VENUE TRANSFERS OF ADMINISTRATIVE LITIGATION AND THE NEGLECTED PERCOLATION ARGUMENT

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Introduction

A local business brings an action against a federal regulator, alleging that the agency's actions are unlawful. The business properly brings the action in federal district court in its home district. But the regulator files a motion to transfer the action, under 28 U.S.C. § 1404(a), to the U.S. District Court for the District of Columbia (D.D.C.). Even though the business did everything right, the district court grants the motion to transfer. Now, the business finds itself in the position of having to litigate the case in D.D.C., incurring all of the costs of litigating in a faraway location, including travel, retaining local counsel, and additional opportunity costs.

This is the situation in which John Doe Corporation (Doe Corp.) found itself. In March 2024, Doe Corp. filed a complaint in the U.S. District Court for the Southern District of Texas (S.D. Tex.). In the complaint, Doe Corp. alleged a pattern of "abusive, retaliatory, and excessively burdensome" behavior by the Public Company Accounting Oversight Board (PCAOB, or the Board) over the course of a years-long investigation. Notably, the Board has an office located in S.D. Tex., and the investigation's proceedings took place there. While the facts established in its initial complaint were not sufficient to show that S.D. Tex. was Doe Corp.'s home district, the company later filed an amended complaint establishing S.D. Tex. as its home district. Doe Corp. went on to challenge the Board's actions for violating the nondelegation doctrine, private nondelegation doctrine, Due Process Clause of the Fifth Amendment, and the statute from which the Board derives its authority. S.D. Tex. eventually dismissed Doe Corp.'s lawsuit after the PCAOB closed its investigation—but not before the Fifth Circuit had the opportunity to voice some important procedural concerns.

Setting the merits aside, Doe Corp.'s case followed a procedural path akin to several similar, recent challenges to actions by administrative agencies in the Fifth Circuit. While the PCAOB is technically a nonprofit corporation for statutory purposes, it is established that it is "'part of the government' for Constitutional purposes" and that its members are officers of the United States.

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(Understood as such for the purposes of constitutional litigation, the Board will be treated as an administrative agency in this Essay.) Repeatedly, district courts in the Fifth Circuit have granted administrative agencies' motions to transfer, only to be reversed on appeal by the Fifth Circuit for improperly weighing the relevant factors. However, as the Fifth Circuit has mentioned in a pair of opinions, the factors to be weighed might not fully account for the implications of these transfers.

On one hand, the case for allowing these transfers is clear. Judicial efficiency is a desirable pursuit for both courts and parties, as no judge or party wants an action to drag on unnecessarily or for unnecessary money to be spent litigating the same issues in multiple courts simultaneously. Additionally, judicial expertise on administrative law in D.D.C. has been cited as a factor weighing in favor of transfer. It seems uncontroversial to claim that parties to an action generally want their claims to be resolved quickly and by a judge with a high level of familiarity with the laws at issue. On the other hand, transferring these cases too readily can not only raise litigation costs for plaintiffs in the immediate case, but also discourage future plaintiffs from bringing similar actions for fear of finding themselves being forced to litigate in a faraway venue. Additionally, allowing repeat transfers to the same court could easily result in too much uniformity in the law. With frontier legal issues, unwavering uniformity diminishes future courts' ability to examine the practical resilience of different approaches to the issue from different courts.

I. Section 1404(a) Motions to Transfer

Under 28 U.S.C. § 1404(a), "[f]or 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 or to any district or division to which all parties have consented."

Each circuit has developed its own case law in interpreting § 1404(a). In the Fifth Circuit, for example, the court has made clear that transfer under the statute is properly granted only if the movant "'clearly establishes good cause' by 'clearly demonstrating that a transfer is for the convenience of parties and witnesses, in the interest of justice.'" In clarifying the standard, the court has stated that "a movant must show (1) that the marginal gain in convenience will be *significant*, and (2) that its evidence makes it plainly obvious—i.e., clearly demonstrated—that those marginal gains will *actually* materialize in the transferee venue."

Each circuit has provided clearer guidance by establishing specific factors for district courts to consider and weigh in assessing whether the § 1404(a) burden has been met by the movant. While every circuit has its own set of factors, they are substantively similar across circuits. The Fifth Circuit considers four private interest factors and four public interest factors. The private interest factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive." The public interest factors include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious[,] and inexpensive." The Fifth Circuit also expressly noted that these factors are not exhaustive or conclusive, and that district courts have "broad discretion in deciding whether to order a transfer," only as limited by the text of § 1404(a) and by Supreme Court and Fifth Circuit precedent.

II. Application of the Factors in Weighing § 1404(a) Motions in Actions Against Administrative Agencies

District courts in the Fifth Circuit appear to treat these transfer factors differently from the Fifth Circuit itself in some cases. One of the first cases demonstrating this pattern began when a group of plaintiffs filed a complaint in their home district, the U.S. District Court for the Western District of Texas, challenging the Commodity Futures Trading Commission's (CFTC) enforcement action against a political betting marketplace. After some procedural back-and-forth, the CFTC filed a motion to transfer the action to D.D.C., which the district court granted without a hearing. However, the plaintiffs appealed the decision to transfer, petitioning for a writ of mandamus from the Fifth Circuit. The Fifth Circuit granted the petition and ordered the district court to request the return of the case from D.D.C. In its opinion, the court found that the district court had abused its discretion by analyzing the local interests factor incorrectly and because "speculation is all the district court used to consider the private interest factors." In issuing this opinion, the Fifth Circuit signaled an aversion to allowing district courts' transfer discretion to become overly broad and encouraged district courts to analyze § 1404(a) motions more critically.

This trend of disparate treatment of the transfer factors continued when several trade associations challenged a CFTC rule governing credit card late fees. The associations filed a complaint

against the CFTC in the U.S. District Court for the Northern District of Texas (N.D. Tex.), alleging that the agency's rule violated the Appropriations Clause and the Administrative Procedure Act (APA). Once again, the CFTC filed a motion to transfer the action to D.D.C., and, once again, the motion was granted. The plaintiffs petitioned the Fifth Circuit for a writ of mandamus, and the Fifth Circuit again granted the writ in *In re Forth Worth Chamber of Commerce (Chamber I)* (2024) on procedural grounds unrelated to the district court's weighing of the transfer factors. While the Fifth Circuit did not reach the merits of the transfer decision in this opinion, Judge Andrew Oldham took the opportunity to pen a concurrence criticizing the district court's treatment of the factors. This concurrence was the seed of the Fifth Circuit's movement toward an implicit endorsement of the benefits of percolation. However, this was not the end of the transfer drama in this case.

After N.D. Tex. received the case back from D.D.C., the CFTC *again* filed for a transfer to D.D.C., and the district court *again* granted the motion. For a second time, the plaintiffs petitioned the Fifth Circuit for a writ of mandamus blocking the transfer, which the court granted in *In re Chamber of Commerce of the United States of America (Chamber II)* (2024). In this opinion, the court, drawing partially on Judge Oldham's previous concurrence, found that the district court had clearly abused its discretion in weighing the transfer factors. First, the court urged district courts to stay transfer orders for a short period to allow for considered appellate review outside of "unnecessarily rushed mandamus proceedings." This language further underscores the Fifth Circuit's eagerness to review these transfer orders with an exacting eye, as opposed to deferring to district court discretion too readily. However, the court also expanded on Judge Oldham's concurrence in hinting at the benefits of percolation in the opinion.

The case of Doe Corp. represents the most recent example of this pattern. Doe Corp. filed an action challenging the PCAOB's actions, the Board filed a § 1404(a) motion to transfer to D.D.C., and the district court granted the transfer without a hearing. The plaintiff then petitioned the Fifth Circuit for a writ of mandamus, which was granted on very narrow procedural grounds. Specifically, the court found that the district court did not comply with S.D. Tex. General Order 2024-02, which requires that out-of-circuit transfers be stayed for twenty-one days. In granting the writ on these grounds, the Fifth Circuit paid no attention to the merits of the district court's transfer order. Following the writ, S.D. Tex. requested the case to be transferred back from D.D.C., and then stayed the case pending full briefing by the parties on the motions pending. Before anything developed further, the PCAOB closed its investigation against Doe Corp. Thus, S.D. Tex. dismissed the

lawsuit without prejudice upon stipulation by the parties. While the Fifth Circuit never intervened on the merits of the transfer order in *Doe Corp.*, the case was primed for another invocation of the importance of percolation.

III. The Neglected Percolation Argument Found Throughout the Cases

In reading through the district court's transfer order in *Doe Corp.*, several aspects of the court's reasoning stand out as having been weighed questionably—but one aspect in particular stands out as being contradictory to an argument mentioned briefly in the *Chamber I* concurrence and in *Chamber II*. In its order, the court stated as a reason weighing in favor of transfer that "the District Court for the District of Columbia is already handling a similar case." While that was arguably true (the plaintiff argued against sufficient similarity in its petition for writ of mandamus), the court should not have been so quick to weigh that factor in favor of transfer.

First, the district court failed to conduct the proper analysis to determine if the cases were similar enough to warrant transfer. In the Fifth Circuit, a district court's decision to transfer based on the similarity of a case in another district is one that occurs not under a § 1404(a) motion, but under the first-to-file rule. This rule is invoked at the district court's discretion *after* conducting the "crucial inquiry . . . of 'substantial overlap.'" Thus, even if the presence of a similar case could be imported into the § 1404(a) analysis, a court must first determine whether the cases substantially overlap. As signaled by the word "substantial" in the first-to-file rule jurisprudence and by the Fifth Circuit in *Chamber II*, this inquiry should not be conducted leniently.

Additionally, in his *Chamber I* concurrence, Judge Oldham warned of the dangers created by allowing this type of transfer to occur too freely. Judge Oldham stated that allowing administrative agencies to successfully argue for transfer based on the convenience of their counsel would allow federal defendants to "*always* argue that litigation should be transferred to the D.D.C." He added that "[s]uch an outcome would concentrate federal judicial power in D.C. and undermine our federalist system." Judge Don Willett later referenced this argument in the majority opinion in *Chamber II*, stating that "[i]f Congress wants to enshrine D.D.C. as a venue for APA challenges or cases where a federal agency or other D.C.-based government actor is the defendant, it can easily do so. But it hasn't." He went on to add that "[a]llowing federal defendants to cite government counsel's convenience and travel costs as a talismanic way to wire around § 1404(a)'s text (and [Fifth Circuit]

precedent) would amass federal judicial power in the District of Columbia," and that "[n]either Congress's words, the wealth of precedent construing those words, nor our federalist system permit such a peculiar result."

While these points were based on defendants' arguments related to convenience of counsel in those cases, the Fifth Circuit's argument holds when applied to the district court's analysis in *Doe Corp.* S.D. Tex. invoked its broad transfer discretion to send the case to D.D.C. The order's discussion of the transfer factors was extremely brief (one paragraph), and all three of the factors deemed to weigh in favor of transfer were directly related to either the Board's location in D.C. or the similar case already being handled by D.D.C. Lending these factors too much weight runs the risk of leading to the exact amassment of judicial power warned against by Judges Oldham and Willett.

In arguing against amassment of judicial power, Judges Oldham and Willett assumed that percolation is a desirable pursuit for our judicial system. Percolation, as defined by Professors Michael Coenen and Seth Davis, is "the practice of awaiting multiple lower courts' answers to a legal question that the Court is bound to decide." Coenen and Davis also emphasized that several notable past and present Supreme Court Justices, including Chief Justice John Roberts and Justices Ruth Bader Ginsburg and John Paul Stevens, have viewed the practice of percolation favorably. For example, Coenen and Davis noted that Justice Ginsburg acknowledged in her dissent in *Arizona v. Evans* (1995) that the Court has in "many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by [the] Court." Coenen and Davis went on to outline the informational and institutional value of percolation and speculate (although not favorably) on the practice's future.

While percolation is generally an effective argument against allowing all cases of a certain type to end up in the same court, in these Fifth Circuit cases in particular, the administrative issues at hand appear to be ones that would benefit greatly from percolation in the lower courts. All of the cases discussed above involve private actors challenging actions by federal regulators as either unconstitutional, disallowed under the agency's empowering statute, or both. Furthermore, percolation comports with existing case law in other procedural contexts.

For example, the multicircuit petition process is another context where percolation maintains great importance. Congress enacted 28 U.S.C. § 2112(a) to provide for a lottery process to determine where

cases will be heard when challenges to certain agency orders are filed in multiple circuit courts. Following the lottery, all related cases are transferred to the same circuit court. Under § 2112(a)(5), the court selected may thereafter transfer the case "[f]or the convenience of the parties in the interest of justice," providing substantively similar considerations to those under § 1404(a).

The recent net neutrality litigation, which involved multiple petitions for review filed across multiple circuits challenging the Federal Communications Commission's (FCC) net neutrality order, demonstrates the importance of percolation. After the lottery selected the Sixth Circuit as the appropriate venue, the FCC moved to transfer the cases to the D.C. Circuit, reasoning that the D.C. Circuit had previously adjudicated related cases. In denying the motion, a panel of the Sixth Circuit articulated benefits of adhering to the random selection process, stating that doing so "dispels any impression that we—or any other court outside of Washington, DC for that matter—are less capable of evaluating the legal questions presented." This argument holds in this context, since continually allowing administrative cases to be transferred to the D.C. Circuit on the whim of government defendants could eventually undermine public trust in local courts' abilities to decide those same types of cases.

The Supreme Court has shown a recent willingness to decide administrative cases, with the October 2023 term bringing with it a slew of extremely consequential administrative cases like *Loper Bright Enterprises v. Raimondo* (2024), *Securities and Exchange Commission v. Jarkesy* (2024), and *Garland v. Cargill* (2024), all of which limited agency power to some extent. The Court's propensity for deciding such cases is reshaping administrative law, an incredibly consequential field that has a tangible effect on the civil liberties of U.S. citizens. There are, of course, strong arguments to be made that it is not a significant problem that these cases often land in the D.C. Circuit. These arguments include the lack of necessary travel for litigants and the administrative expertise of judges in the D.C. Circuit. Indeed, Congress often explicitly *selects* D.C. courts as the appropriate forum for a challenge, such as for Clean Air Act challenges.

Yet by allowing challenges to go forward in courts across the country, Congress implicitly endorses the value of percolation. And arguments for centralization, however strong, often fail to account for the benefits of percolation. The arguments for judicial expertise rest on the assumption that simply hearing more cases of a certain type renders those judges better at deciding that type of case accurately and efficiently. While this assumption might be true in a vacuum, it ignores some of the drawbacks of centralization. If all issues of a certain kind

are predestined to be heard in the same circuit because of that circuit's presumed expertise, there would be very little room for any developments in that legal area. Legal issues often benefit from being seen by fresh judicial eyes, unbound by panel precedent. In a world of centralization, with cases frequently being funneled into the same circuit by defendants, losing parties unsupported by that circuit's precedent would have to petition appellate courts for rehearing en banc to even have a chance of prevailing. The time and resources needed to appeal a decision twice far exceed what most plaintiffs, such as Doe Corp., have at their disposal. Allowing plaintiffs to bring suit in their home districts not only minimizes unnecessary litigation costs but also allows plaintiffs a chance to have their legal arguments heard by a court unburdened by binding precedent.

IV. Conclusion

The Supreme Court will continue to decide consequential administrative law cases. It is assisted in forming stronger doctrines by allowing different courts across the nation to face administrative challenges on a case-by-case basis, unbound by panel precedent. Thus, district courts should consider the value of percolation in a given case as part of their analysis in deciding whether to grant a § 1404(a) motion. The value of doing so is even more pronounced in cases with a clear pattern of repeat-player defendants moving for transfer for no apparent reason other than convenience—and perhaps a more amenable court. In such cases, district courts should directly weigh the benefits of percolation against those of judicial economy.

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