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# In Personam Jurisdiction in Federal Courts Over Foreign Corporations: The Need for a Federal Long-Arm Statute

BARRY E. COHEN\*

## I. INTRODUCTION

Since the United States Supreme Court's approval of "minimum contacts" as a basis for state court jurisdiction over persons not present in a forum state, general purpose long-arm statutes have become part of the jurisprudence of almost every state. These statutes typically subject a party who is not present in a state to suit there, so long as the cause of action arises from certain contacts of the party in the state. An example of this type of long-arm jurisdiction is an action in one state to recover for personal injuries incurred within its borders, but resulting from the use of a defective product manufactured by a company with no physical presence in the forum. The distribution of the defective product in the forum state would generally be a sufficient state "contact" on which to assert personal jurisdiction over the distant manufacturer.<sup>1</sup>

There is, however, no general federal law akin to a state long-arm statute which authorizes in personam jurisdiction in a federal district court. Such a void restricts the court's authority over persons who cannot be served with process within the geographic boundaries of the state in which the district court sits. Although some statutes that establish federal rights and remedies do authorize extraterritorial service of process in cases arising under them,<sup>2</sup> most do not. Thus, for many federal causes of action in which extraterritorial service of process is needed it is necessary to rely on Rule 4(e) of the Federal Rules of Civil Procedure.<sup>3</sup> Rule 4(e) permits a federal plaintiff to utilize the long-arm jurisdiction provided by the law of the state in which the district court sits.<sup>4</sup>

An approach to long-arm jurisdiction which invests a federal court with the same degree of long-arm jurisdiction as a state court has little to command for itself. As it concerns alien corporations, current law on extraterritorial in personam jurisdiction in federal courts creates a significant loophole through which these corporations can avoid personal juris-

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1. *Cf.* *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

2. *See infra* note 7.

3. Rule 4(e) permits extraterritorial service of process pursuant to federal law (where it is authorized) and, alternatively, under applicable law of the forum state.

4. *See infra* at 62.

diction in any federal court. This situation arises from the fact that Rule 4(e) looks to state law principles of extraterritorial personal jurisdiction, which (in both a statutory and constitutional sense), depend upon the alien corporation's activities or contacts with the forum state. If these contacts are insufficient to satisfy state statutory or fourteenth amendment due process criteria, the state long-arm statute cannot be invoked, and long-arm jurisdiction in that forum is unavailable. Moreover, if the alien corporation has no state contacts sufficient to permit the use of a state long-arm statute, but there are sufficient contacts with the United States as a whole to satisfy a fifth amendment due process test of jurisdiction, current law would permit such a defendant to escape federal jurisdiction under most circumstances.

With regard to a foreign corporation,<sup>5</sup> current reliance on state long-arm jurisdiction may be interfering with policies embodied in the general and specific federal venue statutes of Title 28 of the U.S. Code. For example, section 1391(b), allows federal question cases to be brought, *inter alia*, in the district in which the claim arose. That district may not, however, be the one in which the defendant has sufficient contacts under state law to support in personam jurisdiction. Since a federal court is constitutionally permitted to exercise jurisdiction over any domestic corporation regardless of where located, Rule 4(e)'s dependence on state contacts effectively increases locational requirements of federal venue law (*e.g.*, contacts with the forum state). When so viewed, Rule 4(e) may be unintentionally derogating from policies expressed in federal venue statutes and may be an unnecessary circumscription on a plaintiff's choice of fora.

The discussion which follows examines the current status of federal long-arm jurisdiction, the practical problems associated with its use, and the constitutional limits on federal in personam jurisdiction. The conclusion drawn is that a generally applicable federal standard for long-arm jurisdiction presents the possibility of a more rational assertion of in personam jurisdiction by federal courts over distant parties — especially alien corporations. Such a standard should be authorized either by statute or as an amendment to Rule 4 of the Federal Rules of Civil Procedure for use in federal question cases.

## II. THE PROBLEM: THE USE OF STATE LONG-ARM STATUTES IN FEDERAL QUESTION CASES CREATES A GAP BETWEEN A FEDERAL COURT'S ACTUAL AND CONSTITUTIONAL REACH OVER DISTANT PARTIES

Several federal remedial statutes contain provisions for extraterritorial service of process in cases arising under them. Section 12 of the Clayton Antitrust Act, for example, provides:

Any suit, action or proceeding under the anti-trust law against a cor-

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5. In this article, "foreign corporation" refers to a United States domestic corporation not registered to do business in a particular state. An "alien corporation" is one incorporated in a foreign country.

poration may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, and *all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.* (emphasis added).<sup>6</sup>

Section 27 of the Securities Exchange Act of 1934 is similar, authorizing extraterritorial jurisdiction wherever a defendant is an inhabitant, transacts business, or in any district in which an unlawful act has occurred.<sup>7</sup>

Under the Clayton Act, the "transacts business" test of anti-trust venue has permitted long-arm jurisdiction to be exercised over corporate defendants with no physical presence in the forum state.<sup>8</sup> Long-arm jurisdiction under the Securities Exchange Act has extended to defendants with virtually no contacts with the forum state, when venue was based on the occurrence of an unlawful act in that state.<sup>9</sup>

Many federally-created causes of action, however, contain no provisions for extraterritorial service of process.<sup>10</sup> In proceedings under such statutes, in personam jurisdiction over a corporation which cannot be physically served in the forum state depends upon state long-arm law,

6. Clayton Antitrust Act §12, 15 U.S.C. §22 (1982).

7. The Securities Exchange Act of 1934 §27, 15 U.S.C. §78aa (1982) provides in pertinent part:

Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district [wherein any act or transaction constituting the violation occurred] 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.

Other federal long-arm provisions are found in the Foreign Sovereign Immunities Act of 1976 §4 & 5, 28 U.S.C. §1391(f), §1608 (1982) (service of a summons on a foreign state or agency or instrumentality thereof may be made by mail wherever the party is located, if other specified methods not available); federal interpleader, 28 U.S.C. §2361 (1982) (service may be made in any district in which a party resides or is found) and the Miller Act §2, 40 U.S.C. §270b (1982) (where venue is proper, extraterritorial service of process is authorized in suits by subcontractors on federal construction projects against sureties on payment bonds).

8. See, e.g., *B.J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, 355 F.2d 827 (D.C. Cir. 1965); *Lippa's Inc. v. Lenox Inc.*, 305 F. Supp. 175 (D. Vt. 1969). For a review of personal jurisdiction under Section 12 of the Clayton Act, see Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485 (1982); Note, *Personal Jurisdiction Over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330 (1980); Note, *Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions: A Plea for Perspicuity*, 5 SYRACUSE J. INT'L L. & COM. 149 (1977)

9. See, e.g., *Nelson v. Quimby Island Reclamation Dist.*, 491 F. Supp. 1364, 1377-79 (N.D. Cal. 1980).

10. No federal long-arm jurisdiction is provided, for example, under the Civil Rights Act of 1964; for federal trademark infringement (15 U.S.C. §1051 et seq.) in patent matters, see *Activox, Inc. v. Envirotech Corp.* 532 F. Supp. 248 (S.D.N.Y. 1981); and in admiralty actions, see *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276 (D.N.J. 1980), *aff'd* 654 F.2d 280 (3rd Cir. 1981).

incorporated through Rule 4(e) of the federal rules, rather than upon any federal statute. Rule 4(e) provides, in pertinent part, that:

. . .Whenever a statute or rule of court of the state in which the district court is held provides. . .for service of a summons. . .upon a party not an inhabitant or found within the state,. . .service may. . .be made under the circumstances and in the manner prescribed in the [state] statute or rule.<sup>11</sup>

Thus, in situations where no federal statute is available, Rule 4(e) directs a federal plaintiff to the long-arm statute of the state in which the district court sits. In such a case, the in personam jurisdictional question depends upon an examination of the defendant's contacts with the forum state, even when there is a federal claim. Such a "state contacts" test in federal question litigation arises from the requirement in Rule 4(e) that when a state long-arm statute is relied on for service of process, service "is to be made under the circumstances and in the manner prescribed by the [state] statute. . . ." Most state statutes will explicitly require examination of contacts with that state.<sup>12</sup> Even for those states whose statutes are not so explicit, the fourteenth amendment imposes the same "state contacts" requirement; it permits them, as a matter of due process, to "exercise personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state."<sup>13</sup>

For statutory and/or constitutional reasons, when a district court relies on Rule 4(e) and a state long-arm statute for in personam jurisdiction, it will only examine contacts of the defendant with the state in

11. See *supra* note 4.

12. The District of Columbia statute is typical in this respect. It reads in pertinent part:

A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —

- (1) transacting any business *in the District of Columbia*;
- (2) contracting to supply services *in the District of Columbia*;
- (3) causing tortious injury in the *District of Columbia* by an act or omission in the *District of Columbia*;
- (4) causing tortious injury *in the District of Columbia* by an act or omission outside the *District of Columbia* if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, *in the District of Columbia*;
- (5) having an interest in, using, or possessing real property *in the District of Columbia*; or
- (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed *within the District of Columbia*. . .

13 D.C. CODE ANN. 423 (1981) (emphasis added).

13. *World-wide Volkswagen*, 444 U.S. 286, 291 (1980).

which the court sits.<sup>14</sup> However, if the in personam jurisdiction of a federal district, court at least when hearing a federal question, is not *constitutionally* limited by the state-based territorial principles of the fourteenth amendment due process, and if venue is properly laid in a particular district, is it correct that the in personam jurisdiction of the federal court should nevertheless be no greater than that of a state court? Should not federal venue statutes (supplemented by use of *forum non conveniens* principles) determine where a domestic corporation (or an alien corporation doing business in the United States) must defend federal question litigation, rather than have state borders (which are only arbitrary boundaries of federal judicial districts in federal question cases) perform that function?<sup>15</sup>

### III. IN A FEDERAL QUESTION CASE THE IN PERSONAM JURISDICTION OF A FEDERAL COURT IS GREATER THAN THAT ALLOWED STATE COURTS UNDER FOURTEENTH AMENDMENT DUE PROCESS PRINCIPLES

Much of the Supreme Court's teaching on due process limitations on in personam jurisdiction of courts has arisen in review of state court (or federal court diversity) actions. The principal decisions in this area — such as *International Shoe v. Washington*; *Hanson v. Denkla* and *World-Wide Volkswagen Corp. v. Woodson*,<sup>16</sup> — are fourteenth amendment due

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14. Virtually all courts which have considered this point have so held. *See infra* notes 22-31 and accompanying text.

15. In a diversity action, of course, the federal court is merely sitting as a state court, and its use of a state long-arm statute, and its restriction to state contacts, follows directly from the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See, e.g.*, *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) (Black, J., dissenting): "Neither the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court's jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction."

16. In *International Shoe*, 326 U.S. 310 (1945), the question was whether certain contacts of employees of a Delaware corporation in the State of Washington could subject it to suit there for the collection of a state tax. The Court explicitly rejected the notion of "presence" as a basis for jurisdiction over a corporation, and described a qualitative test under the fourteenth amendment to determine whether the corporation's activities in the state are of such a quality and nature as to make the exercise of jurisdiction over it fair and reasonable.

*Hanson v. Denkla*, 357 U.S. 235 (1958), concerned the jurisdiction of a Florida state court over a Delaware trustee in an action by residuary legatees of the trust settlor. The Court followed the fact-dependent approach articulated in *International Shoe* but, in this instance, found the trustee's contacts with Florida insufficient, under the fourteenth amendment to warrant jurisdiction in that state.

*World-wide Volkswagen*, 444 U.S. 286 (1980), was a products liability action brought in an Oklahoma court by parties who had suffered injuries in an accident while driving through Oklahoma, in a vehicle purchased in New York. The Court held that the fourteenth amendment did not permit the New York automobile retailer that sold the car to the injured plaintiff and its wholesaler to be sued in Oklahoma. The *International Shoe* approach, which placed considerable weight on the convenience to a party of litigating in a distant state as a fourteenth amendment factor, was refined somewhat, as the Court noted that

process decisions. The requirements they impose as a matter of constitutional law arise from the limits of state government in our federal system.<sup>17</sup>

Due process limits on the in personam jurisdiction of a federal court arise, of course, from the fifth amendment. The Supreme Court has not opined on whether *International Shoe* principles (i.e., minimum contacts, fundamental fairness) would govern in determining the constitutional reach of a federal court in a federal question case. However, it is clear that the due process clause of the fifth amendment will not impose a *state* contacts test of in personam jurisdiction. Indeed, as early as 1878 the Supreme Court held that,

nothing in the Constitution. . .forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court — any circuit court — in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.<sup>18</sup>

Thus, any person (e.g., a domestic corporation) located anywhere in the United States could, constitutionally, be subject to the jurisdiction of *any* federal court.<sup>19</sup> Indeed, such was the precise holding in a case where the Federal Trade Commission sought to enforce an investigative subpoena against a corporation in the Northern District of Texas.<sup>20</sup> The corporation had neither an office nor any other presence within the state. The fifth circuit, noting that the FTC had statutory authority for such an assertion of personal jurisdiction, held that it did not violate due process. According to the court,

[b]ecause the district court's jurisdiction is always potentially, and, in

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concepts of federalism impose limits on state court jurisdiction regardless of the convenience to the defendant. a products liability action brought in an Oklahoma court by parties who had suffered injuries there in an accident while driving a vehicle purchased in New York. The Court held that the fourteenth amendment did not permit the New York automobile retailer that sold the car to the injured plaintiff and its wholesaler to be sued in Oklahoma. The *International Shoe* approach, which placed considerable weight on the convenience to a party of litigating in a distant state as a fourteenth amendment factor, was refined somewhat, as the Court noted that concepts of federalism impose limits on state court jurisdiction regardless of the convenience to the defendant.

17. As the Supreme Court noted in *World-wide Volkswagen*, the due process clause "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 444 U.S. 286, 292 (1979).

18. *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878).

19. *Continental Illinois Nat'l Bank v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648, 682 (1935) (jurisdiction over reorganization proceedings of a railway line extending over many districts and states may be conferred upon a single district court); *Cf. Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (Rule 4(f), allowing service of process anywhere within a state embracing two or more judicial districts, is in harmony with the Enabling Act); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925) (limiting the Transportation Act of 1920's grant of jurisdiction to the district court where the defendant resides).

20. *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981).

this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States. . . . [The subject corporation]. . . , as a resident United States corporation, necessarily has sufficient contacts with the United States to satisfy the requirements of due process.<sup>21</sup>

The true *International Shoe* analogy in the federal system, however, is that of the alien corporation which has no presence in the United States, yet has certain "contacts" with the United States; for example, a foreign manufacturer whose products are distributed in the United States by an independent company. In this instance, the constitutional due process limits on the exercise of personal jurisdiction by a federal court should not depend on a party's contacts with any particular state. Indeed, numerous lower court decisions have held that the fifth amendment test of due process in federal question cases is different from, but may be derived by analogy to *International Shoe's* state-based minimum contacts test. Since the sovereign in a federal question case is the United States, these cases hold that appropriate contacts of the defendant with the United States as a whole will satisfy fifth amendment due process.<sup>22</sup>

Moreover, current federal statutory law in several areas appears premised on the assumption that in personam jurisdiction in federal question cases need not have any connection to state or judicial district contacts. In the area of securities regulation, for example, the occurrence in a particular district of an act or transaction constituting a violation of the securities laws is a basis for service of process anywhere the defendant may be found. In personam jurisdiction over a particular defendant in such cases is not related to the defendant's own contacts with the state in which the district court sits.<sup>23</sup>

The jurisdiction of the Court of International Trade (formerly the Customs Court) is also not based on any state contacts. In actions brought by the United States against private parties to enforce import revenue laws, service of process may be made anywhere in the United States and abroad.<sup>24</sup> Although the full reach of this court's in personam jurisdiction does not appear to have been judicially determined, it plainly is not based on state contacts.<sup>25</sup>

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21. *Id.*

22. See e.g., *SIPC v. Vigman*, 764 F.2d 1309 (9th Cir. 1985); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972).

23. See, e.g., *Warren v. Bokum Resources Corp.*, 433 F. Supp. 1360, 1364 (D.N.M. 1977): "Given the extraterritorial service of process provision of §27, it is evident that so long as venue is properly laid in the forum district for claims brought under the 1934 Act, it is not necessary that each defendant have personally engaged in acts or transactions within the forum in order to sustain personal jurisdiction over him."

24. CT. INT'L TRADE R. 4(d)(7)(h).

25. Apart from its numerous statements that the process of a federal district court may run anywhere in the United States, the Supreme Court has not determined the specific



IV. ALTHOUGH NOT CONSTITUTIONALLY REQUIRED, RULE 4(E)  
NEVERTHELESS IMPOSES A STATE CONTACTS REQUIREMENT ON FEDERAL  
COURT IN PERSONAM JURISDICTION

While it appears that a state contacts test is not part of a fifth amendment due process limitation on federal in personam jurisdiction, most courts have viewed Rule 4(e) of the Federal Rules of Civil Procedure as requiring such contacts in cases where a specific statute does not authorize a different basis for long-arm jurisdiction.

*Wells Fargo & Co. v. Wells Fargo Express Co.*,<sup>26</sup> an action under federal trademark law, is a prime example. In *Wells Fargo*, the Ninth Circuit Court of Appeals considered the question of personal jurisdiction over an alien defendant who was being sued on a claim arising under federal law. The court had to decide whether it "may appropriately consider not only the alien defendant's contacts with the forum state, but also the aggregate contacts of the alien with the United States as a whole."<sup>27</sup> The district court had found the defendant's state contacts inadequate to satisfy fourteenth amendment due process.<sup>28</sup> As noted above, federal trademark law (unlike the antitrust and securities laws) contains no provisions for the extraterritorial exercise of personal jurisdiction, and therefore the district court had relied on a state long-arm statute.<sup>29</sup>

The Court of Appeals considered the argument that due process, in a federal claim in a federal court, will be satisfied by an aggregation of United States contacts. But, the court specifically rejected such an approach on statutory grounds: "[N]ot only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature."<sup>30</sup> Since the legislature (through the Federal Rules of Civil Procedure) had not authorized a national contacts basis for federal jurisdiction, the court considered itself unable to use it.<sup>31</sup>

A similar result, which follows analogous reasoning, was reached in the arena of admiralty law. Admiralty is another area in which there is no federal statutory provision for long-arm jurisdiction. In *DeJames v. Mag-*

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limits, if any, imposed by the Constitution on in personam jurisdiction of federal courts in federal question cases. Several lower court decisions on the subject, applying *International Shoe* type reasoning (i.e. minimum contacts with the United States as a whole), are cited *infra* nn. 44 & 47. See also *Stabilisierungsfonds für Wein v. Kaiser*, 647 F.2d 200, 204 (D.C. Cir. 1981); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir. 1981); *Honeywell v. Metz Apparatewerke*, 509 F.2d 1137, 1143 n. 2 (7th Cir. 1975); and Abraham, *Constitutional Limitations Upon the Territorial Jurisdiction in Personam of Corporations and Due Process*, 8 VILL. L. REV. 520 (1963); Green, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961).

26. 556 F.2d 406 (9th Cir. 1977).

27. *Id.* at 416 (emphasis in original).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 418.

*nificance Carriers, Inc.*,<sup>32</sup> a foreign defendant's contacts with the forum state were held to be inadequate to satisfy state statutory and fourteenth amendment criteria. The court therefore considered whether a "national contacts" basis for personal jurisdiction could be utilized. From constitutional and policy perspectives, the court found such an approach unobjectionable:

[T]he court believes that it is not unfair nor unreasonable as a matter of due process to consider the nationwide contacts of an alien defendant in determining whether jurisdiction exists. . . . This court also believes that many good policy reasons exist for applying the national contacts theory, particularly in those federal question cases involving alien defendants. In addition to affording greater protection to the rights of domestic plaintiffs, the national contacts approach would promote greater uniformity of treatment in actions involving federal rights since the jurisdiction of the federal court would not depend upon the liberality or conservatism of the laws in the state in which the court sits.<sup>33</sup>

As in *Wells Fargo*, however, the court was compelled to reject the theory because of Rule 4(e)'s requirement that extraterritorial services of process "is only possible in those situations where the in-state activities of the defendant would be sufficient to invoke the long-arm statute had the defendant been sued in state court".<sup>34</sup>

In another decision, *Edward J. Moriarity & Co. v. General Tire & Rubber Co.*,<sup>35</sup> a district court went to some lengths to explain that, but for Rule 4(e), a national aggregated contacts basis for extraterritorial jurisdiction would be available to a district court. The case was an antitrust action in which the question presented was whether proper jurisdiction could be asserted over a Greek company, with no office in the United States but some contacts with the forum state. The court upheld jurisdiction based on state contacts and the state long-arm statute, but only *after* concluding that it was precluded from considering national contacts as a measure of jurisdiction:

[W]e feel that the appropriate inquiry to be made in a federal court where the suit is based on a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the fifth amendment. . . . Unfortunately, this course has not been left open to us by the federal rules or statutes. That is, neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States.<sup>36</sup>

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32. 491 F. Supp. 1276 (D.N.J. 1980), *aff'd* 654 F.2d 280 (3rd Cir. 1981).

33. *Id.* at 1283.

34. *Id.*

35. 289 F. Supp. 381 (S.D. Ohio 1967).

36. *Id.* at 390. Other federal question cases similarly declining to adopt a national con-

Although the reasoning of these cases is sound and they appear to admit of no other result, there are nevertheless several district court opinions reaching directly contrary results (*i.e.* holding that aggregated United States contacts may be used to support extraterritorial jurisdiction, despite the absence of statutory authorization). An example, is *Cryomedics, Inc. v. Spemby, Ltd.*,<sup>37</sup> a patent action in which a British company resisted the in personam jurisdiction of the district court in Connecticut. The company argued that it did not have sufficient contacts with that state to satisfy due process. The British defendant conceded, however, that its contacts with at least one other United States jurisdiction were adequate to satisfy due process if it was sued in that other forum.<sup>38</sup>

The district court did not consider the sufficiency of the British defendant's contacts with Connecticut. Rather, it upheld jurisdiction based upon a "national contacts" analysis. The court reasoned that since a federal court is not subject to fourteenth amendment limits on state court jurisdiction, and since the British company had adequate contacts with other jurisdictions in the United States, jurisdiction in Connecticut was proper. The court did not address Rule 4(e) or any statutory basis for long-arm jurisdiction, resting its decision essentially on its general conclusion that extraterritorial jurisdiction under the circumstances of the case would be constitutional.<sup>39</sup>

Another district court decision upholding extraterritorial jurisdiction based on a national contacts test is *Holt v. Klosters Rederi A/S*.<sup>40</sup> *Holt* was an admiralty action in which a Norwegian corporation contended it did not have sufficient contacts with the forum state to support jurisdiction under the state long-arm statute. The court upheld its own jurisdiction on the basis that "defendant's contacts with the United States, both qualitatively and quantitatively, are constitutionally sufficient to enable this court to render a binding judgment against it."<sup>41</sup>

Rule 4(e) did not enter into the court's analysis in *Holt*. Because the litigation presented a claim under federal law, the court reasoned neither the law of the state in which it sat (*i.e.*, the state long-arm statute) nor

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tacts test of jurisdiction because of the absence of authorization to do so are *Activox, Inc. v. Envirotech*, 532 F. Supp. 248 (S.D.N.Y. 1981); *Ingersoll Milling Machine Co. v. J. E. Bernard & Co.*, 508 F. Supp. 907 (N.D. Ill. 1981); *Finance Co. of America v. Bank American Corp.*, 493 F. Supp. 895 (D.Md. 1980); and *Superior Coal Co. v. Ruhrkohle AG*, 83 F.R.D. 414 (E.D. Pa. 1979).

37. 397 F. Supp. 287 (D. Conn. 1975).

38. *Id.* at 292.

39. Applying the criteria of "fairness" and "reasonability" used in *International Shoe*, the court pointed out that, inasmuch as the British defendant had no place of business anywhere in the United States, there could be little difference to it in convenience in defending in one east coast jurisdiction (where it had requisite "contacts") versus another (where it did not). *Id.* at 292.

40. 355 F. Supp. 354 (W.D. Mich. 1973).

41. *Id.* at 358.

the fourteenth amendment were applicable. Rather, according to the court, the jurisdictional question was one under the fifth amendment, which looks to a defendant's contacts with the United States as a whole. The court did note that even if due process were satisfied, it might, nevertheless, be restricted in the exercise of in personam jurisdiction through a statute or rule of procedure. Having ignored Rule 4(e), the court found no such restriction in this case.

*Centronics Data Computer Corp. v. Mannesmann, A.G.*,<sup>42</sup> is another decision basing extraterritorial jurisdiction, at least in part, on aggregated national contacts. Despite its acknowledgment that a national contact test "has not yet been generally accepted and there is no specific statutory authority for it,"<sup>43</sup> the court nevertheless relied on it. The court held that where the defendant is an alien and where there is no other forum in which to litigate a claim, the defendant's aggregated contacts with the United States can support extraterritorial jurisdiction.<sup>44</sup> Rule 4(e) was not discussed.<sup>45</sup>

None of the foregoing cases upholding extraterritorial jurisdiction based on national contacts are consistent with the Federal Rules of Civil Procedure. As noted above, Rule 4(e) authorizes service of process pursuant to federal or state statute, "under the circumstances and in the manner prescribed in the statute." To rely on a state long-arm statute for extraterritorial service of process (as these cases do), but to ignore the circumstances under which it may be invoked (*i.e.*, the presence of appropriate minimum contacts with the state), is a plain misapplication of Rule 4(e).

A reading of these decisions reveals, instead, that the court in each instance was presented with a situation in which the exercise of its in personam jurisdiction was reasonable and constitutional, and made practical sense under the circumstances of the case. In several of the decisions, the courts appear to have utilized a national standard in order to prevent a situation where a foreign defendant would escape federal jurisdiction because of its limited contacts with any particular state. Under

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42. 432 F. Supp. 659 (D.N.H. 1977).

43. *Id.* at 664.

44. The court addressed personal jurisdiction from both a national contacts and state contacts perspective, and appears to have based jurisdiction on both. As to state contacts, the court observed that if they were "the sole consideration, I would hold they were not sufficient to ground jurisdiction." *Id.* at 663. However, the court concluded that "[b]ased on the defendant's physical contacts with the State, their substantial contacts with the country as a whole, and New Hampshire's interest in protecting its corporate citizens injured as a result of torts such as those alleged here, I find that this court has jurisdiction." *Id.* at 668.

45. See also *Max Daetwyler Corp. v. Meyer*, 560 F. Supp. 869 (E.D. Pa. 1983); and see *First Flight Co. v. National Carloading Corp.*, 299 F. Supp. 730 (E.D. Tenn. 1962). In another case, *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973), the court also upheld jurisdiction based on national contacts, noting that the alien defendant there might otherwise escape federal jurisdiction altogether, since its state contacts might be too dispersed to support jurisdiction in any state.

these circumstances, the courts ignored the requirement of a statutory authorization for in personam jurisdiction, and relied instead on their constitutional power to bring a particular defendant before them. On policy grounds the result may be correct, but on technical legal grounds it is undoubtedly flawed.

#### V. A GENERAL FEDERAL LONG-ARM STATUTE WOULD CURE THE ANOMALIES AND INCONSISTENCIES IN THE CURRENT STATE OF THE LAW

It is difficult to identify a rationale for the inconsistent treatment of long-arm jurisdiction in federal legislation. To be sure, the presence of authorization for extraterritorial service of process in specific statutes is understandable. For example, federal interpleader<sup>46</sup> is a procedure specifically created to adjudicate in a single proceeding, the conflicting claims of various persons. This procedure would have little practical value if it could not reach all interested parties, regardless of their contacts with a particular forum. Moreover, the nationwide jurisdiction of the Court of International Trade is explainable because there is only one such court in the United States.<sup>47</sup>

On the other hand, it is difficult to explain why federal long-arm jurisdiction is available for antitrust and securities law actions, but not for admiralty, patent, trademark, and civil rights actions. And even among statutes with long-arm authorization, there are differences which are difficult to explain. Under the Clayton Act, for example, long-arm jurisdiction is available if venue is proper, with venue based on contacts with the forum state (*i.e.*, presence or doing business).<sup>48</sup> The securities law also collapses personal jurisdiction into venue and allows venue to be had in any district in which an unlawful event occurred. Long-arm jurisdiction over any defendant, regardless of its contacts with the district is then available if venue is proper.<sup>49</sup>

It is likely that the differing statutory treatment of long-arm jurisdic-

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46. *See supra* note 7.

47. *See supra* note 24 and accompanying text.

48. 15 U.S.C. §22 (1982); *see e.g.*, *Goldlawr, Inc. v. Shubert*, 175 F. Supp. 793 (S.D.N.Y. 1959). This limitation on in personam jurisdiction in antitrust actions is criticized, and a statutory national contacts test urged, in 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* 5.06, 5.16 (2d ed. 1980).

A distinctly minority view is that extraterritorial in personam jurisdiction under the antitrust laws may be exercised without regard to forum state contacts. *See General Electric Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982).

49. Rule 4(e)'s reliance on state long-arm statutes, when no federal statute is available, creates its own differences of in personam jurisdiction from judicial district to judicial district, since there are differences (albeit not great ones) among the long-arm statutes of various states.

This, however, is not the only example of differing treatment of federal question cases depending on the district in which suit is brought. Another is where federal law provides no limitation period on bringing a federal claim, in which case state law provides no limitation period. *See, e.g.*, *Holmberg v. Armbrrecht*, 327 U.S. 392 (1945).

tion under various federal laws occurred unintentionally, rather than as the result of deliberate legislative choice to authorize extraterritorial jurisdiction in one context and not the other, or to expand its scope in one instance and contract it in another. The legislative history of the long-arm sections of the anti-trust laws, for example, does not reveal any particular rationale or theory on which those sections were based, other than to maximize personal jurisdiction.<sup>50</sup>

With regard to Rule 4(e), nothing in it or its history reveals a specific reason why long-arm jurisdiction in federal question cases is limited to situations in which there is specific statutory authorization, or a state long-arm statute. As originally adopted in 1937, Rule 4(e) read:

Whenever a statute of the United States or an order of court 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, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

The provision is essentially the first sentence of the current rule, authorizing extraterritorial service pursuant to a federal statute. The Advisory Committee Note to this subpart merely states that various federal long-arm statutes available in specific causes of action "are continued by this rule."<sup>51</sup>

Rule 4(e) was amended only once, in 1963, when what currently appears as its second sentence was added, permitting service of process pursuant to a state long-arm statute. It is clear from the Advisory Committee Note accompanying the new subparagraph that the amendment was intended to accommodate the development of the new principles of state extraterritorial jurisdiction following the landmark 1945 *International Shoe* decision:

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). . . . The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. [Citations omitted]. . . . If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed

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50. The only discussion of long-arm jurisdiction in the legislative history of the Clayton Act is in S. REP. NO. 698, 63d Cong., 2d Sess. 49 (1914), where it is merely noted that the provision "require[s] no special explanation here."

51. J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE 4.C1[2] (2d ed. 1984)(advisory note at 4-19).

under the Federal or the State law, at his option.<sup>52</sup>

Why the Supreme Court did not go further in the 1963 amendment to Rule 4(e) and allow federal in personam jurisdiction to the fullest extent permitted by the Constitution, is not explained. However, it does not appear that the Advisory Committee ever considered such action.<sup>53</sup>

The absence of a general authorization for long-arm jurisdiction, whether by statute or rule, not only creates anomalies, such as alien defendants with U.S. contacts not being amendable to suit, but may actually frustrate Congressional intent as expressed in several venue statutes. Probably the most prominent example is the alien venue statute,<sup>54</sup> permitting an alien to be sued in any district. With such a provision, Congress has apparently determined that the relative convenience of a defendant is of no relevance if that party is an alien. Yet, when suit is brought under federal legislation in which a state long-arm statute must be used, a plaintiff must nevertheless search for a district court in a state in which the alien defendant has the "minimum contacts" necessary to satisfy the state long-arm statute. Thus, the freedom which Congress gave in section 1391(d) regarding choice of forum, Rule 4(e) takes away by imposing state contacts as an additional requirement for in personam jurisdiction.<sup>55</sup> A fifth amendment "U.S. contacts" test of jurisdiction makes excellent sense in such a situation.

Even the general venue provision for federal question actions — authorizing suit in any district where all defendants reside or in which the claim arose,<sup>56</sup> may be undermined by a state contacts requirement. "State contacts" means that federal question litigation against multiple defendants residing in different districts, could occur in a single forum *only* if the plaintiff were fortunate enough to be suing defendants who had the necessary "minimum contacts" with that jurisdiction. If, for example, the claim arose in the Southern District of New York, and one of the defendants was a California corporation with no contacts in New York, but

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52. *Id.* at 4-32. Prior to *International Shoe*, the extraterritorial jurisdiction of state courts was still constrained by the territorial concepts of *Pennoyer v. Neff*, 95 U.S. 714 (1877). Thus, even in the case of pre-*International Shoe* non-resident motorist statutes, which conferred in personam jurisdiction over out-of-state motorists involved in automobile accidents in the state, the perceived need for in-state service was satisfied by the fiction of a state official (e.g. a commissioner of motor vehicle licensing) being deemed the out-of-state motorists' in-state agent for service of process. *See. e.g., Hess v. Pawlowski*, 274 U.S. 352 (1927).

53. The American Law Institute, in its 1969 Study of the Division of Jurisdiction Between State and Federal Courts, published a proposed new Title 28 of the U.S. Code in which, in §1314(d), nationwide service of process would be available in all federal question cases.

54. 28 U.S.C. §1391(d) (1982).

55. The requirement is also artificial as one to secure in personam jurisdiction because such jurisdiction, in a federal question case in a federal court, need not be based on state contacts to satisfy due process.

56. 28 U.S.C. §1391(b) (1982).

with a branch office across the Hudson River in New Jersey, an action against all defendants could not be brought in the Southern District of New York.

Requiring the federal court in New York to depend on minimum contacts with that state in such a situation makes little sense. Constitutionally, the process of the New York court could extend to the California corporation, and the presence of its branch office in New Jersey assures that defending itself in New York would not be burdensome or inconvenient.<sup>57</sup>

### CONCLUSION

In an era of high-speed travel and instantaneous communications, reliance on state borders to determine the in personam jurisdiction of federal courts in federal question cases is an anachronism. The extension of federal in personam jurisdiction to the fullest extent permitted by the Constitution would facilitate the closing of a loophole alien corporations have used to escape federal jurisdiction, and would also economize federal litigation against multiple domestic parties by providing a single forum for adjudication of most claims.<sup>58</sup> It would also avoid the time and effort spent in litigating 12(b) motions based on lack of personal jurisdiction, when the issue is limited to the technicality of whether a large foreign corporation with extensive U.S. contacts has sufficient contacts with the forum state. Cases of legitimate inconvenience to litigants arising from such expanded jurisdiction could be resolved through careful application of the *forum non conveniens* doctrine.

Although a few courts have attempted to fashion such a federal long-arm jurisdiction on a common law basis, it appears that it is up to Congress or the Supreme Court (through an amendment to the Federal Rules of Civil Procedure) properly to achieve such a result.

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57. Any burden or inconvenience that would occur if a "state contacts" test were abandoned—for example, if the branch office of the California corporation discussed in the text were located in Baltimore rather than Newark—could be addressed in a *forum non conveniens* motion.

58. From a policy perspective, there is little difference between federal venue statutes and modern principles of personal jurisdiction, since both direct litigation to a forum having some substantial relationship to either the claim or the defendants. *Cf.*, 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* §1063 (1969).



