

COMMENTS

PERSONAL JURISDICTION OVER ALIENS: UNRAVELLING ENTANGLED CASE LAW

INTRODUCTION

The minimum contacts test as applied to alien defendants is in a state of confusion. Plaintiffs and defendants alike suffer unpredictable and inconsistent outcomes. This Comment explores the incongruous approaches to establishing jurisdiction over alien defendants found in federal appellate case law.

Part I of this Comment reviews the minimum contacts test and suggests theories that courts may consider in deciding whether to exercise jurisdiction. Part II discusses the case law arising under diversity jurisdiction, where state law supplies the rule of decision. Under such circumstances, some circuits apply the same minimum contacts test they would apply to domestic defendants,¹ while other circuits consider certain additional factors.²

Part III introduces the “national contacts” theory of personal jurisdiction, which may be available in federal question litigation. Before asserting jurisdiction, some circuits require that an alien have minimum contacts with the forum state,³ while others require that the defendant have minimum contacts with the United States as a whole.⁴ This latter

1. *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40 (8th Cir. 1988); *Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769 (1st Cir. 1985). *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985); *Behagan v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731 (10th Cir. 1984); *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 499 (5th Cir. 1974); *Scovill Mfg. Co. v. Dateline Elec. Co., Ltd.*, 461 F.2d 897 (7th Cir. 1972); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969).

2. *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989); *Mason v. F. L. Luigi & Franco Dal Maschio Fu, G.B.*, 832 F.2d 383 (7th Cir. 1987); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1988); *FDIC v. British-American Ins. Corp.*, 828 F.2d 1439 (9th Cir. 1987); *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449 (10th Cir. 1983); *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1038 (1981).

3. *Fairbanks Morse Pump Corp. v. ABBA Parts, Inc.*, 862 F.2d 717, 718-19 (8th Cir. 1988); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1982) (Gibbons, J., dissenting); *Grevas v. M/V Olympic Pegasus*, 557 F.2d 65 (4th Cir. 1977).

4. *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1985) (maritime)

view is the "aggregate" or the "national contacts" theory of jurisdiction. The national contacts theory is usually available only where Congress has authorized nationwide or worldwide service of process by statute.

Part IV reviews Supreme Court opinions concerning jurisdiction over aliens. Although the Court recently enunciated special factors to be considered in asserting jurisdiction internationally,⁵ some circuit courts appear not to have followed suit.⁶ The Supreme Court has not yet ruled on the national contacts doctrine.

This Comment will conclude that either Congress or the Supreme Court should clarify the confusing body of law that has developed among the federal circuits. The law of personal jurisdiction requires clear, national standards on what contacts due process demands before a federal court exercises jurisdiction over aliens. The Conclusion will also briefly discuss a proposed amendment to the Federal Rules of Civil Procedure that may profoundly affect assertion of federal court jurisdiction in federal question cases.

I. THE MINIMUM CONTACTS TEST

Over the last century, the power of United States courts to assert jurisdiction over aliens has increased. Under the old law, a court possessed adjudicatory power only over persons physically present within the forum state's territory. In 1877, in the leading case of *Pennoyer v. Neff*,⁷ Justice Field succinctly stated the twin principles that proscribed United States courts' jurisdiction until the early twentieth century: "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory."⁸

The Supreme Court abandoned the strict territorial principle of *Pennoyer* in the landmark decision of *International Shoe Company v. Washington*.⁹ There, the Court held that:

attachment); *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1983)(Jones Act claim); *Honeywell v. Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975)(patent infringement); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977)(antitrust violations); *Engineered Sports Prod. v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973)(patent infringement). Most, but not all, circuits distinguish between federal causes of action with nationwide or worldwide service, and causes of action in which service must be accomplished through a state long arm statute.

5. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

6. *See e.g.*, *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40 (8th Cir. 1988).

7. 95 U.S. 714 (1877).

8. *Id.* at 722, (cited in Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 2 (1987)).

9. 326 U.S. 310 (1945).

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 was prerequisite But now . . . 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."¹⁰

The minimum contacts inquiry established by *International Shoe* and its progeny focuses on the relationship between the defendant, the forum, and the litigation.¹¹ For a court to exercise jurisdiction, the defendant must purposefully avail himself of the privilege of conducting activities within the forum, and the litigation must relate to injury or damages arising out of the defendant's activities in the forum.¹²

Foreseeability of injury or litigation in the forum is irrelevant under minimum contacts analysis; the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there.¹³ The defendant need not have physically entered the forum if a substantial connection between the defendant's conduct and the forum otherwise exists.¹⁴

In federal court, the plaintiff has the burden of establishing jurisdiction by showing that the defendant has sufficient minimum contacts.¹⁵ Once the plaintiff has met this burden, the defendant must present a compelling case that other considerations render jurisdiction unreasonable.¹⁶ In other words, "jurisdictional rules must not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."¹⁷ In deciding whether jurisdiction is reasonable, a court must consider: the burden on the defendant of defending at the particular forum; the forum's interest in adjudicating the

10. 326 U.S. at 316. Inquiry should focus on the nature and quality of the defendant's contacts with the forum. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

11. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

12. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985).

13. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 316 (1980).

14. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

15. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439 (9th Cir. 1987); *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).

16. *Burger King*, 471 U.S. at 477.

17. *Id.* at 478 (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

matter; the plaintiff's interest in convenient and effective relief; the interstate judicial system's interest in obtaining efficient resolution of controversies; and the interests of the states in furthering social policies.¹⁸

If a plaintiff prevails under the principles listed above, the court will have "specific jurisdiction." A court also may have "general jurisdiction," arising from contacts unrelated to the immediate controversy. Such contacts must be so substantial, systematic, and continuous that it is reasonable to compel an alien to submit to the forum's jurisdiction for all purposes.¹⁹ Establishing general jurisdiction usually requires evidence that the alien maintains a residence or office in the forum. Evidence of mere business transactions with residents is rarely sufficient.²⁰ Courts use a "totality of the circumstances" approach in determining whether a defendant's contacts with the forum warrant the exercise of general or specific jurisdiction.²¹

A. Theories that Aid in Establishing Jurisdiction

General jurisdiction and specific jurisdiction are the two general frameworks through which a plaintiff must establish jurisdiction. In enumerating the defendant's contacts, a court might consider the theories listed below.

1. *Alter Ego*.—If a corporation exists for no substantial reason other than to shield investors from liability, a court may pierce the corporate veil under the applicable state law, and exercise jurisdiction over a controlled individual²² or corporation,²³ using the contacts of the corporation to establish jurisdiction over an otherwise jurisdiction-proof investor.²⁴

18. *Id.* at 477; *International Shoe Co. v. Washington*, 326 U.S. 310, 297 (1980).

19. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-47 (1952).

20. *Compare id.*, with *Hall v. Helicopteros Nacionales de Colom.*, 466 U.S. 408 (1984).

21. *See, e.g.*, *Hydrokinetics v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983).

22. *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985).

23. *In re Ocean Ranger Sinking*, 589 F. Supp. 302 (E.D. La. 1984).

24. Factors that help pierce the veil and establish jurisdiction over a controlling party include: the corporation is undercapitalized, without separate books, monies are freely transferred between the corporation and the investor, the corporation is used to defraud or promote illegal activities, and corporate formalities are not followed. *Stuart*, 772 F.2d at 1197.

Other factors may include: the corporation and investor file joint income tax returns; members of the boards of directors overlap; and the corporation is centrally managed by its investor. *Southmark Corp.*, 851 F.2d at 773. *See also*, *Miller v. Honda Motor Co.*, 779 F.2d 769 (1st Cir. 1985)(under Massachusetts law, quadriplegic not allowed to maintain suit against Japanese motorcycle manufacturer where its American subsidiary was effectively a separate entity from its Japanese parent, and the parent-subsidiary relationship did not result in fraud of injurious consequences); *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980)(under Oklahoma

2. *Agency*.—Where an agent acts in the forum under actual or apparent authority, jurisdiction over an absent principal can be maintained.²⁵

3. *Conspiracy*.—A few courts hold that where a co-conspirator undertakes acts within the forum in furtherance of a conspiracy, such acts constitute contacts with which jurisdiction may be established over an absent co-conspirator.²⁶

4. "*Jurisdiction by necessity*."—Under the doctrine of jurisdiction by necessity, if the plaintiff is unable to join necessary defendants, or is unable to bring suit elsewhere, such circumstance weighs in favor of establishing jurisdiction. This doctrine has been recognized, although not adopted, by the Supreme Court.²⁷

II. DISAGREEMENT IN DIVERSITY

When asserting jurisdiction over an alien, circuits courts frequently distinguish between cases founded on diversity of citizenship and cases founded on a federal question.²⁸ In diversity suits, a number of circuit courts mechanically apply the same minimum contacts analysis any court would use in a suit against a domestic defendant, without consideration of the fact that jurisdiction is asserted internationally.²⁹ Other circuits consider additional factors before holding an alien subject to jurisdiction.

law, jurisdiction will be declined over alien subsidiary absent a showing of fraudulent or inequitable conduct in parent-subsidiary relationship).

25. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

26. *Leasco Data Proc. Equip. v. Maxwell*, 319 F. Supp. 1256 (S.D.N.Y. 1970); *Chromium Indus. v. Mirror Polishing and Plating Co.*, 448 F. Supp. 544 (N.D. Ill. 1978).

27. The Supreme Court, in a footnote in *Hall v. Helicopteros Nacionales de Colum.*, 466 U.S. 407, 419, n.13 (1984), considered the argument that jurisdiction is proper if the forum is the only one where all defendants may be joined. The Court stated:

We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum [W]e decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far reaching modification of existing law—in the absence of a more complete record.

Id. See also *Shaffer v. Heitner*, 433 U.S. at 211, n.37.

28. No circuit court has yet held that jurisdiction might be based on a defendant's national contacts in a diversity suit as opposed to a federal question suit.

29. *Wines v. Lake Havasu Boat Mfg.*, 846 F.2d 40 (8th Cir. 1988)(products liability action requires sufficient contacts with forum state); *Miller v. Honda Motor Company*, 779 F.2d 769 (1st Cir. 1985)(quadriplegic not allowed to maintain products liability action against parent where the parent had no contacts with Massachusetts, and the subsidiary was a separate entity); *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985)(jurisdiction proper where alien defendant served while in transit in the forum state); *Behagan v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731 (10th Cir. 1984)(international amateur basketball association subject to Colorado general jurisdiction through the contacts of its agent, the American Basketball

A. National Sovereignty

For example, in *Donahue v. Far Eastern Air Transport Corp.*,³⁰ the Court of Appeals for the District of Columbia held that where a plaintiff requests jurisdiction over an alien defendant, a court should assure itself that jurisdiction does not encroach upon the sovereignty of another nation. The court considered five wrongful death actions resulting from an inter-island airline flight in Taiwan. The plaintiffs alleged that the court had general jurisdiction because of the alien defendant's systematic and continuous contacts with California.³¹ Before the crash, the defendant airline purchased spare parts in California, purchased two Boeing 737 aircraft in California, and applied to the Civil Aeronautics Board to register anticipated flights from California to Taiwan. Noting that the Supreme Court in *International Shoe* did not discuss federal courts asserting jurisdiction internationally, but addressed state courts asserting jurisdiction in a federal system, the court fashioned a new rule using *International Shoe* as a template. In the domestic forum, one of *International Shoe's* primary purposes is to prevent states from encroaching on each other's sovereignty. The court explained that in the international forum,

a foreign land's sovereignty is surely no less worthy of consideration than that of a sister state. Taiwan's interest in providing a forum for this litigation is evident—an event within its borders gave rise to the controversy and it is the place in which [the airline's] activities [were] centered. No similar sovereign interest can be attributed to California or the United States.³²

Encroachment upon another nation's sovereignty was also an issue in *Brainerd v. Governors of the University of Alberta*.³³ There, the

Association); *Lockett v. Bethlehem Steel Corp.*, 618 F.2d 1373 (10th Cir. 1980) jurisdiction will be declined over alien subsidiary absent fraudulent or inequitable conduct in parent-subsidary relationship); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 499 (5th Cir. 1974)(jurisdiction over famous sea voyager requires deliberate contacts with forum state—"trolling with tangled lines of authority . . . the sounds reverberating from the fish are sufficient [for jurisdiction]"); *Scovill Mfg. Co. v. Dateline Elec. Co.*, 461 F.2d 897 (7th Cir. 1972)(purposeful availment of the privilege of doing business in forum state satisfies due process); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969).

30. 652 F.2d 1032 (1981).

31. The D.C. Circuit heard the appeal from an action originally brought in California because of procedural rules not germane to this discussion.

32. *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1038 (1981).

33. 873 F.2d 1257, 1260 (9th Cir. 1989).

plaintiff charged defamation and tortious breach of contract by an officer and the Governors of the University of Alberta. Allegedly, the defendants violated a termination agreement by making defamatory remarks concerning the plaintiff's past job performance. Although the court upheld jurisdiction, it commented that whenever jurisdiction reaches over national boundaries, conflicts of sovereignty should be considered in determining whether jurisdiction comports with traditional notions of fair play and substantial justice.³⁴

The Ninth Circuit, in *FDIC v. British-American Insurance Co.*,³⁵ held that the sovereignty of a foreign nation should be accorded *more* consideration than the sovereignty of a sister state. The Federal Deposit Insurance Corporation (FDIC), as receiver for an insolvent California bank, sued to recover monies expended by the bank under an allegedly fraudulent contract to purchase a foreign corporation. The parties negotiated and entered into the contract abroad, but the seller received and deposited payment in California. The Ninth Circuit held that California lacked a sufficient interest in the transaction to exercise jurisdiction. Specifically, the court stated: "[a]lthough not a dispositive consideration, a foreign nation presents a higher sovereignty barrier than another sister state."³⁶ Unfortunately, this opinion, like the others, is not helpful in eliciting a clear understanding of what respect for another nation's sovereignty entails—other than simply the nation's stake in the controversy.³⁷

34. The court did not elaborate on what exactly "conflicts in sovereignty" might be, other than stating that "[t]here appears to be no problem of a conflict with sovereignty, although there is always some concern in holding a foreign defendant subject to the jurisdiction of the United States." *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989).

35. 828 F.2d 1439 (9th Cir. 1987).

36. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987).

37. For example, in *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449 (10th Cir. 1983), a California land investment counseling corporation brought a defamation action against the publisher of a Dutch investment journal. The only contact of the defendant with the forum was in sending an investigatory reporter to Utah to investigate a number of land investment programs. The Tenth Circuit wrote:

[W]e have not been offered, nor can we find, any significant interest that the Netherlands might have in this action to compel us to require ALP Inc. to travel abroad to litigate torts allegedly committed in the United States. There is no suggestion that permitting this litigation to go forward would intrude upon the sovereignty of the Netherlands.

Id., at 1453.

B. *Applicable Law*

If foreign law governs a dispute, jurisdiction of United States courts may be more difficult to obtain. In *FDIC v. British-American Insurance Co.*, the Ninth Circuit implied that a choice of foreign law weighs in the balance against United States jurisdiction. The court pointed out that since the controversy involved a contract concerning the sale of a foreign corporation, and since the contract contained a choice of law clause designating foreign law, foreign courts were better suited than United States courts to resolve the conflict.³⁸

C. *Burden of Defending in a Foreign Legal System*

Another factor courts may consider is the alien's burden of defending in a foreign and unfamiliar legal system. In a case before the Seventh Circuit, *Mason v. Lli Luigi & Franco Dal Maschio Fu, G.B.*,³⁹ an employee severed her arm while she was operating a defective machine manufactured by an Italian company. The court noted that the defendant's burden was "severe" in travelling from Italy to Illinois and defending in a foreign legal system;⁴⁰ however, the court also noted that (1) the Italian company specially designed the machine for the Illinois factory; (2) the defendant installed the machine in the factory, and (3) the injury occurred in Illinois. Based on these facts, the court held that the defendant's burden was not significant enough to overcome the interests of the severely injured plaintiff, thus jurisdiction was reasonable.⁴¹

D. *Citizenship of the Party Seeking Relief*

A plaintiff's United States citizenship weighs in favor of establishing jurisdiction. United States courts are reluctant to compel United States citizens to seek remedies in a foreign court. In *Irving v. Owens-Corning Fiberglas Corp.*,⁴² the Fifth Circuit held that where a domestic plaintiff sues an alien defendant, a United States forum has an interest in the dispute which weighs in favor of jurisdiction. The *Irving* court carefully

38. Under other circumstances, however, "[i]f California law governed the dispute . . . California would have a substantial interest in adjudicating it." *FDIC v. British-American Ins. Co.*, 828 F.2d at 1444.

39. 832 F.2d 383 (7th Cir. 1987).

40. *Id.* at 385-86. Here, the Seventh Circuit panel was following new precedent set in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). See text accompanying notes 112-30.

41. *Mason v. F. Lli Luigi & Franco Dal Maschio Fu, G.B.*, 832 F.2d 383, 386 (7th Cir 1987).

42. 864 F.2d 383 (5th Cir. 1989).

distinguished a recent Supreme Court case, *Asahi Metal Industry Co. v. Superior Court*,⁴³ on the grounds that *Irving* involved a domestic rather than foreign plaintiff.⁴⁴ The *Asahi* opinion sets forth additional factors that should be considered in asserting jurisdiction over aliens,⁴⁵ and is discussed below in detail.⁴⁶

III. THE NATIONAL CONTACTS DOCTRINE AND FEDERAL QUESTION JURISDICTION

The minimum contacts test consists of two parts. First, a court determines whether a defendant has "minimum contacts" with the forum. If the defendant has such contacts, the court then determines whether "traditional notions of justice and fair play" would be offended by maintaining jurisdiction. A court must decline jurisdiction if either of these two elements are not satisfied.⁴⁷ The national contacts theory relates to the first inquiry.

The national contacts theory first appeared in a 1961 law review article written by Professor Herbert Green.⁴⁸ The theory is that while the Fourteenth Amendment's due process clause restricts jurisdiction of the state courts, the Fifth Amendment restricts jurisdiction of the federal courts.⁴⁹ Since the Fifth Amendment refers to the federal government and federal law, rather than state governments and state law, the contacts inquiry of the Fifth Amendment is the alien's contacts with the United States as a whole, rather than contacts with the forum state.⁵⁰

Potentially the most limiting factor in asserting jurisdiction over an alien under the national contacts theory lies with service of process. Most federal circuits that have addressed the national contacts argument have held that absent a federal statute authorizing nationwide or worldwide service, the national contacts test is unavailable.⁵¹ These courts reason

43. 480 U.S. 102 (1987).

44. 864 F.2d at 387-88.

45. See text accompanying notes 120-27.

46. See text accompanying notes 112-30.

47. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1955).

48. Green, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 987 (1961)(cited in Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 475 (1981)).

49. Like the Fourteenth, the Fifth Amendment requires that the forum be fair and reasonable as to the defendant's compelled appearance, and that the defendant have adequate notice of suit; however, such considerations are undertaken after a court has established that the defendant has sufficient national contacts.

50. *Stabilisierungsfonds fur Wein v. Kaiserstuhl Wine Distrib. Pty. Ltd.*, 647 F.2d 200, 203 (D.C. Cir. 1981).

51. See Note, *National Contacts As a Basis for In Personam Jurisdiction over Aliens in*

that Congress must affirmatively grant federal courts the power to hear cases by authorizing service of process. Without a provision for national or worldwide service, Rule 4(e) of the Federal Rules of Civil Procedure limits service to that contained within the forum state's long arm statute.⁵² Since state long arm statutes are restricted by the Fourteenth Amendment, the Fourteenth Amendment limits service, and thus jurisdiction, in the federal courts.⁵³

Be that as it may, any analysis limiting the power of federal courts to exercise jurisdiction solely by the ability of federal courts to serve process poses problems. Jurisdiction and service of process are separate, distinct limitations on the power of a court to hear a case.⁵⁴ On the one hand, limitations on service of process arise from the Federal Rules of Civil Procedure and from statutes authorizing particular procedures for service. On the other hand, the Supreme Court stated that "[t]he requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁵⁵

To illustrate, if an alien defendant objects to jurisdiction, but does not object to service in his first responsive pleading—thereby waiving his right to object to improper service under Rule 12(h) of the Federal Rules of Civil Procedure—the national contacts issue remains.⁵⁶ Likewise, the

Federal Question Suits, 70 CAL. L. REV. 686 (1982).

52. The fact that federal courts hearing a federal claim are limited by state service statutes adopted for use in state courts has been called an "anomaly". *DeJames v. Magnificence Carriers*, 654 F.2d 280, 293 (3d Cir. 1981)(Gibbons, J., dissenting). However, others have seen the rule rationally related to the goal of ensuring that various state interests are not transgressed, and thus constitutionally sound.

53. See *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (1986)(per curiam), *affirmed sub nom.* *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); see also, *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1986).

54. See Judge Wisdom's dissent in *Point Landing*, 795 F.2d at 430. Note that where it is necessary to send a document abroad in order to effect service in a civil or commercial matter, the Hague Service Convention contains the procedures which must be followed for proper service. *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S.Ct. 2104 (1988). The treaty contains no independent authorization of service, but merely provides the mechanism to be employed where service is authorized under domestic law. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1985). Of course, the Convention only applies where the party being served is a national of a country party to the treaty.

55. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1981).

56. See, e.g., *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1273, n.3 (6th Cir. 1981),

national contacts issue remains if service is made outside the forum state through the 100-mile bulge rule.⁵⁷ Moreover, a number of federal statutes provide nationwide or worldwide service of process, theoretically granting courts the power to preside over *any* controversy.⁵⁸ Under such circumstances, the national contacts theory has obvious application.

A few circuit panels have held that a forum state's long arm service statute, which on its face exceeds the authority of the state legislature, is restricted in its operation by the national contacts concept of due process embodied in the Fifth Amendment, rather than the state contacts concept in the Fourteenth.⁵⁹ Thus, a state long arm statute authorizing

cert. denied, 454 U.S. 893 (1982); *c.f.*, *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973). *See also* Judge Wisdom's dissent in *Point Landing*, 795 F.2d at 430.

57. FED. R. CIV. P. 4(f). Apparently no cases have been decided on such grounds, but holding a defendant subject to jurisdiction under such circumstances is nevertheless theoretically possible.

58. Nationwide or worldwide service of process provisions include the following:

- (1) Clayton Act, § 12, 15 U.S.C. § 22 (1988)(worldwide service upon corporations under the federal antitrust laws);
- (2) Foreign Sovereign Immunities Act, § 8, 28 U.S.C. § 1608 (1988)(worldwide service);
- (3) Federal Bankruptcy Rule 7004(d),(i)(worldwide service);
- (4) Federal Impleader Act, § 24, 28 U.S.C. § 1335 1988)(as amended)(nationwide service);
- (5) Investment Company Act, 15 U.S.C. § 80a-43 (1988)(worldwide service);
- (6) Public Utility Holding Company Act, 15 U.S.C. 79y (1988)(worldwide service);
- (7) Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965 (1988)(nationwide service);
- (8) Securities Exchange Act of 1933, § 22, 15 U.S.C. § 77v (1988)(as amended)(worldwide service);
- (9) Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1988)(as amended)(worldwide service);
- (10) Sherman Act, 15 U.S.C. § 5 (1988)(nationwide service allowed to bring in additional parties);
- (11) 28 U.S.C. § 1655 (1988)(worldwide service for lien enforcement);

For an excellent article on national service of process, see Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988).

59. *Engineered Sports Prod. v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973). *See also* *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1983). *Handley* did not involve a foreign defendant, but its doctrine could easily be so applied. There, the plaintiff seaman was injured while aboard his employer's vessel in West Virginian waters. The plaintiff brought his action in Kentucky, under the Jones Act, § 520, 46 U.S.C. app. § 688 (Supp. I 1983). For a number of years, the vessel had traveled up and down the Ohio river, traversing Kentucky waters. The Sixth Circuit held that the plaintiff's "claim arose, at least indirectly from I&M's [the defendant's] transacting business in Kentucky." *Handley*, 732 F.2d at 1272. The court noted that the defendant's acts had fallen within the literal language of the Kentucky long arm statute, which gave a court jurisdiction over claims "arising from . . . transacting any business" in Kentucky. Ky. Rev. Stat. Ann. § 454.210(2)(a)(1) (*Michie/Bobbs-Merritt*, 1985). The court held that under the Fifth Amendment, minimum contacts with the forum state are not required. The only constitutional inquiry centers around whether assertion of jurisdiction unfairly burdens the defendant with an inconvenient forum, and whether assertion of jurisdiction comports with fair play and substantial justice. *Handley*, 732 F.2d at 1271-72. *See also* *Trans-Asiatic Oil, Ltd. v. Apex Oil*

service "to the extent not inconsistent with due process" could conceivably authorize worldwide service of process. Several commentators have criticized the practice of interpreting states' long arm statutes with reference to Fifth Amendment restrictions since state legislatures intend such statutes to operate in light of Fourteenth Amendment restrictions.⁶⁰

A. *The Case Against National Contacts*

As previously mentioned, a few circuit courts hold that personal jurisdiction in federal court requires the same minimum contacts with the forum state as does personal jurisdiction in a state court.⁶¹ The justification given by many of these courts lies in the contention that Congress must authorize jurisdiction by providing for service of process; absent authorization of nationwide or worldwide service of process, the contacts inquiry should focus on a defendant's contacts with the forum state. The Ninth Circuit, in *Wells Fargo & Co. v. Wells Fargo Express Co.*,⁶² explained:

It might very well be neither unfair nor unreasonable as a matter of due process to aggregate the [defendant's] national contacts. [However,] not only must the requirements of due process be met before a court can assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature If policy considerations do indeed dictate that an alien defendant's contacts with the entire United States should be aggregated, and if the Constitution does not forbid such a practice . . . the Federal Rules should be amended to authorize such a practice. Such a step is, however,

Co., 743 F.2d 956 (1st Cir. 1985) (admiralty jurisdiction over domestic defendant is limited by the due process clause of the Fifth Amendment, rather than the Fourteenth, and requires only national contacts); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 357 (W.D. Mich. 1973) (national contacts is the appropriate analysis). *Cf. Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979 (S.D.N.Y. 1990) (Jones Act claims require both national *and* state contacts). Handley's validity was questioned in *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

60. *Lilly, Jurisdiction over Domestic and Alien Defendants*, 69 VIRG. L. REV. 85, 139-40 (1983). *But see DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 293 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1985) (Gibbons, J., dissenting). ("A state's authority to promulgate rules of competence derives from the state's sovereign power to adjudicate both state and federal question cases This power is preserved to the states through the Tenth Amendment, although it may be limited by congressional provision for exclusive federal subject matter jurisdiction").

61. *See e.g., Fairbanks Morse Pump Corp. v. ABBA Parts, Inc.*, 862 F.2d 717, 718-719 (8th Cir. 1988) (jurisdiction over case involving a violation of the Lanham Trade-Mark Act requires two part analysis: is the activity within the ambit of the state long-arm jurisdiction statute, and does jurisdiction comport with Fourteenth Amendment due process?); *Grevas v. M/V. Olympic Pegasus*, 557 F.2d 65 (4th Cir. 1977) (admiralty action requires minimum contacts with the forum state).

62. 556 F.2d 406 (9th Cir. 1977) (claim under the Lanham Trade-Mark Act).

not ours to take.⁶³

Refusal to adopt the national contacts test has also been predicated on the argument that the Fifth Amendment due process clause requires exactly the same contacts as does the Fourteenth—both demand the defendant to have minimum contacts with the forum state.⁶⁴

Judgments rendered under the national contacts theory would frequently be unenforceable in foreign countries.⁶⁵ Although a few defendants would voluntarily comply with a United States judgment rendered under the national contacts theory, and although some defendants would have assets subject to garnishment or attachment in the United States, many judgments would inevitably remain unsatisfied. A plaintiff may find himself in the unenviable situation of taking his United States judgment abroad to seek enforcement only to find the claim subject to retrial. A United States judgment rendered under the national contacts theory would encounter difficulties with enforcement in many countries—certainly more difficulties than would a judgment rendered under the state contacts theory.⁶⁶ Several nations have even enacted retaliatory jurisdiction statutes, empowering their courts to exercise jurisdiction in any case where their nationals can prove that they are subject to suit in the opposing party's country.⁶⁷ Notwithstanding these limitations of the national contacts doctrine, a few scholars contend that if federal court jurisdiction is restricted because of enforcement difficulties, United States interests would be harmed. Foreign countries would be encouraged to limit recognition of United States judgments, and many United States plaintiffs who could collect on national contacts judgments would be denied access to United States courts.⁶⁸

B. *The Case for National Contacts*

Where any court asserts jurisdiction over a party under a state law claim, that court's jurisdiction over the dispute must not encroach upon other states' interests. A federal court sitting in diversity was designed

63. *Id.* at 416-18.

64. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (3d Cir. 1981)(although the Fifth Amendment governs jurisdiction in admiralty, the Fifth Amendment requires the same analysis as does the Fourteenth).

65. *See, e.g., Degnan & Kane, The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HAST. L.J. 799, 844 (1988).

66. *Id.* at 844-54; Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 11-20 (1987)(Born also notes that there are many problems with enforcing judgments under state long arm statutes).

67. *Id.*, at 15.

68. *Id.* at 24.

to impartially enforce state law and policy, safeguarding states' interests; the federal court is "in effect, only another court of the state."⁶⁹ But when a federal court decides a federal claim,⁷⁰ under a theoretically uniform body of law, such concerns are no longer relevant.⁷¹ States' interests are not in jeopardy when a federal court exercises jurisdiction over a federal question in Kentucky, as opposed to Tennessee. In short, the sovereign interests at stake in federal question cases are those of the United States, and national contacts correspond with federal interests; whereas the sovereign interests at stake in diversity cases are those of states of the union, and state contacts correspond with state interests.⁷²

Some commentators argue that the split on the national contacts theory undermines enforcement of federal law. This split, they argue, creates uncertainty for potential defendants and decreases the deterrence effect of federal legislation. For instance, if an alien violates federal antitrust legislation and has identical contacts with two states, each state lying in a different circuit, the alien may be held accountable for his transgressions in one circuit while he is immune from suit in another.⁷³

Similarly, an alien may have abundant contacts with the United States as a whole, but contacts too diffuse in any one state for a court to exercise jurisdiction based on state contacts.⁷⁴ If the alien causes injury to persons in a number of states, aggregating the alien's contacts with the nation as a whole could prevent dismissal. As one commentator remarked, aggregation "would avoid the problem of scattered contacts."⁷⁵

69. *Angel v. Bullington*, 330 U.S. 183, 187 (1947)(cited in Brief for Petitioners at 23, *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)(No. 86-740)).

70. A federal claim, for purposes of this discussion, includes admiralty proceedings in personam. Because of its unique historical background, and because admiralty jurisdiction is given to the federal courts under a separate constitutional grant, an admiralty proceeding in rem or quasi in rem need not address the minimum contacts requirements at all. *Seguros Banvenez v. Oliver Drescher*, 761 F.2d 885 (2d Cir. 1985); *Merchants Nat'l Bank of Mobile v. Dredge Gen. G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981); *A/S Hjalmar Bjorges Rederi v. The Tug Boat Condor, In Rem*, 1979 A.M.C. 1698 (S.D. Cal. 1979). For an excellent discussion of these topics, see Kalo, *The Meaning of Contact and Minimum National Contacts: Reflections on Admiralty In Rem and Quasi In Rem Jurisdiction*, 59 TUL. L. REV. 24 (1984).

71. See, e.g., *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292-293 (3d Cir. 1981), cert. denied, 454 U.S. 1085 (1982)(Gibbons, J., dissenting).

72. See, e.g., *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1028 (D.C. Cir. 1982); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256-57 (5th Cir. 1981).

73. Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981). Note, *Personal Jurisdiction Over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330, 352 (1980).

74. See, e.g., *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 427 (5th Cir. 1986)(per curiam)(Wisdom, J., dissenting), *affirmed sub nom.* *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

75. Lilly, *supra* note 60, at 117; See also, Note, *supra* note 51, at 692.

Under the state contacts doctrine, an injured plaintiff may be denied effective redress simply because an alien caused his injury; this is so because under the state contacts theory, an alternative United States forum is presumed to be available if the suit is dismissed. But an alternative United States forum is not always available if an alien defendant is involved. The only alternative forum in which to pursue such a defendant may be in another country. If the foreign country has inadequate discovery, a less than impartial judiciary, or if evidence and witnesses are in the United States, the alternative forum may be quite undesirable. Under certain circumstances, no alternative forum may exist at all.⁷⁶

Moreover, more actions could be maintained in United States courts if jurisdiction is established under the national contacts theory. Under the state contacts doctrine, the defense of lack of jurisdiction is frequently a means for the defendant to obtain a procedural victory over an opponent's substantive claim. In many cases, aliens are somewhat indifferent to the location of a forum, assuming that the alien could be required to defend somewhere in the United States.⁷⁷

Aggregation of a defendant's contacts with the United States finds no rebuke in international law.⁷⁸ International law requires that the relationship of an alien defendant to the adjudicating country be such that jurisdiction is reasonable,⁷⁹ but international law imposes no restraints upon the exercise of jurisdiction among domestic courts within a country.⁸⁰

76. Lilly, *supra* note 60, at 124. Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 772 (1984).

77. Lilly, *supra* note 60, at 125.

78. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 521 Reporter's Note 7 (1987)(there is no international law impediment to aggregating a defendant's contacts with the United States as a whole). Some countries, however, may not enforce judgments rendered under a national contacts theory of jurisdiction. See text accompanying notes 65-68.

79. "A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987).

80. *Id.* comment f (1987). In addition to the foregoing arguments, another might be made from a number of Supreme Court cases holding that aliens are not entitled to the same benefits of due process as are United States citizens. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 21 (1987)(citing, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)(foreigners not entitled to procedural due process); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)(Foreigners not entitled to procedural due process); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Galvan v. Press*, 347 U.S. 522 (1954)). Conceivably, some argument could be made that due process does not protect aliens to the extent it protects United States citizens. However, one may question the fairness of forcing an alien to defend in an unfamiliar court, while at the same time denying him the benefits of due process. *Id.* at 22.

C. Federal Long Arm Service of Process

Very few courts have held that federal subject matter jurisdiction alone invokes the national contacts analysis.⁸¹ Courts are much more willing to use a national contacts analysis where service is made under federal legislation providing nationwide or worldwide service of process.⁸² The majority's rationale is that where Congress has authorized national or worldwide service of process, Congress has thereby granted the authority to exercise jurisdiction wherever such service can be made.⁸³

1. *Texas Trading v. Federal Republic of Nigeria*

Texas Trading v. Federal Republic of Nigeria,⁸⁴ decided under the Foreign Sovereign Immunities Act (FSIA), is a leading case adopting this approach. In *Texas Trading*, Nigeria contracted to purchase sixteen million metric tons of cement from one hundred and nine suppliers under irrevocable letters of credit. Nigeria's prior experience with such contracts was that only about twenty percent of the suppliers actually performed. Accordingly, Nigeria contracted for delivery of five hundred percent of its actual requirements. Finding four hundred ships waiting in her chief port's harbor, Nigeria unilaterally canceled the letters of credit by instructing its central bank to withhold payment. Consequently, four suppliers brought suit in the Southern District of New York.⁸⁵

On appeal, the Second Circuit held that the federal courts had subject matter jurisdiction under the FSIA because Nigeria's purchase of cement was a "commercial activity of a foreign state elsewhere that causes a

81. In these cases, where the defendant has sufficient national contacts, service of process becomes the most crucial limiting factor. *See, e.g.*, *Trans-Asiatic Oil, Ltd. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984)(admiralty claim); *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984)(admiralty claim); *Honeywell v. Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975)(patent infringement action); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977)(antitrust action); *Engineered Sports Prod. v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973)(patent infringement claim).

82. *See, e.g.*, *In re Chase & Sanborn Corp. v. Granfinanciera*, 835 F.2d 1341 (11th Cir. 1988)(bankruptcy action); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985)(securities fraud action); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981)(antitrust violation; the court discussed, but declined to rule on the question of whether national contacts could be used).

83. For a list of federal statutes authorizing nationwide or worldwide service, *see supra*, note 58.

84. 647 F.2d 300 (2d Cir. 1981)(*Texas Trading* is one of the leading cases on the national contracts theory, as well as one of the leading cases interpreting the FSIA).

85. *Id.* at 302-6.

direct effect in the United States."⁸⁶ Since service was available worldwide,⁸⁷ the court concluded that the relevant area for delineating contacts is the entire United States.⁸⁸

In addition to ruling on the national contacts issue, the Second Circuit held that four inquiries must be made under the national contacts doctrine: (1) The extent to which the defendants have availed themselves of the privileges of United States law; (2) the extent to which litigation in the United States would be foreseeable to the defendant; (3) the inconvenience to the defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit.⁸⁹ Noting that all factors weighed in favor of jurisdiction over Nigeria, the court held that jurisdiction was proper and the case should proceed to trial.⁹⁰

2. *Go-Video, Inc. v. Akai Electric Co.*

As with controversies decided under the FSIA, the circuit courts have found national contacts to be the appropriate test where service is made under the nationwide or worldwide service provisions of, for instance, the Securities and Exchange Act,⁹¹ the Clayton Act,⁹² and the Federal

86. *Id.* at 311 (applying the FSIA, 28 U.S.C. § 1605(a)(2)(1988)).

87. 28 U.S.C. § 1608 (1988). The FSIA specifically authorizes personal jurisdiction wherever: (1) the court has subject matter jurisdiction under the FSIA, and (2) service has been made under 28 U.S.C. § 1608 (worldwide service of process). 28 U.S.C. § 1330(b) (1988).

88. *Texas Trading*, 647 F.2d at 314.

89. *Id.*

90. *Accord*, *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989)(American broker sued Soviet newspaper and trading organization for libel and breach of contract under the FSIA. The Ninth Circuit affirmed dismissal as to the newspaper, but remanded the contract action against the Soviet trading organization to determine whether jurisdiction was proper in light of the national contacts doctrine); *Meadows v. Dom. Rep.*, 817 F.2d 517, 523 (9th Cir. 1987)(Under the FSIA, an American plaintiff recovered for services rendered in procuring a loan to finance a housing project in the Dominican Republic; the court held that "where service is made under FSIA § 1608, the relevant area in delineating contacts is the entire United States"); *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1028 (D.C. Cir. 1982). The *Gilson* court summarized:

[The] statute [the FSIA] cannot grant personal jurisdiction where the Constitution forbids it, and the Supreme Court has held repeatedly that certain 'minimum contacts' must exist Under the facts alleged in the complaint, defendants entered into contract with plaintiff in the United States, using U.S. mails, telephones, and telegraph [A]t least some of the defendants maintain offices in the United States and have availed themselves of the privileges of American law.

Id. See also *Gemini Shipping, Inc. v. Foreign Trade Org. for Chem. and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981)(Syrian trading company found subject to the jurisdiction of United States courts under the FSIA — "Tafco has a plethora of 'contacts' . . . with the United States Defendants have 'availed themselves of the benefits and protections of United States laws in many ways').

91. *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985)(jurisdiction

Bankruptcy Rules.⁹³ In an important recent case, *Go-Video, Inc. v. Akai Electric Co.*,⁹⁴ Go-Video brought an action alleging violations of the Sherman Act.⁹⁵ Go-Video manufactured "dual deck" video cassette recorders. In its complaint, Go-Video alleged that the defendants conspired to prevent marketing of its VCRs in the United States. After the district court denied the foreign defendants' motion to dismiss for lack of personal jurisdiction, the foreign defendants filed an interlocutory appeal to the Ninth Circuit. All parties also filed a "Joint Application for Determination of 'National Contacts' Issue of Law."⁹⁶

On appeal, the Ninth Circuit held that where Congress has authorized nationwide or worldwide service of process, the national contacts test is appropriate. The court stated that "some courts have endorsed the national contacts approach based on the (not inarguable) proposition that, since the sovereign in federal question cases is the United States, the relevant contacts inquiry necessarily focuses on the Nation [sic] as a whole."⁹⁷ The court justified its adoption of the national contacts theory on different grounds: "national contacts analysis more often finds its basis not in an abstract theory of sovereignty, but in the concrete language of a statute under which Congress has, as it is unquestionably empowered to, authorized nationwide service of process."⁹⁸ Noting that there is no Supreme Court precedent on the national contacts issue,⁹⁹ the court held that the defendant's contacts with the United States as a whole warranted jurisdiction.

The development of the principle that national contacts limits jurisdiction in cases where Congress has provided for worldwide service of process is very important. Where Congress has provided for worldwide service of process, such service goes far beyond the national contacts doctrine in subjecting aliens to the jurisdiction of United States courts.¹⁰⁰

is appropriate in Securities Act case where defendant has sufficient national contacts).

92. *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989)(jurisdiction is appropriate where defendant has sufficient national contacts, where service is available worldwide under the Clayton Act, § 12, 15 U.S.C. § 22 (1988)(antitrust actions)).

93. *In re Chase & Sanborn Corp. v. Granfinanciera*, 835 F.2d 1341 (11th Cir. 1988)(jurisdiction proper where defendant was held to have both state and national contacts).

94. 885 F.2d 1406 (9th Cir. 1989).

95. Section 1, 15 U.S.C. § 1 (1988).

96. *Go-Video*, 885 F.2d at 1408.

97. *Id.* at 1416.

98. *Id.*

99. *Id.*

100. Consider, for example, the FSIA's most liberal grant of subject matter jurisdiction (subject matter jurisdiction being one of two prongs needed for in personam jurisdiction) is contained in 28 U.S.C. § 1605(a)(2)(1988). This section gives subject matter jurisdiction in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state;

Under these circumstances, the national contacts doctrine *limits* the jurisdiction Congress sought to establish, much as the Fourteenth Amendment limits state long arm statutes domestically. Thus, the national contacts theory has entered the realm of constitutional common law—at least in many circuits.

IV. THE SUPREME COURT AND JURISDICTION OVER ALIEN DEFENDANTS

The Supreme Court only recently distinguished between domestic and foreign defendants for jurisdictional purposes.¹⁰¹ Although the Court has denied certiorari to cases representing both sides of the national contacts issue,¹⁰² the Court has neither sanctioned nor disapproved of the national contacts theory. The following discussion focuses on leading Supreme Court cases involving jurisdiction over aliens.

A. *Perkins v. Benguet Consolidated Mining Co.*

*Perkins v. Benguet Consolidated Mining Co.*¹⁰³ introduced general jurisdiction into constitutional law. The defendant was a Philippine corporation engaged in mining operations in the Philippines. Temporarily forced to flee the country because of the Japanese invasion during World War II, the corporation relocated in Ohio. There, it carried on activities such as “directors’ meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.”¹⁰⁴

or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” *Id.* (emphasis added). This language is potentially much more encompassing than even the national contacts theory. The requirements of jurisdiction, on the face of this legislation, are very few indeed. It is readily apparent that without due process limitations, this language could be subject to much abuse. However, the Circuit Courts, in asserting jurisdiction under the FSIA, have uniformly limited this broad grant of jurisdiction by the concept of due process in the national contacts theory. *See, e.g.,* *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989); *Meadows v. Dom. Rep.*, 817 F.2d 517 (9th Cir. 1987); *Gilson v. Republic of Ir.*, 682 F.2d 1023 (D.C. Cir. 1982); *Gemini Shipping, Inc. v. Foreign Trade Org. for Chem. and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981); *Texas Trading v. Fed. Rep. of Nig.*, 647 F.2d 300 (2d Cir. 1981).

101. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). *See* text accompanying notes 112-130.

102. *Compare* *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292-293 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1982)(national contacts appropriate); *and* *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1273, n. 3 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1982)(national contacts appropriate); *with* *Max Daetwyler Corp v. R. Meyer*, 762 F.2d 290 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1986)(national contacts inappropriate).

103. 342 U.S. 437 (1952).

104. *Id.* at 445.

Although the plaintiff's claim arose entirely from the corporation's activities in the Philippines, and although the corporation's Ohio activities were completely unrelated to the claim, the Supreme Court held that Ohio state courts could exercise personal jurisdiction without violating the constraints of the Fourteenth Amendment. "General jurisdiction," as the doctrine became known, was proper; the corporation could be sued in Ohio based on its activities elsewhere because the company's president and general manager "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities for the company."¹⁰⁵ In *Perkins*, the Supreme Court offered no special guidelines for asserting jurisdiction over an alien as opposed to a domestic defendant.

B. Hall v. Helicopteros Nacionales de Colombia

In the well-known case of *Hall v. Helicopteros Nacionales de Colombia*,¹⁰⁶ the United States Supreme Court reversed a Texas Supreme Court decision that upheld jurisdiction over a foreign helicopter transportation company. The Court, in holding jurisdiction unconstitutional, sharply limited the circumstances under which general jurisdiction could be maintained.

The action commenced when survivors of four United States citizens killed in a helicopter crash in Peru brought four wrongful death actions. The defendant, Helicol, owned and operated the helicopter. At the time of the crash, the helicopter was operating pursuant to a contract to carry machinery and supplies.¹⁰⁷

The Texas Supreme Court noted that several facts weighed against jurisdiction: Helicol maintained no office in Texas, lacked a designated agent for service, lacked authorization to do business in the state, performed no helicopter operations in Texas, and did not recruit employees in Texas. On the other hand, Texas was the state in which Helicol: (1) purchased most of its helicopters; (2) purchased four hundred thousand dollars worth of parts and equipment; (3) sent pilots and maintenance personnel for training (keeping employees there year-round); (4) received a five million dollar payment from a bank pursuant to the contract; (5) directed banks to make payments pursuant to the contract; and (6) negotiated the contract for the helicopter services in issue. Considering all Helicol's contacts, the Texas Supreme Court held that

105. *Id.* at 448 (emphasis added).

106. 466 U.S. 408 (1984).

107. *Hall v. Helicopteros Nacionales de Colom.*, 638 S.W.2d 870, 871-72 (Tex. 1982), *rev'd*, 466 U.S. 407 (1984).

Helicol had sufficient contacts with Texas to meet the requirements of general jurisdiction.¹⁰⁸

Before the United States Supreme Court, the only question presented was whether Helicol's contacts with Texas were continuous and systematic enough to justify general jurisdiction.¹⁰⁹ The Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."¹¹⁰ And "the training [of Helicol's pilots and maintenance personnel] was a part of the package of goods and services purchased by Helicol."¹¹¹

Left with the holding that the purchase and training contacts were insubstantial, the plaintiffs' case in establishing general jurisdiction became very weak indeed; accordingly, the Court ruled that jurisdiction was improper. As with *Perkins*, the *Helicopteros* Court offered no special guidelines for asserting jurisdiction internationally.

C. *Asahi Metal Industry Co. v. Superior Court*

Unlike the Supreme Court cases discussed above, *Asahi Metal Industry Co. v. Superior Court*¹¹² offered new guidelines to consider in asserting jurisdiction over aliens. In *Asahi*, the plaintiff lost control of his motorcycle and collided with a truck. His wife—his passenger—was killed. An explosion in the rear tire of the motorcycle caused the accident.¹¹³

The plaintiff filed a products liability action against the Japanese manufacturer of the tire. The manufacturer, in turn, sought indemnity from the Taiwanese manufacturer of the valve stem. The plaintiff settled with the tire manufacturer, leaving the tire manufacturer's indemnity action against the valve stem manufacturer. The valve stem manufacturer filed a motion to dismiss on grounds of lack of personal jurisdiction. The only

108. *Id.* at 415-416. *But see* Pope's dissent: "[T]he court makes Texas the courthouse for the world, requiring only that the plaintiff show that the defendant had made purchases of supplies from some unrelated business located in Texas." The activities cited by the majority, Pope maintained, were not related to the accident and were not sufficiently continuous, systematic and substantial so as to justify general jurisdiction. *Id.* at 877-83 (Pope, J., dissenting).

109. *Helicopteros*, 466 U.S. at 415-16.

110. *Id.* at 418. The Court recognized, however, that jurisdiction might well be proper if the cause of action arises out of or relates to the defendant's purchases. Such an occasion, however, would be an exercise of specific jurisdiction, not general jurisdiction.

111. *Id.*

112. 480 U.S. 102 (1987).

113. *Asahi Metal Indus. Co. v. Superior Court*, 39 Cal. 3d 35, 40-41, 216 Cal. Rptr. 385, 387, 702 P.2d 543, 544-45 (Cal. 1985), *rev'd*, 480 U.S. 102 (1987).

contact of the third-party defendant with the state of California existed through sales of valve stems to the Japanese tire manufacturer, which incorporated the valve stems into tires sold in California.¹¹⁴

The California Supreme Court adopted the stream of commerce jurisdictional theory, holding that where a product enters the stream of commerce in a particular state, jurisdiction over the manufacturer is proper so long as "the manufacturer is aware that a substantial number of its products will be sold in the forum state."¹¹⁵ Finding the valve stem manufacture so aware, the California Supreme Court upheld jurisdiction.

The United States Supreme Court reversed. In a sharply divided plurality opinion, the Court disagreed on the stream of commerce theory.¹¹⁶ Three Justices joining the opinion of the Court held that due process requires more than mere awareness that products will be sold in a given state; instead, the manufacturer must have taken some affirmative action purposefully availing itself of the state's market.¹¹⁷ The majority, however, declined to hold that the stream of commerce theory violates due process.¹¹⁸ In all, four Justices stated that they would allow the stream of commerce theory, four stated they would disallow it, and one did not address the issue, stating that the case should be decided on other grounds.¹¹⁹

Although the *Asahi* Court did not resolve the stream of commerce issue, it did announce special factors to be considered in asserting jurisdiction over an alien defendant. Eight of the nine Justices joined in Part II(B), the relevant part of the opinion in this regard.

First, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal

114. *Id.*

115. *Id.* at 39 Cal. 3d at 52, 216 Cal. Rptr. at 394, 702 P.2d at 552 (Bird, J.).

116. However, note the dicta in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), "if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or owners or to others."

117. *Asahi*, 480 U.S. 102 (1987).

118. *Id.* at 116 (Brennan, J., concurring).

119. *Id.* at 121. Note that Justices Blackmun and White joined in two concurring opinions; one held that the stream of commerce theory should be allowed, and the second held that the issue was unnecessary to the case's resolution. Only Justice Stevens did not join in any part of the Court's opinion, nor in any concurring opinion which expressed a view as to the stream of commerce theory.

jurisdiction over national borders."¹²⁰ In *Asahi*, the burden on the Taiwanese third-party defendant was "severe."¹²¹

Second, a court must consider the interests of the plaintiff in obtaining jurisdiction in a United States court. The Court noted that the plaintiff could have brought his indemnification claim abroad, the indemnification claim arose from a business transaction that took place abroad, and the Japanese manufacturer did not show that California was a more convenient place than Taiwan or Japan to litigate its dispute.¹²²

Third, a court must consider the interests of the forum in exercising jurisdiction over the particular dispute. California clearly had an interest in enforcing its products liability laws when its resident was actively involved in the litigation; however, the California plaintiff settled with the tube manufacturer and dismissed his claims. Only the indemnity action by the Japanese tire manufacturer against the Taiwanese defendant remained. Moreover, California law probably would not govern the controversy.¹²³ Under such circumstances, California's interests were slight.¹²⁴

Fourth, a court should consider "procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction." Exercising jurisdiction over the indemnity action may minimally benefit California's interests, but would unreasonably intrude upon Taiwanese and Japanese interests in the outcome of the dispute. The Court cautioned "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international forum."¹²⁵

Weighing the fairness of subjecting the third-party defendant to California jurisdiction, the Court found that jurisdiction would violate standards of fair play and substantial justice.¹²⁶ Notably, the Court did not restrict application of *Asahi's* four criteria to assertions of state court jurisdiction. Arguably, the *Asahi* criteria should apply to any assertion of jurisdiction over an alien, whether the claim is in state or federal court, and whether it is founded on diversity or federal question jurisdiction.¹²⁷

120. *Id.* at 114.

121. *Id.*

122. *Id.*

123. Suggesting, perhaps, that governing law might also be a relevant consideration.

124. *Asahi*, 480 U.S. at 116.

125. *Id.* at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965)(Harlan, J., dissenting)).

126. *Id.* 480 U.S. at 114.

127. For a discussion of the stream-of-commerce theory in *Asahi*, see Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry v. Superior Court of California*, 1987 DUKE L.J. 669 (1987). See also Dessem, *Personal Jurisdiction After*

Although the *Asahi* Court had the opportunity to announce a very liberal rule allowing state courts to aggregate an alien defendant's contacts with the entire United States,¹²⁸ eight Justices concurred that state court jurisdiction required state contacts.¹²⁹ The Court disallowed the national contacts theory where a state court holds an alien defendant subject to jurisdiction under a state law claim—but the Court did not explicitly bar states from exercising jurisdiction based on national contacts under a federal law claim.

The *Asahi* Court explicitly declined to rule on whether federal courts could exercise personal jurisdiction over an alien based on national contacts¹³⁰—*Asahi* involved an appeal from a state court, and no such opportunity was presented. However, this opportunity was available to the Court in *Omni Capital International, Limited v. Rudolf Wolff & Co.*¹³¹

D. Omni Capital International, Limited v. Rudolf Wolff & Co.

Omni Capital was litigated in federal court on a federal cause of action. In *Omni Capital*, United States citizens sued United States investment corporations on the ground that the defendants fraudulently induced overseas investment in violation of the Commodity Exchange Act (CEA).¹³² In turn, the corporate defendants impleaded an alien investment corporation and its agent on the same grounds. The alien parties filed motions to dismiss on grounds of lack of personal jurisdiction.¹³³

The Fifth Circuit, per curiam, affirmed the district court, holding that jurisdiction was improper since the defendants were not amenable to service under the Louisiana long-arm statute.¹³⁴ Amenability to service,

Asahi: The Other International Shoe Drops, 55 TENN. L. REV. 41 (1987); and Hart, *You Can Run But You Can't Hide*, XXIII TORT & INS. L.J. 662 (1988)(discusses the four *Asahi* criteria).

128. See for example the proposal in, Degnan & Kane, *supra* note 65, at 816 (but the authors insist a federal or statute long arm state must exist).

129. See note 119.

130. In *Asahi*, Justice O'Connor, speaking for only four justices, wrote in a footnote:

We have no occasion here to determine whether Congress could, consistent with the Due Process clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

Id. at 113, n.*.

131. 484 U.S. 97 (1987).

132. 7 U.S.C. §1-50 (1988).

133. *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986)(per curiam), *aff'd sub nom. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

134. *Point Landing*, 795 F.2d at 427. The Fifth Circuit noted that

[t]here may be some appealing arguments for the notion of aggregating national contacts in federal cases where in any one forum there are not enough local contacts . . . although the aggregate of the national contacts are substantial. But we cannot blink the

the court held, was necessary before jurisdiction arises.¹³⁵ The Fifth Circuit reasoned that since the CEA is silent about service of process for private causes of action, service must be made according to Rule 4(e) of the Federal Rules of Civil Procedure, which requires service under the long arm statute of the state in which the district court sits.

In the petitioners' brief to the Supreme Court, the domestic corporate defendants argued that the alien third-party defendants should be subject to a common law rule of service. The petitioners based this proposed common law rule on two arguments. First, the petitioners maintained that an alien's amenability to jurisdiction should be determined under the national contacts doctrine irrespective of service of process limitations. Second, the petitioners argued that since the CEA authorizes worldwide service for actions brought by the Commodity Futures Trading Commission, a beneficiary of a Commission order, or a state attorney general, worldwide service of process for private litigants should be implied.¹³⁶ Conversely, the alien corporations argued that the national contacts theory was unconstitutional, and that courts should not be empowered to fashion common law rules of service.¹³⁷ The Supreme Court unanimously held that

before a federal court may exercise personal jurisdiction over a defendant, the requirement of service of summons must be satisfied . . . "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."¹³⁸

language of Rule 4(e). We cannot read the rule except as saying that absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits.

Id. at 426-27. *But see* Judge Wisdom's dissent, joined by eight judges, arguing that implied service is consistent with the Federal Rules of Civil Procedure. *Id.* at 427-434.

135. One may question the logic of the Fifth Circuit's holding, since under rule 12(h)(1) of the Federal Rules Civil Procedure objection to service of process, as distinguished from objection to jurisdiction, is waived if not raised in the first responsive pleading. Nevertheless, on appeal the Supreme Court accepted the argument, noting in a footnote that "[t]here is no objection to the method of service in this litigation; the objection is only to amenability to service." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103, n.6 (1987). The holding seems to be inconsistent with the plain language of the rule, but it does now have Supreme Court authority.

136. Brief for Petitioners at 10-36, *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)(No. 86-740).

137. Brief for Respondent James Gourlay at 5-19, *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)(No. 86-740); Brief for Respondent Rudolf Wolff & Co., Ltd. at 9-46, *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)(No. 86-740).

138. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)(Blackmun,

Unpersuaded by the petitioners' implied service argument, the Supreme Court held that "Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress has failed to do so here argues forcefully that such authorization was not its intention."¹³⁹ The Court continued, "[W]e would consider it unwise for a court to make its own rule authorizing service of summons A legislative grant of authority is necessary It is not for the federal courts . . . to create such a rule as a matter of common law."¹⁴⁰

Although the national contacts issue was in all briefs and opinions before it, the *Omni Capital* Court conspicuously did not decide whether jurisdiction over an alien may be based on a defendant's national contacts. As in *Asahi*, the Court explicitly stated that it was not addressing the national contacts theory.¹⁴¹ Such a determination would have required the Court to break one of its most well known principles, that the Court should not reach constitutional issues unless necessary to decide the case.

V. CONCLUSION

In 1957, in *McGee v. International Life Insurance*,¹⁴² the Supreme Court declared that

[t]oday, many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.¹⁴³

This view was later re-embraced in *World-Wide Volkswagen*, where the Court stated that the jurisdictional limits imposed by the due process clause "have been substantially relaxed over the years [t]his trend is largely attributable to a fundamental transformation in the American economy."¹⁴⁴

Certainly these observations have application in the national contacts debate. Given the substantial development of international commerce and

J.) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)).

139. *Omni Capital*, 484 U.S. at 106.

140. *Id.* at 111.

141. *Id.* at 103, n.5.

142. 355 U.S. 220 (1957).

143. *Id.* at 222, 223 (1957).

144. 444 U.S. 286, 292 (1980).

investment of recent years, the case for extending jurisdiction has become more persuasive. Not only must our jurisprudence reflect the defendant's interest in a convenient forum, but, of course, it also must address the plaintiff's interest in convenient and effective relief.¹⁴⁵

Some commentators take the view that the minimum contacts inquiry should always be into an alien defendant's national contacts, whether the action is in federal or state court, whether it is brought on a federal or state claim.¹⁴⁶ Others contend that wherever a federal claim is at issue, both state and federal courts act under federal authority and should be limited by Fifth Amendment national contacts instead of Fourteenth Amendment state contacts.¹⁴⁷ In considering these views, one should question the wisdom of extending broad powers, invoking concerns of foreign relations, to the trial courts of fifty states.¹⁴⁸ A better view is that only federal courts should have authority to aggregate national contacts. Giving only federal courts this power allays concerns over foreign relations, and maintains continuity in case law that has developed around both the Fifth and Fourteenth Amendments.

The national contacts doctrine could become firmly established in three ways.¹⁴⁹ First, the Supreme Court could adopt the national contacts doctrine by holding that the Fifth Amendment due process clause controls the minimum contacts inquiry. Most likely such a case would occur in the context of a challenge to a lower court opinion holding that the national contacts test is appropriate where Congress has provided for nationwide or worldwide service of process.¹⁵⁰ Second, a statutory federal long-arm statute could provide for nationwide or worldwide service of process. Statutory provisions are the better alternative for reasons discussed below. Third, the Federal Rules of Civil Procedure could be amended to provide nationwide or worldwide service of process in the federal courts. An amendment to the Federal Rules, as opposed to a

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

146. *Degnan & Kane*, *supra* note 65, at 816 (but the authors insist a federal or state long arm statute must exist).

147. *See, e.g., DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292-93 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1982)(Gibbons, J., dissenting).

148. *Accord, Lilly*, *supra* note 60, at 145-149.

149. *See* the suggestions of Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 485 (1981)(federal long arm statute needed, along with more liberal change of venue provisions); *Lilly*, *supra* note 60, at 152 (Rule 4(e) of the Federal Rules of Civil Procedure should be amended so as to hold aliens subject to service "wherever they may be found" in both federal and diversity cases).

150. Where the national contacts issue has been considered by the courts, the circuit courts have been unanimous in holding that the national context test is the appropriate test under such circumstances.

federal statutory service provision has the advantage of review and supervision by the Judicial Conference¹⁵¹ and the American Bar Association Judicial Committee.¹⁵²

In fact, the Judicial Conference's Committee on Rules of Practice and Procedure (Rules Committee) proposed an extensive revision of Rule 4 of the Federal Rules of Civil Procedure.¹⁵³ The revision provides for nationwide service of process for persons found within the United States,¹⁵⁴ for worldwide service of process for individuals in a foreign country,¹⁵⁵ and for worldwide service for corporations and associa-

151. Established by 28 U.S.C. § 331 (1988). The Judicial Conference is charged with the responsibility of studying the operation of rules of procedure and proposing modifications.

152. Note, *supra* note 51, at 699. The ABA Judicial Committee monitors application of the Federal Rules of Civil Procedure and proposes amendments to the Supreme Court. *See also* Lilly, *supra* note 60, at 152.

153. Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rule of Civil Procedure 4 (December, 1990)(copy on file at the *Houston Journal of International Law*)(hereinafter, Proposed Rules).

154. *Id.* at Rule 4(e). Proposed Rule 4(e) provides:

(e) SERVICE UPON INDIVIDUALS WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in any judicial district of the United States:

(1) pursuant to the law of the State in which the district court is held, or in which service is effected, for the service of a summons upon such defendant in an action brought in the courts of general jurisdiction of such State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode . . . or by delivering a copy . . . to an agent authorized by appointment or by law to receive service of process.

155. *Id.* at Rule 4(f),(h). Rule 4(f) provides:

(f) SERVICE UPON INDIVIDUALS IN A FOREIGN COUNTRY. Unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent person, from whom a waiver has not been obtained and filed, may be effected in a foreign country:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of copies of the summons and of the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

tions.¹⁵⁶ Service of process, according to the amended Rule, is effective to establish jurisdiction in federal question cases.¹⁵⁷ At the time of this printing, the proposed revision is before the Supreme Court for its review and approval. After approval by the Court, the revision will be reported to Congress, and takes effect after ninety days after being so reported.¹⁵⁸ This process could be completed as soon as April, 1991.

The Rules Committee comments expressly recognize that the new rule invokes a national contacts jurisdictional analysis rather than the traditional state contacts analysis.¹⁵⁹ Regardless, one may question whether the Committee is empowered to make such a revision. The Rules

(iii) diplomatic or consular officers when authorized by the United States Department of State; or

(3) by whatever means may be directed by the court, including service by means not authorized by international agreement or not consistent with the law of the foreign country, if the court finds that internationally agreed means or the law of the foreign country (A) will not provide a lawful means by which service can be affected, or (B) in cases of urgency, will not permit service of process within the time required by the circumstances.

156. *Id.* at Rule 4(h). Proposed Rule 4(h) provides:

(h) SERVICE UPON CORPORATIONS AND ASSOCIATIONS. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, and from whom a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by paragraph (e)(1) of this rule or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a foreign country in any manner prescribed for individuals by subdivision (f) of this rule, except personal delivery as provided in clause (f)(2)(C)(i).

157. *Id.* at Rule 4(k). Proposed Rule 4(k) provides:

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held, or

(B) who is a party joined under Rule 14 or Rule 19 and served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. 1335, or

(D) when authorized by a statute of the United States.

(2) Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing a waiver of service is also effective to establish jurisdiction with respect to claims arising under federal law over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

158. 28 U.S.C. § 2072 (1988).

159. Proposed Rules, at 39.

Enabling Act¹⁶⁰ authorizes the Supreme Court to make and amend rules of procedure—if such rules do not "abridge, enlarge or modify any substantive right."¹⁶¹ Whether a person is amenable to jurisdiction is quite arguably a substantive right.¹⁶² While the service of process requirement flows from federal statutes and from the Federal Rules of Civil Procedure, the personal jurisdiction requirement of federal courts originates in the Due Process Clause: Jurisdiction protects an individual liberty interest.¹⁶³ Despite commentary that the rule should survive attack under the Rules Enabling Act¹⁶⁴, and despite the fact that existing case law poorly distinguishes service limitations and jurisdictional limitations,¹⁶⁵ the revised rule, it seems, is open to challenge.

Although an amendment to the Federal Rules is of questionable validity, this writer submits that the national contacts jurisdictional test should be adopted in the context of federal *legislation* authorizing nationwide or worldwide service of process. The national contacts test does not unduly inconvenience alien defendants. Alien defendants can always move the court to transfer venue,¹⁶⁶ or move to dismiss on grounds of forum non conveniens.¹⁶⁷ While a motion to transfer venue would result in another United States court obtaining jurisdiction, a motion to dismiss on grounds of forum non conveniens may result in a trial at a foreign forum.¹⁶⁸ Besides, as a matter of procedure, both motions can be made at any time during the litigation; whereas an

160. 28 U.S.C. § 2072 (1988).

161. *Id.*

162. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

163. *Id.*

164. *See, e.g., Note, Nationwide Personal Jurisdiction in all Federal Question Cases: A New Rule 4*, 64 N.Y.U.L. REV. 1117, 1146-47 (1989). It is true, however, that historically, the Court has been unreceptive to challenges founded on the Rules Enabling Act. *See Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

165. *See text accompanying notes 51-58.*

166. Under 28 U.S.C. § 1404 (1988).

167. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989), the defendants/appellants argued that the burden placed on themselves, as alien defendants sued in Arizona, was such a burden as to violate the fair play and substantial justice elements of due process. The court, unpersuaded by this argument, noted that "the concerns appellants raise are far more akin to a forum non conveniens argument than to a jurisdictional one. Considerations underlying a non-jurisdictional doctrine like forum non conveniens must be kept separate from the constitutional and jurisdictional analyses we conduct here." *Id.* at 1416. The court commented that the federal transfer of venue statute, 28 U.S.C. § 1404(a) (1988), was a more appropriate vehicle for these concerns.

168. *Gulf Oil*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Certain concessions may be exacted of the defendant in allowing the transaction to be transferred, such as waiver of the foreign statute of limitations.

objection to jurisdiction must be made in the first responsive pleading. Motions to transfer venue or dismiss on grounds of forum non conveniens will be granted where the balance of conveniences weighs in favor of transferring the action to another forum.¹⁶⁹

The venue transfer statute and the common law doctrine of forum non conveniens provide a foreign defendant with effective protection against an inconvenient forum, while ensuring the plaintiff a forum in which to litigate.¹⁷⁰ Even if these two doctrines are ineffective under some circumstances, should a court find that litigation in the United States is unreasonable, the national contacts doctrine would not foreclose dismissal. If maintenance of jurisdiction truly offends "traditional notions of fair play and substantial justice," the due process clause of the Fifth Amendment, like the Fourteenth, mandates dismissal.

Even if there is no revision to federal statutes or rules, the Court must soon address the national contacts issue, and, for better or worse, put the inconsistencies to rest. The Court must more precisely and affirmatively define standards delimiting the power of United States courts to assert jurisdiction internationally. The case law in the circuits is confusing and conflicting—the issue is ripe for review.

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169. *Id.*

170. See generally Degan & Kane, *supra* note 65, at 824-34. See also Dessem, *supra* note 127, at 88-92. Not only may an unwilling or inconvenienced defendant object to jurisdiction and service, but so may such a defendant object to venue. The requirements for venue provide yet more assurance, albeit slight assurance, that the forum will be appropriate.

