this country. It is time that the federal courts, or Congress, direct their attention to a very real question which is implicit in the presumption, what is to be done with the aliens who do in fact "reside" in the United States? Although it would be preferable that even non-resident aliens receive better federal venue treatment, certainly resident aliens do not deserve the potential burden placed upon them by section 1391(d). Concurrent with the inconvenience to the alien, constitutional and international issues raised by section 1391(d) must be answered.

John M. Lefler