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Driver v. Helms and the Long-Arm, Strong-Arm Effects of 28 U.S.C. § 1391(e)

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NOTES

DRIVER v. HELMS AND THE LONG-ARM, STRONG-ARM EFFECTS OF 28 U.S.C. § 1391(e)

INTRODUCTION

In the past decade a significant jurisdictional problem has arisen in the federal courts over the prosecution of federal officials for violations of the constitutional rights of private citizens. A major cause of this problem is the varying interpretations courts have given to 28 U.S.C. § 1391(e),[1] passed as part of the Mandamus and Venue Act of 1962 (the Act).[2] Although the Act was originally proposed as a solution to the specific problems entailed in bringing a mandamus action against a federal official, an increasing number of plaintiffs are attempting to use its venue provisions in non-mandamus actions for money damages.[3] To facilitate these actions, plaintiffs are also

1. 28 U.S.C. § 1391(e) (1976) provides: "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." The section contains extremely broad venue provisions, as opposed to § 1391(b), which limits venue to the district where all the defendants reside or where the claim arises. 28 U.S.C. § 1391(b) (1976). Service of process is also made easier, in that service by certified mail is sufficient; the usual method of service on a government official is by service both upon the government agency and personally upon the officer. Fed. R. Civ. P. 4(d)(5). Moreover, unless a statute provides otherwise, service is generally limited to the boundaries of the state in which the district court sits. *Id.* 4(f). Section 1391(e), therefore, modifies the venue and service requirements so that an official of the federal government can be sued locally, rather than only at his residence in the District of Columbia. *See* notes 7-13 *infra* and accompanying text.

2. Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (codified, as amended, at 28 U.S.C. §§ 1361, 1391(e) (1976)).

3. *See* pt. I *infra*. Many of these plaintiffs have sued for alleged violations of their constitutional rights resulting from the wiretapping and mail intercept operations conducted by agents of the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). Under the mail intercept program, originated in 1950, all mail between the United States and any Communist country was funnelled, at various times, through New York City, San Francisco, New Orleans, or Hawaii. The Nelson Rockefeller Report to the President by the Commission on CIA Activities 101 (Manor Book ed. June 1975). At first, the program was limited to surveying and selectively photographing the covers of all such letters. *Id.* at 103. By 1959, however, the East Coast intercept program, based in New York City, was opening about 30,000 letters per year chosen on the basis of a "watch list" of suspect organizations and individuals supplied in part by the FBI. *Id.* at 105, 111. In its last full year of operation, the East Coast program handled 4,350,000 letters; the covers of 2,300,000 of these were photographed and 8,700 letters were actually opened. *Id.* at 111. Amazingly enough, CIA records show that almost 2,000,000 separate

asserting that the nationwide service of process provision of section 1391(e) inherently empowers district courts to assert personal jurisdiction over the defendant federal officials.[4] Unfortunately, resolution of the propriety of these attempts[5] is clouded by an ambiguous and often self-contradictory legislative

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entries in the computerized information system resulted from the mail opening operation between 1955 and 1973, the year the program was terminated. *Id.* at 112. Meanwhile, the FBI was also conducting illegal operations. *See* The Center for National Securities Studies, The Abuses of the Intelligence Agencies (J. Berman & M. Halperin ed. 1975). Until 1966, when they were supposedly discontinued, burglaries committed by the FBI upon individuals, groups, and several embassies averaged about 100 per year. *Id.* at 21-22. As of March 1, 1973, FBI files contained approximately 6,426,813 "intelligence and . . investigation" files on United States citizens and groups. *Id.* Moreover, between 1969 and 1974, FBI wiretap installations averaged well over 100 per year. *Id.* at 34.

4. *See* note 14 *infra* and accompanying text.

5. One of the earliest debates surrounding the scope of § 1391(e) was whether its provisions applied in suits against defendants who were no longer in government service. By definition, the section pertains to: "[a] civil action in which a defendant *is* an officer or employee of the United States or any agency thereof *acting* in his official capacity . . . ." 28 U.S.C. § 1391(e) (1976) (emphasis added). Because all the verbs are in the present tense, the First Circuit has interpreted the statute, according to the plain meaning rule of statutory interpretation, to apply only to officials in government service at the time the action is initiated. Driver v. Helms, 577 F.2d 147, 150 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); *see* Blackburn v. Goodwin, No. 78-7592, slip op. at 4669 (2d Cir. Sept. 10, 1979). The plain meaning rule allows that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion . . . ." Caminetti v. United States, 242 U.S. 470, 485 (1917). However, if such a reading results in a meaning which is absurd or "plainly at variance with the policy of the legislation as a whole," then the court must go beyond the plain meaning of the words of the statute and search out the legislative intent. Ozawa v. United States, 260 U.S. 178, 194 (1922); *see* Massachusetts Financial Servs., Inc. v. Securities Investor Protection Corp., 545 F.2d 754, 756 (1st Cir. 1976), *cert. denied,* 431 U.S. 904 (1977). Despite the fact that the First Circuit found § 1391(e) to be unambiguous, it nevertheless delved into an examination of the legislative history. The court found nothing in this history from which it could be inferred that the section was ever intended to reach former officials. Driver v. Helms, 577 F.2d at 150-51; *see* Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal. 1976); Wu v. Keeney, 384 F. Supp. 1161, 1168 (D.D.C. 1974), *aff'd,* 527 F.2d 854 (D.C. Cir. 1975). *See generally* H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961) [hereinafter cited as House Report]; S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2784 [hereinafter cited as Senate Report]. Several courts, however, have come to an opposite conclusion based on public policy considerations. United States v. McAninch, 435 F. Supp. 240, 245 (E.D.N.Y. 1977); Lowenstein v. Rooney, 401 F. Supp. 952, 962 (E.D.N.Y. 1975); *see* Driver v. Helms, 74 F.R.D. 382, 398-400 (D.R.I. 1977), *modified,* 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). These courts contend that if former officials were not included under § 1391(e), the officials could escape the broadened venue provisions of the section by resignation and force plaintiffs to sue them as private citizens under the general venue statutes, thereby resulting in greater litigation expense and a multiplicity of suits. *Id.* at 399; *see* note 67 *infra.*

The general rule, however, seems to be that § 1391(e) cannot be used as a method of gaining venue and jurisdiction over former officials. *See, e.g.,* Lamont v. Haig, 590 F.2d 1124, 1131 (D.C. Cir. 1978); Relf v. Gasch, 511 F.2d 804, 808 (D.C. Cir. 1975); Kipperman v. McCone, 422 F. Supp. 860, 876 (N.D. Cal. 1976); Wu v. Keeney, 384 F. Supp. 1161, 1168 (D.D.C. 1974), *aff'd,* 527 F.2d 854 (D.C. Cir. 1975). In addition to the plain meaning of the statute, this position

history[6] which fails to delineate clearly the statute's intended scope.

is bolstered by the 1976 amendment to § 1391(e). Act of Oct. 21, 1976, § 3, Pub. L. No. 94-574, 90 Stat. 2721 (1976). This amendment was designed to eliminate the "whipsaw effect" which several defendants had interposed as a means of avoiding § 1391(e)'s jurisdiction. This ploy consisted of joining a non-federal defendant in an action under § 1391(e). Because the statute applied only when "each defendant" was a federal official, joinder of a non-federal defendant defeated application of the section. Powelton Civic Home Owners Ass'n v. Department of Hous. & Urban Dev., 284 F. Supp. 809, 833 & n.14 (E.D.Pa. 1968). Although the *Powelton* court and others had already rejected this artifice, *id.* at 833-34; *see* Liberation News Serv. v. Eastland, 426 F.2d 1379, 1382 n.5 (2d Cir. 1970), Congress amended the statute to read "a defendant" in order to make it clear that such a device would no longer work. Act of Oct. 21, 1976, § 3, Pub. L. No. 94-574, 90 Stat. 2721 (1976). The amendment also provided that additional, non-federal defendants could be brought into such actions under the general venue and service rules. *Id.*; *see* note 1 *supra*. Therefore, because the former officials are now considered "non-federal defendants," they come within the provisions of the statute requiring application of the general rules. *See* Driver v. Helms, 577 F.2d 147, 149 n.6, 150 n.10 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). There is no doubt that these former officials are still liable for their actions, *see* Halperin v. Kissinger, 424 F. Supp. 838 (D.D.C. 1976), but they are no longer subject to the venue and service of process provisions of § 1391(e), which could subject them to suit anywhere in the country. 577 F.2d at 150; Driver v. Helms, 74 F.R.D. 382, 400 (D.R.I. 1977), *modified*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). It is interesting to note that the *Driver* court also held that "§ 1391(e) does not apply to those defendants who, at the time this action was brought, were not serving the government in the capacity in which they performed the acts on which their alleged liability is based." 577 F.2d at 151 (footnote omitted). However, *Driver* specifically did not decide whether someone promoted within the same department was still liable under the provisions of § 1391(e). *Id.* at n.11; *see* Blackburn v. Goodwin, No. 78-7592, slip op. at 4669 (2d Cir. Sept. 10, 1979). Another factor in the argument against the application of § 1391(e) to former officials is Congress' expressed intention that "[t]his bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." House Report, *supra*, at 2. Because retired officials living outside Washington, D.C. were not subject to suit in the district court for the District of Columbia at the time the statute was passed, it would follow that former officials were not intended to be within the ambit of §1391(e). Driver v. Helms, 577 F.2d at 150 n.10. Finally, while denials of certiorari have no precedential value, it is interesting to note that in the mail opening litigation certiorari has been granted in the two cases involving petitions by present officials for a review of the circuit court's decision, Colby v. Driver, No. 78-303, and Stafford v. Briggs, No. 77-1546, *see* 99 S. Ct. 1015 (1979), while certiorari has been denied in the two cases challenging the decision to exclude former officials from the application of § 1391(e), Driver v. Helms, No. 78-310, and Helms v. Driver, No. 78-311, *see* 99 S. Ct. 1016 (1979).

6. The contradictory nature of the virtually identical House and Senate reports is highlighted by an examination of several of their passages. The House Report states that "[t]his bill is directed primarily at facilitating review by the Federal courts of administrative actions." House Report, *supra* note 5, at 1. Such a statement seems strictly to contemplate mandamus actions. Likewise, the Senate Report states: "This bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." Senate Report, *supra* note 5, at 2, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2785. This statement also seems to restrict the Act to mandamus actions, which had historically been limited to the District of Columbia. *See* note 7 *infra* and accompanying text. The House Report notes at a later point, however, that "[problems] also arise . . . in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, *supra* note 5, at 3. Therefore, Congress seems to be restricting § 1391(e) to mandamus

Prior to the passage of the Act a plaintiff seeking to compel action by a local federal official could do so only by obtaining a writ of mandamus in the United States District Court for the District of Columbia.[7] As a result, the plaintiff had to bear the expense of transporting himself, his witnesses and his evidence to Washington, D.C., as well as the expense of hiring additional local counsel.[8] The Act, therefore, empowered all federal district courts to hear and determine actions "in the nature of mandamus" against federal officials.[9] To implement this section, Congress also added section 1391(e) to the general venue statute[10] to provide that, where no real property is involved

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actions while at the same time indicating an intent to apply the section to money damage actions. These apparent contradictions are due in part to the discussion of two separate statutes in a single report. Once this is taken into account and the divergent nature of the reports is considered, the conflicts resolve themselves. *See* note 25 *infra* and accompanying text.

7. This historical accident was the result of two early Supreme Court cases. In M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813), which involved an action brought in an Ohio federal court to mandamus the register of the local land office, the Court held that Congress simply had not delegated the power of mandamus to the lower federal courts. *Id.* at 506. The harshness of this decision was lessened somewhat in Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), in which the Court held that the United States District Court for the District of Columbia had the power to issue such writs. This power was found to exist because, in addition to being a federal court, the district court was also charged with the enforcement of the laws of Maryland, which had traditionally granted lower courts the power to mandamus government officials. *Id.* at 622-24; *see* House Report, *supra* note 5, at 2; Senate Report, *supra* note 5, at 2, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2784-85. *See generally* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 Harv. L. Rev. 308-13 (1967). At the time the Act was passed, the need for local mandamus actions against federal officials usually arose because of land disputes. Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970). In general, these disputes arose in the western states, where the federal government was a large landowner. Because the plaintiff could only obtain a writ of mandamus in the district court in Washington, D.C., he was forced to travel across the country to assert his claim. In addition to the inconvenience and expense to such a plaintiff, the caseload in the District of Columbia district court became congested because of the number of mandamus actions funnelled into that court. House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786. *See also Byse & Fiocca, supra,* at 313-18. Prior to the Act, some plaintiffs attempted to circumvent the jurisdictional problem by disguising their mandamus suits in the form of suits for mandatory injunctions. These actions failed, however, because the chief officer of the federal agency, stationed in Washington, D.C. and usually deemed by statute to be an indispensible party, was beyond the reach of process of any federal court other than the district court for the District of Columbia. *See* Blackburn v. Goodwin, No. 78-7592, slip op. at 4661-62 (2d Cir. Sept. 10, 1979); Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970); Fed. R. Civ. P. 4(f). Therefore even if the plaintiff were successful in disguising the action it would still fail in the local court. *See id.* 19.

8. *Hearings on H.R. 10089 Before the Comm. on the Judiciary (Subcomm. No. 4),* 86th Cong., 2d Sess. 2-4 (May 26 & June 2, 1960) [hereinafter cited as *Hearings*] (statement of Rep. Budge). These unpublished hearings concerning the draft version of § 1391(e) were made available by counsel to, and were relied upon by, the court in *Driver.* Driver v. Helms, 577 F.2d 147, 152 n.16 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). Prior cases had not even hinted at their existence.

9. 28 U.S.C. § 1361 (1976) provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

10. 28 U.S.C. § 1391(b) (1976); *see* note 1 *supra.*

in the action,[11] venue is proper in the district where the plaintiff resides,[12] and that the district court may deliver its process nationwide by certified mail.[13]

The most recent case interpreting the scope of section 1391(e), *Driver v. Helms*,[14] has come down with a holding contrary to the prevailing view on the money damage issue as enunciated by the Second Circuit. In *Driver*, the First Circuit held that the section was in fact applicable in actions for money damages.[15] On the issue of personal jurisdiction, however, the First Circuit followed the conventional analysis, holding that section 1391(e), like all other nationwide service of process statutes, confers personal jurisdiction on the district court issuing the process.[16] While the First Circuit's position on the money damage issue is a more accurate analysis of the congressional intent behind section 1391(e) than the heretofore prevailing view, its interpretation of the jurisdictional issue is conclusory at best and overlooks critical distinctions between section 1391(e) and the remaining nationwide service of process statutes.

I. Money Damages Against Federal Officials In Their Individual Capacities

The threshold issue facing the *Driver* court was whether section 1391(e) is applicable in actions against federal officials in their individual capacities for money damages.[17] The necessity of suing federal officials in their individual capacity for actions taken "under color of legal authority" rather than bringing a direct suit against the United States *eo nomine* arose because of

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11. This Note will focus exclusively on factual situations similar to the wiretapping and mail opening cases. All analysis, therefore, will assume that no real property is involved in the action, thereby permitting venue wherever the plaintiff resides. *See* note 1 *supra*.

12. 28 U.S.C. § 1391(e)(4) (1976).

13. *Id.; see* note 69 *infra* and accompanying text.

14. 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). In *Driver*, the plaintiff filed a class action suit in the federal district court for the district of Rhode Island against twenty-five present and former federal officials, in their official capacities for injunctive and declaratory relief and in their individual capacities for money damages, for the officials' participation in alleged mail openings which had taken place in New York City. 577 F.2d at 148-149. Because the mail openings did not take place in Rhode Island and because only the plaintiff resided within that state, *id.* at 149 nn.2, 3, venue would not have been proper under the general federal venue provisions. *Id.* at 149; *see* 28 U.S.C. § 1391(b) (1976). Moreover, because the defendants were served by certified mail beyond the territorial limits of Rhode Island, service was improper under the general service provisions of the Federal Rules of Civil Procedure. 577 F.2d at 149. Rule 4(f), which would govern in this situation absent the presence of § 1391(e), provides that process must be served "anywhere within the territorial limits of the state in which the district court is held" unless another statute authorizes service beyond the state boundaries. Fed. R. Civ. P. 4(f). The basis for using § 1391(e) was that one of the plaintiffs, Driver, resided in Rhode Island. This triggered the statute and consequently broadened venue and service of process. 577 F.2d at 149; *see* 28 U.S.C. § 1391(e)(4) (1976).

15. 577 F.2d at 151-54; *see* pt. I *infra*.

16. 577 F.2d at 154-57; *see* pt. II *infra*. Although the defendants in *Driver* argued that they lacked minimum contacts with Rhode Island, the court held that federal jurisdiction was based not upon state lines, but upon contacts with the United States. 577 F.2d at 156; *see* note 92 *infra* and accompanying text.

17. 577 F.2d at 151-54.

the doctrine of sovereign immunity and the legal fiction developed in *Ex parte Young*[18] to circumvent it.[19] The doctrine of sovereign immunity bars actions directly against the United States unless the federal government is found to have expressly waived its immunity by statute.[20] The *Young* court determined that "[i]f the act which the [official] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[21] Despite the fact that this legal fiction dictated by *Young* results in roundabout suits, it is the only method by which plaintiffs may sue the United States for such acts until the mantle of sovereign immunity is relinquished.[22]

Had Congress limited section 1391(e) to actions taken by federal officials in their official capacity, there would be little question that the statute was meant to apply only in mandamus actions.[23] Congress, however, recognized the necessity of bringing suit under the *Young* fiction when it included acts performed "under color of legal authority" within the purview of section 1391(e).[24] On its face, this language conflicts with the theory adhered to by

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18. 209 U.S. 123 (1908).

19. Although the decision in *Young* applied only to state officials, it was subsequently found to apply in cases requesting money damages from both state, Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part,* Monell v. Department of Social Servs., 436 U.S. 658 (1978), and federal officials. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

20. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. Thompson, 98 U.S. 486, 489 (1878). The Supreme Court has recently stressed that this waiver must be express and will not be implied. United States v. Testan, 424 U.S. 392, 399 (1976). Moreover, it has been held that wiretapping and mail opening violations are not among the waivers present in the Federal Tort Claims Act. *See* Kipperman v. McCone, 422 F. Supp. 860, 867-70 (N.D. Cal. 1976).

21. 209 U.S. 123, 159-60 (1908).

22. *Hearings, supra* note 8, at 91-93 (statement of Judge Maris).

23. *See* Blackburn v. Goodwin, No. 78-7592, slip op. at 4663 (2d Cir. Sept. 10, 1979); *Hearings, supra* note 8, at 32 (statement of Mr. Drabkin).

24. H.R. Rep. No. 1936, 86th Cong., 2d Sess. 6 (1960). The predecessor bill, H.R. 10089, 86th Cong., 2d Sess. (1960), to the bill finally enacted as § 1391(e), applied only to the official acts of a federal officer. Because most suits are brought against the official in his individual capacity, a statute worded only to include official acts would not serve any useful purpose. Consequently, the statute was amended, on the advice of the Justice Department, to include acts taken "under color of legal authority." H.R. Rep. No. 1936, 86th Cong., 2d Sess. 6-8 (1960). This revision would therefore seem to prove that Congress was aware of the necessity of bringing the action against the official in his individual capacity, and authorized such suits by its amendment. *See* Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 Geo. L.J. 19, 33-37 (1964). "[U]nder color of legal authority" is defined by the House as follows: "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or an employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be

the Second Circuit that the statute provides venue solely in suits for mandamus and is strictly a companion to section 1361's grant of mandamus subject matter jurisdiction to the federal courts.[25]

The Second Circuit based its view upon the theory that the mandamus and venue provisions, having been passed simultaneously, must be read together.[26] Isolated sections of the legislative reports tend to confirm this position. Congress had stated that the purpose of the venue provision "is similar to that of section 1 [the mandamus section]. It is designed to permit an action which is essentially against the United States to be brought locally" rather than in the district court for the District of Columbia.[27] From this statement, the argument can be made that any action against a federal official in his individual capacity is not "in essence" against the United States, and therefore does not fall within the statute's scope.[28] The declaration that the

brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." House Report, *supra* note 5, at 3-4.

25. Blackburn v. Goodwin, No. 78-7592, slip op. at 4660 (2d Cir. Sept. 10, 1979); Natural Resources Defense Council, Inc. v. TVA, 459 F.2d 255, 258 (2d Cir. 1972); *see* Relf v. Gasch, 511 F.2d 804, 807 n.15 (D.C. Cir. 1975); Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970); Kenyatta v. Kelley, 430 F. Supp. 1328 (E.D. Pa. 1977); Davis v. FDIC, 369 F. Supp. 277, 279 (D. Colo. 1974); Paley v. Wolk, 262 F. Supp. 640, 643 (N.D. Ill. 1965), *cert. denied*, 386 U.S. 963 (1967). In Natural Resources Defense Council, Inc. v. TVA, 459 F.2d 255 (2d Cir. 1972), the Second Circuit held that because the House and Senate reports emphasized the legal anomaly which necessitated the creation of a statute dealing with mandamus and venue, the sole congressional intent behind the enactment of § 1391(e) must have been to supply venue in mandamus actions arising under § 1361. *Id.* at 258; *see* Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970). In fact, the beginning portions of both the House and Senate reports were devoted to an explanation of the "historic accident" and the manner in which the Act rectified it. *See* House Report, *supra* note 5, at 2; Senate Report, *supra* note 5, at 2, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2785. The reports, however, proceeded beyond mandamus and discussed venue against federal officials in general. *Id.* In both *Natural Resources* and *Liberation News*, the Second Circuit read the reports as entireties, without recognizing that the congressional discussion had gone off on a tangent concerning venue in general. Thus, the Second Circuit's view was based on the theory that Congress had created the statute only to solve the mandamus problem. This position was recently reinforced by the Second Circuit in Blackburn v. Goodwin, No. 78-7592 (2d Cir. Sept. 10, 1979). *See* note 28 *infra*.

26. Blackburn v. Goodwin, No. 78-7592, slip op. at 4660 (2d Cir. Sept. 10, 1979); Natural Resources Defense Council, Inc. v. TVA, 459 F.2d 255, 258 (2d Cir. 1972).

27. House Report, *supra* note 5, at 2.

28. Blackburn v. Goodwin, No. 78-7592, slip op. at 4663 (2d Cir. Sept. 10, 1979); *see Hearings*, *supra* note 8, at 54 (statement of Mr. MacGuineas). In *Blackburn*, the most recent case interpreting § 1391(e), the Second Circuit went beyond its previous interpretation that §§ 1391(e) and 1361 were meant to be read together and held that such money damage actions are not "in essence" against the United States. Slip op. at 4662-63. Quoting Land v. Dollar, 330 U.S. 731, 738 (1947), the court defined an action to be in essence against the sovereign if "[t]he 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain or interfere with the public administration." Slip op. at 4663. Because an adverse judgment in *Blackburn* would have to be paid by the defendant rather than the United States, the Second Circuit held that the money damage action was not within the scope of § 1391(e). *Id.* at 4662-63. *But see* Driver v. Helms, 577 F.2d 147, 154 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); Briggs

Act was intended to "facilitate review by the Federal courts of administrative actions"[29] is further evidence that Congress contemplated that section 1391(e) was to be applicable only when the subject matter of the suit was in the nature of mandamus.[30]

The First Circuit, however, reached the opposite conclusion based upon equally sound, and perhaps more persuasive, authority. Section 1391(e) is applicable in "a civil action," the only prerequisite being that "a defendant" is a federal official.[31] Both the district and circuit courts in *Driver* chose to follow the plain meaning of the statute,[32] while at the same time reading the

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v. Goodwin, 569 F.2d 1, 3 n.15, 6-7 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546); Lowenstein v. Rooney, 401 F. Supp. 952, 962 (E.D.N.Y. 1975) (individual actions brought against federal officials are in essence against the United States).

29. Senate Report, *supra* note 5, at 2, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2785; *see* House Report, *supra* note 5, at 1. The general statute for review of administrative decisions, the Administrative Procedure Act, ch. 324, §§ 1-12, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.), has been held not to constitute a waiver of soverign immunity for actions against the United States based upon conduct such as illegal wiretapping. *See* Kipperman v. McCone, 422 F. Supp. 860, 869-70 (N.D. Cal. 1976).

30. Natural Resources Defense Council, Inc. v. TVA, 459 F.2d 255, 258 (2d Cir. 1972). In *Natural Resources,* the Second Circuit chastised the lower court for merely parsing the words of the text without considering the relevant history. 459 F.2d at 257. The appellate court, quoting Mr. Justice Frankfurter at length, bypassed the strict meaning of the language of the statute and delved into the legislative history. *Id.; see* United States v. Witkovich, 353 U.S. 194, 199 (1957) (Frankfurter, J.) ("[O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words becomes operative [and a] restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, [or] by the persuasive gloss of legislative history. . . ."). Justice Frankfurter's view that the words of a statute "acquire scope and function from the history of events which they summarize," Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186 (1941), and that "[t]he starting point for determining legislative purpose is plainly an appreciation of the 'mischief' that Congress was seeking to alleviate," ICC v. J-T Transp. Co., 368 U.S. 81, 107 (1961) (dissenting opinion), had been used in *Liberation News* to arrive at basically the same result as *Natural Resources. See* Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970). Because Congress stated that "[t]his bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia," House Report, *supra* note 5, at 2, and that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia," *id.* at 1, the Second Circuit concluded that there was no intention to include actions against officials in their individual capacities under the Act. Natural Resources Defense Council, Inc. v. TVA, 459 F.2d at 258.

31. The courts which have chosen to deemphasize the actual words of the statute ignore the fact that "[i]f Congress wanted to limit the application of § 1391(e) to mandamus actions, the statutory language it chose was extraordinarily ill-fitted to [the] task" of so limiting the statute's scope. Driver v. Helms, 74 F.R.D. 382, 393 (D.R.I. 1977), *modified,* 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). Moreover, "Congress has demonstrated its ample ability to distinguish between civil actions in general and mandamus actions in particular, and this Court believes that the legislative history contradicting the plain meaning of the subsection would have to be unusually clear and persuasive to warrant adoption of a reading which a) is opposed to the plain meaning of the words of the subsection, and b) attributes such carelessness to Congress." *Id.*

32. *Id.;* 577 F.2d at 151-52.

House and Senate reports much more expansively than the Second Circuit had.[33] Despite the fact that the primary reason for the enactment of the Mandamus and Venue Act was to rectify the historical accident regarding mandamus actions,[34] the scope of section 1391(e) goes far beyond that of being a mere companion to section 1361. While section 1391(e) was intended to aid in the application of section 1361, it would appear that it was also intended to stand by itself and be used according to its own terms.[35]

According to the *Driver* view, there is a definite indication in the legislative history that Congress intended to apply section 1391(e) to actions for money damages against officials in their individual capacities. The trial court in *Driver* approached both the House and Senate reports as being divided into two distinct areas—one portion concerned strictly with mandamus and a second portion concerned strictly with venue.[36] This method of analysis differs from the approach taken by the Second Circuit, which viewed each report as an entirety.[37] The addition of an expanded venue provision was far more than a mere complement to section 1361; it was a necessity. Without it, all cases against federal officials would be mired in the District Court for the District of Columbia.[38] This relationship, however, should not be used to limit the effectiveness of section 1391(e) in non-mandamus actions. The fact that a statute is created in order to aid in the implementation of another section does not automatically preclude its use in other areas.[39] This is especially true when, as in this situation, the statutes are titled separately and placed without reference to one another in different sections of title 28. Certainly Congress would have had the foresight to link the two statutes indivisibly if it intended them to be read together. Moreover, in light of historical facts first analyzed in *Driver*,[40] a far broader purpose behind the passage of the venue statute than that accorded it by the Second Circuit would seem appropriate.

Perhaps the single most important statement in both the House and Senate reports regarding the money damage question is that "[t]he venue problem also arises in an action against a Government official seeking damages *from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."[41] To reconcile

33. *See* 577 F.2d at 151-54; note 25 *supra* and accompanying text.

34. *See* notes 7, 25 *supra*.

35. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 453-55 (1970); Jacoby, *supra* note 24, at 36-37. Both articles state that § 1391(e) is a much broader venue provision, not merely a companion to § 1361, and is intended to apply to any civil action. The district court in *Driver* gave particular weight to the opinion of Dean Cramton because of the major role he played in the revisions of § 1391(e). 74 F.R.D. at 394 n.10.

36. 74 F.R.D. at 392.

37. *See* note 25 *supra*.

38. *Hearings*, *supra* note 8, at 24-25 (statement of Judge Maris); *see* House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

39. *See* note 35 *supra* and accompanying text.

40. *See* note 8 *supra*.

41. House Report, *supra* note 5, at 3 (emphasis added); Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

this statement with the Second Circuit view, one would have to argue that Congress was completely unaware of the necessity of bringing suit under the *Ex parte Young* doctrine,[42] which clearly was not the case:[43]

> By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity.[44]

The two legislative reports, which are virtually identical,[45] are best analyzed by separating the initial paragraphs dealing with the historical background on mandamus from the remainder of the reports. Such a separation is logical given Congress' awareness of the possibility of money damages in suits against federal officials.[46] The non-background portions of the reports, while concerned specifically with venue in mandamus actions, also address the broader issue of venue in civil actions against federal officials. Indeed, the reports note that "[t]he committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice."[47] Once the historical background is put in its proper place, it seems to follow that Congress was more concerned with reducing caseloads in the District of Columbia[48] and making the judicial process more efficient and convenient for citizens to sue government officials than with solely providing a means for citizens to obtain writs of mandamus.[49]

There are several other clear indications that Congress was aware of the possible, even probable, implications of section 1391(e). The most formidable is a letter written by then-Deputy Attorney General Byron R. White to the Senate Judiciary Committee expressing the Justice Department's reservations

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42. *See* notes 18-22 *supra* and accompanying text.

43. *Hearings*, *supra* note 8, at 32-33 (statement of Mr. MacGuineas apprising the committee of the existence of the *Ex parte Young* doctrine); *see* note 24 *supra*.

44. House Report, *supra* note 5, at 3-4; *see* Jacoby, *supra* note 24, at 33.

45. *Compare* House Report, *supra* note 5, *with* Senate Report, *supra* note 5, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2784.

46. *Hearings, supra* note 8, at 32-33, 62 (statements of Mr. MacGuineas); *see* Senate Report, *supra* note 5, at 6, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2789; notes 50-56 *infra*.

47. House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

48. *See* House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786. Because most actions against federal officials were funnelled into the district court for the District of Columbia due to the venue rules and the doctrine of indispensible parties, that court soon became overburdened. *Id.; see* note 7 *supra*.

49. House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786. Because most suits are based on acts performed by local federal officials, it makes sense to bring the action in the district where the court is more fully aware of the circumstances. *Id.; see* Cramton, *supra* note 35, at 452-455.

concerning the possible applications of section 1391(e).[50] This letter characterized the venue portion of the bill as covering "an entirely different subject" than the mandamus portion.[51] White suggested placing the mandamus and venue provisions within the Administrative Procedure Act.[52] The effect of this recommendation would have been to limit the venue provisions to administrative acts, thereby "unquestionably eliminat[ing] suits for money judgments against officers."[53] Despite the fact that Congress incorporated other of White's suggestions into the final draft,[54] it failed to take any steps to limit the scope of section 1391(e).[55] Thus it appears that Congress, fully aware of the potential use of section 1391(e) in actions against federal officials in their individual capacities for money damages, did nothing to correct this supposed flaw.[56]

In addition, unpublished hearings, the existence of which was revealed in *Driver*,[57] concerning the first draft of section 1391(e) also indicate that Congress intended that the statute apply to money damage suits.[58] These hearings resulted in the first version of section 1391(e) containing the "under color of legal authority" language.[59] The indication was that only private

50. Senate Report, *supra* note 5, at 5-7, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2788-90.

51. *Id.* at 6, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2789.

52. *Id.* The purpose of this suggestion was to require that all administrative remedies be exhausted before an appeal to a court was allowed and to avoid any separation-of-powers problems by eliminating any future question as to whether a discretionary executive act could be reviewed by the judiciary. *Id.*

53. *Id.*

54. Congress adopted the Department's suggestion that § 1361 be limited to actions which would compel an officer to carry out a duty owed to the plaintiff. Driver v. Helms, 577 F.2d 147, 153 & n.20 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303).

55. *Id.*

56. *Id.* at 152-53.

57. *See* note 14 *supra.*

58. *Hearings, supra* note 8, at 53-54 (statements of Reps. Dowdy & Whitener). The hearings, however, also show a general confusion among the committee members as to the purposes of the statute. At one point, Rep. Dowdy and Judge Maris seemed to definitely rule out money damages. *Id.* at 87; however, prior to this discussion, the committee had considered a hypothetical dealing with libel and slander perpetrated by a Congressman upon a private citizen. In such a case, money damages would be the obvious remedy, yet this inconsistency was never discussed. *Id.* at 55. On another occasion, Mr. MacGuineas of the Justice Department stated that in order to form an opinion, the Department had to "know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Rep. Dowdy replied: "Maybe we want it to apply to all suits . . . We want it to apply to any one." Rep. Whitener added: "I did not understand there was any doubt." *Id.* at 53-54. Part of this confusion stems from the fact that the original bill was drawn only to affect federal officers in their official capacities. Eventually, the Justice Department apprised the committee that because of the *Ex parte Young* doctrine very few suits were brought directly against the government officer in his official capacity. Most were brought against the official in his individual capacity. This revelation prompted the inclusion of the "under color of legal authority" language. *Id.* at 32-35, 91.

59. Driver v. Helms, 577 F.2d 147, 153 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). "The desire to reach a variety of causes of action prompted the first mention of the 'under color of legal authority' phrase." *Id.* Several examples

actions, completely without the scope of official business, were intended to be excluded from the ambit of section 1391(e).[60]

Finally, the 1976 amendment of section 1391(e)[61] further supports the result reached in the First Circuit. This amendment permits parties other than federal officials to be joined, under normal venue rules, in actions under section 1391(e).[62] Because it would make little sense to involve private citizens in actions where the relief demanded is mandamus, it appears that Congress has reaffirmed its intention to allow money damage actions against federal officials to be brought with the aid of section 1391(e).[63]

In summary, the result in *Driver* seems to comply more with the overall spirit of the Act, which seeks to make the judicial system more efficient and more convenient for a private citizen, than does the Second Circuit view.[64] Because the official will be defended either by the local United States Attorney or by outside counsel retained by the government,[65] it should not be burdensome for that official or the government to defend the official's actions in a forum convenient to the plaintiff. Also, the knowledge that section 1391(e), with its broad venue and service of process provisions, may be applied to the federal defendant and may result in an out-of-pocket loss to him might deter the official from a course of action which violates private citizens' constitutional rights.[66] The alternative to permitting the use of section 1391(e) in suits for money damages is to force aggrieved plaintiffs to incur the high cost of multiple district litigation.[67] Such an occurrence would allow officials to act with impunity by

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were used during the hearings. For example, a slander made during the course of the official's work would be covered, while a claim based on an injury caused by the purely private action of an off-duty postman would fall outside the purview of § 1391(e). *Hearings, supra* note 8, at 61-62 (statement of Mr. Drabkin).

60. Driver v. Helms, 577 F.2d at 153; *see* Paley v. Wolk, 262 F. Supp. 640 (N.D. Ill. 1965) (actions of defendant federal officials were purely private and therefore did not come within the statute), *cert. denied,* 386 U.S. 963 (1967).

61. *See* note 5 *supra.*

62. 28 U.S.C. § 1391(e), *as amended by* Act of Oct. 21, 1976, § 3, Pub. L. No. 94-574, 90 Stat. 2721 (1976).

63. Driver v. Helms, 577 F.2d 147, 154 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); Kipperman v. McCone, 422 F. Supp. 860, 876 (N.D. Cal. 1976). *But see* Blackburn v. Goodwin, No. 78-7592, slip op. at 4667-68 & n.11 (2d Cir. Sept. 10, 1979) (amendment was designed solely to facilitate joinder of parties, other than federal officials, involved in mandamus controversies).

64. *See generally* House Report, *supra* note 5, at 3-4; Senate Report, *supra* note 5, at 3-4, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786-87.

65. 28 C.F.R. § 50.15 (1978); *see* Driver v. Helms, 74 F.R.D. 382, 400 & n.22 (D.R.I. 1977), *modified,* 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786. It is the policy of the federal government to defend present or former officials sued for actions taken under color of their authority. In cases in which conflicts of interest occur, such as when the government is proceeding in a criminal investigation involving the officials, outside counsel is hired by the government to defend the officials. 28 C.F.R. § 50.15(a)(5); *see* 74 F.R.D. at 400 n.22.

66. Driver v. Helms, 74 F.R.D. at 398.

67. *Id.* at 399. Because the officials would no longer be subject to the expanded venue and service of process provisions of § 1391(e), the plaintiff would be forced to use § 1391(b), the general venue statute, which authorizes venue where all defendants reside or where the cause of

hiding behind a mere venue statute. This would clearly frustrate the congressional purposes behind section 1391(e).[68]

II. In Personam Jurisdiction

The most important issue involved in the interpretation of section 1391(e) is whether its grant of nationwide service of process[69] gives the district court automatic personal jurisdiction over the federal official.[70] The *Driver* court held that personal jurisdiction is authorized over out-of-state parties whenever a statute, such as section 1391(e), provides for service beyond state

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action arises. The mail openings involved in this type of litigation often occur far from the plaintiff's home, and venue in the district where the cause of action arises, therefore, may be inconvenient. Moreover, because defendants, including the former officials also sued under the general provisions, may be scattered throughout the country, the plaintiff may not be able to serve all of them with process from the same district. The plaintiff, as a result, would be forced to incur the added costs of multiple suits scattered about the country, each one based on the same set of facts and law. In addition to the added financial burden upon the plaintiff, this situation would also result in an unnecessary duplication of judicial effort, clearly in contravention of the Act's goal of judicial economy. *See* House Report, *supra* note 5, at 3; Senate Report *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

68. Powelton Civic Home Owners Ass'n v. Department of Hous. & Urban Dev., 284 F. Supp. 809, 833 (E.D. Pa. 1968) ("Section 1391(e) attempts to remove the virtually impenetrable barrier of procedural entanglement which has so frequently provided the government with de facto immunity from law suits").

69. "Nationwide service of process" is a term used to cover a statutory scheme whereby the plaintiff is permitted to serve process upon the defendant without the normal regard for state boundaries. *See generally* Fed. R. Civ. P. 4(f). The plaintiff may serve the defendant wherever he is found and need not resort to other statutes in which factual connections, such as contacts with the forum state, must be proved before the statute can be utilized. Professor Moore has listed 16 federal statutes that provide for nationwide service of process: (1) 28 U.S.C. §§ 1335, 1397, 2361 (1976) (actions under the federal interpleader act); (2) 28 U.S.C. § 1655 (1976) (actions to assert rights in property when the defendant cannot be served within the state); (3) 28 U.S.C. § 1695 (1976) (service of process against a corporation in a shareholder's derivative action); (4) 15 U.S.C. § 5 (1976) (action by the United States under the Sherman Act); (5) 15 U.S.C. § 25 (1976) (action by the United States under the Clayton Act); (6) 15 U.S.C. § 22 (1976) (action against a corporation under the antitrust laws); (7) 28 U.S.C. § 1692 (1976) (actions concerning land which lies in more than one district); (8) 28 U.S.C. § 2321 (1976) & 49 U.S.C. §§ 20, 23, 43 (1976) (actions under the interstate commerce laws); (9) 40 U.S.C. § 270b(b) (1976) (actions brought by the United States on bonds of public contractors); (10) 15 U.S.C. §§ 77v(a), 78aa (1976) (actions under the Securities Act of 1933 and Securities Exchange Act of 1934); (11) 15 U.S.C. § 80a-43 (1976) (actions under the Investment Company Act of 1940); (12) 15 U.S.C. § 79y (1976) (actions under the Public Utility Holding Company Act of 1935); (13) 15 U.S.C. § 80b-14 (1976) (actions under the Investment Advisers Act of 1940); (14) 15 U.S.C. § 49 (1976) (actions to enforce subpoenas of the Federal Trade Commission); (15) 9 U.S.C. § 9 (1976) (actions to confirm arbitration awards under the Federal Arbitration Act); (16) 28 U.S.C. § 1391(e). *See* 2 Moore's Federal Practice ¶ 4.42[1], at 4-518 to -523 (2d ed. 1979).

70. The problem of personal jurisdiction is relevant only if a court decides that § 1391(e) applies to individual actions. If it is found that § 1391(e) applies only to mandamus actions directed against officials, the jurisdictional problem is less likely to arise. At most, the defendant will be ordered to carry out an official act, and he will not suffer any out-of-pocket loss. *See* Blackburn v. Goodwin, No. 78-7592 (2d Cir. Sept. 10, 1979).

boundaries.[71] Such authorization is within the power of Congress, which may provide for the exercise by the federal courts of personal jurisdiction over any person having contacts with the United States.[72] The First Circuit further concluded that this particular nationwide service of process provision "[c]learly . . . does more than describe the mechanics of service of process. It creates an exception to the general rule by allowing service of process anywhere in the United States by certified mail."[73] Because broadened venue could not be effectuated without broadened service of process, according to this theory, it followed that such service, without attendant automatic personal jurisdiction, was insufficient to accomplish Congress' aims.[74] Yet nowhere in the legislative reports is any express mention made of personal jurisdiction.[75] It seems incredible that Congress would so broaden an area of civil procedure without comment.[76] Nevertheless, the First Circuit and many district courts interpreting section 1391(e) have simply concluded that Congress intended to so broaden personal jurisdiction.[77]

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71. Driver v. Helms, 577 F.2d 147, 155-56 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303).

72. Briggs v. Goodwin, 569 F.2d 1 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546). *Briggs* was a § 1391(e) case which postulated the existence of only one federal district encompassing the entire United States. *Id.* at 9; *see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816). Because the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish," U.S. Const. art. III, § 1, Congress apparently may redraw the existing district lines at any time. In the interest of convenience to the parties and the witnesses, however, the district lines and the limits of the federal courts' service have traditionally been determined by state boundaries. 569 F.2d at 9 & n.72; *see* J. Goebel, History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, at 226, 460, 473 (1971); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 72 (1923). By exercising this power and creating only one federal district, Congress could necessitate a form of automatic personal jurisdiction because the federal court would be able to assert personal jurisdiction by service upon the defendant anywhere within the district of the United States. 569 F.2d at 9-10. If Congress has this power, the *Briggs* analysis concluded, it is reasonable to allow it to accomplish the same result through a statute authorizing nationwide service of process along with an implied grant of automatic personal jurisdiction. *Id.* Because the equivalent of automatic personal jurisdiction could be accomplished in this manner, the *Briggs* court required little in the way of direct congressional expression to infer such an intent. *Id.* at 9; *see* Robertson v. Railroad Labor Bd., 268 U.S. 619, 627 (1925).

73. 577 F.2d at 155.

74. Driver v. Helms, 577 F.2d 147, 156 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); Briggs v. Goodwin, 569 F.2d 1, 7-8 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546).

75. *See* House Report, *supra* note 5, at 4. In fact, the intent seems to have been "to modify the service requirements." *Id.* Moreover, § 1391(e) never mentions personal jurisdiction, but provides only that the "summons and complaint" may be delivered beyond state lines. 28 U.S.C. § 1391(e) (1976).

76. Blackburn v. Goodwin, No. 78-7592, slip op. at 4670 (2d Cir. Sept. 10, 1979); Kipperman v. McCone, 422 F. Supp. 860, 877 (N.D. Cal. 1976); *see* Robertson v. Railroad Labor Bd., 268 U.S. 619, 627 (1925).

77. Driver v. Helms, 577 F.2d at 154-56; *see, e.g.*, Crowley v. United States, 388 F. Supp. 981, 987 (E.D. Wis. 1975); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338,

The *Driver* court found a congressional intent to include personal jurisdiction within the ambit of section 1391(e)[78] despite the fact that Congress declined to act upon a warning from a representative of the Judicial Conference of the United States that a court using the new statute might have problems obtaining in personam jurisdiction.[79] When this theory is compared with the same court's analysis on the subject of individual liability for money damages, a logical inconsistency is exposed. If Congress' silence when confronted with the possibility that section 1391(e) could be used in money damage actions implies its approval of such a result,[80] then does not Congress' silence when confronted with the information that section 1391(e) might not grant automatic personal jurisdiction also indicate its approval of that result? If knowledge plus silence equals intent, then Congress must have intended that section 1391(e) not be used as a grant of personal jurisdiction.[81] Either the *Driver* court did not realize this inconsistency in its logic or it did not feel burdened to account for it.

Nationwide service of process statutes have generally been construed as providing the court issuing the process with personal jurisdiction over the defendant served.[82] A typical case in this regard is *Leasco Data Processing Equipment Corp. v. Maxwell*,[83] in which the Second Circuit construed section 27 of the Securities Exchange Act of 1934, which provides that "process in such cases [covered by the act] may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."[84] The court reasoned that "although the section does not deal specifically with *in personam* jurisdiction, it is reasonable to infer that Congress meant to assert

364 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973); English v. Town of Huntington, 335 F. Supp. 1369, 1373 (E.D.N.Y. 1970); Macias v. Finch, 324 F. Supp. 1252, 1254-55 (N.D. Cal. 1970).

78. *See* 577 F.2d at 155-56.

79. *Hearings, supra* note 8, at 87 (Judge Maris pointed out that there may be a "problem about the acquisition of jursidiction in personam by the Court in the venue").

80. *See* notes 50-56 *supra* and accompanying text.

81. *But see* Driver v. Helms, 577 F.2d at 155-56.

82. Mariash v. Morill, 496 F.2d 1138, 1143 (2d Cir. 1974); Garner v. Enright, 71 F.R.D. 656, 660 (E.D.N.Y. 1976); *see* Driver v. Helms, 577 F.2d 147, 156 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); Briggs v. Goodwin, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339-40 (2d Cir. 1972). When service of process is nationwide, the only due process requirement is that "the service authorized by statute must be reasonably calculated to inform the defendant of the pendancy of the proceedings in order that he may take advantage of the opportunity to be heard in his defense." Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). Thus, "where . . . the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present. Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extraterritorial, service of process." *Id.* (footnotes omitted).

83. 468 F.2d 1326 (2d Cir. 1972). *Leasco* involved an attempt to exert jurisdiction over a foreign corporation by means of a nationwide service of process statute. The court applied the doctrine of minimum contacts with the United States in order to do so. *Id.* at 1340.

84. 15 U.S.C. § 78aa (1976).

85. 468 F.2d at 1340; *see* Driver v. Helms, 577 F.2d at 155; Briggs v. Goodwin, 569 F.2d at 7-8.

personal jurisdiction."[85] Using a similar analysis, the First Circuit and other federal courts have found that the second paragraph of section 1391(e), dealing with the method of service of process, was also intended to supply personal jurisdiction.[86]

The limited judicial opposition[87] to the *Driver* view of in personam jurisdiction centers upon a due process analysis which applies to the federal district courts the "minimum contacts" test first developed by the Supreme Court in *International Shoe Co. v. Washington*[88] to define the power of state long-arm jurisdiction.[89] This theory requires that a defendant official have such contacts with the forum district before section 1391(e) can be held to confer jurisdiction.[90] This analysis, however, ignores the fact that the jurisdictional power of a federal district court is based not upon the power of the state in which the court sits but upon the sovereignty of the United States.[91] All that due process requires, therefore, is that the defendant have

86. *See* Driver v. Helms, 577 F.2d 147, 156-57 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303); Briggs v. Goodwin, 569 F.2d 1, 7-10 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546); Misko v. United States, 77 F.R.D. 425, 427 (D.D.C. 1978); United States v. McAninch, 435 F. Supp. 240, 244 (E.D.N.Y. 1977); Crowley v. United States, 388 F. Supp. 981, 987 (E.D. Wis. 1975); Rimar v. McCowan, 374 F. Supp. 1179, 1181 (E.D. Mich. 1974); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973). Several of these cases go into a detailed analysis for their holdings that nationwide service of process also provides personal jurisdiction. *See* Driver v. Helms, 577 F.2d at 154-57; Briggs v. Goodwin, 569 F.2d at 7-10. Other cases, however, merely provide conclusory statements with no apparent basis in authority. *See, e.g.*, Misko v. United States, 77 F.R.D. at 427 (nationwide service of process "not only authorizes a particular manner of service, but speaks to general amenability to service, *i.e.* in personam jurisdiction"). Crowley v. United States, 388 F. Supp. at 987 (conclusion without citations); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. at 364 ("[t]his Court has jurisdiction of the persons of the two individual federal defendants by virtue of 28 United States Code § 1391(e)").

87. *See, e.g.*, United States *ex rel.* Rudick v. Laird, 412 F.2d 16, 20 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969); Kipperman v. McCone, 422 F. Supp. 860, 871-75 (N.D. Cal. 1976); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. 471, 477 (E.D. Pa. 1970). The holdings in *Rudick* and *Armstrong*, both habeas corpus cases, are questionable in light of the Supreme Court's holding in Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971), that habeas corpus actions are not "civil actions" for purposes of § 1391(e).

88. 326 U.S. 310 (1945).

89. The *International Shoe* test seeks to ensure that the Fourteenth Amendment's requirement of basic "fairness" is met when a state court asserts personal jurisdiction over an out-of-state defendant. *Id.* at 316; *see* Hanson v. Denckla, 357 U.S. 235, 251-53 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); U.S. Const. amend. XIV, § 1. Minimum contacts, and therefore by definition the "fairness" which the Fourteenth Amendment requires, are present when the defendant performs "some act by which [it] purpose[ly] avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. at 253. Thus, for a state court to assert jurisdiction over a non-resident defendant, such an assertion must comport with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

90. United States *ex rel.* Rudick v. Laird, 412 F.2d 16, 20 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969); Kipperman v. McCone, 422 F. Supp. 860, 871 (N.D. Cal. 1976); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. 471, 476-78 (E.D. Pa. 1970).

91. Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Driver v. Helms, 74 F.R.D. 382,

some contacts with the United States;[92] such contacts are obvious when the defendant is an official of the federal government.

A sounder justification for the view that section 1391(e) does not supply automatic personal jurisdiction is based not upon due process but upon the discrepancies between section 1391(e) and the remaining nationwide service of process statutes. These statutes either have venue provisions related to the residence of the defendant or determine venue according to section 1391(b), the general venue statute.[93] For example, section 27 of the Securities Exchange Act of 1934, construed in *Leasco*, provides that suit may be brought where the defendant resides or does business, or where the cause of action has arisen.[94] By determining venue in these terms Congress has traditionally

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390-91 (D.R.I. 1977), *modified*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 99 S. Ct. 1015 (1979) (No. 78-303). Therefore, a federal court's service of process may constitutionally transcend state lines, and the court may assert jurisdiction over any person within the United States. Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925); Briggs v. Goodwin, 569 F.2d 1, 8-10 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546); Driver v. Helms, 74 F.R.D. at 389-401; *see* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1126, at 529 (1969). Although contacts with the district play no part in the determination of federal jurisdiction, they may become a consideration on a motion for transfer under 28 U.S.C. § 1404(a). *See* notes 106-14 *infra* and accompanying text.

92. *See* Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972).

93. In lien enforcement actions against absent defendants, venue is proper in the district where the property is situated. 28 U.S.C. § 1655 (1976). *See, e.g.*, Dick v. Foraker, 155 U.S. 404 (1894) (predecessor section applied only when the land against which the lien was applied was in the district where the suit had originated); Fabian v. Kennedy, 333 F. Supp. 1001 (N.D. W.Va. 1971) (section is applicable only when the suit is in rem and not in personam against the defendant for money damages). In shareholder derivative actions, process may be served where the corporation is organized, licensed to do business or doing business. 28 U.S.C. § 1695 (1976). *See, e.g.*, Norte & Co. v. Huffines, 222 F. Supp. 90 (S.D.N.Y. 1962), *appeal dismissed sub nom.* Norte & Co. v. Defiance Indus. Inc., 319 F.2d 336 (2d Cir. 1963) (service quashed where corporation was organized elsewhere, did no business in the district, and no defendant resided in the district); Clay v. Thomas, 185 F. Supp. 809 (S.D.N.Y. 1960) (venue for the action must still be laid pursuant to 28 U.S.C. § 1401). In actions for injunctions under the antitrust laws, the court, in its discretion, can bring in non-resident defendants when "the ends of justice require that other parties should be brought before the court." 15 U.S.C. §§ 5, 25 (1976). *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911) (if one co-conspirator is present in the district, it justifies the court's decision to draw in the other co-conspirators). In antitrust actions, suit must be brought in the state of incorporation, or where the corporation is found or transacts business. 15 U.S.C. § 22 (1976). *See, e.g.*, San Antonio Tel. Co. v. American Tel. & Tel. Co., 364 F. Supp. 1157 (W.D. Tex. 1973, *aff'd* 499 F.2d 349 (5th Cir. 1974) (section is not intended to give plaintiffs the unlimited right to choose venue); Albert Levine Assoc. v. Bertoni & Cotti, 314 F. Supp. 169 (S.D.N.Y. 1970) (general venue provisions still apply to actions where the defendant is served under this section); Chemical Specialties Sales Corp.—Indus. Div. v. Basic Inc., 296 F. Supp. 1106 (D. Conn. 1968) (nationwide service is provided only after all venue provisions are met). In actions under the Federal Interpleader Act, venue is proper where one or more claimants reside. 28 U.S.C. §§ 1335, 1397, 2361 (1976). *See, e.g.*, Marine Bank & Trust Co. v. Hamilton Bros., Inc., 55 F.R.D. 505 (M.D. Fla. 1972) (sections should not be used as a tool to expand the jurisdictional drawing power of a court over non-residents).

94. 15 U.S.C. § 78aa (1976). "Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder . . . may be brought . . . in the district wherein the defendant is found or is an inhabitant or transacts business. . . ." *Id.*

ensured—out of fairness, not out of constitutional necessity[95]—that the suit would be brought in a forum district with which the defendant has had some minimum contact.

In section 1391(e), however, Congress has dispensed with the usual focus upon the defendant and has instead created venue wherever the plaintiff resides.[96] When this broad venue provision is combined with the ability to serve process nationwide, the inherent guarantee of some degree of fairness through minimum contacts, present in typical nationwide service of process statutes, is eliminated. For example, a plaintiff who is injured in New York and subsequently moves to Alaska may force a federal official, in his individual capacity, to answer to suit in Alaska, even thought the official had no hint that his actions would eventually subject him to possible personal liability in that state or part of the country.[97] In effect, such a situation unduly discriminates against federal officials who are sued individually and who must pay any judgment out of their own pockets. There is little difference between the federal official sued individually and a private defendant, yet the private defendant has the privilege of being sued where he resides, while a federal defendant must travel to the plaintiff's residence.[98]

In the aforementioned hypothetical, all the parties and witnesses may be located in another section of the country, save one single plaintiff; such was the case in *Driver*.[99] It is difficult to see, therefore, how the First Circuit's interpretation of the statute conforms to the notions of judicial efficiency and economy expressed in the House and Senate reports.[100] In fact, the *Driver* view seems to work against these goals. Although the plaintiff's burden is eased, there is a potential for abuse which may work undue hardship upon the defendants, witnesses, and even co-plaintiffs.

Because of the lack of focus on the defendant in section 1391(e), it is arguable that the requisite intent to create an automatic personal jurisdiction statute is not present. In the past, the Supreme Court has stated that intent is not to be lightly assumed when Congress is departing from longstanding tradition.[101] First, as evidenced by its language, section 1391(e) seems to apply only to the method of service of process and not to the defendant's amenability to process:

The summons and complaint in such an action *shall be served* as provided by the

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95. *See* Briggs v. Goodwin, 569 F.2d 1, 8-10 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 99 S. Ct. 1015 (1979) (No. 77-1546).

96. 28 U.S.C. § 1391(e)(4) (1976).

97. *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (although the defendant never actually did business in California, his actions were calculated to achieve results there).

98. *Hearings, supra* note 8, at 62 (statement of Mr. MacGuineas); *see* Blackburn v. Goodwin, No. 78-7592, slip op. at 4669-70 (2d Cir. Sept. 10, 1979).

99. 577 F.2d at 149 & nn.2, 3 (the 25 defendants were all non-residents of Rhode Island, as were all but one of the plaintiffs; the alleged violations took place in New York City); *see* Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal. 1976).

100. House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

101. Robertson v. Railroad Labor Bd., 268 U.S. 619, 627 (1925); *see In re* East River Towing Co., 266 U.S. 355, 367 (1924); Panama R.R. v. Johnson, 264 U.S. 375, 384 (1924); United States v. Barnes, 222 U.S. 513, 520 (1912).

Federal Rules of Civil Procedure except that the *delivery* of the summons and complaint to the officer or agency as required by the rules *may be made by certified mail* beyond the territorial limits of the district in which the action is brought.[102]

This language differs substantially from the usual language of such statutes, which call for service wherever the defendant is found.[103] In contrast, section 1391(e) is more specific in speaking to method rather than amenability of service. Second, when this practical difference between section 1391(e) and other nationwide service statutes is uncovered and it is obvious that Congress has not merely followed established legal patterns but has in fact broken completely new ground by basing venue upon the location of a single plaintiff, inferences concerning congressional intent should not be made without strong evidence. The conclusions drawn by the First Circuit in *Driver,* overlooking statutory discrepancies, are conclusory at best. With the intent of Congress anything but "unmistakeably expressed,"[104] therefore, such conclusions are clearly unwarranted.[105]

In cases in which the courts have nevertheless found automatic personal jurisdiction, one might expect, given the discriminatory effect of this basic difference between section 1391(e) and other statutes, a large number of requests for transfer pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[106] Such transfers, however, have not occurred.[107] Even in *Driver,* an action in which not one defendant and only one plaintiff had any contacts with the District of Rhode Island, transfer was considered but rejected on the ground that "officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States."[108]

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102. 28 U.S.C. § 1391(e) (1976) (emphasis added).

103. *See, e.g.,* Securities & Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (process "may be served . . . wherever the defendant may be found"); Investment Company Act of 1940, § 44, 15 U.S.C. § 80a-43 (1976) (same).

104. "On traditional canons of interpretation, the intention of the framers being unmistakeably expressed, that intention is as good as written into the text." R. Berger, *Government by Judiciary* 7 (1977).

105. It has been suggested that policy decisions are for the legislature; policing of constitutional boundaries is for the courts. *Id.* at 355. In the instant situation the prudent course may well be to interpret the statute narrowly and defer to Congress for future clarification.

106. 28 U.S.C. § 1404(a) (1976).

107. Of all the § 1391(e) cases cited herein, transfer was considered only in Driver v. Helms, 577 F.2d at 157, and Relf v. Gasch, 511 F.2d 804, 806-08 (D.C. Cir. 1975). In *Driver,* the appellants argued that creation of automatic personal jurisdiction was unfair to them because it created a harsher burden upon the officials than on private litigants. The court recognized this, stating that their best remedy was transfer under § 1404(a). Transfer, however, was denied because, as government officials, they should have expected that their actions would have far-reaching effects. 577 F.2d at 157. In *Relf,* a case holding that § 1391(e) does not create automatic personal jurisdiction, the court found that the transferee district would not have had personal jurisdiction in the original action; transfer, therefore, could not have been granted. 511 F.2d at 806-08; *see* 28 U.S.C. § 1404(a) (1976).

108. 577 F.2d at 157.

In categorically rejecting transfer, the First Circuit apparently overlooked evidence in the unpublished hearings on the predecessor bill to section 1391(e) which indicates that Congress not only intended the section 1404(a) right of transfer to be available to defendants in section 1391(e) actions, but saw such transfers as the obvious remedy to the potential abuses involved in these actions.[109] This evidence clearly undercuts any argument that in a conflict between the two sections, section 1391(e), as a "plaintiffs' provision,"[110] should prevail. Moreover, such an argument against the use of section 1404(a) would not comport with the stated objectives of convenience and judicial efficiency expressed in the legislative reports.[111] Section 1404(a) satisfies these objectives by leaving the transfer question in the discretion of the court.[112]

109. *Hearings, supra* note 8, at 24-25 (statement of Judge Maris). Although a primary consideration was to allow an action to be brought in a forum convenient for the plaintiff and the witnesses and in a forum where the presiding judge would have some special knowledge concerning the factual background of the suit, for example actions concerning real property, the wisdom of allowing the plaintiff to bring the action where he resided was questioned. *Id.* In analyzing this problem, Rep. Ray propounded a hypothetical concerning a plaintiff who resided in California, but also held grazing permits for land he owned in Montana. An action brought under § 1391(e)'s predecessor could conceivably have been brought in California and not Montana (§ 1391(e) bypassed this problem by permitting venue where the plaintiff resided only when there was no real property involved in the action), where all the litigated events actually took place. Thus, the total effect of the statute would have been to move the action from Washington, D.C. to California, still leaving all the witnesses and property in Montana. *Id.* at 16. Judge Maris then assured the congressional committee that if such a situation occurred, the court would be able to transfer the action to a more appropriate forum. *Id.* at 26. He stated: "We have the statute on the books now which authorizes the District Court in the interest of justice and for the convenience of the parties to transfer a case from one venue to another. You are familiar with that statute, section 1404(a) of title 28. That would apply here, too. So that the Government would still have the opportunity, if a case were really brought in a place that was going to be oppressive to the administration of justice, to ask the Court of that place to transfer the case to the District of Columbia or some other place. It would be completely within the power of the District Judge to see that the case was ultimately lodged in a District which was appropriate and convenient as nearly as might be to all parties." *Id.* at 26. Furthermore, "[a] defendant will still not be precluded from making his motion for the change of venue to a more convenient forum under this proposal." *Id.* at 58. (statement of Rep. Whitener). Therefore, even though the statute was subsequently restricted to provide venue where the plaintiff resides only when no real property is involved in the action, *see* 28 U.S.C. § 1391(e)(4), transfer must still be carefully considered by the court.

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

111. House Report, *supra* note 5, at 3; Senate Report, *supra* note 5, at 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News at 2786.

112. *See* Hoffman v. Blaski, 363 U.S. 335, 342 (1960); Foster-Milburn Co. v. Knight, 181 F.2d 949, 951 (2d Cir. 1950); 28 U.S.C. § 1404(a) (1976); 7B Moore's Federal Practice § 1404, at JC-603 to -610 (2d ed. 1979). Although in Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947), the Supreme Court held that "unless the balance [of factors in the transfer decision] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," the Court also held that the decision was always in the discretion of the trial court. *Id.* at 508. The Court then went on to list some of the appropriate considerations for such a decision, including the plaintiff's initial choice of forum, the ease of access to sources of proof, the availability of compulsory process for bringing in unwilling witnesses, the cost of bringing in such witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* In *Driver*, it

The fact that section 1391(e) was designed to aid plaintiffs, therefore, should be a factor in the trial court's decision but should not be allowed to bar transfers under section 1404(a) when expedient to the interests of justice.[113]

The transfer of actions based upon factual situations similar to *Driver* is an option which all federal defendants should explore fully and one which all judges, given the peculiar nature of the statute, must consider. In the event that a court chooses to create automatic personal jurisdiction, the unique nature of section 1391(e) opens the way for serious abuses.[114] Transfer appears to be the best solution to curb these abuses.

CONCLUSION

The full potential of section 1391(e) is only now being realized. As more and more private citizens become aware of possible past infringements of their constitutional rights, the use of section 1391(e) in actions similar to *Driver* will certainly escalate. It is imperative, therefore, that the scope of the section be resolved to enable potential plaintiffs against federal officials to balance cost factors against the probability of success. Moreover, a construction in which the federal official is subjected to the maximum effects of section 1391(e) would have a beneficial effect in that officials might be more aware of their potential liability and restrict their activities accordingly.

Based upon the available evidence, *Driver*'s holding that section 1391(e) should be applicable to actions for money damages seems correct. The rationale for creating automatic personal jurisdiction, however, is not as convincing. Section 1391(e) is not a carbon copy of other nationwide service of process statutes; rather, it is an unprecedented deviation from the general venue rules, which have traditionally required at least a minimal tether between the defendant and the forum court. In light of this deviation, the sufficient congressional intent to find a grant of automatic personal jurisdiction is lacking. Section 1391(e) is essentially designed to provide only a method of service of process.

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would have been difficult to say that for any of the parties except Driver, the Rhode Island venue was easy, expeditious or inexpensive.

113. Another argument against the creation of automatic personal jurisdiction and for the proposition of transfer is the discrimination § 1391(e) works against federal defendants. As Mr. MacGuineas noted: "[I]f that judgment is rendered against that defendant [sued in his individual capacity], he pays out of his own pocket and then if you are going to say that in that case the Government official must be sued in the plaintiff's district, you discriminate against him in favor of every other citizen because the other citizen who is sued for slander—I am talking about two private citizens now who are in suit—the defendant in that case has the privilege of demanding that suit be brought in his district. . . . Now, wouldn't it raise serious policy questions if a bill were enacted which would discriminate against Government officials and deny them the same kind of venue privileges which every other citizen of this country has when he is made a defendant in a lawsuit." *Hearings, supra* note 8, at 62-63; *see* Blackburn v. Goodwin, No. 78-7592, slip op. at 4669-70 (2d Cir. Sept. 10, 1979). This problem of subjecting a federal defendant to such discriminatory treatment has never been squarely faced by the courts. While this treatment should not invalidate the statute, it is a factor to be considered in any transfer decision.

114. *Hearings, supra* note 8, at 25, 62 (statements of Judge Maris, Mr. MacGuineas); *see* note 109 *supra*.

Finally, the possibility of transfer should be considered by all participants in a section 1391(e) action. Although *Driver* involved a situation in which there were no contacts with the district, it is possible that its facts were not sufficiently extreme to justify transfer.[115] *Driver,* however, exposes the potential abuses which defendants may encounter when they are sued in their individual capacities pursuant to section 1391(e). While Congress' attempt to make federal officials more accountable to the public through section 1391(e) is reasonable, the statute's discriminatory side effects require a narrow interpretation in the Supreme Court.

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115. While Rhode Island is relatively proximate to Washington, D.C. and a forum there might not prove to be a hardship on an official actively involved in the government's defense of his private wealth, venue in the hypothetical posed in the text at note 97 might cause problems for the same official. *See Hearings, supra* note 8, at 16-17 (statements of Rep. Budge supporting proposal to limit venue to district where cause of action arises).