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## THE ALIEN VENUE STATUTE: AN HISTORICAL ANALYSIS OF FEDERAL VENUE PROVISIONS AND ALIEN RIGHTS

“Ye shall have one manner of law, as well for the stranger as for one of your country.”—*Leviticus* 24:22

A venue requirement must be satisfied each time a plaintiff brings suit in the United States.<sup>1</sup> The purpose of this requirement is to protect defendants from being sued in forums with which they have insufficient connections,<sup>2</sup> thus basing forum choice primarily on convenience. The present federal venue statute ensures this in several ways. When jurisdiction is based on diversity, United States citizens may be sued only in the district where all the plaintiffs or defendants reside or where the claim arose.<sup>3</sup> When jurisdiction is founded on grounds other than diversity, suit may be brought only in the district where all the defendants reside or where the claim arose.<sup>4</sup>

Alien defendants, however, may be sued in any district in the United States.<sup>5</sup> Consequently, an alien may be forced to defend a suit wherever a plaintiff chooses to bring it, and, quite naturally, a plaintiff will choose a forum in which the law conforms most favorably with her claim.<sup>6</sup> In this way the Alien Venue Statute indirectly promotes forum shopping, so that while generally considered only a procedural device, it has a significant, substantive impact on the outcome of litigation involving alien defendants.

This note will analyze the impact of this statute on the rights of aliens by tracing the development of the law as it has evolved through legislative enactment and judicial decision-making.

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1. R. FIELD, B. KAPLAN & K. CLERMONT, *CIVIL PROCEDURE* 163-64 (4th ed. 1978).

2. *Harley v. Oliver*, 400 F. Supp. 105, 108 (1975).

3. 28 U.S.C. § 1391(a) (1976).

4. 28 U.S.C. § 1391(b) (1976).

5. 28 U.S.C. § 1391(d) (1976) [hereinafter cited as the Alien Venue Statute]. Aliens, as referred to in this note, include all resident and non-resident aliens, as defined by the Immigration and Nationality Act. *See infra* note 98.

6. *See* A. SCOTT & R. KENT, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* 320 (1967). Under the doctrine of *forum non conveniens*, an alien may request that the case be removed to a more convenient location, although the applicable law will continue to be that of the State where the action was originally brought. *Id.* *See also* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

## II

Several sections of the Judiciary Act of 1789<sup>7</sup> afforded alien litigants protection.<sup>8</sup> Section 11 of the Act, with which this paper is concerned, dictated the grounds upon which venue could be established.<sup>9</sup> The framers of the Judiciary Act were influenced by the European legal scholars of the time.<sup>10</sup> The writings of Emmerich de Vattel and William Blackstone were particularly instructive, providing guidelines for the framers in delimiting the scope of alien rights.<sup>11</sup> According to Vattel, the rights of aliens while temporarily in a foreign state were equivalent to the rights accorded citizens of that state.<sup>12</sup> Concomi-

7. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 [hereinafter cited as the Judiciary Act].

8. *Id.* § 9. Alien plaintiffs were given the right to bring an action "for a tort only in violation of the law of nations or a treaty of the United States." Section 11 of the Judiciary Act stated that the circuit courts had original jurisdiction over civil suits where an alien was a party.

*And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

*Id.*

9. *Id.* § 11.

But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court and no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . .

*Id.*

10. S. PADOVER, *TO SECURE THESE BLESSINGS* 23 (1970). Padover's study of the men who framed the Constitution includes an analysis of their heritage and its effect on the document. As these are the same men who later wrote the Judiciary Act, *see infra* note 25, his analysis holds good with reference to that document as well. He said that:

The delegates shared a common culture outlook. Their ethnic roots were British (including Northern Irish), their religious background was Protestant, and the education they received was based on the classics. . . . In the field of legal ideas and political theory, about half-a-dozen writers had the deepest influence. These were Sir Edward Coke (1552-1634), Henry Homes (Lord Kames: 1696-1782) and Sir William Blackstone (1723-1780) in the field of law . . . .

*Id.* The writings of Emmerich de Vattel were also of great importance to the Framers. *Id.* at 129.

11. *See infra* text accompanying note 25.

12. *See generally* F. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* 188-91 (1975). )

tantly, aliens were subject to the laws of the host countries in which they were residing.<sup>13</sup> Vattel relied on treatises of the seventeenth and eighteenth centuries to reach these conclusions.<sup>14</sup>

Blackstone found that aliens possessed legal rights, although he did not think that these rights were as extensive as Vattel had asserted.<sup>15</sup> Under the laws of England, aliens had the power to draft wills, bring actions against native-born Englishmen, and acquire goods, money and personal estates of a transitory nature.<sup>16</sup> Blackstone enunciated four legal limitations on the activities of aliens. The first was that a foreigner was prohibited from purchasing real property.<sup>17</sup> The three other limitations discussed by Blackstone were offenses violative of both English law and the law of nations.<sup>18</sup> Provisions addressing

13. *Id.* at 189.

14. *See, e.g.*, Treaty of Peace, Sept. 20, 1697, France—The Netherlands, 21 Parry's T.S. 347. An English translation of article XII may be found in F. RUDDY, *supra* note 12, at 188, which provides:

The ordinary course of justice shall be free and open on both sides, and the subjects both on one or the other dominion may pursue their rights, suits and pretensions, according to the laws and statutes of each country; and then without any distinctions, obtain all the satisfaction that is justly due them

. . . .

*Id.* *See also* Treaty of Peace and Friendship, July 13, 1713, Great Britain—Spain, 28 Parry's T.S. 295. Article VII provides:

That the ordinary distribution of justice be restored and open again through the Kingdoms and dominions of each of their Royal Majesties; so that it be free for all subjects on both sides to prosecute and obtain their rights, pretensions and actions; to the laws, constitutions and statutes of each kingdom . . . .

*Id.*

15. I W. BLACKSTONE, COMMENTARIES.

16. *Id.* at \*360.

17. 2 W. BLACKSTONE, COMMENTARIES at \*274.

18. *Id.* According to Blackstone there were three offenses against the law of nations, cognizable under English law, upon which aliens could bring suit. 4 W. BLACKSTONE, COMMENTARIES \*68-73. The first offense of which he spoke was the violation of the doctrine of safe-conduct. He said:

[D]uring the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the King and the law; and, more especially, as it is one of the articles of *magna carta* (9 Hen. III, c. 30) that foreign merchants shall be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the King . . . .

*Id.* at \*69. The doctrine of safe-conduct as interpreted in *Tirlot v. Morris*, 80 Eng. Rep. 828 (1611), was found to apply to a range of actions brought by foreign merchants. *Tirlot*

these offenses were later incorporated into article III of the United States Constitution<sup>19</sup> and permeated the drafts of the Judiciary Act of 1789.<sup>20</sup>

James Madison, particularly aware of the importance of addressing the issue of the federal judiciary's power to adjudicate conflicts that involved aliens, proposed that article III read:

[T]he jurisdiction of the inferior tribunals shall be to hear and determine in the first instance and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy, cases in which foreigners or citizens of other States applying to such jurisdiction may be interested . . . .<sup>21</sup>

Although the specific language offered was not included in the final version of article III,<sup>22</sup> concern with jurisdiction over foreigners remained. Madison reiterated this concern in *The Federalist*<sup>23</sup> when he wrote, "the federal judiciary ought to have cognizance of all causes in

involved an action brought by an alien for libel. The court found the suit to be actionable in England, stating: "As to merchant strangers by the laws of this realm, they are well enabled for to have personal actions here, but not real action." *Id.* at 834.

A number of years later, the court had the opportunity to interpret the phrase "personal actions" in *Pisani v. Lawson*, 133 Eng. Rep. 35 (1839). Here the court held that "an alien friend might well maintain all actions personal, such as assault and battery." *Id.* at 37. The second offense violative of the law of nations was the infringement of the rights of ambassadors. *See generally* 4 W. BLACKSTONE, COMMENTARIES \*69-70.

The final wrong was piracy. Piracy, according to Blackstone, "is an offense against a universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*." Accordingly, "every community hath a right, by the rule of self-defense, to inflict punishment upon him . . . ." *Id.* at \*71. The concept of *hostis humani generis* was recently invoked by Judge Kaufman in *Filartiga v. Pena-Irala*, 630 F. 2d. 876, 890 (2d Cir. 1980). Judge Kaufman stated that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Id.*

19. U.S. CONST. art. III.

20. The Judiciary Act, *supra* note 7.

21. M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 22 (rev. ed. 1937).

22. Article III, section 2 now reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between . . . Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*

23. THE FEDERALIST (P. Ford ed. 1898).

which the citizens of other countries are concerned."<sup>24</sup>

By the time the Framers of the Constitution sought to establish a judicial code the legal theories espoused by Vattel and Blackstone were entrenched in American political thought.<sup>25</sup> The Judiciary Act of 1789 attempted to affirmatively establish the rights of aliens under the federal judicial system.<sup>26</sup> Prior to the Act of 1789 aliens were subject to the venue rules that applied to citizens.

Section 11 of the Act was first applied in *Piquet v. Swan*,<sup>27</sup> and was originally construed so as to continue to grant alien defendants the same rights as native-born defendants.<sup>28</sup> This conclusion was reached by interpreting the word "inhabitant" in the statute to include both aliens and citizens. As Justice Story held:

I lay no particular stress upon the word "inhabitant" and deem it a mere equivalent description of "citizen" and "alien" in the general clause conferring jurisdiction over parties. A person might be an inhabitant without being a citizen; and a citizen might not be an inhabitant, though he retained his citizenship.<sup>29</sup>

Justice Story's reading of the Act was disputed and eventually repudiated by both legal scholars and the judiciary.<sup>30</sup>

### III

In 1875 Congress revised section 11 of Judiciary Act of 1789 by

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24. *Id.* at 532-33. In further explanation Madison stated that: "A distinction may perhaps be imagined between cases arising upon treaties and the law of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States." *Id.*

25. S. PADOVER, *supra* note 10, at 129. Many of the delegates to the Constitutional Convention participated in the drafting of the Judiciary Act of 1789. They included Oliver Ellsworth, delegate from Connecticut, and William Patterson, delegate from New Jersey. *Id.* See Warren, *infra* note 55, at 50. He states:

[T]he original Draft Bill is in several different handwritings. Section 1 to 9 inclusive are in the handwriting of William Patterson; Sections 10 to 23 are, in all probability, in the handwriting of Oliver Ellsworth; Section 24 is in the handwriting of Caleb Strong; and the succeeding sections are written by a recording clerk.

*Id.*

26. See *supra* notes 8 & 9 and accompanying text.

27. 19 F. Cas. 609 (D. Mass. 1828).

28. *Id.*

29. *Id.* at 613.

30. See *infra* text accompanying notes 31-60.

replacing the phrase "against any inhabitant"<sup>31</sup> with the words "against any person" so that the text now read: "No civil suit shall be brought before either of said courts against any person in any other district than that whereof he is an inhabitant or in which he shall be found. . . ."<sup>32</sup> The next change in wording occurred in 1887 when Congress deleted the language "where he shall be found" from the statute.<sup>33</sup> The Supreme Court, in *Shaw v. Quincy Mining Co.*,<sup>34</sup> interpreted these changes as signalling the beginning of the retreat from affording aliens the same protection as citizens under the federal venue law.

The *Shaw* case involved a Michigan corporation, sued in the Southern District of New York.<sup>35</sup> The defendant, Quincy Mining Company, claimed that venue in New York was improper, because the corporation was incorporated in, and thus was an inhabitant of, the Western District of Michigan.<sup>36</sup> The company therefore alleged that it could only be sued in Michigan, the district of which it was an inhabitant.<sup>37</sup> The Court held that a corporation had but one residence, the State in which it was incorporated,<sup>38</sup> and that based on the Act of March 3, 1887<sup>39</sup> where jurisdiction was founded on diversity, a suit could only be brought in the district where all the plaintiffs or all the defendants reside.<sup>40</sup> Thus the Court held that the Circuit Court of New York had no jurisdiction.<sup>41</sup>

In the course of its analysis, the Court found that the word "inhabitant," as used in the venue statute, had no larger meaning than

31. The Judiciary Act, *supra* note 7, § 11.

32. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

33. Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, amended by Act of Aug. 13, 1888, ch. 866, §§ 1, 6, 25 Stat. 433, 436. The Act reads:

No civil suit shall be brought before either of said courts against any person or 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, suit shall be brought only in the district of residence of either the plaintiff or the defendant.

*Id.*

34. 145 U.S. 444 (1891).

35. *Id.* at 453.

36. *Id.*

37. *Id.* at 450-53.

38. *Id.*

39. See *supra* note 33.

40. 145 U.S. 444. The plaintiff was a citizen of Massachusetts. *Id.*

41. *Id.* at 453.

"citizen."<sup>42</sup> The Court then qualified this finding by stating that their interpretation of the venue statute was precedentially limited to diversity cases and that this "case does not present the question what may be the rule in suits against an alien or foreign corporation, which may be governed by different considerations."<sup>43</sup>

By construing the terms "citizens," "inhabitants" and "residents" as they did, the Court unwittingly created the dilemma that surfaced in 1893 in *In re Hohorst*.<sup>44</sup> *Hohorst* involved an allegation of patent infringement. A suit was brought against the Hamburg-American Packet Company, a company incorporated under the laws of Germany.<sup>45</sup> Relying upon the residence criteria established in *Shaw*, the company claimed that it was incorporated abroad, that it had no residence in the United States, and thus could not be sued in this country.<sup>46</sup> In order to give plaintiffs a remedy, the Court was forced to conclude that the venue statute was completely inapplicable to aliens.<sup>47</sup> In the Court's words, to hold otherwise "would leave the Courts of the United States open to aliens against citizens and close them to citizens against aliens."<sup>48</sup> The Court held that aliens had been outside the venue provision prior to 1875 and were not brought within it by the Act of 1888.<sup>49</sup>

The Court used a two-step analysis to reach its decision. First, in reviewing the legislative history on the scope of federal venue, the Court concluded that the Act of 1876<sup>50</sup> did not include aliens, and that the change in wording, as adopted by the Act, was not a substantive change.<sup>51</sup> After deciding that, historically, aliens had been excluded

42. *Id.* at 447. The Court found that "inhabitant" in [the] act, was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, like the districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same act.

*Id.*

43. *Id.* at 453.

44. 150 U.S. 653 (1893).

45. *Id.* at 654.

46. *Id.* at 657.

47. *Id.* at 653.

48. *Id.* at 660.

49. *See supra* note 33.

50. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

51. 150 U.S. at 661. The Court stated that, "the substitution, in the act of March 3, 1875, ch. 137, § 1, of the words 'against any person' with 'against an inhabitant of the



from the statute, the Court discussed the question of whether they might currently be included and found that since the statute was framed with reference to the defendant's place of residence, aliens could not possibly be included since by definition an alien was a resident of no district. The Court reasoned that when Congress eliminated the provision authorizing suits wherever the defendant could be found,<sup>52</sup> federal question cases were only brought in districts where the defendant was an inhabitant.<sup>53</sup> It was therefore necessary for aliens to either satisfy the residence requirement, which they could not do based on *Shaw*, or to find that they were outside of the venue statute. By finding that aliens were outside the venue statute, the Court left them vulnerable to suit "in any district in which valid service can be made upon the defendant."<sup>54</sup>

While the judicial trend of exclusion of aliens from the venue statute was developing in the courts, the same conclusions were reached by Charles Warren in his 1923 treatise on the Judiciary Act.<sup>55</sup> At that time Warren uncovered the original draft bill of the Act and used it as the basis for reinterpreting numerous sections of the bill. According to Warren, there were two preliminary drafts of section 11 prior to the final writing.<sup>56</sup> Warren interpreted the changes in language from the draft bill to the final version as signifying an elimination of foreigners and foreign corporations from the federal venue statute.<sup>57</sup> By so doing, Warren was bound to conclude that alien defendants were wholly outside of the Judiciary Act for venue purposes. Thus, as there were no alternative statutory provisions from which alien defendants

United States,' has been assumed to be an immaterial change." *Id.*

52. *Id.*

53. *Id.* The Court also noted that diversity jurisdiction, which would have allowed the suit to have been brought where either the plaintiff or the defendant resided, was not germane to suits against aliens on the grounds that true diversity with an alien as a party could never exist. *Id.* at 660.

54. *Id.* at 662. Had the Court had the foresight, it might at this time have distinguished between resident and non-resident aliens, granting the former protection under the venue statute and only excluding the latter.

55. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 80-81 (1923).

56. *Id.* The first draft in part read: "[N]o person shall be arrested for trial in any . . . other Circuit Court or District Court than that within which the arrest shall be made." *Id.* The second draft read: "[N]o person shall be brought to trial in any cause in any other district than that where the defendant is an inhabitant or in which he shall be found at the time of serving the writ." *Id.* For the final draft of the bill, see *supra* note 9.

57. *Id.* Warren reached this conclusion by assuming that the change from the word "person" to "inhabitants of the United States" was the author's way of excluding aliens.

could derive venue protection, they could be sued in any district.<sup>58</sup> Warren's view was adopted by the courts and by the legal scholars of the day, and became the dominant judicial interpretation.<sup>59</sup>

Statutory legitimacy was given to the Court's holding in *In re Hohorst* as well as to Warren's scholarly analysis in 1945 when Congress enacted the Alien Venue Statute.<sup>60</sup> Present day case law confirms the exclusion of alien defendants from all other venue provisions, both general and special.<sup>61</sup>

#### IV

The men whose ideas shaped the concepts promulgated by the Judiciary Act of 1789 started with a common notion, that an alien was to be accorded legal rights and liabilities substantially equivalent to those of a citizen.<sup>62</sup> This premise was established by both English and European legal tradition, and adopted by this country at its birth.<sup>63</sup> This legal heritage was acknowledged by Justice Story when he first interpreted the Judiciary Act and found aliens to be within its venue confines.<sup>64</sup> By interpreting the Act as he did, Justice Story credited the framers with the wisdom of including all venue situations, those involving aliens and citizens alike, within the ambit of the bill. Only by disregarding the roots from which this Act grew, could the conclusion be reached that alien defendants were omitted from the venue provisions, either intentionally or through oversight.

The Warren interpretation, coupled with the decisions of *Shaw* and *Hohorst*, solidified a notion contrary to the intentions of the authors of the Act. Warren's analysis of section 11, the venue provision, concentrates on the first use of the word "inhabitants" in that section; the *Shaw* Court took umbrage with the second use of "inhabitants" in that same section.<sup>65</sup> Yet both Warren and the Court reached the same

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58. Section 11 of the Judiciary Act is the only portion of the bill to deal with venue. By concluding that aliens were unprovided for in that section of the bill, Warren necessarily had to reach the conclusion that there were no statutory limitations on where an alien could be sued.

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

60. 62 Stat. 935, ch. 646, June 25, 1948.

61. See *Brunette*, 406 U.S. at 714. "1391(d) is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special." *Id.*

62. See *supra* notes 12-17 and accompanying text.

63. See *supra* notes 10-18 and accompanying text.

64. See *supra* notes 27-28 and accompanying text.

65. See *Shaw*, 145 U.S. at 449; Warren, *supra* note 55, at 80-81.

conclusion, namely, that aliens are excluded from the venue provisions.<sup>66</sup>

The errors of both stem from the same misconception. Quite simply, if the framers had changed the first use of "inhabitant" to "citizen," they would have excluded aliens from the rule and left no ambiguity in the law. There would have then been no need to use the word "citizen" instead of "inhabitant," the second time "inhabitant" appears in the text. This formulation alleviates the problem foreseen by the *Shaw* Court, namely that of speaking of a person as a citizen of less than a state. Only by leaving the words as they did, were the framers able to include both aliens and citizens within the venue provisions without resort to tedious verbiage and supererogatory explanations.

## V

As a result of the semantic misinterpretations that shaped alien venue, we are heirs to a statute that poses constitutional problems in its failure to protect aliens. The constitutional adequacy of federal statutes<sup>67</sup> that rely on alienage distinctions has been analyzed by the Supreme Court under a due process and equal protection rubric.<sup>68</sup> The Court's inquiry has focused on the immigration and foreign affairs issues evoked by these statutes on the one hand and on the deprivations to alien liberties that they engender on the other hand.<sup>69</sup>

In *Hampton v. Mow Sun Wong*,<sup>70</sup> the Court confronted these conflicting interests in the area of public employment of aliens.<sup>71</sup> The Civil Service Commission (CSC) had enacted a regulation which pro-

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66. See *Shaw*, 145 U.S. at 449; Warren, *supra* note 55, at 81.

67. As the Court noted in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1975), "the Fourteenth Amendment's restrictions on state power are not directly applicable to the Federal Government . . . because Congress and the President have broad power over immigration and naturalization which the States do not possess." *Id.* at 95.

68. *Id.* at 103. A due process analysis was applied in *Hampton*. The Court found that: "[W]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Id.*

69. *Id.* at 104, 116.

70. 426 U.S. 88 (1975).

71. *Id.* The case involved five alien Chinese residents, lawfully and permanently residing in the United States, who had been denied federal employment because of their alienage. They had either begun work and had been terminated when it was realized that the citizenship requirement was unfulfilled, or they were not even allowed to compete for jobs they were fully capable of holding, but for the fact that they were not citizens. *Id.* at 91-92.

hibited the employment of resident aliens in the federal civil service.<sup>72</sup> The CSC claimed that the regulation served several functions.<sup>73</sup> The Court found that only one of these functions was of legitimate concern to the Commission, that of having "one simple rule excluding all non-citizens when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions."<sup>74</sup> Yet, when balanced against the deprivations endured by aliens seeking employment, the Court found that there was inadequate justification for the Commission's guidelines.<sup>75</sup> The Court did state, however, that should Congress or the President choose to determine that all non-citizens were ineligible for federal jobs on "national interest" grounds, they would have the right to do so.<sup>76</sup> Thus, while vindicating the rights of aliens vis-a-vis federal agencies, alien rights remained subordinate to congressional and executive concerns.

While the Court in *Hampton* established that a due process test would be applied when federal regulations conflicted with the rights of aliens,<sup>77</sup> the Court in *Mathews* applied an equal protection analysis, with presumptive validity extended to the legislation examined.<sup>78</sup> The Court's deference to Congress rested on the conclusion that alienage classifications were within the general naturalization arena and were thus particularly suitable to legislative rather than judicial determina-

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72. 5 C.F.R. § 338.101 (1976). This regulation restricts admission to the qualifying examination to citizens or persons who owe permanent allegiance to the United States. Under this provision, a non-citizen may be entitled to a limited executive assignment in the absence of qualified citizens or in other rare circumstances. *Id.*

73. 426 U.S. at 104. They claimed that "the broad exclusion may facilitate the President's negotiation of treaties with foreign powers" or that it might serve as "an appropriate incentive to aliens to qualify for naturalization." *Id.*

74. *Id.* at 115.

75. 426 U.S. at 116.

The impact of the [Civil Service Commission's] rule on the millions of lawfully admitted resident aliens is precisely the same as the aggregate impact of comparable state rules which were invalidated by our decision in *Sugarman* [*Sugarman v. Dougall*, 413 U.S. 633 (1973)]. By broadly denying this class substantial opportunities for employment, the Civil Service Commission rule deprives its members of an aspect of liberty.

*Id.*

76. *Id.* at 116. The Court stated that "assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all non-citizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission." *Id.*

77. *Hampton*, 426 U.S. at 116-17.

78. 426 U.S. at 67.

tion and administration.<sup>79</sup>

In *Mathews*, the Court adjudged the validity of section 1831 of the Social Security Act of 1935.<sup>80</sup> Under the Social Security Act in order to be eligible for participation in the Medicare program, an alien had to have been admitted to the United States for permanent residence and to have resided in the United States for at least five years.<sup>81</sup> Justice Stevens, writing for a unanimous Court, first examined the federal interest implicated in the legislation. He found that Congress had broad power over aliens due to legitimate congressional concern in the areas of immigration and naturalization.<sup>82</sup> He further found that the federal government could discriminate between citizens and aliens,<sup>83</sup> as well as among various sub-categories of aliens.<sup>84</sup> Consequently, the Court held that "[t]he fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"<sup>85</sup>

With this in mind, the Court turned to the standard to be used in evaluating the Medicare legislation. It found that a "narrow standard of review"<sup>86</sup> was required because the Court was delving into an area that fell within the overlay of judicial and congressional authority.<sup>87</sup> In examining the Act, the Court found Congress' goal legitimate and only minimally scrutinized Congress' means.<sup>88</sup> Turning next to the question of aliens' rights, the Court accepted the power of Congress to bestow greater benefits on those aliens who had resided in this country for a longer period of time than upon those aliens who had recently arrived

79. *Id.* at 79-80.

80. 42 U.S.C. § 1395(o) (1976 & Supp. IV 1974).

81. The statutory provision at issue was the Social Security Act, 42 U.S.C. § 1395(o)(2)(B) (1976 & Supp. IV 1974), as amended by 42 U.S.C. § 1395(o)(2)(B) (1976 & Supp. II 1972).

82. 426 U.S. at 79-80. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens . . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.*

83. *Id.* at 78. "[A] legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other." *Id.*

84. *Id.* at 78-79. Justice Stevens relied on the classification scheme established by the Immigration and Nationality Act, 66 Stat. 163, as amended by 8 U.S.C. § 1101 (1970 and Supp. IV 1974). The Act begins by dividing alien-immigrants from alien-visitors or non-immigrants, and then further subdivides these categories. 426 U.S. at 79 n.13.

85. 426 U.S. at 80.

86. *Id.* at 82.

87. *Id.* at 81.

88. *Id.* at 83. The Court said: "Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind." *Id.*

here. The Court took notice of the congressional determination that those aliens who had lived in the United States for several years would have more extensive ties to this country.<sup>89</sup>

The precedents established in the *Hampton* and *Mathews* decisions aid in structuring an equal protection claim that the Alien Venue Statute is unconstitutional. The *Hampton* decision, although it does grant certain rights to aliens, limits those rights to claims against administrative agencies and not Congress.<sup>90</sup> Because the Alien Venue Statute was enacted by Congress, it is doubtful that *Hampton* will be of substantial precedential value to the litigant. *Mathews*, on the other hand, limits aliens' rights by establishing two criteria. First, it looks at the ties an alien has to the country and then it examines the congressional interest involved.<sup>91</sup> Beginning with the premise that aliens may constitutionally be distinguished from citizens, the basis by which this may be done must be established. In *Mathews*, the Court suggests that "Congress may decide that as the alien's tie [to the United States] grows stronger, so does the strength of his claim to an equal share of munificence."<sup>92</sup> This standard makes both logical and practical sense, if it is assumed that the longer an alien remains in the United States the greater his contribution will be. As the length of his stay increases, so does his right to partake of this nation's assets.

One of these assets is our judicial system and the protections it affords litigants. Under the venue provisions<sup>93</sup> litigants are assured that they will not be forced into an inconvenient forum.<sup>94</sup> The rationale behind this is that people reside in one place, that they spend most of their time in the district in which they reside, and therefore, the most convenient forum will usually be that district.<sup>95</sup> The assumption that is made regarding aliens is that they do not reside in one place, hence one district will be as convenient as another.

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89. *Id.* at 83.

90. *See supra* notes 75 & 76 and accompanying text.

91. 426 U.S. at 78-80. This is an intermediate level of scrutiny under an equal protection analysis. *Id.*

92. *Id.* at 80.

93. 28 U.S.C. § 1391(a) & (b).

94. *See, e.g.*, *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1221-22 (5th Cir.), *cert. denied*, 396 U.S. 1003 (1969). "Venue is primarily a question of convenience for litigants and witnesses . . . and venue provisions should be treated in practical terms." *Id.* *Accord* *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). This Court states that "venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Id.* at 184.

95. *See* *Finger v. Materson*, 152 F. Supp. 224, 225 (1954). The court stated that "residence does not arise out of a transitory abode or out of a temporary sojourn in a place other than that of residence or domicile." *Id.* at 225.

The fallacy inherent in this reasoning is readily illustrated by the very definitions embodied in the Immigration and Nationality Act.<sup>96</sup> The Act begins by defining an alien as "any person not a citizen or national of the United States."<sup>97</sup> A sub-group of aliens, the "immigrant," is defined by the Act in terms of intent.<sup>98</sup> Those aliens who maintain residences in foreign countries without the intent to abandon them are considered to be non-immigrants.<sup>99</sup> Those persons who are classified as immigrants have evidenced an intent to remain in the United States.<sup>100</sup> It logically follows that if an intent to remain is present, a residence will be established. Moreover, since the concept of intent is a prerequisite for status as an immigrant, not only will residence be established, but the requirements for domicile will be met.<sup>101</sup> Once it is officially recognized that immigrants maintain residences and are not amorphously floating across the country, it should also follow that they will be as inconvenienced as any citizen forced to defend suit in a foreign state.<sup>102</sup>

While numerous sub-groups of aliens may not possess a single place of residence, to legislate on the assumption that no alien resides

96. 8 U.S.C. § 1101(3).

97. Act of June 27, 1952, ch. 477, 66 Stat. 163.

98. Under the Immigration and Nationality Act, 8 U.S.C. § 1101, immigrants would include grown unmarried children of citizens; spouses and grown unmarried children of aliens lawfully admitted for permanent residence; grown married children of citizens; brothers and sisters of citizens; certain victims of persecution and catastrophic natural calamities who were granted conditional entry and remained in the United States at least two years; and children and spouses of citizens and parents of citizens at least 21 years old.

99. 8 U.S.C. § 1101 (15). "Residence" is defined as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." *Id.* at (33). A "resident alien" is any non-citizen "lawfully admitted for permanent residence" in accordance with the immigration laws of the United States. *Id.* § 1101(a)(20).

100. See *supra* note 98 and accompanying text.

101. J. STORY, *CONFLICT OF LAWS* 45 (1834). "If a person has actually removed to another place, with the definite intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." *Id.*

102. Rosbery, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 *MICH. L. REV.* 1092, 1103 (1977):

Resident aliens have the same stake as citizens in the long-range welfare of the communities in which they live. They may, to be sure, move from one community to another, and some will return to their country of origin. But citizens also move, and I know of no reason to believe that resident aliens have a higher rate of mobility than other persons.

*Id.*

in one place is to grossly over-generalize from the circumstances of a few. As the Court stated in *Mathews*, "[t]he class of aliens is itself a heterogenous multitude of persons with a wide-ranging variety of ties to this country."<sup>103</sup> Thus, it would appear to be a legitimate exercise of congressional or judicial power to allow some aliens, immigrants perhaps, protection under those sections of the venue statute that are currently applicable only to citizens.

In the second part of the test established by *Mathews*, the question becomes, what are the congressional interests in retaining this statute, and do they outweigh the interests of alien residents? Unlike the benefits bestowed by Medicare,<sup>104</sup> there is no monetary burden attached to granting aliens the right to defend suits in the district within which they reside. Burdening the courts with additional cases is also not a legitimate concern, as a revision of the statute would not increase, but only reallocate, the present case load.<sup>105</sup> Nor does this statute involve a fundamental governmental interest that would justify the exclusion of aliens from the courts in the states in which they live. The statute does not seek to deprive aliens of access to the courts per se. It only dilutes their power to effectively litigate, by creating a situation in which increased expenditures of time and money will necessarily be mandated, due to the additional expenses incurred in defending a suit in a remote district or state.

### CONCLUSION

The Alien Venue Statute is unsound in conception and prejudicial in application. This statute, unlike numerous other statutes that restrict the rights of aliens,<sup>106</sup> is supported by neither a significant gov-

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103. 426 U.S. at 78-79.

104. *Id.* at 82-83. Although the Court found that the "five-year line drawn by Congress [was] longer than necessary to protect the fiscal integrity of the program," the Court found that some residence requirements would be legitimate in order to insure payment of taxes by aliens prior to their receiving monetary benefits from the government. *Id.*

105. Again, this differs from the issue in *Mathews*, where there would be a tremendous increase in the number of Medicare patients, had the Court struck down the five-year rule. See 426 U.S. at 81 n.20. The Court also pointed out that: "An unlikely, but possible consequence of holding that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees." *Id.*

106. See, e.g., 26 U.S.C. § 931 (1976 & Supp. IV) (income tax benefits and deductions for citizens); 46 U.S.C. § 1171(a) (1976) (applications for government subsidy for shipping operations involving foreign trade are granted to citizens only).



ernmental interest in foreign affairs nor by a legitimate concern with federal fiscal expenditures.<sup>107</sup>

To narrow or abolish this statute would not deprive citizens of their constitutional rights or limit any of the expectations that attach to United States citizenship. Certainly, the loss of the strategic procedural advantage presently held by citizens would fail to amount to the denial of a fundamental right or interest if the statute were to be repealed.

Yet the burden upon alien-defendants is oppressive. The inference is that an alien is without a residence. This official statement of inferiority serves to stigmatize the alien in the eyes of the community and to perpetuate an unfortunate myth. The statute also promotes forum-shopping by allowing plaintiffs to scan the laws of each and every district in the nation in search of that rule of law that conforms most favorably with their claim. The statute further disadvantages alien-litigants by forcing them to defend suit in a district that may be several hundred miles from where they reside and with which they have no connection.

Regardless of the level of scrutiny the Court may choose to apply, the disparate treatment afforded aliens can be justified by neither an equal protection nor a due process analysis.<sup>108</sup> By failing to take cognizance of the legal-historical context in which the rights of aliens were initially circumscribed, the Judiciary and the Congress have needlessly shackled the liberties of aliens residing in this country.

*Hilary Jane Leff*

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107. See *supra* note 104 and accompanying text.

108. U.S. CONST. amend. XIV, § 1.