



1988

Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign

Robert A. Lusardi

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Civil Procedure Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 Vill. L. Rev. 1 (1988).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol33/iss1/1>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

VILLANOVA LAW REVIEW

VOLUME 33

FEBRUARY 1988

NUMBER 1

NATIONWIDE SERVICE OF PROCESS: DUE PROCESS LIMITATIONS ON THE POWER OF THE SOVEREIGN

ROBERT A. LUSARDI*

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SERVICE OF PROCESS IN FEDERAL COURT	2
A. <i>Personal Jurisdiction in Federal Courts</i>	2
B. <i>Amenability Without Reference to State Boundaries</i>	6
1. <i>Rule 4(f)—The “Bulge” Service Provision</i>	6
2. <i>Congressional Authorization of Nationwide Service of Process</i>	8
a. <i>Mandamus and Venue Act of 1962</i>	9
b. <i>The Federal Interpleader Act</i>	15
c. <i>The Securities Exchange Act of 1934</i>	17
III. A SUGGESTED ANALYSIS	23
A. <i>State Court Jurisdiction Cases</i>	24
B. <i>Application to Nationwide Jurisdiction Cases</i>	32
C. <i>Fair Forum Standard</i>	40
IV. CONCLUSION	48

I. INTRODUCTION

THERE are a number of instances in which a federal court asserts personal jurisdiction by service of process beyond the territorial limits of the state in which it sits. The most common examples of these assertions of jurisdiction are the use of a state's long-arm statute¹ and the “bulge” provision of the federal rules.² But, in addition, there are a number of statutes by which Con-

* Professor of Law, Western New England College School of Law. A.B., Colgate University, 1968; J.D., Boston College, 1971.

1. FED. R. CIV. P. 4(e); e.g., *United States v. First Nat'l City Bank*, 379 U.S. 378, 381 (1965).

2. FED. R. CIV. P. 4(f). See *infra* text accompanying notes 21-29.

gress has authorized nationwide service of process in particular circumstances.³

It is generally accepted that Congress may authorize expansion of a federal district court's jurisdiction beyond the territorial limits of the states in which it sits, including authorization of extraterritorial service of process.⁴ However, a question which must be considered is whether there are any constitutional limitations on this congressional power and, if so, what those limitations are. For absent any restrictions, defendants could find themselves placed in the difficult position of having to litigate a case in a district far from home, with which they have no connection.

This article will begin by examining the principles which govern the assertion of personal jurisdiction in federal court. It will analyze examples of situations in which nationwide service of process has been authorized for the purpose of establishing the paradigm by which such authorizations are justified and limited. Finally, this article will suggest that the prevailing paradigm is inadequate and it will offer an alternative for dealing with this problem in the future.

II. SERVICE OF PROCESS IN FEDERAL COURT

A. *Personal Jurisdiction in Federal Courts*

In order for a federal court to assert personal jurisdiction over a defendant, it must have power to do so. The defendant must be amenable to service under a statute or rule of court which authorizes the exercise of jurisdiction, and that assertion of jurisdiction must be consistent with the due process clause of the fifth amendment.⁵ Beyond this, service of process must be exercised in a manner both consistent with the authorizing provision

3. For a reference to statutes authorizing such nationwide service of process, see *infra* note 30.

4. *E.g.*, *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1925); Peterfreund, *Federal Jurisdiction and Practice*, 32 N.Y.U. L. REV. 491, 499 n.65 (1957).

5. *E.g.*, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409 (1987); *Shaffer v. Heitner*, 433 U.S. 186, 221 (1977) (Brennan, J., concurring in part and dissenting in part); *Burstein v. State Bar of California*, 693 F.2d 511, 514 (5th Cir. 1982); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio, 1967). *Omni Capital* does leave open the possibility of a common law service provision. For more detail on this point, see *infra* note 17. While most personal jurisdiction cases revolve around state court jurisdiction and are restricted by the fourteenth amendment, it is the fifth amendment which places due process limits on the courts of the federal government. *E.g.*, *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974).

and reasonably calculated to notify the defendant of the action.⁶

The authority of a federal court to exercise jurisdiction over a defendant was historically limited as a general rule to persons found or living in the judicial district.⁷ In *Robertson v. Railroad Labor Board*⁸ the Supreme Court stated that Congress had the power to authorize the process of federal courts to run throughout the United States.⁹ The Court went on to rule that such authorization had not been given in that case, which was a suit under the Transportation Act of 1920. As such, "the general rule [that] the jurisdiction of a district court *in personam* [was] limited to the district of which the defendant is an inhabitant or in which he can be found" was to govern the outcome.¹⁰

This concept of the limits of service has been broadened by the adoption of rule 4 of the Federal Rules of Civil Procedure. The primary function of rule 4 is to set forth the appropriate manner of service of process in federal courts.¹¹ It expands on the *Robertson* rule by stating in subsection (f) that the basic reach of federal process covers the entire state in which the court is located when two or more judicial districts are located therein.¹² Beyond this, rule 4(f) makes clear that service may be accomplished beyond the territorial limits of the state in which the district court sits if it is authorized by a federal statute or by the rules.¹³ This provision must be read in conjunction with rule

6. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

7. *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WIS. L. REV. 9, 16 (1969). This was the situation prior to the adoption of the Federal Rules of Civil Procedure in 1938. Foster, *supra*, at 16.

8. 268 U.S. 619 (1925).

9. *Id.* at 622 (citing *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878)). This congressional power arises out of its general supervisory authority under article III, section 1 of the United States Constitution. *United States v. Union Pac. R.R.*, 98 U.S. 569, 602 (1878).

10. *Robertson*, 268 U.S. at 627. In *Omni Capital International v. Rudolf Wolff & Co.* the Supreme Court questioned whether *Robertson* has been undercut by subsequent decisions which have moved away from principles of territoriality. Having raised the question, however, it then stated that it expressed "no view as to the continued validity of *Robertson's* rationales." 108 S. Ct. 404, 412 n.10 (1987).

11. 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE ¶ 4.02[1], [2] (2d ed. 1987) [hereinafter MOORE].

12. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946). The relevant part of FED. R. CIV. P. 4(f) is set forth *infra* in the text accompanying note 21.

13. A detailed explanation of the relation of rules 4(e) and 4(f) is set forth in 2 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 4.32[2] (2d ed. 1986) [hereinafter MOORE'S FEDERAL PRACTICE].

4(e), which deals with extraterritorial service of process and provides that, in the absence of a federal statute, extraterritorial service may be accomplished as provided by the rules.¹⁴ The second sentence of the rule incorporates by reference the state court practice of the state in which the district court sits as an alternative means of service.

One other provision of rule 4(f) is relevant to this discussion. The second sentence of that section effectively provides for the expansion of jurisdiction in the appropriate circumstances by a 100 mile "bulge" from the place at which the courthouse is located, even though service may thereby be effected beyond the state's boundaries, as long as it is within the United States.¹⁵

In summary, rule 4 effectively states that a district court may assert jurisdiction over any party within the state in which it sits, and beyond the state's territorial boundaries if service is authorized by state law, a special federal statute or the 100 mile "bulge" provision.

While courts have traditionally stated that rule 4 attempts to

14. FED. R. CIV. P. 4(e) provides:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

This rule was read in conjunction with former FED. R. CIV. P. 4(d)(7) which appeared to be primarily concerned with use of state law for serving defendants who were inhabitants of or found within the state in which the district court sat. 4A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1114, at 241-42 (2d ed. 1987) [hereinafter WRIGHT]; Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 94 n.63 (1968). However, there was apparently no intention to draw a sharp line between the two rules, but rather they were intended to overlap. WRIGHT, *supra*, at 243; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 619-22 (1964); The 1983 amendments to the Federal Rules of Civil Procedure eliminated rule 4(d)(7), and incorporated its substance into rule 4(c)(2)(C)(i). MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 4.08[3]. The new rule should be interpreted in the same way as its predecessor. *Id.*

15. *E.g.*, *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 416 (5th Cir. 1979) ("[T]he 100 mile bulge provision has effectively expanded the territorial jurisdiction of a federal district court beyond state lines . . ."). For a discussion of the policy underlying the "bulge" provision, see *infra* note 22.

do no more than set forth the appropriate manner of service of process,¹⁶ it is clear that it goes further. It incorporates federal and state standards authorizing assertions of jurisdiction: that is, not merely how service is accomplished but whether a defendant is amenable to suit. In addition, by providing for service throughout the state and within the 100 mile "bulge," it is authorizing, without other reference, some assertions of jurisdiction.

While typical questions of jurisdiction relate to whether the defendant has sufficient connection with the state where the district court sits to warrant service,¹⁷ this is not always the case. Two exceptions to this generalization are the "bulge" provision included in rule 4(f)¹⁸ and those federal statutes which authorize nationwide service of process.¹⁹ In these situations, the territorial limits of effective service are expanded beyond the boundaries of the state in which the district court sits. As numerous authorities have pointed out, the fifth amendment due process clause provides the applicable constitutional standard in reviewing these assertions of jurisdiction since we are concerned with the federal

16. *E.g.*, *Petrol Shipping Corp. v. Greece*, 360 F.2d 103, 109 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966). There is a minority view, however, which sees Rule 4 as a basis for asserting jurisdiction. *Berger, Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285, 288-93; *Foster, supra* note 7, at 16-17 n.28.

17. The several types of cases which can be brought in federal court usually require this sort of "sufficient connection." In diversity cases it is generally accepted that state law governs and the federal court must determine if the defendant is amenable to suit under state law, and whether that is consistent with due process. *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963). *Contra Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960); *Green, Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961). In a federal question case, the federal court may only assert jurisdiction to the same extent as a state court, if pursuant to the second sentence of rule 4(e), it makes use of the state's long-arm statute because of the absence of a federal statute providing for service. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404, 409-11 (1987); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264-69 (5th Cir. 1983); *Burstein v. State Bar of California*, 693 F.2d 511, 514-17 (5th Cir. 1982). In *Omni Capital* the requirements of the applicable state long-arm statute were not met, and it was suggested that the federal courts develop their own rule to authorize service. The Supreme Court refused to decide whether it could "fashion a rule authorizing service of process," because it felt that even if it had such power, it was not prepared to exercise it in the case before it. This was because it had always been assumed that statutory authorization was necessary, and it was not prepared to go beyond this assumption since it felt that Congress was in a better position to structure service rules, and that it would be appropriate to show "circumspection . . . in going beyond what Congress had authorized." 108 S. Ct. at 411-13.

18. For a discussion of the "bulge" provision, see *infra* notes 21-29 and accompanying text. *See also* *Berger, supra* note 16, at 318-19 n.157.

19. For a general reference to statutes authorizing nationwide service of process, see *infra* note 30.

government's power to require a defendant to appear.²⁰ The question is what is the appropriate limiting standard under the fifth amendment. To fully analyze this question it is necessary to consider examples of such assertions of jurisdiction, the reasons for them and the congressional authority to allow them.

B. *Amenability Without Reference to State Boundaries*

1. *Rule 4(f)—The "Bulge" Service Provision*

Rule 4(f) provides, in relevant part, as follows:

[P]ersons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced²¹

The purpose behind this provision, according to the advisory committee, was "to promote the objective of enabling the court to determine entire controversies" by expanding personal jurisdiction over a limited class of additional parties.²² Implicit in the advisory committee's understanding of the rule is a concern over whether this purpose is a sufficient justification for extending jurisdiction beyond the boundaries of the state in which the district court is sitting based solely on the party's connection with the lawsuit, irrespective of the quality of contacts with the forum. Be-

20. *E.g.*, *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980); *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709 (S.D.N.Y. 1978); *Foster*, *supra* note 7, at 31; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 2 comment b (1969); RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment f (1980).

21. FED. R. CIV. P. 4(f). The provision was added by an amendment to the rule in 1963. MOORE, *supra* note 11, ¶ 4.42[2.-3]. It was amended to its present form in 1966. *Id.* at ¶ 4.01[26].

22. FED. R. CIV. P. 4 advisory committee's note to 1963 amendment subdivision (f) [hereinafter Committee's Note]. As the advisory committee pointed out, this provision's primary value is "in metropolitan areas spanning more than one State." *Id.* Courts have generally agreed that the rule provides for both the manner of service of process and the amenability of the party to service. The only limitation imposed is that the party served must have minimum contacts either with the "bulge," *e.g.*, *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 415-17 (5th Cir. 1979), or the entire state in which service is accomplished. *E.g.*, *Coleman v. American Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 251-53 (2d Cir. 1968); MOORE, *supra* note 11, ¶ 4.42[2.-3] at 4-402 n.22.

yond this the committee had to consider whether the Supreme Court could authorize such an expansion of jurisdiction.

Regarding the appropriateness of such a rule, the committee indicated that it would operate in only a limited number of situations.²³ In addition, the increased territorial range would not be a hardship to parties in light of modern systems of communications and travel.²⁴ Regarding the Supreme Court's power to authorize such a provision, the committee simply cited *Mississippi Publishing Corp. v. Murphree*.²⁵

In *Murphree* the United States Supreme Court rendered an opinion which is invariably cited for the proposition that congressional authorization of jurisdiction is not limited by state boundaries.²⁶ In this case a resident of the northern district of Mississippi filed a suit for libel in the district court against a Delaware corporation. The defendant had an office in the southern district of Mississippi and had consented to suit in Mississippi. The libel was published in the southern district. In the context of discussing a number of objections raised by the defendant, the Court considered the significance of its consent. It pointed out that such consent rendered the defendant "present" in the state and thus subject to service under the provision of rule 4 which authorized service throughout the state and not simply in the district. In this context, the Court asserted that "Congress could provide for service of process anywhere in the United States."²⁷ Since Congress had this power, although it had not exercised it statutorily, the Court believed that it could effectuate such service through its rulemaking power.²⁸ Thus the opinion both confirms the power of Congress to authorize personal jurisdiction without reference to state boundaries, and the Court's authority to exercise such service through its rulemaking power.²⁹

23. Committee's Note, *supra* note 22.

24. *Id.*; Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 535 (1963).

25. Committee's Note, *supra* note 22 (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946)).

26. *E.g.*, *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 416 (5th Cir. 1979); see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Supporting Memorandum B 437 (1969) [hereinafter ALI STUDY].

27. 326 U.S. 438, 442 (1946) (citing *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); *United States v. Union Pac. R.R.*, 98 U.S. 569, 604 (1878); *Robertson*, 268 U.S. at 622).

28. *Id.* at 442-43. See *supra* note 9.

29. 326 U.S. at 442-43; ALI STUDY, *supra* note 26, at 441; WRIGHT, *supra* note 14, § 1127. The opinion went on to make clear that it was permissible for

This analysis disposes of the concerns of the advisory committee concerning the bulge provision, and, in addition, serves as a basis for the principle that Congress has the power to authorize nationwide service of process. However, it avoids any direct comment on the question of whether there are due process limitations on these authorizations of service of process. The reason for this may simply be that there is no real problem with due process in the "bulge" service situation. *Murphree* makes it clear that there is no legitimate basis for saying that a federal court's territorial reach is necessarily limited by state borderlines, and that Congress has the power to authorize service of process across state lines. If this is so, then it can be argued that expanding a district by 100 miles from the courthouse, as the advisory committee suggests, is not onerous or unreasonable and therefore not violative of personal due process rights. But to conclude that a slight increase in the reach of federal jurisdiction beyond state borders is valid does not resolve the question whether (and to what extent) limitations can or should be placed on more expansive assertions of jurisdiction such as nationwide service of process. In considering this question it is necessary to examine how the courts have dealt with situations in which Congress has authorized jurisdiction far beyond the limits of the 100 mile bulge.

2. *Congressional Authorization of Nationwide Service of Process*

Congress has exercised its power to provide for nationwide service of process in a number of areas.³⁰ Typical examples of this type of legislation are the jurisdictional provisions of the Mandamus and Venue Act of 1962,³¹ the Federal Interpleader Act,³² and the Securities Exchange Act of 1934.³³ An examination of the purposes of these provisions, and how the courts have

the rules to be used to implement this federal power in the absence of explicit action by Congress. In the view of the court this neither violated FED. R. CIV. P. 82 nor the Enabling Act. The court stated that rule 82 had to be construed with rule 4(f) since the advisory committee had drafted both. As such the court saw rule 82 as referring only to venue and subject matter jurisdiction. The Enabling Act was not violated since the court viewed the rules as only affecting the manner and means of recovery, but not substantive rights. 326 U.S. at 445-46.

30. For a listing of statutes authorizing nationwide service of process, see MOORE, *supra* note 11, ¶¶ 4.33 & 4.42[2.-1]; Berger, *supra* note 16, at 318-19 n.157.

31. 28 U.S.C. §§ 1361, 1391(e) (1982).

32. *Id.* §§ 1335, 1397, 2361.

33. 15 U.S.C. §§ 78a-78KK (1982).

treated them, will be of assistance in formulating a general approach to nationwide service of process.

a. Mandamus and Venue Act of 1962

Two major cases³⁴ have fully considered situations in which jurisdiction was obtained by nationwide service of process under the Mandamus and Venue Act of 1962.³⁵ The relevant section provides:

A civil action in which each 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, or any agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.³⁶

The section has been described as a "plaintiff's provision"

34. *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980); *Driver v. Helms*, 74 F.R.D. 382 (D.R.I. 1977), *aff'd in part and rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980).

35. 28 U.S.C. §§ 1361, 1391(e) (1982). It appears that the nationwide service of process provision set forth in this section is intended to confer personal jurisdiction and is not simply a method of service applicable to a defendant already amenable to suit. *E.g.*, *United States ex rel. Garcia v. McAninch*, 435 F. Supp. 240, 244 (E.D.N.Y. 1977). *Contra United States ex rel. Rudick v. Laird*, 412 F.2d 16 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969). *Rudick* would seem to be undercut by the dictum in the later Second Circuit opinion of *Liberation News Service v. Eastland*, 426 F.2d 1379, 1382 (2d Cir. 1970).

36. 28 U.S.C. § 1391(e) (1982). The Mandamus and Venue Act of 1962 also added 28 U.S.C. § 1361 which enlarged the subject matter jurisdiction of federal district courts by specifically authorizing mandamus actions to require government officials to perform their duties. By "historic (sic) accident" such proceedings had previously been limited to the United States District Court for the District of Columbia. S. REP. NO. 1992, 87th Cong., 2d Sess. 2, *reprinted in* 1962 U.S. CODE CONG. & ADMIN. NEWS 2784, 2785; *see Stafford v. Briggs*, 444 U.S. 527, 533-35 (1980); Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310-13 (1967).

which is intended to allow suits against supervisory federal officials or heads of agencies in places other than the District of Columbia, where they usually have their official residences.³⁷ It also is intended to avoid the situation in which a plaintiff wished or was required to sue two indispensable federal officers in her home state, but only one resided there.³⁸ It accomplishes these purposes by expanding the possible bases for proper venue and allowing service of process by certified mail beyond the territorial limits of the state in which the court is located.³⁹

In considering these provisions, Congress made only passing reference to the service of process provision.⁴⁰ Its primary focus was to provide a local forum for resolution of such disputes.⁴¹ While it has been generally accepted that the section provides for nationwide service of process, it has been left to the courts to consider whether there are any constitutional limits on this congressional authorization.

In *Briggs v. Goodwin*⁴² the plaintiffs sued three federal prosecutors and an FBI agent who had allegedly violated their constitutional rights during a grand jury investigation in the northern district of Florida. The suit was filed in the Federal District Court for the District of Columbia, which was the official residence of one of the defendants.⁴³ The three Florida defendants were served by certified mail. These defendants moved for transfer to

37. See, e.g., *Powelton Civic Home Owners Ass'n v. Department of Hous. & Urban Dev.*, 284 F. Supp. 809, 833 (E.D. Pa. 1968).

38. See Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. L.J. 19, 41 (1964).

39. *Id.*; MOORE, *supra* note 11, ¶ 4.29, at 4-242 to -245. Presumably the second federal officer, as an indispensable party, could be served under the 100 mile bulge provision of rule 4(f), but this is of limited utility since frequently the absent federal officer is located in the District of Columbia. It should be noted that the "bulge" provision was adopted in 1963, so that it did not exist at the time of adoption of section 1391(e). Of course, it would also be possible to use the state's long-arm statute, but in 1962 the general venue statute required that the suit be brought where all the defendants resided and not where the claim arose. *Driver v. Helms*, 74 F.R.D. 382, 388 (D.R.I. 1977), *aff'd in part and rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980).

40. H.R. REP. NO. 536, 87th Cong., 1st Sess. 4 (1961).

41. *Id.* at 2-3.

42. 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980).

43. The District of Columbia defendant was served within the district and did not contest jurisdiction. *Id.* at 3 n.11. Both the district court and court of appeals denied this defendant's motion to dismiss on grounds of absolute prosecutorial immunity. *Briggs v. Goodwin*, 384 F. Supp. 1228 (D.D.C. 1974), *aff'd*, 569 F.2d 1 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

the northern district of Florida or, alternatively, for dismissal for improper venue and insufficiency of process.

In reversing the district court's order of dismissal, the Court of Appeals for the District of Columbia began its analysis by pointing out that section 1391(e) was controlling, and that it provided that the district where one of the defendants resided was a proper venue.⁴⁴ The court then considered whether extraterritorial service, as provided by the statute, presented any constitutional problems. The defendants argued that service was improper because Congress did not intend nationwide service to apply in a personal action for money damages against federal officials. They argued alternatively that if it did apply, then such service was constitutionally deficient.⁴⁵

The court quickly disposed of the first argument by relying on the categorical language of the section which did not provide for any exceptions.⁴⁶

The court next considered the constitutional sufficiency of the statute as applied. The defendants argued that it was unconstitutional to require their appearance in the District of Columbia unless they had minimum contacts with that district. They pressed the analogy of fourteenth amendment due process limitations on the assertion of state court jurisdiction and suggested that similar limitations should apply in federal question cases. The court of appeals also rejected this argument. In its view, there was no basis for concluding that limitations placed on state courts applied as well to congressional authorization of jurisdiction in federal courts. It felt that there was no magic to state boundaries since Congress could redraw the federal districts at anytime ignoring state lines—or even reducing the number of federal courts, to “one . . . or a mere handful.”⁴⁷ Thus, it rea-

44. 569 F.2d at 3-7. The district court's opinion was an unreported memorandum decision which is set out in some detail by the court of appeals. *Id.* at 3 n.15. The court of appeals questioned why the district court did not reserve on the question of transfer (which it denied) until it decided the motion to dismiss so that it would have had the option to transfer at that point. The court found support for this in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962). 569 F.2d at 3 n.15. For a discussion of *Goldlawr*, see *infra* note 216.

45. 569 F.2d at 4-7.

46. The court held that section 1391(e) was applicable to suits for money damages against federal officials in their individual capacity if the official inflicted the injury “under color of legal authority” as opposed to simply a personal act. *Id.* at 5 & n.43. The United States Supreme Court ultimately reversed on this point. See *infra* note 59.

47. 569 F.2d at 9 & n.72. The question has at least been raised as to whether there is any significance to the fact that Congress has, with rare excep-

soned, since there is no special significance to the boundaries of districts, and since Congress could create a situation which would necessitate nationwide service of process, it must have the power to do so. As a result, it rejected the view of those courts which had determined federal jurisdiction to be subject to the same "fairness standard" as state court jurisdiction when service was made outside the federal judicial district.⁴⁸ Implicit in this analysis is the assumption that constitutional limitations on the assertion of federal jurisdiction are foreclosed because the assertion of such jurisdiction is different than the assertion of jurisdiction by a state court.

A similar problem was faced in *Driver v. Helms*,⁴⁹ a class action brought in the Rhode Island Federal District Court against various government officials who allegedly violated the plaintiffs' constitutional rights by interfering with first class mail. Some of the defendants, who neither resided in nor had any contacts with Rhode Island, filed a motion to dismiss for improper venue, insufficiency of process and lack of personal jurisdiction.⁵⁰

In a detailed opinion the district court denied the motions. It concluded that Congress had authorized the assertion of personal jurisdiction on a nationwide basis under the statute. The court reasoned that the defendants were all within the United States and since it was only asserting sovereignty, there was no extraterritorial assertion of jurisdiction involved. This situation was

tion, chosen not to have districts cross state lines. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1106 (2d ed. 1973) [hereinafter *HART & WECHSLER*].

48. 569 F.2d at 9 & n.74. The court cited *Fraleley v. Chesapeake & Ohio Railway Co.*, 397 F.2d 1, 3 (3d Cir. 1968) and *Lone Star Package Car Co. v. Baltimore & Ohio Railroad*, 212 F.2d 147, 155 (5th Cir. 1954) as examples of courts applying a fairness test. It pointed out that *Fraleley* relied on *Lone Star* and the latter relied on *United States v. Scophony Corp. of America*, 333 U.S. 795, 818 (1948) which had considered a fairness analysis in dealing with a nonresident British corporation. The *Briggs*' court stated that an attempt to assert jurisdiction over a defendant not within the United States is a different matter from asserting jurisdiction over one within its borders. See *infra* text accompanying notes 87-89.

49. 74 F.R.D. 382 (D.R.I. 1977), *aff'd in part and rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980). Plaintiffs claimed violation of their rights under the first, fourth, fifth and ninth amendments to the United States Constitution, and sought damages and declaratory and injunctive relief. Subject matter jurisdiction was based on 28 U.S.C. §§ 1331(a), 1339, 1343, 1361 (1982) and 5 U.S.C. § 702. 74 F.R.D. at 387.

50. The district court set up a procedure to deal with the preliminary motions and limited its opinion to the motions referred to in the text as well as plaintiffs' motion to certify the class and a motion to dismiss defendant Clarence Kelly, then Director of the Federal Bureau of Investigation. 74 F.R.D. at 387.

therefore distinct from that in which a state attempted to assert jurisdiction over a party beyond its borders, or the United States attempted to assert jurisdiction over a foreign defendant. As long as the defendant is within the sovereign's territorial limits, all that due process required was adequate notice.⁵¹

On appeal, the United States Court of Appeals for the First Circuit undertook consideration of the question of personal jurisdiction.⁵² Appellants argued that section 1391(e) only dealt with venue, not personal jurisdiction. They further argued that, if section 1391(e) did authorize the assertion of personal jurisdiction, it was unconstitutional to the extent that it applied to individuals lacking minimum contacts with the state in which the court was located. The court of appeals first concluded that section 1391(e) was a jurisdictional provision.⁵³ It then considered the question of constitutional impediments to such an assertion of jurisdiction.

The argument that minimum contacts were necessary to legitimize jurisdiction was rejected. Concurring with the district court's view, the court of appeals concluded that contacts analysis was only relevant when state courts were involved because a state's sovereignty was circumscribed by its boundaries. But such boundaries were irrelevant to federal assertions of jurisdiction because the federal government's sovereignty is only limited by national borders.⁵⁴ Using language similar to that of the *Briggs* court, the First Circuit pointed out that Congress could draw its judicial districts anyway it wished, and therefore, federal court jurisdiction was not limited by state boundaries.⁵⁵

In response to appellant's argument regarding unfairness and due process violations, the court indicated that federal officials have to accept this possibility of being sued in distant forums

51. *Id.* at 391 n.6.

52. 577 F.2d at 154-57. The First Circuit, however, first disposed of a number of preliminary issues. The court concluded that section 1391(e) did not apply to former government officials, but only to current government officials. It also held that the section permitted personal damage actions. *Id.* at 149-54. This latter point was the basis for reversal by the United States Supreme Court. *See infra* note 59.

53. The court pointed out that while the section was labeled "Venue," the language therein clearly allowed service by mail beyond the territorial limits of the state as an exception to the general provisions for service provided in rule 4(f). The court also pointed out the legislative history which supported the view of the section as a jurisdictional provision. 577 F.2d at 155-56. For a further discussion *see supra* note 35.

54. 577 F.2d at 156 n.25.

55. *Id.* at 156-57.

given the broad range of people affected by their official acts.⁵⁶ In addition, the court felt that the district court's ability to transfer actions protected the defendants against any excessive burden.⁵⁷ The court felt that proper notice, reasonably calculated to inform the defendant of the pendency of the action, was the only due process limitation on Congress. The court found this requirement satisfied.⁵⁸

The United States Supreme Court reversed *Briggs and Driver* on the grounds that section 1391(e) did not apply to actions for money damages, and, therefore, the actions brought were not proper under the statute.⁵⁹ By basing its decision on a limiting statutory construction, the majority avoided the need to discuss the question of nationwide service of process. Justice Stewart dissenting, joined by Justice Brennan, made the only comment relevant to the jurisdictional question. He rejected the defendants' contacts argument saying:

The short answer to this argument is that due process requires only certain minimum contacts between the defendant and the sovereign that has created the court. See *Shaffer v. Heitner*, 433 U.S. 186; *International Shoe Co. v. Washington*, 326 U.S. 310. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involved suits against residents of the United States in the courts of the United States. No due process problem exists.⁶⁰

It is interesting to note that while the lower courts and Justice Stewart are emphatic in stating that the presence of the defendant within the sovereign's borders ends all due process considera-

56. *Id.* at 157. *But see* *Stafford v. Briggs*, 444 U.S. 527, 544-45 (1980). For a discussion of *Stafford*, see *infra* note 208.

57. See 28 U.S.C. § 1404(a) (1982) (providing for transfer of actions).

58. In support of this the court cited *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). The court concluded that certified mail met this test. 577 F.2d at 157.

59. 444 U.S. 527, 540-45.

60. *Id.* at 554 (Stewart, J., dissenting); accord *Leroy v. Great W. United Corp.*, 443 U.S. 173, 192 (White, J., dissenting) (simply states conclusion that there are "no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents") (citing *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979)).

tions, except as to notice, they do not state any compelling reasons for this conclusion. It is arguable that due process limitations on service of process should be concerned with factors relating to fairness which go beyond sovereign power.⁶¹ If this is so, nationwide service of process would necessarily be subject to greater restrictions than simply fair notice.

b. The Federal Interpleader Act

The Federal Interpleader Act was originally passed by Congress to deal with situations in which insurance companies were faced with multiple claims to the proceeds of a policy and the claimants were located in different jurisdictions.⁶² Since there was no single jurisdiction which could obtain personal jurisdiction over all the necessary parties, it was impossible for the companies to use common-law interpleader procedure to avoid potential multiple liability.⁶³ Congress solved this problem by allowing nationwide service of process in these cases.⁶⁴

In interpleader cases reaching the Supreme Court, the issue of the constitutional power to exercise such nationwide service has not yet been addressed. Thus, possible fifth amendment due

61. See *infra* text accompanying notes 107-58.

62. 3A J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 22.06 (2d ed. 1987). This statutory interpleader is distinct from interpleader pursuant to FED. R. CIV. P. 22 which provides for interpleader under state law without the restrictions of the statute, but also without the benefits of nationwide service of process. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 528 n.3 (1967); MOORE, *supra*, ¶¶ 22.13 at 22-120, 22.04[2.-2] at 22-33.

63. When all the claimants live in a single jurisdiction so that personal jurisdiction could be obtained over them, interpleader permits the so-called stakeholder to sue them all in either state or federal court. The stakeholder may then deposit the funds in court and all the claimants are enjoined from suing the stakeholder. The claimants then litigate amongst themselves the question of entitlement to the fund. See generally Hazard & Moskowitz, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 (1964). The Supreme Court decided shortly before the adoption of the statute that *in rem* and *quasi in rem* jurisdiction could not be used to bind nonresidents in interpleader. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916); see generally Seeburger, *The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee*, 10 IND. L. REV. 480, 495-500 (1977).

64. The statutory requirements for nationwide service of process are (1) that there be \$500 at stake, (2) that at least two of the adverse claimants be of diverse citizenship, and (3) that the plaintiff deposit the fund with the court clerk. 28 U.S.C. § 1335 (1982). In addition, the action must be brought in a judicial district where at least one of the claimants resides. 28 U.S.C. § 1397. If these requirements are met then process may be served in any judicial district where a claimant resides, without limitation. 28 U.S.C. § 2361. Whether process could be served on nonresidents of the United States has been left open by the Supreme Court. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 537 n.18 (1967).

process limitations on its use are still an open question.⁶⁵ As indicated in the earlier discussion, it seems clear that Congress has the power to authorize this broad jurisdictional scope, so the fact that this question of power has not been raised in the context of interpleader is not surprising.⁶⁶ But the absence of any real discussion of the due process question does not negate the existence of due process concerns. There has been no conclusive statement on this question. It can be argued, therefore, as Justice Stewart suggested in his dissent in *Briggs*,⁶⁷ that as long as the defendants have minimum contacts with the United States there is no due process problem in as much as the "particular sovereign" has power over them. However, one might also argue that due process requires a reasonably convenient forum when the multistate nature of the underlying controversy necessitates appearance in a forum with little, if any, connection with certain defendants. At a minimum, such an argument plays off due process interests against interests in the economy and consistency in the resolution of controversies.⁶⁸ As indicated above,⁶⁹ the purpose of the Interpleader Act was to deal with situations in which no one court could otherwise obtain jurisdiction over all of the parties. In the absence of a statute, a stakeholder would be faced with the possibility of multiple lawsuits and the consequent substantial risk of inconsistent results. In such cases resolution of the problem necessitates that some claimants must be subjected to jurisdiction in a district in which they would not normally have to appear. But since this is a special type of case and since at least one claimant must reside in the district where the suit is filed, there is an essential pragmatic fairness which appears to justify the assertion of jurisdiction. Such an analysis would allow for the continued use of nationwide service of process in interpleader, while establish-

65. The interpleader cases reaching the Court were *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967); *Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); *Dugas v. American Sur. Co.*, 300 U.S. 414 (1937); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934); *Levinson v. United States*, 258 U.S. 198 (1922). The question of nationwide service of process was alluded to, but not discussed, in the United States Court of Appeals for the Ninth Circuit's decision in *Tashire. Tashire v. State Farm Fire & Casualty Co.*, 363 F.2d 7, 10 (9th Cir. 1966), *rev'd*, 386 U.S. 523 (1967); *see generally* Seeburger, *supra* note 63, at 484-85 & 493-502.

66. ALI STUDY, *supra* note 26.

67. *See supra* text accompanying note 60.

68. *See Foster*, *supra* note 7, at 30-31; *Hazard, Interstate Venue*, 74 Nw. U.L. REV. 711, 717-18 (1979); *Traynor, Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 663 (1959).

69. *See supra* notes 62-63.

ing a more flexible test for consideration of this question in other contexts.⁷⁰

c. The Securities Exchange Act of 1934

The Securities Exchange Act of 1934⁷¹ was adopted by Congress in response to demands for regulation of the abuses in the securities market.⁷² Section 27 of the Act⁷³ provides for exclusive subject matter jurisdiction in federal district courts for suits under the Act. The section then goes on to provide, in relevant part:

Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.⁷⁴

The meaning of this language as a basis for nationwide service of process has been considered numerous times.⁷⁵ The courts have generally agreed that this section provides for nationwide service, and that Congress can authorize such assertions of jurisdiction.⁷⁶ Having reached these conclusions, courts have gone on to consider the due process implications of such assertions of jurisdiction.

In *Mariash v. Morrill*,⁷⁷ the plaintiff filed suit in the Southern District of New York against a number of Massachusetts defendants who were involved in selling shares in Viatron Corporation

70. See *infra* text accompanying notes 193-98.

71. 15 U.S.C. §§ 78a-78kk (1982).

72. 2 L. LOSS, *SECURITIES REGULATION* 784-85 (2d ed. 1961). The act attempts to regulate these excesses in four ways. "Every non-exempt security listed on an exchange must be registered by its issuer. Periodic reports must be filed thereafter. The solicitation of proxies must comply with the Commission's rules. And there are certain controls over insider-trading practices." *Id.* at 785. For a brief introduction to the Act and its amendments see R. JENNINGS & H. MARSH, *SECURITIES REGULATION CASES AND MATERIALS* 441-48 (5th ed. 1982).

73. 15 U.S.C. § 78aa (1982).

74. *Id.*

75. *E.g.*, *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974); *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978); *Garner v. Enright*, 71 F.R.D. 656 (E.D.N.Y. 1976). See *infra* note 83.

76. See cases cited *supra* note 75.

77. 496 F.2d 1138 (2d Cir. 1974).

as part of a private placement exempt from registration under the Securities Act of 1933.⁷⁸ The complaint alleged that the defendants had conspired to favor one of the defendants over the plaintiff in the delivery of an opinion letter, thus making it impossible for the plaintiff to sell his shares.⁷⁹ This was alleged to be a violation of section 10(b) of the Securities Exchange Act of 1934⁸⁰ and therefore nationwide service of process was authorized under section 27. Among the defendants were eleven members of the law firm who had been Viatron's Boston attorneys.⁸¹

These eleven defendants moved to dismiss on a variety of grounds, including lack of personal jurisdiction. The district court rejected the plaintiff's view that section 27 was a basis for personal jurisdiction, viewing it only as a provision governing subject matter jurisdiction and venue.⁸² The district court also concluded that personal jurisdiction had not been established under the New York long-arm statute and so dismissed the action as to that group.

On appeal, the United States Court of Appeals for the Second Circuit began by pointing out that section 27 did provide for nationwide service of process whenever a claim is stated under the Act.⁸³ The court then went on to consider whether there was any limit to this assertion of jurisdiction. In its view the assertion of nationwide service was limited by the due process clause of the fifth amendment.⁸⁴ But it concluded that all that due process required was notice reasonably calculated to inform the defendants

78. Section 77e requires the registration of any security sold in interstate commerce and section 77d(2) exempts transactions which do not involve a public offer. 15 U.S.C. §§ 77e, 77d(2) (1982).

79. Plaintiff needed the opinion letter in order to release his shares from the restrictions of the private placement. It was alleged that this was delayed so that defendant Burwick could put his substantial holdings in Viatron on the market first. When the plaintiff finally attempted to sell the shares he was informed that the presence of these other shares on the market would make it difficult to sell the plaintiff's shares. 496 F.2d at 1141.

80. 15 U.S.C. § 78j(b) (1982).

81. Originally twelve members of the firm were sued, but the dismissal of one was stipulated by the parties. 496 F.2d at 1141, 1142 n.5.

82. This was an unreported opinion which Judge Kaufman only alludes to in his own opinion. *Id.* at 1140.

83. *Id.* at 1142-43. The court indicated that it did not need to consider whether there was personal jurisdiction under New York law because section 27 authorized nationwide service of process. In the court's view it was simply "too late in the day" to argue otherwise and found support for this view in *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974) and *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). *Id.*

84. 496 F.2d at 1143. *See supra* note 20.

of the action so that they would have an opportunity to be heard.⁸⁵ Since there was no dispute over the notice given to the defendants, the court concluded that due process had been satisfied.

In response to the defendants' argument that due process also required "minimal contacts" with the state where the district court sat, the court said that such a test was irrelevant to an assertion of jurisdiction by the United States. It stated:

It is not the State of New York but the United States "which would exercise its jurisdiction over them [the defendants]." And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the "minimal contacts," required to justify the federal government's exercise of power over them, are present. Indeed, the "minimal contacts" principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.⁸⁶

In so reasoning, the court sought to clarify an earlier Second Circuit opinion, *Leasco Data Processing Equipment Corp. v. Maxwell*.⁸⁷ In that case, also a section 10(b) action, personal jurisdiction was also based on section 27. The court used a minimum contacts analysis to decide whether due process had been satisfied. The *Mariash* court explained that this was not because such an analysis was necessary in all actions under section 27, but rather because the foreign defendants were not "present" within the United States.⁸⁸ As such the question was one of extraterritorial service beyond the borders of the United States. Therefore, the *Leasco* court felt it necessary to determine whether the foreign defendants had sufficient connection with the United States to warrant an assertion of jurisdiction.⁸⁹

85. 496 F.2d at 1143. In support of this proposition the court simply cited, without explanation, *Hanson v. Denckla*, 357 U.S. 235, 245 (1958); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

86. 496 F.2d at 1143 (emphasis supplied by the court) (footnotes omitted).

87. 468 F.2d 1326 (2d Cir 1972).

88. 496 F.2d at 1143 n.9.

89. 468 F.2d at 1340; accord *In re Fotochrome, Inc.*, 377 F. Supp. 26, 29 (E.D.N.Y. 1974), *aff'd*, 517 F.2d 512 (1975).

A similar view on this issue was taken by the United States Court of Appeals for the Seventh Circuit in *Fitzsimmons v. Barton*.⁹⁰ The court of appeals reviewed a dismissal by the district court of a nonresident defendant in a securities fraud action under the Securities Exchange Act of 1934 on the grounds that he lacked sufficient contacts with Illinois to satisfy its long-arm statute.⁹¹ The court of appeals began by pointing out that section 27 provided for nationwide service, and therefore the Illinois statute did not have to be considered.⁹² Having reached this conclusion, the court considered whether there were any restraints placed on this service by the due process clause. The court concluded that under the reasoning of *Shaffer v. Heitner*⁹³ and *International Shoe Co. v. Washington*⁹⁴ a "fairness" standard was to be applied in reviewing all assertions of jurisdiction. However, it went on to say that this "fairness" related to the "exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum."⁹⁵ Based on this test the court felt that the assertion of jurisdiction was fair since the defendant was a resident of the United States and therefore had sufficient contacts with the "particular sovereign" seeking to exercise power over him.⁹⁶ In rejecting the idea that fairness, for jurisdictional pur-

90. 589 F.2d 330 (7th Cir. 1979).

91. *Id.* at 332. The district court decision was unreported.

92. The court stated that rule 4(e) authorizes the use of the law of the state in which the district court sits when no United States statute provides for manner of service. Since Congress had authorized service, then under rule 4(e) that is sufficient, and no reference to state law was necessary. 589 F.2d at 332. If an action is brought pursuant to a federal statute which does not provide for service of process then it would be necessary to resort to a special provision such as rule 4(f) or to the law of the state in which the district court sits to accomplish service outside that state's borders. *E.g.* *Volk Corp. v. Art-Pak Clip Art Serv.*, 432 F. Supp. 1179, 1181 & n.2 (S.D.N.Y. 1977). For a further discussion, see *supra* note 17.

93. 433 U.S. 186 (1977).

94. 326 U.S. 310 (1945).

95. 589 F.2d at 333. The court recognized that both *Shaffer* and *International Shoe* were cases dealing with state court jurisdiction, but felt that the broad articulation of a fairness standard should be applied to all such assertions. *Id.* at 332.

96. The court found additional support for its method of analysis in the older cases approving of Congress' power to require a defendant to appear in any court of the United States when she has been served within its borders. It cited *Murphree*, 326 U.S. 438 (1946); *Robertson* 268 U.S. 619 (1925); *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878); and it also cited *Mariash*, 496 F.2d 1138 as supportive in the context of section 27. *Id.* at 333-34. Similarly, the Ninth Circuit has held that minimum contacts with the United States is all that is required under section 27 of the Securities Act of 1934. *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985). There the court concluded defendants who were residents of the United States had sufficient minimum contacts to be subject to personal jurisdiction in any federal district

poses, also related to the imposition of the burden of litigating in a particular forum, it said that such concerns could be dealt with in the context of deciding questions of change of venue.⁹⁷

In so ruling, the court disapproved of the “fairness” test relating to the burden of litigating in a particular forum which had been set out in *Oxford First Corp. v. PNC Liquidating Corp.*⁹⁸ by a district court in denying a motion to dismiss for lack of jurisdiction under section 27. The *Fitzsimmons* court viewed such a “fairness” test as irrelevant to the question of a particular sovereign exercising power; rather it viewed fairness as pertinent to questions of the convenience of the forum for purposes of venue.⁹⁹ It stated that these factors were relevant to the “non-jurisdictional doctrine of *forum non conveniens*,” and that they were therefore inappropriate to determine the constitutionality of personal jurisdiction.¹⁰⁰

The cases which have considered the question of nationwide service under section 27 have recognized that the fifth amendment does place limitations on Congress’ power to authorize na-

court, but remanded the question of whether a defendant who was not a resident of the United States has sufficient contacts with the United States to make it reasonably foreseeable that it would be subjected to suit in the United States. *Id.* at 1316.

97. The court viewed these questions as relating to the issue of *forum non conveniens* in considering motions for change of venue pursuant to 28 U.S.C. § 1404(a). *Id.* at 334.

98. 372 F. Supp. 191 (E.D. Pa. 1974). That court set out five factors as relevant to its fairness analysis. *Id.* at 203-04. For a further discussion, see *infra* text accompanying notes 190-92.

99. 589 F.2d at 334 n.5.

100. *Id.* at 334 & n.5. In that footnote, the court criticized the *Oxford First* court for not simply applying its factors to the concept of *forum non conveniens*. It then stated:

Oxford First considered this argument and rejected it on the ground that it avoids the issue of constitutional restrictions. 372 F. Supp. at 203 n.24. However, if these factors are of constitutional significance, an issue that we do not decide, we do not understand why they would be any less so because applied under the rubric of *forum non conveniens* instead of personal jurisdiction.

Id. at 334 n.5. This statement by the court seems to misperceive the problem before it. It assumes that concepts of fairness are irrelevant to personal jurisdiction because they have always been considered under the doctrine of *forum non conveniens*. Such a sharp distinction between these concepts does not appear justified for the reasons indicated in the next section of this article. See *infra* text accompanying notes 161-73. In addition, to avoid the question of the constitutional significance of a fairness concept, under whatever rubric, is to beg the question. As long as such factors do not have constitutional significance, courts will continue to exercise broad discretion in deciding to hold, transfer or dismiss a case with only limited appellate review. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

tionwide service of process. While a due process standard of fairness has been suggested by some courts,¹⁰¹ the trend in authority seems to be that due process only requires adequate notice. In turn this principle is based on the fact that the minimum contacts test developed in cases such as *International Shoe*,¹⁰² *Hanson v. Denckla*¹⁰³ and *Shaffer v. Heitner*¹⁰⁴ is relevant only in determining whether a particular sovereign can assert jurisdiction. Thus, in considering state court jurisdiction, the question is relevant in determining the constitutionality of such assertions beyond state borders. In cases based on nationwide service of process, it would be relevant only in cases involving defendants

101. *E.g.*, *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974). A number of other courts have suggested this. For example, in *United States ex rel. Armstrong v. Wheeler*, 321 F. Supp. 471 (E.D. Pa. 1970), the court concluded that section 1391(e) authorized the assertion of personal jurisdiction in a habeas corpus proceeding for discharge from the army. But it went on to say that it was still necessary to determine if the defendant had "sufficient contacts with this district such that the maintenance of the suit does not offend traditional notions of fair play." *Id.* at 478. A federal district court sitting in Iowa came to the conclusion that a defendant had to have sufficient contacts with Iowa to comport with due process even where jurisdiction was based on section 27 of the Securities Exchange Act of 1934. *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559 (S.D. Iowa, C.D. 1973). However that court reached its result because it felt bound by *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973), which came to that conclusion in a section 27 suit against a Canadian corporation not present in the United States. As we have already seen the assertion of jurisdiction over defendants who are either not citizens of, or are not found in, the United States has received different treatment. A fairness test was also considered in general terms by the court, in *Dijulio v. Digicon, Inc.*, 325 F. Supp. 963 (D. Md. 1971), in an action where jurisdiction was asserted both under the Securities Act of 1933 and the Securities Exchange Act of 1934. *Dijulio* was disagreed with by the court, in *Stern v. Gobeloff*, 332 F. Supp. 909 (D. Md. 1971), but the court added that even if *Dijulio* was correct the defendant in *Stern* had sufficient contacts with the district for a suit under the Securities Act of 1933 and the Securities Exchange Act of 1934. Finally, in *Kipperman v. McCone*, 422 F. Supp. 860 (N.D. Cal. 1976), which was a class action under section 1391(e) seeking relief for the CIA's opening of mail intended for the Soviet Union, the court stated that section 1391(e) provided a mechanism for effective service but it was still necessary to decide if the assertion of jurisdiction comported with due process. In support of this it cited, *inter alia*, *United States ex rel. Rudick v. Laird*, 412 F.2d 16 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969). Having stated this, the court seems to have decided *sub silentio* that it was obliged to determine whether jurisdiction could be asserted under the California long-arm statute and minimum contacts. 422 F. Supp. at 871.

It should be noted that subsequent to the decisions in *Wheeler* and *Rudick* the United States Supreme Court decided that section 1391(e) did not extend jurisdiction in habeas corpus cases. *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). It is necessary that the "custodian" defendant be present or have contacts with the district in which suit is brought. *Id.* at 490-91; *Strait v. Laird*, 406 U.S. 341, 345 n.2 (1972).

102. 326 U.S. 310 (1945).

103. 357 U.S. 235 (1958).

104. 433 U.S. 186 (1977).

located outside the United States. But when defendants reside within the United States the necessity of requiring more than adequate notice does not exist.¹⁰⁵

In reaching this conclusion, these courts seemed to have focused exclusively on the power aspect of jurisdiction, while failing to consider how concepts of territorial sovereignty have been supplemented by principles of fairness and convenience in the state court personal jurisdiction area.¹⁰⁶ This latter movement suggests that the concept of due process is broad enough to encompass a fairness analysis even where sovereign power exists. The next section will consider why such an analysis is appropriate in the area of nationwide service of process. Once this proposition is established consideration will be given to the factors relevant to deciding the fairness of assertions of jurisdiction in this area.

III. A SUGGESTED ANALYSIS

The difficulty with the "power focused" analysis in this area is that concepts of fairness are invariably equated with power over the defendant in considering the due process ramifications of extraterritorial service of process.¹⁰⁷ Once it is determined that the defendant is within the sovereign's power, courts have assumed that there is no due process limitation on requiring such a defendant to appear in a particular court.¹⁰⁸ This is a most grudging application of the concept of due process in the area of personal jurisdiction. The justification for this ungenerous application of due process is found in the assumption that a "minimum contacts" approach to jurisdictional questions is only relevant to the power of sovereign states to act beyond their borders.¹⁰⁹

However, the Supreme Court has frequently emphasized that the due process limitations on state court jurisdiction are intended to function not solely as limitations on sovereign power,

105. *E.g.*, *Mariash*, 496 F.2d at 1143 nn.8 & 9.

106. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); see HART & WECHSLER, *supra* note 47, at 1106. For a further discussion, see *infra* text accompanying notes 110-39.

107. *E.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (noting that although Exchange Act authorized service of process anywhere, it did not do so beyond bounds of due process which in this case meant fair notice of suit).

108. *E.g.*, *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting). For a discussion of this point in the context of the Mandamus and Venue Act of 1962, see *supra* text accompanying notes 45-61.

109. *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting).

but also to ensure that the defendant receives the protection of a fair forum.

A. State Court Jurisdiction Cases

In order to understand the nature of these dual functions, it will be helpful to briefly review the development of these concepts in Supreme Court jurisprudence. Beginning with *Pennoyer v. Neff*¹¹⁰ the Supreme Court established that assertions of jurisdiction were to be limited by the due process clause and that in order to establish jurisdiction a tribunal must be able to assert physical power within the territorial limits of the state.¹¹¹ This standard remained the hallmark of jurisdictional limitations for the next sixty-eight years. In this period, however, many situations arose in which a strict "power" principle did not provide a satisfactory resolution of jurisdictional questions, especially in a society increasingly confronted with conflicts between parties from different states.¹¹² It was during this period that the Court developed a number of fictions to justify the assertion of jurisdiction within the framework of a "power" analysis.¹¹³

Finally, in *International Shoe Co. v. Washington*¹¹⁴ the Court attempted to revamp its analysis to deal with this situation. In that case the question was whether the defendant, a Delaware corporation based in Missouri, was amenable to suit in the State of

110. 95 U.S. 714 (1877). For an analysis of the period prior to *Pennoyer*, see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 569-70 (1958); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-62 (P. Kurland ed.).

111. 95 U.S. at 720-22; Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 414-15 (1981). Technically, the holding in *Pennoyer* was that the state court judgment was to be denied full faith and credit, but its dicta clearly established the due process clause as controlling in this area, though it was not applicable to the case before the Court. Kurland, *supra* note 110, at 572.

112. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

113. Thus, for example, in *Hess v. Pawloski*, 274 U.S. 352 (1927), the Court upheld the assertion of jurisdiction over a nonresident motorist who had been involved in an automobile accident in the forum state by the fiction that he had consented by his actions to the appointment of an agent within the jurisdiction for service of process, thus making him present and subject to the power of the tribunal. See also *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935). The Supreme Court ultimately recognized the fictive nature of "consent," *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 341 (1953), as well as other fictions based on "presence." *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). An excellent summary of this period in the development of a due process analysis by the Court may be found in Kurland, *supra* note 110, at 573-86.

114. 326 U.S. 310 (1945).

Washington to collect payments owed to Washington's unemployment compensation fund. The Court, speaking through Chief Justice Stone, began by rejecting the need for physical presence in the state as the sole means of asserting jurisdiction:

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff* But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹¹⁵

While the Court suggested a new basis for personal jurisdiction in terms of the now familiar concept of "minimum contacts" and "fair play and substantial justice," the opinion created difficulties because this new standard was abstract, amorphous and difficult to define in the concrete instance.¹¹⁶ At some points the Court focused on "minimum contacts" indicating that a key question was the defendant's activities in the forum and how they related to the cause of action.¹¹⁷ At other times, it spoke in broad terms about reasonableness¹¹⁸ and "'estimate[s] of the inconveniences.'"¹¹⁹

As a result, it was unclear what precise test was to be used by courts in resolving jurisdictional questions. However, it was clear

115. *Id.* at 316 (citation omitted).

116. The amorphous nature of the majority's standard led Justice Black to file a separate opinion decrying the use of "elastic standards" such as "fair play," "justice" and "reasonableness" which might unduly limit the power of states to assert jurisdiction. *Id.* at 325; Kurland, *supra* note 110, at 590.

117. 326 U.S. at 317-19; Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61, 64 (1977); Clermont, *supra* note 111, at 415-16; Ehrenzweig, *Pennoyer is Dead—Long Live Pennoyer*, McGee v. International Life Insurance Co. and *Jurisdiction Over Individuals*, 30 ROCKY MTN. L. REV. 285, 287-88 (1958).

118. 326 U.S. at 320.

119. *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)). As Professor Kurland has suggested, *International Shoe* may have "served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow." Kurland, *supra* note 110, at 586.

that "fairness" was to be a term in the equation. In the next several years the Court decided a number of cases which appeared to increase the emphasis on "fairness" in deciding jurisdictional questions. In particular, this was suggested by the Supreme Court's opinion in *McGee v. International Life Insurance Co.*¹²⁰ In *McGee*, a California resident sought to assert jurisdiction in California over a Texas insurance company for recovery on an insurance policy issued by the defendant to her son. The only contacts the defendant had with California were an agreement, sent by mail, to insure the defendant and the acceptance of premium payments, mailed from California by the defendant.¹²¹ In concluding that, consistent with due process, California could assert jurisdiction over the defendant, the Court focused its analysis on balancing the interests of the plaintiff, the defendant, and the state to decide whether the assertion of jurisdiction was reasonable. As the Court stated:

It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were

120. 355 U.S. 220 (1957). In the period between *International Shoe* and *McGee* the Court decided three cases which were consistent with the development of a concern for fairness. In *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950), Justice Black, speaking for four justices concluded in an opinion, in which Justice Douglas concurred, that the defendant was subject to jurisdiction to regulate its advertising and sale of insurance to citizens of Virginia. In the course of the opinion Justice Black, in dicta, suggested that factors such as convenience of the plaintiff and the state's interest in asserting jurisdiction were relevant to its analysis. *Id.* at 648-49. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court approved the assertion of jurisdiction of New York over all claimants to common trust funds located in New York based on the need of the state to administer and close these trusts without focusing on defendants' activities. *Id.* at 312-13. In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court said it would be consistent with due process for Ohio to assert jurisdiction over a corporation created under the laws of the Philippines, which operated in Ohio during the Japanese occupation of the Philippines, for an action relating to events occurring outside of Ohio. The opinion states that continuous business activity in the state is enough for due process. *Id.* at 445-46.

121. 355 U.S. at 221-22. Upon the insured's death, and the defendant's refusal to pay on the policy, his mother sued in California state court to recover under the policy. California based jurisdiction on its statute which subjected foreign corporations to suits based on insurance contracts with residents. Judgment was obtained in California. When it could not be collected there, the plaintiff sought to enforce it in Texas, which was the defendant's principal place of business. Texas refused to enforce the judgment stating it was void under the fourteenth amendment. *McGee v. International Life Ins. Co.*, 288 S.W.2d 579 (Tex. Civ. App., 1956).

forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.¹²²

To the extent that this language suggests that questions of jurisdiction are to be resolved by balancing all interests to determine a fair forum,¹²³ it was undercut a year later by the Court's decision in *Hanson v. Denckla*.¹²⁴ The Court in *Hanson* ruled that Florida could not assert jurisdiction over a Delaware trust company in a suit involving the validity of a power of appointment under a trust. Chief Justice Warren, speaking for the majority in a 5-4 decision, made it clear that territorial power was still a key issue in any due process analysis:

[T]he requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. Washington* 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 respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.¹²⁵

122. 355 U.S. at 223-24.

123. In summarizing this period, Professor Kurland has said:

From *International Shoe to International Life*, the Supreme Court had evolved a doctrine of non-interference with the exercise of jurisdiction over nonresident defendants by state courts. By use of the "fairness" test, suggested by Mr. Chief Justice Stone in derivation from Judge Learned Hand, the Court had made the question of the propriety of such personal jurisdiction a matter of fact which, for all practical purposes, was not reviewable in the Supreme Court.

Kurland, *supra* note 110, at 610.

124. 357 U.S. 235 (1958).

125. *Id.* at 251. The Court not only emphasized the importance of power, but also appeared to resurrect the importance of categorization of actions as *in*

While the opinion has been criticized by commentators as a retrogressive approach to jurisdiction based on unclear reasoning,¹²⁶ it is at least fair to say that, as the language quoted above suggests, the opinion does not reject the significance of a “fairness” analysis, but rather seeks to reenforce the importance of sovereign power as a key element in ascertaining the limitations on state court jurisdiction.¹²⁷ Having made that point, but having not resolved the relationship of “power” and “fairness” in this area, the Court remained silent on the issue for almost twenty years.

Finally, in *Shaffer v. Heitner*¹²⁸ the Court decided the first in a series of cases which attempted to clarify the elements of a due process analysis. In *Shaffer* the Court rejected the assertion of jurisdiction by Delaware over nonresident directors of a Delaware corporation in a derivative action. The Court’s most important and significant statement in *Shaffer* was that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”¹²⁹ However, the Court also sought to evaluate whether assertions of jurisdiction could be justified by examining “the relationship among the defendant, the forum, and the litigation.”¹³⁰ Implicit in this approach was a recognition that both “power” and “fairness” were relevant to a jurisdictional analysis.¹³¹ Similarly, in *Kulko v. Superior Court*¹³² the Court recognized the relevance of “power” and “fairness” in this area when it rejected California’s assertion of jurisdiction over a nonresident father in a child support case.¹³³

rem, quasi in rem and *in personam*. This was after having appeared to reject the significance of these categories in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950).

126. *E.g.*, *Clermont, supra* note 111, at 419; *Hazard, supra* note 110, at 244.

127. The majority’s disagreement with the dissent is that the latter, in an opinion written by Justice Black, would focus on the reasonableness of the forum as the key to deciding state court jurisdiction. 357 U.S. at 259. Interestingly, both sides sought support from the language of the *International Shoe* opinion, which only means that that opinion raised both criteria as relevant to a due process analysis without clarifying their relationship. *See supra* text accompanying notes 116-19.

128. 433 U.S. 186 (1977).

129. *Id.* at 212.

130. *Id.* at 204.

131. *Clermont, supra* note 111, at 421 n.55. At least one judge has viewed *Shaffer* as central to a revised analysis of nationwide service cases because of its “abandonment of territorial sovereignty strictures” in a due process analysis. *Haile v. Henderson Nat’l Bank*, 657 F.2d 816, 828 (6th Cir. 1981) (Keith, J., dissenting), *cert. denied*, 455 U.S. 949 (1981).

132. 436 U.S. 84 (1978).

133. *Id.* at 92.

The Court concluded that the defendant lacked sufficient contacts with California to assert control over him,¹³⁴ and thus it did not consider other interests which might have been relevant to the fairness of the forum.¹³⁵

The Court reenforced and made the relationship between “power” and “fairness” explicit in *World-Wide Volkswagen Corp. v. Woodson*.¹³⁶ In that case Oklahoma sought to assert jurisdiction over two New York corporations neither of which did business in Oklahoma. These defendants were involved in the sale of an automobile in New York to the plaintiffs who were then residents of New York. Subsequently the plaintiffs left New York and were involved in an accident in Oklahoma in which the vehicle burned. They filed a products liability suit in Oklahoma against, among others, the two New York corporations, who then moved to dismiss for lack of personal jurisdiction. The Oklahoma Supreme Court refused to overturn a denial of this motion by the trial court.¹³⁷ In reversing this decision, Justice White, speaking for six Justices, began by asserting the dual purposes of a minimum contacts-due process analysis:

The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable functions. It 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 co-equal sovereigns in a federal system.¹³⁸

After analyzing these functions in general terms, the Court concluded by stating that even a convenient state forum does not comport with due process if the state lacks “power” over the defendants since the due process clause acts as an “instrument of interstate federalism.”¹³⁹ If, as the Court suggests, the functions of sovereign power and fairness are related, and overreaching the

134. *Id.* at 101.

135. *Id.* at 98-101.

136. 444 U.S. 286 (1980).

137. *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1978), *rev'd*, 444 U.S. 286 (1980).

138. 444 U.S. at 291-92.

139. *Id.* at 294. The Court reiterated this in a companion case to *Woodson* which was decided the same day. *Rush v. Savchuk*, 444 U.S. 320, 332-33 (1980); Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 421 (1980).

limits of sovereignty warrants a denial of jurisdiction, then should it not follow that a violation of norms of fairness also warrant a denial of jurisdiction?

The Court has shown an increased willingness to focus its attention on the "fairness" issue in analyzing jurisdiction questions. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*¹⁴⁰ this point was made clear in its review of a decision by the United States Court of Appeals for the Third Circuit.¹⁴¹ The Court of Appeals in *Bauxites* had affirmed a district court decision¹⁴² to impose a sanction under rule 37(b)(2). The sanction, which established personal jurisdiction over a defendant, had been ordered by the district court for failure to provide discovery on the issue of jurisdiction as had been ordered. In the process of affirming the decision of the Court of Appeals, Justice White pointed out that personal jurisdiction placed "a restriction on judicial power . . . as a matter of individual liberty," and was therefore waivable.¹⁴³ In a footnote he sought to clarify the underlying concerns which govern personal jurisdiction and the application of due process:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other states. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement¹⁴⁴

Bauxites takes a step beyond *Woodson* in that it emphasizes the Court's willingness to focus on the concept of fairness or an "individual liberty interest" as the ultimate concern of the due pro-

140. 456 U.S. 694 (1982).

141. *Compagnie des Bauxites v. Ins. Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981), *aff'd*, 456 U.S. 694 (1982).

142. The opinion of the district court was unreported.

143. 456 U.S. at 702-03 & n.10.

144. *Id.* at 702-03 n.10.

cess clause. The opinion makes it clear that simply focusing on the traditional federalism questions of “power” and “sovereignty” is not adequate in analyzing questions of personal jurisdiction. Those questions are not the ones with which the due process clause is concerned. Since due process ultimately touches individual liberty interests, it follows that these interests cannot be swept away without consideration when “power” is not at issue as, for example, in the typical nationwide service cases.

The Court once again emphasized the importance of fairness over and above issues of power in *Burger King Corp. v. Rudzewicz*.¹⁴⁵ In an opinion written by Justice Brennan,¹⁴⁶ the Court addressed the individual liberty interests which the due process clause seeks to protect and delineated the factors relevant to protecting those interests.¹⁴⁷ The Court stated that traditional minimum contacts were necessary to establish the defendants’ tie with the forum much in the way the Court had required in *Hanson* and *Woodson*,¹⁴⁸ but, at the same time, it also emphasized the importance of fairness factors once minimum contacts are established.¹⁴⁹ As the Court stated:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” *International Shoe Co. v. Washington* Thus courts in “appropriate case[s]” may evaluate “the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide Volkswagen Corp. v. Woodson* These considerations sometimes serve to establish

145. 471 U.S. 462 (1985).

146. It is interesting to note that Justice Brennan had written strong dissents in earlier cases. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part).

147. See 471 U.S. at 471-72 & n.13 (citing *Insurance Corp. of Ir. v. Compagnie de Bauxites de Guinee*, 456 U.S. at 702-03 n.10 (1982)).

148. *Id.* at 474-76.

149. *Id.* at 476-78.

the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. . . . On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.¹⁵⁰

It is clear that the Court has reinforced the view that due process is concerned with more than questions of sovereign power, and that in deciding personal jurisdiction questions in the state court context the fairness to the defendant, i.e., the defendant's individual liberty interests, is of central importance in determining personal jurisdiction even when the forum has sufficient connections to justify an exertion of sovereign power.

B. *Application to Nationwide Jurisdiction Cases*

Such an analysis in the state court jurisdiction area must be given serious consideration in the analogous area of nationwide jurisdiction cases. In the nationwide service of process cases, courts have correctly pointed out that a minimum contacts-due process analysis which serves to limit coequal sovereigns is not relevant to the power to assert jurisdiction within the United States.¹⁵¹ They have also recognized that such an analysis, adapted from the state court jurisdiction analogue, is relevant to assertions of jurisdiction beyond the territorial limits of the United States.¹⁵² Once attention is focused on assertions of jurisdiction within the United States, however, it is inconsistent to conclude that a minimum contacts-due process approach can be discarded because, as the Supreme Court has pointed out, a *separate* function of that approach is to protect defendants from unfair and distant litigation. Since both of these functions must be satisfied to comport with due process, it is clear that the fair forum function must be established in order for there to be a proper

150. *Id.* at 476-77 (citations omitted). The concern of the Court for the fairness of the forum was the basis for its judgment in *Asahi Metal Industry v. Superior Court*, 107 S. Ct. 1026 (1987), that it would violate due process for California to assert jurisdiction over a Japanese manufacturer. While the Court divided evenly on the issue of minimum contacts, eight Justices agreed that it would violate due process to assert jurisdiction because it would be an unfair and unreasonable forum. *Id.* at 1033-35.

151. *E.g.*, *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974).

152. *E.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

assertion of jurisdiction.¹⁵³

This is particularly so in light of the Court's recognition in *Bauxites* that all of the restrictions that due process requires are intended to protect individual liberty interests of the defendant. If individual liberty, or fairness, is the key, then whether or not the defendant is within the sovereign's boundaries, and therefore subject to its sovereign power, she is entitled to protection from an unfair choice of forum. It is illogical to contend that a person is protected from an unreasonable choice of forum only if she is a defendant not subject to the sovereign's power; but once such person is so subject, the due process clause would give no protection against an arbitrary and inconvenient choice of forum. Thus, if a defendant lived in New Jersey and had no contacts with California, but was sued in California state court, the due process clause would protect her from the burden of defending in that distant forum. But if the suit were based on a violation of the Securities Exchange Act of 1934, the due process clause would not protect her even if it were an unreasonable choice of forum.¹⁵⁴ The defendant's only hope would be to convince the court to grant a transfer.¹⁵⁵

It might be argued that such a result is correct because Congress, in adopting certain remedial statutes, had decided that it is of paramount importance to protect the potential plaintiffs even if such protection results in greatly inconveniencing the party who must defend far from home.¹⁵⁶ But this is only to accept the principle that Congress has the power to authorize nationwide service

153. 444 U.S. at 293-94; *Asahi Metal Indus. v. Superior Court*, 107 S. Ct. 1026, 1033-35 (1987).

154. Following the logic of those courts which suggest that due process only requires fair notice in suits in which service is based on nationwide service of process, it would also seem that any assertion of jurisdiction by a federal court would only be limited by a fair notice test. Thus, if Corporation *A* were sued on a federal question in a federal court located in State *X* and service was accomplished under FED. R. CIV. P. 4(d)(3) by serving an agent of the corporation who was transiently present in the state taking a train through State *X* to State *Y*, due process would not require a denial of jurisdiction even if the corporation had no other connection with State *X*. Such a result is compelled by a rejection of a fairness due process standard when there is power over the defendant. *But see supra* note 17. *See also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956). A different result may ensue if service is based on a state long-arm statute pursuant to Rule 4(e). *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1123 n.6 (1966).

155. *E.g.*, *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980).

156. *E.g.*, *Stern v. Gobeloff*, 332 F. Supp. 909, 912 (D. Md. 1971).

of process.¹⁵⁷ Such congressional power is still limited by fifth amendment due process considerations. The real question is the nature of that due process limitation when sovereign power is not involved. In light of the functions suggested by the *Woodson* Court, and the amplification of the underlying concerns developed in *Bauxites* and *Burger King*, it is clear that a fairness component is an integral part of a due process analysis, which must be satisfied even in the absence of any concern over sovereign power. Granting that Congress is empowered to authorize nationwide service of process, the case by case implementation of that authority should still be limited by a due process requirement of fairness to the defendant in the choice of the particular forum.¹⁵⁸

There are a number of arguments that may be made in oppo-

157. See *supra* text accompanying notes 5-10.

158. This application of a fairness standard based on the *Bauxites* analysis was rejected by the district court in *First Federal Savings & Loan v. Oppenheim, Appel, Dixon & Co.*, 634 F. Supp. 1341 (S.D.N.Y. 1986). The court pointed out that the author of *Bauxites*, Justice White, gave no indication of changing the "legal landscape" in the area, and had indicated that there were no constitutional restrictions on nationwide service in an earlier dissent. *Id.* at 1347. See *supra* note 60. Moreover, the court relied heavily on *Mariash* and *Fitzsimmons* for its view that a fairness analysis was inappropriate. 634 F. Supp. at 1347-48. Finally, the court felt that to adopt such a standard would make decisions difficult because courts would be required to make a highly factbound analysis. *Id.* at 1348. As to whether the "legal landscape" has been changed, a full review of the jurisdictional cases suggests this is a logical progression for the Court. See *supra* text accompanying notes 110-50. This analysis also suggests the weaknesses of *Mariash* and *Fitzsimmons*. In response to the argument that such a factbound analysis will create problems, it should be noted that the Supreme Court has clearly rejected this argument in jurisdictional cases. *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977) (stating in response to argument that *in rem* jurisdiction should not be subjected to inherently uncertain test of *International Shoe* that fairness standard could be easily applied in most cases and in those cases which were difficult Court was not prepared to sacrifice fairness for simplicity). It is interesting to note that the *Oppenheim* court had no difficulty doing a fairness analysis in a footnote. 634 F. Supp. at 1348 n.9.

It has been argued that a constitutional limitation on Congress' power to authorize nationwide service of process is necessary because safeguards of a nonconstitutional nature, such as venue provisions, could be eliminated by Congress, and even if those provisions were not eliminated, defendants would be disadvantaged because of the absence of the right of collateral attack, and the difficulty of obtaining review and reversal of what are perceived as primarily discretionary trial court decisions. Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U.L. REV. 1, 36-37 (1984). It should be noted, however, that even in the absence of venue provisions, courts could provide some protection for defendants under principles of transfer and *forum non conveniens*. See *infra* text accompanying notes 169-78. It has been suggested that in the context of an overall scheme to modernize venue and service of process in federal court, it would be appropriate to have a general provision for nationwide service of process with venue provisions used to ensure a convenient forum. Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Re-*

sition to this view. As the courts suggested in *Briggs* and *Driver*, it might be argued that a fairness-due process analysis is relevant only where the sovereign is attempting to assert power beyond its borders.¹⁵⁹ But, as argued above, this approach is logically inconsistent with the Supreme Court's analysis in the analogous area of state court jurisdiction.¹⁶⁰

A second argument was suggested by the United States Court of Appeals for the Seventh Circuit in *Fitzsimmons*.¹⁶¹ The court rejected the consideration of fairness as a constitutional restriction because it had always been "applied under the rubric of *forum non conveniens*."¹⁶² In so stating, the court left open the question whether the fairness factor had "constitutional significance."¹⁶³ In using the term "*forum non conveniens*" the court presumably intended to encompass all the aspects of venue which seek to limit the choice of forum within the judicial system that has adjudicatory power over the defendant.

This concept of federal venue as a means of allocating cases operates in two ways: first, by statutes which arbitrarily denote a number of locations in which a case may be heard.¹⁶⁴ Such provisions are structured to allow for suit in certain arbitrarily defined

form, 7 VAND. L. REV. 608, 629 (1954); ALI STUDY, *supra* note 26, §§ 1314 (Federal Question Jurisdiction), 217 (multi-party, multi-state diversity).

159. See *supra* text accompanying notes 47-55.

160. Clermont, *supra* note 111, at 439 n.132 ("[T]he tendency to ignore the separate concept of forum-reasonableness explains the misleading statements [that power is all that is relevant in this analysis] in the *Stafford*-type authorities . . . and the *Driver*-type cases . . .") (citations omitted).

161. 589 F.2d 330 (7th Cir. 1979).

162. *Id.* at 334 n.5; accord *FTC v. Jim Walter Corp.*, 651 F.2d 251, 255-58 (5th Cir. 1981). For a further discussion, see *supra* note 100. Decisions such as these should be seriously questioned in light of the Supreme Court's subsequent decision in *Bauxites*. Thus, in *Burstein v. State Bar of California*, the court questioned, without deciding, the continued vitality of *Jim Walter* when it stated that "this court in *Jim Walter Corp.* suggested that the conceptual requirements of both [fifth and fourteenth amendment] due process clauses were the same, albeit relating to different sovereigns. If this is true, then the rationale of *Jim Walter Corp.* may have been undermined by *Insurance Corp. of Ireland*." 693 F.2d 511, 516 n.8 (5th Cir. 1982); *Bamford v. Hobbs*, 569 F. Supp. 160, 165 (S.D. Tex. 1983) (suggesting that *Jim Walter* was "seriously undermine[d]" by the *Bauxites* decision); accord *GRM v. Equine Inv. & Management Group*, 596 F. Supp. 307, 312-15 (S.D. Tex. 1984). In *GRM*, the court, however, cited some district court opinions which have continued to apply a "national-contacts" test. 596 F. Supp. at 314 n.9.

163. 589 F.2d at 334 n.5.

164. *E.g.*, 28 U.S.C. § 1391(a) (1982) (permits diversity action to be brought in district where all plaintiffs reside, defendants reside, or claim arose). Since such provisions are arbitrary they may allow for suit in a highly inconvenient place while not allowing it in a convenient one. Also the venue provisions adopted in relation to nationwide service provisions are invariably drafted

fora without regard to the convenience or fairness of those choices in particular cases. Whether such a provision will be helpful in avoiding an unfair choice of forum depends exclusively on whether the particular statute is more or less restrictive in the choices it permits.¹⁶⁵ For example, in cases under section 1391(e) the provision will do little to limit the plaintiff's choice since she may always sue in the judicial district where she resides.¹⁶⁶ Even in cases where plaintiff's residence is not an acceptable forum, the statutory choices may be broadened by language such as that in the venue provision used in *Mariash* and *Fitzsimmons*. Such provisions permit venue in any district where "any act or transaction constituting the violation occurred"—a provision which has been read broadly by the courts.¹⁶⁷ On the other hand, if a venue statute contains neither of these provisions, but only permits suit where the defendant is an inhabitant, is found or transacts business, it is more likely to ensure a fair and convenient forum.¹⁶⁸ This is only to suggest that Congress may avoid due process problems by carefully limiting venue in nationwide service cases. It does not address the question whether due process operates to set parameters for congressional action which would become relevant when the plaintiff's forum of choice was unreasonable in a particular case.

The second method of allocation operates by transfer provisions which allow courts to move a suit from one district to another for the convenience of the parties and in the interests of justice.¹⁶⁹ As such, these provisions operate in a fashion analogous to the common law concept of *forum non conveniens*.¹⁷⁰ If the

broadly to favor the plaintiff consistent with the purpose of the service provision. *E.g.*, *id.* § 1391(d).

165. Fullerton, *supra* note 158, at 71-76.

166. That provision was the basis for venue in *Driver*, 74 F.R.D. at 400, while venue in *Briggs* was based on another provision in 1391(e) which authorized venue where any defendant had an official residence. 569 F.2d at 4-6.

167. For example, the *Mariash* court concluded that this provision was met since the transfer agent had to be contacted in New York to remove the restrictive legend on the stock in order to complete the transaction which had nothing to do with the reasonableness of the forum. 496 F.2d at 1143-45. Also a number of courts have adopted a co-conspirator venue theory which grants venue as to all defendants sued in a case involving a common scheme if any one defendant has acted within the forum district. *E.g.*, *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1317-18 (9th Cir. 1985).

168. *See* Fullerton, *supra* note 158, at 74-76.

169. 28 U.S.C. §§ 1404, 1406 (1982).

170. The common law doctrine of *forum non conveniens* in the federal court system is only utilized in those rare cases where the more convenient forum is a state court, or a court in a foreign country. 15 C. WRIGHT, A. MILLER & E.

concept of a constitutional basis for a fairness analysis is accepted, it may be less important whether such analysis is denominated under a "rubric" of jurisdiction or *forum non conveniens*,¹⁷¹ since the resulting analysis should be the same. As a matter of structure, however, the maintenance of this standard under a jurisdictional title would be superior. This is so because the development of concepts such as *forum non conveniens* and transfer were intended to limit a jurisdictional system which focused on physical power over the defendant, rather than intended as methods of finding a fair forum for the litigation.¹⁷² It would be more appropriate to structure a jurisdictional analysis to deal with the affirmative responsibility to provide a constitutionally fair forum; and as a consequence to de-emphasize these other analyses which historically have not had a constitutional basis, leaving wide discretion in the trial court.¹⁷³

Those who support the predominance of the concept of transfer in this area have further argued that, while a constitutional fairness doctrine does exist, it is unnecessary to consider because all the problems it would address are handled by subconstitutional concepts such as transfer. As one court has stated:

Some commentators have suggested that the due process clause of the fifth amendment imposes upon the personal jurisdiction of the federal courts restrictions similar to those imposed on state courts under the fourteenth amendment. . . . As this court has observed, "[a]lthough the propriety of service issuing from a federal court need not necessarily be tested by the same yardstick as is the constitutional limitation upon service of process from a state court, the latter standard provides a helpful and often used guideline." . . . Strict federal venue requirements, however, have made it

COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (1976). An example of this limited use of *forum non conveniens* in federal court is *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In *Reyno* the Supreme Court pointed out that transfer is more than a mere codification of *forum non conveniens*, but is instead a revision which gives greater discretion to the court to transfer since it would not involve a dismissal. *Id.* at 253.

171. One problem raised by the choice of title is that historically defendants have had greater freedom to collaterally attack a default judgment for lack of personal jurisdiction, but not for lack of venue. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 303-04 & n.430 (1969); Fullerton, *supra* note 158, at 36-37.

172. Ehrenzweig, *supra* note 154, at 305-09.

173. *See id.* at 312.

unnecessary to develop a judicial doctrine of the limits of personal jurisdiction in federal cases. Thus, as a practical matter, the most significant restraint on the personal jurisdiction of federal courts in federal cases is service of process¹⁷⁴

There are several reasons why it would be unwise to follow this approach. The purpose of a constitutional limitation on jurisdiction is to serve as a floor which limits Congress' legislative use of venue and the discretionary right of courts to change venue.¹⁷⁵ In the same way that fairness serves as a constitutional limit on assertions of jurisdiction by state courts, it should serve as a limit on the federal system's use of process and venue. In addition, by only addressing the subconstitutional issue of venue, such an analysis encourages arbitrary line drawing between jurisdiction and venue. These arbitrary distinctions, in turn, lead courts to erroneously view jurisdiction as exclusively a question of "power" and venue as the sole basis behind considerations of fairness.¹⁷⁶ The development of a due process analysis in the state-court jurisdiction cases has shown the increasing interdependency of power and fairness as analytic tools.¹⁷⁷ This should be encouraged by a more unified jurisdictional approach which recognizes this interdependency. Finally, to focus on the "fairness" as the domain of a subconstitutional venue analysis is to de-emphasize an issue of central significance which would be best

174. *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 401-02 (5th Cir. 1981) (citations omitted). The Fifth Circuit subsequently overruled *Terry* on other grounds. *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 427 (5th Cir. 1986) (overruled only to extent that it held no specific congressional authorization was necessary to assert jurisdiction).

175. See Clermont, *supra* note 111, at 437-41. Professor Clermont has suggested a "reformulation" of jurisdictional analysis which recognizes the constitutional concept of fairness under the title of "forum-reasonableness."

176. A better way of distinguishing jurisdiction and venue is based on the view that

jurisdiction is relatively more concerned with fairness and venue more with inconvenience. If the two concepts should be described as applying along a continuum, one extreme might be demonstrated by the case in which the corporate defendant's contacts with the forum were so minimal that it would be patently unfair, let alone inconvenient, to require him to defend an action there. Due Process would say that the forum lacked jurisdiction. . . . At the other extreme would be the case in which not only were jurisdiction and venue proper, but the inconvenience caused the corporation by requiring it to defend the suit where brought would be so slight that a motion for discretionary transfer . . . would be denied.

Time, Inc. v. Manning, 366 F.2d 690, 696 (5th Cir. 1966) (citations omitted).

177. See *supra* text accompanying notes 110-50.

confronted head-on by courts.¹⁷⁸

In addressing these arguments it is important to recall that there may be situations in which problems of convenience and fairness can be solved by venue provisions, but because such tools are available does not mean that a constitutional due process standard cannot continue to operate as a limiting standard of judicial control. To conclude otherwise would be illogical in light of the Supreme Court's efforts to clarify the underlying concerns of due process in the state court area. This point was made clear by Justice Brennan in *Burger King*, where he emphasized that even if a defendant had sufficient forum activities to warrant an assertion of jurisdiction, other fairness factors might warrant a denial of jurisdiction. Justice Brennan went on to point out that many of those considerations could be dealt with "through means short of finding jurisdiction unconstitutional."¹⁷⁹ This did not lead to the conclusion that a constitutional standard was unnecessary, but rather, that "[m]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."¹⁸⁰ The clear import of the Court's reasoning is that while venue and transfer provisions may avoid many problems before they reach constitutional proportions, the due process clause continues to be present and to operate as a minimum standard of fairness to protect defendants from being unfairly treated.

178. See *supra* notes 158 and 171. Thus in a case such as *Briggs* it is possible that the trial court would quickly dispose of the transfer question because it felt that if it had jurisdiction because it had "power," it need not be concerned with the exercise of discretionary power based on convenience. See *supra* note 44. The Court of Appeals in *Driver* did raise the possibility of transfer, which was not mentioned in the district court's opinion. The Court of Appeals stated that it would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect parties' rights. Furthermore, we note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

577 F.2d at 157. While the court's suggestion that change of venue be given serious consideration is important, the fact that it was little considered in *Driver* and *Briggs* gives support to the view that the discretionary nature and history of transfer leave substantial risks for defendants which can only be protected with a constitutional due process minimum requirement. Courts are simply too willing to exercise their discretion to allow the plaintiff's choice without careful analysis. See *Fitzsimmons*, 589 F.2d at 334 n.6.

179. 471 U.S. at 477.

180. *Id.*; *Asahi Metal Indus. v. Superior Court*, 107 S. Ct. 1026, 1033-35 (1987).

C. *Fair Forum Standard*

If such an approach is correct, then it is clear that due process does require a fair forum for the defendant. The question remains, however, what standards are relevant to this determination of fairness. It is not possible to simply use the tests which the Supreme Court has developed in the state jurisdictional cases. In setting up that flexible concept,¹⁸¹ the Court was concerned about the question of a fair forum and the sovereign power of the state.¹⁸² Therefore it focused on "the relationship among the defendant, the forum, and the litigation" in determining the appropriateness of an assertion of jurisdiction.¹⁸³ However, federal courts would only be concerned with the fair forum function in establishing standards in nationwide service of process cases. In light of this and the congressional purpose of providing a convenient forum for the plaintiff in these cases, less emphasis need be placed on the defendant, since there is no justification for favoring one party over the other.¹⁸⁴ Rather, it would be appropriate for a court to make its determination by looking more broadly at both parties, the transaction which underlies the lawsuit, the nature of the litigation and the relationship of these factors to the chosen forum.¹⁸⁵ This analysis is appropriate in the context of situations where the fair allocation of cases within the federal court system is of concern, rather than the power to require the defendant to appear.¹⁸⁶

181. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

182. *See, e.g., Woodson*, 444 U.S. at 292-94.

183. *Shaffer*, 433 U.S. at 204.

184. *See von Mehren & Trautman, supra* note 154, at 1127-28.

185. This approach led Justice Black to dissent in *Hanson v. Denckla*, 357 U.S. 235 (1958), and state his view of what was relevant to deciding whether a defendant could be required to appear in a particular state's forum.

It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."

Id. at 258-59 (Black, J., dissenting). Fullerton has suggested a more defendant-focused approach, which would analyze the inconvenience to the defendant and whether the defendant should have reasonably anticipated litigation in the forum, along with government interests in litigating in a particular place in deciding whether the assertion of jurisdiction is proper. Fullerton, *supra* note 158, at 38-60.

186. It has been suggested that this analysis is appropriate even when the case involves state court jurisdiction. *E.g., Hazard, supra* note 110, at 281; Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33, 79-90 (1978). *But see Louis, supra* note 139, at 408-09, 423-25.

This approach was suggested and embellished upon by Justice Brennan in his concurring and dissenting opinion in *Shaffer v. Heitner*.¹⁸⁷ In *Shaffer* (a state court jurisdiction case) he argued that the due process analysis was “closely related” to the analysis of choice of laws because

[i]n either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum State. . . . [I]mportant considerations certainly include the expectancies of the parties and the fairness of governing the defendants’ acts and behavior by rules of conduct created by a given jurisdiction. . . . [T]he decision that it is fair to bind a defendant by a State’s laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy.¹⁸⁸

While we are not concerned with choice of law here, those same basic factors seem most relevant to any fairness analysis.

A similar note was sounded in *Woodson*, where the Court set forth elements, in addition to the burden on the defendant, which it thought were relevant to the fairness question. These factors included:

the forum State’s interest in adjudicating the dispute, . . . the plaintiff’s interest in obtaining convenient and effective relief . . . at least when that interest is not adequately protected by the plaintiff’s power to choose the forum, . . . the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies¹⁸⁹

Putting aside any particular state’s interest, and substituting for it the interest of the federal government, these opinions support an analysis which focuses on the plaintiff’s and defendant’s desire to litigate in a particular forum and the government’s concern that special protection be given to certain classes of plaintiffs, but which at the same time allows for an economical resolution of dis-

187. 433 U.S. at 219 (Brennan, J., concurring in part and dissenting in part).

188. *Id.* at 225; see also *Woodson*, 444 U.S. at 299-301 (Brennan, J., dissenting).

189. *Woodson*, 444 U.S. at 292 (citations omitted).

putes. Weighing these elements, a court would decide whether it was warranted in requiring a defendant to appear.

A comparable formula was suggested in *Oxford First Corp. v. PNC Liquidating Corp.*,¹⁹⁰ in which the district court attempted to place some fifth amendment fairness limits on nationwide service of process in a suit under the Securities Exchange Act. The factors which the *Oxford* court considered relevant to its decision were (1) the extent of the defendant's contacts with the district in which the action was brought; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than the place of his residence; (3) judicial economy; (4) the probable situs of discovery; and (5) the nature of the regulated activity and its impact outside defendant's state of residence or business.¹⁹¹ These factors are certainly helpful. However, as has already been noted, once fairness to litigate in a particular place is accepted as the basis of this analysis, rather than the power to require the defendant to appear, it would be proper to eliminate those factors which focus exclusively on the needs and burdens placed on the defendant, and substitute a balancing of the interests of both parties and the sovereign in efficiently disposing of the case.¹⁹² Once this is done it would be possible to focus on the underlying transaction, the litigation and the interests of all those involved in determining whether the litigation is in a constitutionally adequate forum for due process purposes.

Thus, a court should consider a variety of factors in determining whether an assertion of jurisdiction under a nationwide service of process provision should require a person to defend in

190. 372 F. Supp. 191 (E.D. Pa. 1974). As indicated earlier, this opinion was criticized in *Fitzsimmons* on the view that a fairness test was not appropriate in these circumstances. See *supra* text accompanying notes 99-100. *Contra* *Smith v. Pittsburgh Nat'l Bank*, 674 F. Supp. 542, 544 (W.D. W. Va. 1987) (following *Oxford First* because it "recognizes the underlying rationale of fundamental fairness to restrictions on jurisdiction").

191. 372 F. Supp. at 203-04.

192. Thus, in *GRM v. Equine Investment & Management Group*, the district court cited *Oxford First* with approval, but in setting forth its fairness test the court made a subtle shift towards a more balanced consideration of fairness. 596 F. Supp. 307, 314 (S.D. Tex. 1984). Its factors were:

(1) the burden imposed upon the defendants by Texas litigation, (2) defendants' reasonable expectations and the foreseeability of Texas litigation, (3) plaintiffs' interest in convenient and effective relief, (4) the federal judicial system's interest in efficiently resolving controversies, and (5) Texas's interest in having a court in Texas adjudicate this dispute.

Id. at 315. In a footnote the court suggested that the five factors could be summarized as weighing "the relative equities and convenience between parties." *Id.* at 315 n.12.

a particular district court. One such factor would be where the events took place and whether the witnesses and various types of evidence would be available in the chosen forum. On a practical level it would be highly inefficient to allow a case to be conducted in a court which cannot conveniently hear it.¹⁹³

A second factor is the relative convenience of the plaintiff and the defendant, and their reasonable expectations in litigating in the chosen forum. Of particular significance is whether either party's activities are so localized, or conversely, so pervasively multistate, as to warrant allowing the case to be heard in the chosen forum.¹⁹⁴ Given the nature of the parties and the location of the forum where the plaintiff instituted suit, it may be the case that litigating in the chosen forum would not be unreasonable for the defendant, whereas requiring the plaintiff to travel to the defendant's residence might be. For example, if the plaintiff was an individual residing in the forum, and the defendant was a corporation whose business reasonably lead it to expect suits in other districts, the court would be acting properly in giving substantial weight to the plaintiff's choice. This would be particularly true if the defendant's multistate activities aggressively impinged on a plaintiff whose activities were local to the chosen forum.¹⁹⁵ Even though the defendant's aggressiveness was not sufficient to satisfy a state court minimum contacts test, it might be sufficient under a more flexible analysis that was concerned only with the fairness of the forum and not with the sovereign power of the court involved.

Finally, it would be important for the court to weigh its own interest, and that of the parties, in resolving the case in one proceeding. This would be particularly important in cases where the other fairness factors were not dispositive. For example, in a case involving multiple districts and multiple plaintiffs or defendants, various interests could lead to a situation where different fora would be fairest depending on the point of view considered. At this juncture the court should have some flexibility to decide whether the plaintiff's choice was reasonable, and if so, whether to hear the entire case in that one location.¹⁹⁶

193. See *Cornelison v. Chaney*, 16 Cal.3d 143, 150-51, 545 P.2d 264, 268-69, 127 Cal. Rptr. 352, 356-57 (1976).

194. See *von Mehren & Trautman*, *supra* note 154, at 1168.

195. See *Woods*, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 891-92 (1978).

196. See, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal.2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). This legitimate policy concern is also the

If the interests of the parties were in equipoise, then the court should resolve the dispute in favor of the plaintiff's choice, since there would be an absence of unjustified unfairness to the defendant. Given the absence, the congressional purpose evidenced in the particular statute of favoring the plaintiff's choice of forum, should be upheld.

The factors suggested here are not intended as an exclusive list but rather as an open ended series of suggestions informing the type of factual questions necessary to consider in determining the fairness under the due process clause of requiring litigation to be conducted in a particular court. Even if these standards are used by the courts, it does not necessarily mean that the result in any particular case will be different than it has been in the past. But in making its decision, a court will be applying an appropriate standard to determine the parties' rights.

Particularly in some areas, such as cases under the Interpleader Act, it has already been suggested earlier in this article¹⁹⁷ that courts should weigh heavily the plaintiff's need for a single forum for resolution of the dispute. It would be unfair to the plaintiff in those circumstances to decline jurisdiction over all of the defendants in any reasonably chosen forum. Thus the interests of the plaintiff and the judicial system in a single adjudication would outweigh the interests of any particular defendant.¹⁹⁸

In other areas, however, more emphasis may be placed on some of the other factors mentioned. Of special importance may be the relative convenience of obtaining discovery and evidence, as well as the district court's familiarity with the locale in which the transaction took place. Also the relative interests of the plaintiff and defendant in having a convenient forum may be important, especially as this relates to those who have aggressively pursued or imposed themselves on others. Thus, in a case such as *Mariash*¹⁹⁹ the facts indicated that the plaintiff was contacted in New York and the various opinion letters were sent to New York even though the corporation whose stock was involved was incorporated in Massachusetts and the defendant-attorneys resided in

basis for the broad application of venue provisions which courts have used under a co-conspirator venue theory. See *supra* note 167.

197. See *supra* text accompanying notes 68-70.

198. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 346-48, 316 P.2d 960, 965-66 (1957), *appeal dismissed and cert. denied*, 357 U.S. 569 (1958).

199. 496 F.2d 1138 (2d Cir. 1974). For a further discussion see *supra* text accompanying notes 77-89.

Massachusetts.²⁰⁰ Also many of the nonparty witnesses were in New York.²⁰¹ Given the multistate nature of the defendants' activities and the fact that so much of the underlying transaction occurred in New York, it would be reasonable to require the attorney-defendants to appear there, even if they did not have the requisite contacts to satisfy a state jurisdiction minimum contacts test.²⁰²

In *Fitzsimmons*,²⁰³ the defendant, Barton, who challenged jurisdiction, had made several trips to the chosen forum. These trips were apparently not so directly related to the fraudulent activity as to satisfy the Illinois long-arm statute, which the district court had erroneously assumed applied.²⁰⁴ Since the court of appeals concluded that the assertion of jurisdiction did not require a fairness analysis, it chose not to develop the facts necessary to make a firm analysis in this case. However, the opinion suggests that the other defendants in the lawsuit were subject to jurisdiction in the forum since they chose not to challenge on personal jurisdiction grounds.²⁰⁵ Beyond this, the nature of Barton's trips indicate multistate activities²⁰⁶ which should have reasonably led

200. 496 F.2d at 1140-41.

201. *Id.* This would include the plaintiff's broker, independent legal counsel hired to give an opinion letter and the corporation's transfer agent. *Id.* at 1141. Also the other defendants presumably had substantial relations with New York since they chose not to challenge the assertion of jurisdiction, although this is never specifically discussed in the opinion. If the court had required the analysis which is suggested in this article, it presumably would have required more discovery, instead of relying on the "barest skeleton of a record" as it did here. *Id.* at 1140.

202. The district court had in fact dismissed the defendant-attorneys on the erroneous assumption that the New York long-arm statute applied and that these defendants were not subject to jurisdiction under it. *Id.* at 1142.

203. 589 F.2d 330 (7th Cir. 1979). For a further discussion, see *supra* text accompanying notes 90-100.

204. 589 F.2d at 331-32. Defendant Barton was president and chief executive officer of United Founders Life Insurance Company whose business was primarily generated by the Teamsters' Pension Fund, whose Trustees were the plaintiffs in this action. He was also a director and officer of Reis Corporation which was a creditor of United Founders. In turn Reis was indebted to the Pension Fund. The Pension Fund considered the possibility of self-insuring, and this created the possibility that United Founders would not be able to pay Reis, and Reis would then be unable to pay the Pension Fund. Ultimately the Pension Fund did not self-insure, but it did alter the terms of its insurance. This led to a need to restructure the Reis indebtedness to the Pension Fund. It was during this restructuring that the alleged fraudulent misrepresentations took place. The district court felt that Barton's trips to Illinois did not constitute sufficient contacts with Illinois because it was satisfied that those trips related to self-insurance plans and not to the debt restructuring. *Id.*

205. *See id.* at 331.

206. *Id.* at 334 n.6.

him to expect to be subject to suit in a forum such as that chosen by the plaintiffs. If, in addition, a sufficient portion of the transaction underlying the lawsuit occurred in the forum,²⁰⁷ then it would clearly be reasonable to require the defendant to appear there.

Cases such as *Briggs*²⁰⁸ and *Driver*²⁰⁹ may require a somewhat different conclusion. In *Briggs* all of the events relating to the grand jury proceeding took place in Florida and three of the four defendants apparently resided there.²¹⁰ The plaintiffs were called to testify in Florida and resided in a number of different states, but none resided in the District of Columbia where the suit was brought.²¹¹ The only connection the case had with the District of Columbia was that the fourth defendant had his official residence there.²¹² In these circumstances it would be inconsistent with due process to require the Florida defendants to appear in the District of Columbia. The events took place in Florida, three of the defendants resided there and the alleged improper activity of all the defendants occurred there. In addition, the plaintiffs' residences would not indicate any compelling reason for litigating in the District of Columbia. Under these circumstances due process should require that the suit be brought in Florida with the nationwide

207. The court specifically left open whether any of the defendant's arguments might be relevant to the question of proper venue in the district since section 27 requires an act or transaction constituting the violation to have occurred in the district. *Id.* at 334-35 & n.7.

208. *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980). See *supra* text accompanying notes 42-48. One aspect of suits under the Mandamus and Venue Act of 1962 may place cases such as *Briggs* and *Driver* in a special category. Since the Supreme Court ruled that defendants were not subject to damages under the Act, the result is that in most cases officers will only be sued for mandamus while they are in office. See 444 U.S. at 543-44. As such the local United States Attorney's Office and the Justice Department will bear most of the burdens of litigation, and the officer will only rarely have to appear and, then, at government expense. *Id.* The realities of this type of case will presumably tip the balance in plaintiff's favor in most instances, while not changing the fact that the balancing must be done.

209. *Driver v. Helms*, 74 F.R.D. 382 (D.R.I. 1977), *aff'd*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.*, *Stafford v. Briggs*, 444 U.S. 527 (1980). For a further discussion, see *supra* text accompanying notes 49-58. For a special caveat in this type of case, see *supra* note 208.

210. Brief for the Petitioners at 3, *Stafford v. Briggs*, 444 U.S. 527 (1980) (No. 77-1546).

211. Six of the plaintiffs resided in Florida, two in Texas, one in Delaware and one in New York. *Id.* at 4.

212. 444 U.S. at 532. This defendant joined the other defendants in requesting the case be transferred to the Northern District of Florida. *Id.* at 531 n.2.

service provision being used to require the District of Columbia defendant to appear in the appropriate federal court located in that state.

In *Driver* the basis for bringing the class action in Rhode Island Federal District Court was that it was the residence of one of the representative plaintiffs.²¹³ All of the alleged improper interference with the plaintiffs' mail occurred in New York City.²¹⁴ Consequently, the defendants could argue that there was no reasonable basis for this case to be heard in Rhode Island. However, the plaintiffs might respond that the defendants' interference with their mail constituted multistate activity which had an impact in the locale where the letters were mailed. As a result, the defendants should reasonably expect to litigate these questions where their actions had an impact. Since Rhode Island was apparently such a place,²¹⁵ great weight should be given to the plaintiffs' choice of forum. This should be especially so, if the defendants failed to show any particular burdens on them. Relevant to this latter question would be whether there would be any discovery or trial problems raised by a Rhode Island forum. This would appear to be the most difficult case of the group for the court to make a determination. However, in light of the congressional presumption in favor of plaintiffs' choice of forum, it would seem that a strong argument could be made for allowing the case to continue in Rhode Island.

In all of these cases, it might be necessary for the court to allow the parties preliminary discovery to ascertain additional facts. This was apparently not done in these cases because of the limited standards of fifth amendment due process which the courts felt obliged to use. Once the appropriate information is before the court it could make a careful review of all the factual permutations in the particular situation in deciding whether to dismiss or transfer the action.²¹⁶ Such a determination would not be made based upon a wooden analysis of whether there was ade-

213. The other plaintiffs who represented the class were residents of New York, Minnesota, Connecticut and California. 577 F.2d at 149 n.2.

214. *Id.* at 149 n.3.

215. *Driver*, 74 F.R.D. at 400 n.23.

216. It is clear that in the absence of personal jurisdiction, a federal court has the option to transfer the case in the interests of justice to a district that can properly assert jurisdiction. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962); 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3827, at 171 (1976); Comment, *Change of Venue in Absence of Personal Jurisdiction Under 28 U.S.C. 1404(a) and 1406(a)*, 30 U. CHI. L. REV. 735 (1963).

quate notice, but rather on a more supple consideration of all the components relevant to due process.

IV. CONCLUSION

As we have seen, Congress has the power to authorize nationwide service of process, but that power should be limited by the due process clause of the fifth amendment. In establishing the restrictions on this congressional power, the courts have failed to establish meaningful due process requirements. Consistent with what the Supreme Court has established as the functions of a due process analysis in state-court jurisdiction cases, it is clear that this congressional power should be limited by a case by case analysis of the fairness of a forum to hear a particular matter. Such an analysis will require a careful review of the relations of the plaintiff, defendant and the transaction involved in the litigation in order to ensure that the defendant receives the protection to which he is entitled under the Constitution.