

10-1-1978

## Aliens under the Federal Venue Statute

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### Recommended Citation

Hyder, Syed I. (1978) "Aliens under the Federal Venue Statute," *North Carolina Central Law Review*: Vol. 10 : No. 1 , Article 13.  
Available at: <https://archives.law.nccu.edu/ncclr/vol10/iss1/13>

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## Aliens Under The Federal Venue Statute

The United States is committed to providing its citizens and aliens with equal protection of the law and equal access to its judicial tribunals. But the federal venue provision<sup>1</sup> significantly discriminates against aliens by denying them the protection of venue laws; it subjects aliens to the possibility of defending suits wherever they can be found in the United States.<sup>2</sup> Traditionally, federal venue laws have been based on citizenship, inhabitation and residence.<sup>3</sup> There is a long-standing presumption in the United States that an alien does not reside in any district.<sup>4</sup> Therefore, venue of a suit against an alien may lie in any district where the alien is subject to service of process.<sup>5</sup>

Prior to 1887, discrimination against aliens was not significant, because general venue provisions allowed all civil suits to be brought in any district where the defendant was “an inhabitant, or in which he [could] be found.”<sup>6</sup> Discrimination against aliens, under venue laws, began in 1875 when a significant expansion of federal jurisdiction necessitated the “narrowing of” the venue statute so that people would not be inconvenienced by having to defend suits anywhere they could be found. In 1887, Congress deleted the language “where he shall be found” from the venue statute and provided that:

No civil suits shall be brought in any district court *against any person* by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or the defendant.<sup>7</sup>

Except for the deletion of the language “where he shall be found,” the statute remained the same as it was written in the 1875 revision of the Judiciary Act.<sup>8</sup> Although Congress did not specifically mention venue in suits against aliens in the 1875 revision of the Judiciary Act, it substituted the phrase “suits against any person” for “suits against inhabitants of the United States” in describing the suits subject to the limitation of the venue provisions.<sup>9</sup> This was a clear indication of Congress to extend the protection of the venue provisions to aliens. However, when the Supreme Court, in 1893, was faced with reconciling this statute with the long-standing presumption of the nonresidence of aliens,<sup>10</sup> the Court failed

1. 28 U.S.C. § 1391 (1948).

2. In *Re Hehorst*, 150 U.S. 653 (1893); *Brunette Machine Works Ltd. v. Kockum Industries Inc.*, 406 U.S. 706 (1972).

3. Act of September 24, 1789, Ch. 20, Section 11, 1 Stat. 73, 79; Act of March 3, 1875, Ch. 137, Section 1, 18 Stat. 470.

4. *See* cases cited in note 2 *supra*.

5. *Id.*

6. Act of September 24, 1789, Ch. 20, Section 11, 1 Stat. 73, 79.

7. Act of March 3, 1887, 24 Stat. 552 as corrected by the Act of August 13, 1888, 25 Stat. 433 (emphasis added).

8. Act of March 3, 1875, Ch. 137, Section 1, 18 Stat. 470.

9. *Id.*

10. In *Re Hehorst*, 150 U.S. 653 (1893).

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to recognize the significance of the change in language. If a presumption of non-residence was valid, then the Court would have been correct in stating that "[t]o construe the provisions as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens and close them to citizens against aliens."<sup>11</sup> The Court however, failed to examine the validity of the presumption and determined that the change in language was not substantive. The Court held that Congress did not thereby bring suits against aliens within the scope of the venue laws.<sup>12</sup>

*In re Hehorst* has been repeatedly reaffirmed without examination of the presumption of the nonresidence of aliens.<sup>13</sup> Two years after *In re Hehorst*,<sup>14</sup> and despite the discrimination against aliens inherent in the principle announced there, the same Court declared that a foreign judgment would be recognized in the United States only if the judgment was rendered under a system of jurisprudence likely to insure an impartial administration of justice between the citizens of its own country and those of other countries.<sup>15</sup>

In 1948, Congress gave statutory recognition to *In re Hehorst* and the presumption of the nonresidence of aliens, by enacting 28 U.S.C. § 1391(d), which reads: "An alien may be sued in any district." In contrast, the same venue provision provides that a civil action against a citizen, based on diversity of citizenship, may be brought "only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose."<sup>16</sup> Where the action is not based solely on diversity of citizenship, it may be brought "only in the judicial district where all defendants reside, or in which the claim arose."<sup>17</sup> Therefore, an alien may never sue a citizen in a district where he has, for all practical purposes, established a residence unless it also happens to be the place where all defendants reside or the claim arose; an alien may be sued wherever he can be served with a valid process.<sup>18</sup>

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 actually resides, and a federal action has been filed in that state. since an alien may be sued in any district,<sup>19</sup> venue may properly lie in a district court in New Mexico against an alien resident of Maine. If the alien is sued in New Mexico, he may be compelled to defend the suit in that state or face a default judgment. A citizen however, is protected by the venue provision;<sup>20</sup> venue will not lie in any district other than the district where he resides or where the claim arose.<sup>21</sup>

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11. *Id.* at 660.

12. *Id.*

13. *Keating v. Penn Co.*, 245 F. 155 (6th Cir. 1917); *Brunette Machine Works Ltd. v. Kockum Ind. Inc.*, 406 U.S. 706 (1972).

14. 150 U.S. 653 (1893).

15. *Hilton v. Guyot*, 159 U.S. 113 (1895).

16. 28 U.S.C. § 1391(a) (1948).

17. 28 U.S.C. § 1391(b) (1948).

18. *See Brunette Machine Works Ltd. v. Kockum Ind. Inc.*, 406 U.S. 706 (1972).

19. 28 U.S.C. § 1391(d) (1948).

20. *See note 16 supra.*

21. *Id.*

Some relief is provided by the change of venue provision, which states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."<sup>22</sup> The controversy over the weight to be attached to different factors in determining whether to order a transfer in a particular case has given rise to a veritable flood of litigation.<sup>23</sup> "Probably no issue of civil procedure gives rise to so many reported decisions, year after year, as does this seemingly simple statute."<sup>24</sup> Even if the alien is ultimately successful in transferring the suit to another district, in order to seek the transfer he is compelled to answer the suit initially in the district where it was originally filed. Additionally, since the suit must be transferred, if at all, to a district or division "where it might have been brought," a citizen defendant may seek transfer to the district of his residence; but an alien defendant may never seek transfer to any district other than the district of defendant's residence or the district where the claim arose.<sup>25</sup> *A fortiori*, since a suit against an alien "might have been brought" in any district, it may be transferred to any district.<sup>26</sup>

It is the thesis of this comment that such discrimination against aliens, at least so far as it concerns individual permanent resident aliens, is not only in violation of the principles of international law and treaty obligations of the United States, but is also inconsistent with the constitutional policy of affording equal justice under law to all persons within the jurisdiction of the United States.

### I. REASONS BEHIND § 1391(d)

Section 1391(d), which applies equally to alien individuals and alien corporations, was enacted to give "statutory recognition to the weight of authority concerning a rule of venue as to which there had been a sharp conflict of decisions."<sup>27</sup> According to the weight of authority referred to above, aliens were not within the scope of either the general venue statute or the special venue statute concerning patent infringement suits.<sup>28</sup> At issue in the conflicting decisions was whether the provisions of the special venue statute for patent infringement suits were exclusive of the general venue statute.<sup>29</sup>

Prior to 1893, patent infringement suits were generally regarded as subject to the general venue statute.<sup>30</sup> But in 1893, the Court announced that the general venue statute was intended to apply only to that part of the federal jurisdiction which was concurrent with state court jurisdiction, and was not intended to

22. 28 U.S.C. § 1404(a) (1948).

23. C. WRIGHT, LAW OF FEDERAL COURTS 186 (3rd ed. 1976).

24. *Id.*

25. See 28 U.S.C. § 1391(d), § 1404(a).

26. *Keating v. Penn. Co.*, 245 F. 155, 160-61 (6th Cir. 1917).

27. Reviser's Note, Judicial Code, 28 U.S.C. § 1391 (1948).

28. *Sandusky Foundry & Machine Co. v. DeLavand*, 251 F. 631, 632 (6th Cir. 1918); *Keating v. Pennsylvania Co.*, 245 F. 155, 160 (6th Cir. 1917).

29. *Sandusky Foundry & Machine Co. v. DeLavand*, 251 F. 631 (6th Cir. 1918); *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

30. *Chafee v. Hayward*, 20 How. 208, 215-16 (1858).

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apply to patent suits which were entrusted exclusively to the federal courts.<sup>31</sup> The apparent effect of that decision was that *all* patent infringement suits, against both citizens and aliens, could be brought in any district.<sup>32</sup> This generated great confusion in the lower Courts. Congress then responded by enacting a new special venue statute<sup>33</sup> which permitted patent infringement claims "to be heard only in the district where the defendant was an inhabitant, or in the district where the defendant committed acts of infringement *and* also maintained a regular and established place of business."<sup>34</sup> Thus the Congress put such cases "in a class by themselves, outside the scope of general venue legislation."<sup>35</sup>

The new special venue statute generated new problems concerning patent infringement suits against aliens. The Supreme Court had determined that venue of patent infringement suits was exclusively governed by the special venue statute for such actions, independent of the general venue statute.<sup>36</sup> This holding permitted the construction that alien corporations were not inhabitants of the United States, did not have a regular and established place of business in the United States, and could not be sued in any federal district court.<sup>37</sup> Also, since jurisdiction of patent infringement suits was entrusted exclusively to federal courts,<sup>38</sup> such alien corporations conceivably could assert that such units could not be brought against them even in the state courts. Such a construction of the special venue statute in patent infringement suits would prohibit citizens from suing aliens anywhere in the United States, but allow aliens to sue citizens, subject only to the restrictions of the venue provision. In order to resolve this new problem, the courts, relying on the old presumption of the nonresidence of aliens, held that an alien was not within the scope of the venue statutes,<sup>39</sup> and therefore he could be sued anywhere in the United States. Thus, alien corporations were subject to the jurisdiction of the United States courts.

This rule may be justified by the underlying policy considerations that an alien corporation could otherwise "flood this country with merchandise known by it to infringe and escape responsibility merely because it did not maintain a regular business here."<sup>40</sup> Since alien corporations prefer to conduct their business in the United States through agents, they neither reside nor maintain a regular and established place of business in any federal district.<sup>41</sup> But the statutory

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31. In *Re Hehorst*, 150 U.S. 653, 661-62; *See also*, *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

32. *Supra* note 18, at 712.

33. 29 Stat. 695 (1897) (codified at 28 U.S.C. § 1400(b) (1948) ).

34. *Supra* note 18, at 712 (emphasis added).

35. *Id.*

36. *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 567 (1942). *See also* *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228, (1957); *Brunette Machine Works Ltd. v. Kockum Ind. Inc.*, 406 U.S. 706 (1972).

37. *See* *United Shoe Machine Co. v. Duplessis Co.*, 133 F. 930 (1st Cir. 1904).

38. *See* *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

39. *See* *United Shoe Machine Co. v. Duplessis Co.*, 133 F. 930 (1st Cir. 1904); *Wind River Lumber Co. v. Frankfurt Marine, Accident and Plate Glass Ins. Co.*, 196 F. 340 (9th Cir. 1912).

40. *Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Therapeutici*, 278 F. Supp. 148 (S.D.N.Y. 1967).

recognition of the rule, 28 U.S.C. § 1391(d), did not limit its applicability to such corporations. The statute is equally applicable to individual aliens who are in the United States temporarily, individual aliens who are in the United States with a view to becoming citizens, and political refugees who have severed all connections with their country of origin. These individuals share equally with citizens in the resources of the country, contribute to the economic welfare of the states in which they live, and may be called to serve in the armed forces of the United States.<sup>42</sup> They are subject to the burdens and have a right to enjoy the benefits of residence in the United States. An alien corporation may acquire citizenship simply by incorporating in the United States.<sup>43</sup> An individual alien however, may not apply for citizenship until he or she has resided in the United States for at least five years.<sup>44</sup> Whereas it may justifiably be said that an alien corporation is not a resident of any district, and therefore does not come within the scope of the language of the venue statute, the same reasons do not hold true in applying the rule to individuals.

## II. SECTION 1391(d) UNDER INTERNATIONAL STANDARD OF JUSTICE

The ancient method of *marque and reprisal*<sup>45</sup> allowed aliens to seek redress of their grievances in foreign territories by force. The Law of Nations, which superseded *marque and reprisal*, was based principally on the assumption that "justice will be as impartially administered to aliens as it is to the subjects of that Prince, in whose court the matter is being tried."<sup>46</sup> The United States itself has sought protection under this principle of equality. When the North American colonies achieved their independence from Great Britain they faced a hostile European commercial practice which discriminated against American traders in European ports by collecting more imposts from American ships than European ships.<sup>47</sup> The colonies then signed treaties with the foreign nations guaranteeing equal treatment to aliens and citizens, particularly in the matters of commerce and navigation.<sup>48</sup>

Beginning with the American treaty with Belgium and Sicily in 1848, protection of person and property of aliens was specifically mentioned in the treaties, and that protection was provided in comity with nationals. Typical of such treaties was the treaty with Italy in 1871 which provided: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their person and property and shall enjoy in this respect the same rights and privileges as are or shall be

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41. *Id.*

42. See notes 85 through 92 *infra*.

43. See *Princeton Min. Co. v. Butte First National Bank*, 7 Mont. 530, 19 P. 210 (1888); *Kathleen Citrus Land Co. v. City of Lakeland*, 124 Fla. 659, 169 So. 356 (1936).

44. 8 U.S.C. §1427 (a).

45. SOHN & BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 23-25 (1973).

46. E. SOTAN, *The Silesian Loan and Fredrick the Great*, in *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 26 (Sohn & Buergenthal ed. 1973).

47. GIBSON, *ALIEN AND THE LAW* 20 (1940).

48. *Id.* at 21.

granted to natives.”<sup>48</sup> More recently, in its treaties of Friendship, Commerce and Navigation treaties with Japan and Germany, the United States is committed to provide “national treatment” to Japanese and German nationals in their access to the judicial tribunals of the United States.<sup>50</sup> “National treatment” is defined in the treaties as “treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein in like situations to national companies, products, vessels and other objects, as the case may be, of such Party.”<sup>51</sup>

In addition to its treaty obligations, by committing itself to uphold the international standard of human justice in several international declarations on human rights, the United States is obligated to assure that “[e]very person may resort to the courts to insure respect for his legal rights,”<sup>52</sup> that “[e]veryone is entitled to full equality to a full and fair public hearing, by an independent and impartial tribunal in the determination of his rights and obligations,”<sup>53</sup> and that “all are equal before the law and are entitled without any discrimination to equal protection of the laws.”<sup>54</sup>

By denying aliens equal access to the judicial tribunals, the federal venue statute significantly compromises the effectiveness of the international guarantees of the United States. It has been stated:

The right to protection of person and property carries with it the right to equal treatment in tribunals charged with its protection. Moreover it is a violation of international law if a state, in peace time, refuses or limits juristic protection of aliens either in its courts or at the hands of its administrative officers. In the matters of administration and judicial procedure, nationals of foreign states are by virtue of international law assimilated, in principle, to nationals.<sup>55</sup>

The effects of the presumption of nonresidence of aliens, for venue purposes, are not consistent with the United States’ commitments<sup>56</sup> to uphold the international standard of human justice found in several international declarations on human rights.<sup>57</sup>

49. *Id.* at 22.

50. Note, *Federal Venue for Aliens: The Presumption of Non-Residency*, 3 CALIF. W. INTER’L L.J. 417 (1972-73).

51. *Id.* at 418.

52. *American Declaration of the Rights and Duties of Man*, Ch. 1 Art. XVIII (1948), in BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (Sohn & Buergenthal ed. 1973).

53. UNITED NATIONS GENERAL ASSEMBLY 1948, *Universal Declaration of Human Rights*, Art. 10, in BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 73 (Sohn & Buergenthal ed. 1973).

UNITED NATIONS GENERAL ASSEMBLY 1948, *Universal Declaration of Human Rights*, Art. 10, in BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 73 (Sohn & Buergenthal ed. 1973).

54. *Id.* Art. 7.

55. *Supra* note 7, at 18.

56. *Supra* note 18, at 712.

57. *Id.*

## III. CONSTITUTIONAL INFIRMITY OF SECTION 1391(d)

Aliens, as a class, have always enjoyed an important status in the United States. From its inception, the United States has welcomed and drawn strength from the immigration of aliens.<sup>58</sup> The Declaration of Independence indicates that one of the causes of the American Revolution was the fact that England had hindered free immigration into the colonies.<sup>59</sup> As long ago as 1886, the U.S. Supreme Court brought aliens within the protection of the fourteenth amendment's directive that a state must not "deny to any person within its jurisdiction the equal protection of the laws."<sup>60</sup> However, until a few decades ago, rights and privileges of aliens were not fully recognized in the United States. The rule denying protection of venue laws to aliens on which section 1391(d) stands, acquired prominence in the days when discrimination against aliens was held to be constitutionally permissible on the slightest pretext of a supposed state interest.<sup>61</sup>

More recently, the Supreme Court significantly expanded the scope of the guarantees of the equal protection clause of the fourteenth amendment to aliens. The Court concluded:

Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular minority" (See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)) for whom such heightened judicial solicitude is appropriate.<sup>62</sup>

This constitutional policy has been repeatedly reaffirmed by the Supreme Court in its more recent pronouncements,<sup>63</sup> and the Court has consistently emphasized that a state must justify the use of a suspect classification by showing that "its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguard of its interest."<sup>64</sup>

In some of the alienage cases brought under the equal protection clause, the Supreme Court appears to have adopted a less demanding standard of review

58. *In Re Griffith*, 413 U.S. 717, 719 (1973).

59. PRESIDENT'S COMMISSION ON IMMIGRATION, *America a Land of Immigrants*, in IMMIGRATION AS A FACTOR IN AMERICAN HISTORY 202 (Handlin ed. 1962).

60. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

61. The Supreme Court validated a state statute denying pool room licenses to aliens, stating: "It is enough for present purposes that the ordinance in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment." *Clarke v. Deckenback* 274 U.S. 392, 397 (1927); Validating a state statute which disqualified aliens from taking or holding interest in land the Court held that the fourteenth amendment protects only "against arbitrary and capricious or unjustly discriminatory actions of the state . . . but it does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution." *Terrace v. Thompson*, 263 U.S. 197, 216-17 (1923).

62. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

63. *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *In Re Griffith*, 413 U.S. 717 (1973).

64. *In Re Griffith*, 413 U.S. 717 (1973) (footnotes omitted).

than strict scrutiny, examining the nature of the state's interest.<sup>65</sup> But the emphasis is on the nature of the state's interest, and it is not clear whether the Court is defining the circumstances requiring a less demanding review, or simply indicating that the nature of the state's interest may be so compelling as to withstand strict scrutiny.<sup>66</sup> In *Sugarman v. Dugall*,<sup>67</sup> which used strict scrutiny to invalidate a state statute excluding aliens from competitive civil services, the Court announced that if the state barred aliens from holding "state elective or important non-elective, executive, legislative, and judicial positions" in which persons participate directly in the formulation, execution, or review of broad public policy, such exclusion would be scrutinized under a standard less demanding than that normally accorded classifications involving 'discrete and insular' minorities.<sup>68</sup> Recently, the Court used the *Sugarman* analysis when, while emphasizing that a "[p]olice officer very clearly falls within the category of 'important non-elective . . . officers who participate directly in the . . . execution . . . of broad public policy,'"<sup>69</sup> the Court validated a New York statute excluding aliens from police jobs, under a less demanding scrutiny generally applied for the review of states' discretionary functions.<sup>70</sup> Emphasizing the importance of the state's interest in protecting the rights of its own citizens to be "governed" by their citizen peers, the Court held: "The state need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."<sup>71</sup> Although the case indicates a significant departure from the "heightened judicial solicitude" considered appropriate for aliens in the Court's recent decisions,<sup>72</sup> it has not indiscriminately withheld strict scrutiny from all alienage classification cases. Rather, the Court has chosen to vary the standard of review depending upon the nature of the state's interest.

Although the concept of equal justice under the law found in both the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment require the same type of analysis, some overriding national interest may justify selective federal legislation that would be unacceptable for an individual state.<sup>73</sup> When a federal law concerns matters of national importance, it is not subject to the strict judicial scrutiny required in the equal protection analysis.<sup>74</sup>

It is settled that decisions concerning aliens "may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently

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65. *Sugarman v. Dugall*, 413 U.S. 634 (1973); *Foley v. Connelie*, 430 U.S. 944 (1978).

66. See *Foley v. Connelie*, 430 U.S. 944 (1978) (Marshall, J., dissenting).

67. 413 U.S. 634 (1973).

68. *Id.* at 648.

69. *Foley v. Connelie*, 430 U.S. 944 (1978).

70. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

71. *Supra* note 69.

72. See *Graham v. Richardson*, 403 U.S. 365 (1971).

73. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

74. *Id.*

of a political character.”<sup>75</sup> Therefore, under its exclusive constitutional authority to regulate aliens,<sup>76</sup> Congress is allowed wide discretion in its policy determination concerning aliens.<sup>77</sup> Such need for political discretion however, has not convinced the Court to abdicate its review of congressional decisions concerning aliens under the due process clause of the fifth amendment.

Recently, in *Fiallo v. Bell*,<sup>78</sup> the Supreme Court announced the standard of review required of congressional decisions concerning aliens. In that case, the petitioner had challenged the constitutional validity of section 101(b)(1)(D) and 101(b)(2) of the Immigration & Nationality Act of 1952, which exclude the relationship between an illegitimate child and his natural father (as opposed to his natural mother) from the special preference immigration status accorded by the Act to the child or parent of a United States citizen or permanent resident alien. The Court recognized that the need for political discretion in congressional decisions concerning aliens allows only a limited review under the due process of the fifth amendment.<sup>79</sup> But the Court expressly rejected the government’s claim of unreviewable discretion and stated: “Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to [the] power of Congress to regulate the admission and exclusion of aliens.”<sup>80</sup> Such limited judicial responsibility was announced by the Court in *Kleindienst v. Mandel*.<sup>81</sup> In that case, the Attorney General had authority under the law to waive the statutory prohibition of visas to aliens who advocate the economic, international and governmental doctrines of world communism.<sup>82</sup> Upon denial of such waiver to Mandel, he and other citizens of the United States who claimed that their first amendment right to hear Mandel in person was abridged by the denial, sued. The Court rejected the Government’s contention that it had “unfettered discretion, and any reason or no reason (for denying a waiver) may be given,” and upheld the denial only after finding that it was based on a “legitimate and bona fide” reason—Mandel’s abuse of the visa privileges on a prior occasion.<sup>83</sup>

The presumption that aliens do not reside anywhere in the United States, which is the basis of section 1391(d),<sup>84</sup> cannot be justified even under this limited review. No legitimate distinction between citizens and aliens exists which will justify the receipt by citizens of benefits from the venue provision which are not accorded to aliens. By statutory definition, “[i]mmigrant aliens are those seeking to enter the United States for permanent residence with a view of becoming citizens.”<sup>85</sup> Aliens pay taxes as do bona fide citizens, and are subject to call into

75. *Mathew v. Diaz*, 426 U.S. 67, 81-82 (1976).

76. *Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1941).

77. *Supra* note 47.

78. 430 U.S. 787 (1977).

79. *Id.* at 796.

80. *Id.* at 796 n. 5.

81. 408 U.S. 753 (1972).

82. 8 U.S.C. § 1182 (a) (28) (1952).

83. *Supra* note 54, at 769.

84. *Supra* note 27.

the armed forces.<sup>86</sup> They live and establish their residence in various states and engage in different occupations just as citizens do. They contribute to the economic growth of the state in which they live.<sup>87</sup> They share equally with citizens in welfare assistance,<sup>88</sup> state financial assistance for education,<sup>89</sup> and may demand from states full assurance that the laws of the land will be applied to them on the same basis as they are applied to citizens.<sup>90</sup> They have a right to be employed in civil service jobs,<sup>91</sup> and to be admitted to the bars of several states.<sup>92</sup> If permanent resident aliens are entitled to the benefits and protections of all state laws equally with citizens, there is no legitimate basis for distinguishing between a resident-citizen and a resident-alien merely for purposes of venue laws which operate on the basis of a person's residence in a state and are meant to save the defendant from inconvenience if he is compelled to answer suits wherever found. There is no bona fide reason to justify subjecting aliens to the possibility of answering suits in remote areas of the country. It only encourages harassing suits by citizens against aliens and handicaps aliens in conducting an effective defense. By compelling aliens to sue a citizen in the district of the citizen's residence, while allowing citizens to sue an alien wherever he may be found, even temporarily, the venue provision weakens the aliens' litigating strength and denies him the opportunity of an equally effective defense. The Supreme Court stated long ago that an alien's liability to be sued brings with it the right to use all means to defend: "The liability and the right of defense are inseparable. A different result would be a blot on our jurisprudence and civilization. It will be contrary to the first principle of the social compact, and of the right administration of justice."<sup>93</sup>

### CONCLUSION

Despite its inconsistency with the United States' constitutional policy and international commitments, the federal venue statute, which is based upon the presumption of the nonresidence of aliens, has withstood challenges throughout the history of the United States. The presumption arose in the days when the constitutional right of aliens to enjoy the fruits of their residence in the United States equally with other citizens was not fully recognized. Today however, this presumption of nonresidence is clearly inconsistent with the United States constitutional policy to afford equal protection of laws to all, and its recent assertion of leadership in the field of human rights. It is time that the Congress reexamine the policy behind this presumption and recognize the status of

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85. 8 U.S.C. § 1101 (a) (5), 1181, 1184 (1952).

86. *Graham v. Richardson*, 403 U.S. 365, 367 (1971).

87. *Id.*

88. *Graham v. Richardson*, 403 U.S. 365 (1971).

89. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

90. *Mohamed v. Park*, 352 F. Supp. 518 (D. Mass. 1973).

91. *Suragman v. Dougall*, 413 U.S. 634 (1973).

92. *In Re Griffith*, 413 U.S. 717 (1973); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

93. *Nierbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

residence for venue purposes, at least for aliens who are permanent residents of the United States by law and who reside in the United States.

Nonresident aliens temporarily in the United States may not assert their rights in equality with permanent resident aliens. An effectuation of the policy of providing equal justice to *all* will not be completed by excluding them from the harassment of defending suits anywhere in the country, specially since it does not serve any legitimate national purpose. However, the policy behind the present statute may fairly be justified as to alien corporations conducting their business in the United States through agents. Clearly, the policy is not justifiable as to those alien corporations that have an established place of business in this country.

The Congress should extend recognition of residence to an alien in the district where, in the case of an individual, he or she has established legal residence, and in the instance of an alien corporation, it has established a place of business according to the law of the state. Such recognition will not require any significant overhaul of either the general venue statute (28 U.S.C. § 1391) or the special venue statute for patent infringement suits (28 U.S.C. § 1400(b)), because the general venue statute is clearly based upon residence, and an examination of the cases holding section 1400(b) inapplicable to aliens reveals that the result would have been otherwise in the absence of the presumption of nonresidence of aliens. The task may be effectively accomplished by deleting the language of section 1391(d) and substituting instead a provision recognizing the residence of an alien in the district of his or her legal residence.

SYED I. HYDER