

WALDEN v. FIORE AND THE FEDERAL COURTS: RETHINKING
FRCP 4(k) (1) (A) AND STAFFORD v. BRIGGS

by
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If it were not so common, the reasoning in Walden v. Fiore would seem bizarre: the jurisdiction of a federal court over a federal claim against a federal agent depends on how much power the Constitution allows the State of Nevada. This strange result is, of course, a consequence of FRCP 4(k)(1)(A), which, in most cases, makes the jurisdiction of a federal district court co-extensive with the jurisdiction of a state court of general jurisdiction in the same district. Less obviously, the outcome in Walden v. Fiore reflects Stafford v. Briggs, which, contrary to the plain language of the federal venue statute, held that a Bivens action could not be brought in the judicial district in which the plaintiff resides. Walden v. Fiore thus provides an opportunity to revisit the wisdom of FRCP 4(k)(1)(A) and Stafford v. Briggs. FRCP 4(k)(1)(A) should be revised in cases involving federal law to allow jurisdiction in any federal district court. Venue, however, should be restricted to ensure that the most convenient forum is chosen, taking into account convenience to both plaintiffs and defendants. In cases involving alleged misconduct by federal officers, where the U.S. can easily defend in any district, a plaintiff should be allowed to sue in his or her home district.

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¹ *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

federal district court co-extensive with the jurisdiction of a state court of general jurisdiction in the same district. Less obviously, the outcome in *Walden v. Fiore* reflects *Stafford v. Briggs*,² which, contrary to the plain language of the federal venue statute,³ held that a *Bivens* action could not be brought in the judicial district in which the plaintiff resides. *Walden v. Fiore* thus provides an opportunity to revisit the wisdom of both FRCP 4(k)(1)(A) and *Stafford v. Briggs*.⁴

I. RETHINKING FRCP 4(k)(1)(A)

FRCP 4(k)(1) states:

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located⁵

Since the jurisdiction of a state court of general jurisdiction is determined by the state's long-arm statute and the Fourteenth Amendment of the U.S. Constitution, FRCP 4(k)(1)(A) means that the jurisdiction of a federal court is constrained by a state statute and a constitutional amendment designed to limit state power.⁶ Most long-arm statutes give state courts, either explicitly or by judicial construction, the full power allowed by the U.S. Constitution,⁷ so the only real constraint on state court jurisdiction, and thus on personal jurisdiction in federal court, is the Fourteenth Amendment of the U.S. Constitution. Although the

² *Stafford v. Briggs*, 444 U.S. 527 (1980).

³ 28 U.S.C. § 1391(e) (1979). The statute is, in all relevant respects, the same today.

⁴ Other articles questioning FRCP 4(k)(1)(A) include Robert Haskell Abrams, *Power, Convenience and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L. REV. 1, 89 (1982); Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1126–27 (1989) (discussing and supporting an amendment to FRCP 4 proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States that would have allowed nationwide service of process in all federal question cases); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1315–16 (2014); Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2924–25 (2009); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 327–29 (2010); Geoffrey P. Miller, *A New Procedure for State Court Personal Jurisdiction* (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Paper No. 391, 2014), available at http://lsr.nellco.org/nyu_plltwp/391.

⁵ FED. R. CIV. P. 4(k)(1)(A).

⁶ See *Walden*, 134 S. Ct. at 1121; see also *supra* note 4. FRCP 4(k)(1)(A) was created by the 1993 amendments to the FRCP. *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 404, 415 (1993). Nevertheless, even before 1993, FRCP 4(e) and 4(f) had the same effect. Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 31–32 (1995).

⁷ Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525, 528 (2004).

Court has made clear that constitutional constraints on state court jurisdiction come from the Due Process Clause, the Court has made federalism an integral part of its due process jurisprudence by stating that a defendant has a liberty interest in being subjected only to lawful judgments.⁸ Thus, personal jurisdiction in state court depends on the constitutional limits on a state court's legitimate power. So, by virtue of FRCP 4(k)(1)(A), personal jurisdiction in federal district court also usually depends on constitutional limits on state court power.⁹

Subjecting federal courts to state court limits might make sense if state court limits were based on fairness and convenience.¹⁰ Since travel to federal and state courts in the same location would impose an equal hardship on the parties and witnesses, imposing the same convenience-based constraints on courts in both systems would be logical. Nevertheless, over the last half-century, the Supreme Court has increasingly turned away from a fairness interpretation of constitutional constraints on personal jurisdiction. Instead, the Court has focused on defining the extent of sovereignty.¹¹ Most importantly, it has defined legitimate governmental power as a *quid pro quo*. A government can only assert jurisdiction if the defendant received something in return, that is, if the de-

⁸ *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (Due process “protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”); *J. McIntyre Mach. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (Kennedy, J., plurality opinion) (“Personal jurisdiction, of course, restricts judicial power not as a matter of sovereignty, but as a matter of individual liberty, for due process protects the individual’s right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.” (citation and internal quotation marks omitted)). The Court has not always been clear about the relationship between the Due Process Clauses and federalism concerns, but the interpretation presented in the text is the one that makes the most sense to the Author, and it is consistent with the decisions quoted in this footnote.

⁹ When federal law explicitly provides for nationwide service of process, when a party is joined under FRCP 14 or 19, and when there is no state court with jurisdiction over a federal claim, limits on state court power no longer apply. *See* FED. R. CIV. P. 4(k)(1)(B),(C), and FED. R. CIV. P. 4(k)(2).

¹⁰ *Walden*, 134 S. Ct. at 1122 (“Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.”).

¹¹ *See supra* note 8 and *infra* note 13; *see also* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 6 (2010) (“[Q]uestions about whether the Constitution limits personal jurisdiction in state court are difficult because they implicate the allocation of regulatory authority between coequal states in a federal system.”); Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 388 (2012) (arguing that the “conceptual core” of personal jurisdiction remains “limiting the scope of governmental authority to those establishing the requisite relationship with the sovereign”).

fendant “purposefully availed” itself of the benefits of the government that established the court.¹² This, of course, leads to very different constitutional constraints for federal and state courts. Under the Due Process Clause of the Fourteenth Amendment, a state court can constitutionally assert jurisdiction only if the defendant has purposefully availed itself of the benefits of that state. Under the Due Process Clause of the Fifth Amendment, federal courts can constitutionally assert jurisdiction if the defendant has purposefully availed itself of the benefits of the United States.¹³ That means that if the purposeful availment requirement is satisfied for any state, it is also satisfied for any federal court. That is, a defendant who purposefully availed itself of California can be constitutionally haled into federal court in Massachusetts, Alaska, or Hawaii. In addition, there are probably situations where a federal court has jurisdiction but no state court would.¹⁴

The constitutional authority of a federal court to assert jurisdiction based on contacts with any part of the United States is the justification for statutes that give the federal courts “nationwide service of process” and thus nationwide personal jurisdiction in antitrust, securities, and some other areas of federal law.¹⁵ Nevertheless, Congress and the federal rule makers have chosen not to give similar authority to federal courts in other areas of law.¹⁶ As discussed below, it makes sense to restrict federal court jurisdiction so as not to give plaintiffs complete choice of forum and so as not to subject defendants to litigation in inconvenient fora. The question, however, is whether FRCP 4(k)(1)(A) is the best way to restrict plaintiff choice and ensure a convenient forum. That is, does it make

¹² *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014) (“*International Shoe* . . . unleashed a rapid expansion of tribunals’ ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum.”); *Hanson*, 357 U.S. at 253 (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”).

¹³ *See Nicastro*, 131 S. Ct. at 2789 (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”); *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting); Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 775 (2015) (stating that if Congress had authorized nationwide service, then Walden’s “contacts with the United States as a whole would justify jurisdiction”); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. REV. 1301, 1315–22 (2014); *see also supra* note 12.

¹⁴ FED. R. CIV. P. 4(k)(2); *Nicastro*, 131 S. Ct. at 2789.

¹⁵ Erbsen, *supra* note 11, at 49–52; John T. Parry, *Rethinking Personal Jurisdiction after Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 637 (2015) (“With respect to federal question cases, the regulatory interest of the federal government easily justifies special personal jurisdiction rules for federal courts.”).

¹⁶ Kelleher, *supra* note 6, at 31. One exception is FED. R. CIV. P. 4(k)(2), which allows service of process anywhere for claims arising under federal law, if “the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction.”

sense to constrain federal courts by imposing on them the very same restrictions imposed on state courts, even though the reasons to constrain federal courts (curbing forum shopping and ensuring convenience) have little to do with the reasons the Court has used to limit state court jurisdiction (federalism limits on state court authority)?

Before discussing appropriate constraints on the power of federal district courts, it should be noted that those constraints could be imposed either by limits on jurisdiction or by limits on venue. It makes little difference which doctrinal hook is used. Since a key policy at issue is convenience to the parties, which has traditionally been the concern of venue, the rest of this Article will propose that federal district courts be given personal jurisdiction in federal question cases to the full extent allowed by the Fifth Amendment, and that convenience-based constraints be imposed by venue statutes.¹⁷

From a pragmatic standpoint, there are two reasons to constrict venue in federal district courts: economizing on litigation costs and preventing forum selling.¹⁸ Forum selling will be discussed in the last paragraph of this Section. That venue rules should economize on litigation costs is relatively obvious. Plaintiffs should not be able to choose a court that imposes significant costs on defendants and witnesses, at least not without good reason. Nevertheless, there is also little justification for structuring venue rules that focus exclusively or primarily on convenience to the defendant. While the Due Process Clauses may require that jurisdictional analysis focus on the defendant, there is no reason that venue must do so. To the extent that venue focuses on litigation costs, it should weigh costs imposed on everyone equally—plaintiffs, defendants, and witnesses.¹⁹ Unfortunately, a rule that stipulated that “venue shall be appropriate

¹⁷ The extension of personal jurisdiction could be accomplished simply by deleting FED. R. CIV. P. 4(k)(2)(A). See below for a proposed venue statute. Forum non conveniens doctrine may also help address convenience concerns. As discussed in John Parry’s contribution to this symposium, the Fifth Amendment may also require that the forum meet minimal standards for convenience, in which case a venue statute constraining forum choice (or at least authorizing transfer) would be constitutionally required if jurisdiction were based solely on an analysis of whether the defendant had purposefully availed itself of the United States. Parry, *supra* note 15, at 637; Erbsen, *supra* note 13, at 782. The separation of functions proposed here between jurisdiction and venue accords with Erbsen’s suggestion that “venue doctrine would assess whether litigation in a particular physical location is appropriate, while personal jurisdiction doctrine would consider whether a particular government can compel the defendant to appear.” Erbsen, *supra* note 13, at 781.

¹⁸ See Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 250–58, 259–63 (2014). That article also discusses a third pragmatic reason to constrict jurisdiction or venue: preventing adjudication that is biased against out-of-state parties. That concern, however, is not relevant to federal courts generally, and especially when they are applying federal law. See *id.* at 263–80, 285–86.

¹⁹ Sometimes the interest of witnesses will weigh more heavily, because witnesses cannot usually be subpoenaed far from their homes. The proposed statute below addresses this possibility in section (c) by allowing a judge to transfer a case for the convenience of witnesses.

in and only in the district that minimizes litigation costs,” would be impractical, because it may not be apparent at the outset of a case which district would minimize litigation costs.²⁰ So, the best option would be to draft rules that would select the cost-minimizing district in most cases and provide discretion to the district court to transfer the case when the rules have failed to select the most convenient forum. The current venue statute, 28 U.S.C. § 1391, does not serve these purposes, because § 1391(b)(1) makes venue dependent on residence, and § 1391(c)(2) defines residence of a corporation by referring to personal jurisdiction.²¹ By referring to personal jurisdiction, the current venue statute thus imports sovereignty notions that, as discussed above, are not appropriate for determining which federal court should hear a case. A venue rule for cases arising under federal law might look something like the following:²²

Venue for Claims Arising Under Federal Law

(a) A civil action of which the district court shall have original jurisdiction not founded on 28 U.S.C. § 1332 may be brought:

(1) in the judicial district in which a majority of plaintiffs and a majority of defendants reside, or

(2) if there is no district satisfying subsection (a)(1), in the judicial district in which the relevant good or service or the largest quantity of the relevant goods or services were sold, if the suit arises out of the sale of goods or services. If a good was shipped to a purchaser in a particular state, that state shall be deemed the place of sale. If a service was provided to a purchaser whose address was known to the service provider, the state in the address shall be deemed to be the place of sale.

(3) if there is no district satisfying subsection (a)(1) or (a)(2), then in the judicial district in which the most important event or events or omission or omissions giving rise to the claim occurred, or the place where all or a majority of

²⁰ *But see* Miller, *supra* note 4, at 33–34 (arguing that Congress should grant “federal district courts the full judicial power authorized by the Constitution coupled with discretion to dismiss, transfer or remand cases when it appears that some other forum is more adequate for resolving the controversy.”).

²¹ 28 U.S.C. § 1391 (2012).

²² Venue statutes might also be drafted for particular causes of action. While there are advantages to trans-substantivity, there are also advantages to tailoring venue to the particular issues that arise under particular statutes. This proposed statute would not govern venue in diversity cases. In a prior article, the Author argued for a similar focus on convenience and the prevention of forum selling in diversity cases as well. Klerman, *supra* note 18, at 281–84. Nevertheless, for diversity cases there are additional reasons that might suggest that federal and state courts in the same location should have jurisdiction over the same set of disputes. For example, under *Klaxon v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941), the Court concluded that allowing federal district court jurisdiction when a state court in the same state would not have jurisdiction could change substantive law. Abrams, *supra* note 4, at 28–29.

the injury was suffered, or in the district in which the most important property that is the subject of the litigation is situated, or

(4) if there is no district satisfying subsection (a)(1), (a)(2), or (a)(3), then in the judicial district in which a majority of plaintiffs or a majority of defendants reside.

(b) For the purposes of this statute:

(1) a natural person resides in the district in which that person has his or her habitual residence at the time the lawsuit is filed, even if that place is not the person's domicile.

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not it be incorporated, shall be deemed to reside in the district where such entity has its principal place of business.

(3) the federal government or agents of the federal government acting in their official capacity or under color of law shall be deemed to reside in every judicial district.

(4) a natural person not residing in the United States shall be deemed to reside in every judicial district.

(5) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not it be incorporated, that does not have its principal place of business in the United States shall be deemed to reside in the district where such entity has its principal place of business in the United States, or, if it has no place of business in the United States, it shall be deemed to reside in every judicial district.

(c) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action of which the district court has original jurisdiction not founded on 28 U.S.C. § 1332 to any other district or division.

(d) 28 U.S.C. § 1391 shall apply only to cases in which the district court has original jurisdiction founded on 28 U.S.C. § 1332.

Others more experienced in statutory drafting can probably draft a better statute,²³ but several aspects of the proposed statute are worthy of note. For reasons that will be discussed further below relating to forum selling, the statute gives the plaintiff very little choice. In a given case, there is at most one district that could satisfy (a)(1), and if there is a district that satisfies (a)(1), that is the only district for which venue would be proper. Similarly, there are relatively few districts satisfying (a)(2) or

²³ It might, for example, be wise to integrate the proposed statute into the existing venue statute, 28 U.S.C. § 1391. In addition, if the above statute were passed, 28 U.S.C. § 1391 would need to be amended to make clear that it applies only to diversity cases.

(a) (3), and if such districts exist, the plaintiff must choose one of those districts, assuming, of course, that no district satisfies (a) (1).

The provisions of (a) (2) address patent infringement and similar causes of action, where the Author has argued that the place where the largest number of infringing goods is sold is usually the most appropriate place for litigation.²⁴ In addition, it should be noted that residence is defined differently than in 28 U.S.C. § 1391. In 28 U.S.C. § 1391(c) (1), residence for individuals is equated with domicile.²⁵ Domicile, however, is not a good proxy for convenience, because one may be domiciled in a place that would be very inconvenient to litigate. For example, college students are often domiciled where their parents live, even if they spend most of their time closer to their university. Similarly, in contrast to § 1391(c) (2), the statute defines residence for corporations in terms of principal place of business, not personal jurisdiction, because for most corporations, the most convenient place to litigate is their principal place of business. Section (c) of the statute, which gives the district court the power to transfer the case to any other district or division, is important, because no set of rules can select the most convenient forum in every case. There are too many facts to consider, and, perhaps more importantly, many of the facts can be manipulated by the plaintiff by joining (or not joining) additional plaintiffs or defendants. In order to prevent the plaintiff from being able to de facto select any district it pleases, it is important to ensure that the district court has discretion to transfer.

As noted above, a second reason to restrict venue in federal courts is to prevent forum selling. As Greg Reilly and the Author argue elsewhere, if plaintiffs are given too many possible fora in which to sue, there is a danger that judges in some districts may tilt the law in a pro-plaintiff direction in order to attract more cases.²⁶ While most judges have little interest in increasing their caseload, and while most judges would not distort the law to attract more cases even if they wanted to hear more, it only takes a few motivated judges to create problems for the entire country. A prime example involves patents and the Eastern District of Texas.²⁷ The patent venue statute has been interpreted to allow patentees to sue for infringement in any district where the infringing product is sold.²⁸ For nationally distributed products, this means that patent plaintiffs can sue in any district. Judges in the Eastern District of Texas have distorted the rules and practices relating to case management, joinder, discovery,

²⁴ Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. (forthcoming January 2016). For an argument that the place of sale is often the best forum more generally, see Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012).

²⁵ 28 U.S.C. § 1391.

²⁶ Klerman & Reilly, *supra* note 24.

²⁷ *Id.*; see J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 651–63 (2015).

²⁸ Klerman & Reilly, *supra* note 24, at 6.

transfer, and summary judgment in order to attract patent litigation to their district, increase their prestige, and benefit the local economy. As a result, nearly a quarter of all patent infringement cases were filed in the Eastern District of Texas in 2012 and 2013.²⁹ According to Lynn LoPucki, bankruptcy judges in the District of Delaware have similarly distorted bankruptcy law and procedure to attract large bankruptcy filings,³⁰ and Reilly and the Author have documented other examples as well.³¹ The best way to prevent forum selling is to restrict the number of places plaintiffs can sue and thus to restrict the number of courts that can potentially compete for any given suit. The statute proposed above does so by restricting venue.

II. RETHINKING *STAFFORD v. BRIGGS*

In cases involving suits against federal officers, Congress recognized many of the arguments discussed in the prior Section when it enacted 28 U.S.C. § 1391(e). In particular, under that statute, venue takes into account the convenience of the plaintiff as well as the convenience of the defendant and thus allows the plaintiff to sue where he or she resides. 28 U.S.C. § 1391(e) reads, in relevant part:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may . . . be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.³²

By its plain language, this statute would seem to have made the District of Nevada a proper venue in *Walden v. Fiore*, because Walden was sued for seizing Fiore's cash while "acting . . . under color of legal authority" as a DEA agent at the Atlanta airport.³³

²⁹ Anderson, *supra* note 27, at 18.

³⁰ LYNN M. LOPUCKI, *COURTING FAILURE* 49–50, 234–36 (2005).

³¹ Klerman & Reilly, *supra* note 24, at 38.

³² 28 U.S.C. § 1391(e)(1) (2012).

³³ It is an interesting question whether the fact that Walden was a "police officer for the city of Covington, Georgia" working "as a deputized agent" of the DEA, *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014), means that he was not "an officer or employee of the United States or any agency thereof" for the purposes of 28 U.S.C. § 1391(e). The Author is not aware of any case law on that point, although the fact that the Department of Justice provided representation to Walden under 28 C.F.R. § 50.15 (2014) and 28 C.F.R. § 50.16 (2014) indicates that they considered him a federal official or federal employee, because those provisions apply only to "present and former Federal officials and employees." 28 C.F.R. § 50.15(a). It is also unclear whether, in addition to satisfying 28 U.S.C. § 1391(e), Walden would also have had to satisfy personal jurisdiction as reflected in *FED. R. CIV. P.* 4(k)(1)(A). It seems unlikely that he would, because 28 U.S.C. § 1391(e)(2) states that service may be

Nevertheless, in *Stafford v. Briggs*, the U.S. Supreme Court held that § 1391(e) did not apply to suits for damages.³⁴ Chief Justice Burger acknowledged that the broad language of the statute, which refers to any “civil action” and to actions “under color of legal authority,” would seem to encompass the *Bivens* actions, which were the subject of both *Stafford* and *Walden*.³⁵ Nevertheless, Chief Justice Burger interpreted the legislative history as evincing congressional intent to expand venue only for cases involving injunctive relief. In dissent, Justice Stewart argued that § 1391(e) “means what it says, and . . . thus applies as well to a suit for damages.”³⁶ In addition, Justice Stewart examined the legislative history and found both a committee report and a contemporaneous interpretation by Deputy Attorney General Katzenbach indicating that the legislation was intended to cover suits for damages.³⁷ If the case was decided today, when the justices pay much more attention to statutory text and are less inclined to rely on ambiguous legislative history, it seems likely that the case would have come out differently.

Stafford's narrow reading of § 1391(e) should be overturned by the Court or Congress. It is an erroneous interpretation of the statute, and, for the reasons discussed in the prior Section, it is bad policy. In most cases involving suits against federal agents, the agent will be represented by the Department of Justice, which can easily defend actions in any district. While the federal government has discretion not to represent a federal official,³⁸ it certainly has the power to do so and thus to limit the financial burden on federal officials. While it is true that an agent will sometimes be required to travel to testify at trial, most cases settle, and the government can easily reimburse federal agents for their travel expenses. In addition, deponents are usually deposed in their home states,

made “beyond the territorial limits of the district in which the action was brought,” thus obviating the need to rely on FED. R. CIV. P. 4(k)(1) and its limits on personal jurisdiction. See *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (Stewart, J., dissenting).

³⁴ *Stafford*, 444 U.S. at 542. The text of 1391(e) was identical in relevant respects when *Stafford* was decided.

³⁵ *Walden*, 134 S. Ct. at 1120.

³⁶ *Id.* at 545–46.

³⁷ *Id.* at 551–52. For a similar critique of *Stafford*, see Barry W. Fissel, Recent Case, *Stafford v. Briggs*, 100 S. Ct. 774 (1980), 49 U. CIN. L. REV. 675, 684, 688 (1980) (criticizing Burger’s opinion “for the slight weight it gave the plain meaning of the statutory language” and “its misleading treatment of the legislative history,” although concluding that the decision “is probably correct” because passage of “the Tort Claims Act amendments would have rendered the Court’s decision moot.” The amendments to the Federal Tort Claims Act referred to were never enacted.)

³⁸ 28 C.F.R. § 50.15 (2014). In *Walden v. Fiore*, Walden was represented by the Department of Justice in the district court and in proceedings before the Ninth Circuit panel. *Fiore v. Walden*, 688 F.3d 558, 561, 584 (9th Cir. 2012). Jeffrey S. Bucholtz, who was hired as “private counsel at federal expense” under 28 C.F.R. § 50.16, filed the petition for rehearing en banc in the Ninth Circuit and represented Walden in the Supreme Court. Telephone Interview with Jeffrey S. Bucholtz, Partner, King & Spalding (Feb. 5, 2015).

and that could be required in *Bivens* cases.³⁹ As noted above, in cases involving federal law, where minimizing litigation costs is the dominant concern, the convenience of the plaintiff and defendant should have equal weight. Since there is a U.S. Attorney's Office in every district, it is generally much easier for the government to defend in the district where the plaintiff resides than for the plaintiff, especially an individual plaintiff, to have to sue where a relevant act or omission occurred or where the government official who is the defendant resides. Therefore, when convenience to the plaintiff and defendant are weighed equally, the most appropriate forum will usually be where the plaintiff resides. Of course, if it turns out that another district would be more convenient, the district court judge should use her discretion under the proposed statute to transfer the case to the more convenient district.

Under the venue statute proposed above, a *Bivens* plaintiff must bring the case in the district where he or she resides.⁴⁰ In contrast, 28 U.S.C. § 1391(e) gives the plaintiff the choice to bring the case where she resides, where substantial events or omissions took place, or where the defendant resides. The proposed statute has the advantage of constraining the plaintiff's choice and thus preventing forum selling. On the other hand, forum selling does not seem to be a problem in cases against the government or government officials, so giving the plaintiff more choice, as § 1391(e) does, would also probably be fine. Either § 1391(e) or the proposed venue statute would be better than current law, which leaves jurisdiction and venue to 4(k)(1)(A) and § 1391(b). Those provisions are inappropriate, because they reflect the constitutional and sovereignty concerns that inform state court jurisdiction, rather than issues of convenience and forum selling that should influence cases in federal court.

III. CONCLUSION

Walden v. Fiore provides courts, commentators, and legislators an opportunity to rethink jurisdiction and venue in federal court cases involving federal law, and especially in cases involving alleged misconduct by federal agents. Jurisdiction in such cases is currently determined by FRCP 4(k)(1)(A), which means that the appropriate forum must satisfy constraints on state court jurisdiction. State court constraints are irrelevant to cases in federal court, because limits on state courts are based on notions of state sovereignty, which do not apply to federal courts. When determining the appropriate federal court for cases involving federal law, the main goals should be to discourage forum selling and to minimize

³⁹ Such a requirement might be particularly appropriate when, as in *Walden v. Fiore*, the federal agent was a local officer working as a deputized agent of the DEA. See *supra* note 33. Local agencies might be reluctant to allow their employees to become deputized agents if they could be forced to travel for depositions and other pre-trial proceedings.

⁴⁰ See *supra* text following note 22. This is the combined effect of sections (a)(1) and (b)(3).

litigation costs. Forum selling can be prevented by ensuring that the plaintiff has relatively few choices about where to bring the suit. Litigation costs are minimized by considering convenience to the plaintiff, defendant, and witnesses equally. In contrast, current provisions relating to jurisdiction and venue focus almost exclusively on the defendant and sometimes give the plaintiff wide choice of forum.

In cases involving alleged misconduct by federal agents, the venue statute, 28 U.S.C. § 1391(e), already moves beyond the defendant-centered analysis typical of jurisdiction and venue in private cases. Nevertheless, this sensible provision does not currently apply to *Bivens* actions because of the Supreme Court's decision in *Stafford v. Briggs*. Because that case's legal reasoning was weak and because of the strong policy arguments in favor of more liberal venue, it would be appropriate for the Court to overrule that case or for Congress to enact legislation overriding it.