JURISDICTION—28 U.S.C. § 1391(e) PROVIDES NATIONWIDE IN PERSONAM JURISDICTION IN SUIT FOR MONEY DAMAGES AGAINST PRESENT GOVERNMENT OFFICIALS SUED IN THEIR OFFICIAL CAPACITIES—*Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom., Colby v. Driver*, 439 U.S. 1113 (1979).

Throughout the years 1953 to 1973, the Central Intelligence Agency was engaged in an operation designated as the East Coast Mail Intercept.[1] The objective of the operation, which allegedly was based in New York City,[2] was the opening, inspecting and photographing of first class mail sent to or coming from the Soviet Union.[3] This activity was carried on without the benefit of a search warrant.[4] In 1975, a group of American citizens[5] filed a class action suit in the federal district court of Rhode Island[6] against thirty present and former federal government officials, charging that the defendants conducted and conspired to conduct a surreptitious mail interception and thereby violated the first, fourth, fifth and ninth amendments to

---

[1] Plaintiff's Amended Complaint, para. 53, Driver v. Helms, 74 F.R.D. 382, 387 n.1 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The operation was called HTLINGUAL and a description can be located in the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities. United States Senate Book III, at 559–679. Brief for Respondents at n.3, Colby v. Driver, No. 78-303 (U.S. 1979). It is estimated that 215,000 pieces of mail were read during this period. *Id.* at 3.

[2] Driver v. Helms, 577 F.2d 147, 149 n.3 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[3] Driver v. Helms, 74 F.R.D. 382, 387 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[4] Plaintiff's Amended Complaint, *supra* note 1, at paras. 45 & 52.

[5] Driver v. Helms, 74 F.R.D. 382, 387 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). Rodney Driver, a resident of Rhode Island, is a professor of mathematics at the University of Rhode Island, and had corresponded with fellow mathematicians in the Soviet Union. Michael Avery, a resident of Connecticut, is an attorney and had visited the Soviet Union as an exchange student. B. Leonard Avery, a resident of Minnesota, is the father of Michael and had received correspondence from his son. Victoria Wilson, a resident of New York City, had corresponded with her father who was in the Soviet Union researching a novel. Julia Siebel, a resident of California, corresponded with friends in the Soviet Union. Plaintiff's Amended Complaint, *supra* note 1, at paras. 3–7.

[6] Driver v. Helms, 74 F.R.D. 382, 408 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The actual number and identity of the members of the class were known only to the CIA. The plaintiffs contended that the class numbered in the tens of thousands. Plaintiff's Amended Complaint, *supra* note 1, at para. 42.

the Federal Constitution, and various federal statutes.[7] They also alleged that in having conspired to commit these constitutional torts, the defendants became personally liable for money damages.[8] The plaintiffs sought declaratory and injunctive relief against defendant Clarence Kelley, Director of the Federal Bureau of Investigation.[9] In addition, they sought compensatory and punitive damages from each of the other defendants, who were sued both in their individual and official, or former official, capacities.[10]

At the outset of the suit, the defendants, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, moved to dismiss the complaint for lack of in personam jurisdiction.[11] They demonstrated by way of uncontroverted affidavits that they had not been served with process in Rhode Island, that they did not reside in or have any contact with that State, and that the complaint did not allege that any of the wrongful activity had occurred there.[12]

The district court denied the motion and held that 28 U.S.C. § 1391(e)[13] was properly relied upon in an action which sought to re-

---

[7] Plaintiff's Amended Complaint, *supra* note 1, at paras. 8–37 & 53–59. The defendants included among others, the directors of the Central Intelligence Agency, the United States Post Office Department and the Federal Bureau of Investigation at the time of filing suit as well as past directors and subordinate officers. For a complete list of the defendants, see Plaintiff's Amended Complaint, *supra* note 1, at paras. 8–37. The United States moved to become a party defendant and the motion was granted. Driver v. Helms, 74 F.R.D. 382, 387 n.2 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

The alleged violations were: fourth amendment (security from unreasonable search and seizures); first amendment (freedom of speech); first, fourth, fifth and ninth amendments (right to privacy); 18 U.S.C. §§ 1701, 1702, 1703, 1708 & 1709 (1976) (prohibiting interference with the United States mails). Plaintiff's Amended Complaint, *supra* note 1, at para. 59.

[8] Plaintiff's Amended Complaint, *supra* note 1, at para. 59; *see* 42, U.S.C. § 1985(c) (1976).

[9] Driver v. Helms, 74 F.R.D. 382, 387 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The FBI necessarily became involved in the East Coast Mail Intercept because of its dominion over domestic security operations. *See id.*

[10] *Id.* The plaintiffs requested $20,000 per letter intercepted as compensatory damages and $100,000 punitive damages for each member of the class. The damages could total in excess of one billion dollars. Plaintiff's Amended Complaint, *supra* note 1, at para. 59.

[11] Driver v. Helms, 74 F.R.D. 382, 387 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The defendants also moved to dismiss because of improper venue under Rule 12(b)(3) and insufficiency of process under Rule 12(b)(4) of the Federal Rules of Civil Procedure. *Id.* at 387.

[12] Brief for Appellants at 5–6, Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[13] Act of Oct. 5, 1962, Pub. L. No. 87-748, § 2, 76 Stat. 744. Section 1391(e) and section 1361 were enacted as The Mandamus and Venue Act of 1962. The act originally read as follows:

cover money damages from a federal official's personal resources.[14] The court ruled that section 1391(e), when applicable, provided in personam jurisdiction,[15] that such a grant of jurisdiction did not violate the due process clause of the fifth amendment[16] and, finally, that section 1391(e) effected jurisdiction over former as well as present

---

§ 1361. Action to compel an officer of the United States to perform his duty

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.

§ 1391. Venue generally

. . . .

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or 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.

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.

Act of Oct. 5, 1962, Pub. L. No. 87-748, §§ 1(a), 2, 76 Stat. 744.

Section 1391(e) was amended in 1976. The word "each" was changed to "a" in the first sentence and the following sentence was added to the end of the first paragraph:

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.

Act of Oct. 21, 1976, Pub. L. No. 94-574, § 3, 90 Stat. 2721.

[14] Driver v. Helms, 74 F.R.D. 382, 392–98 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[15] *Id.* at 389–92. Plaintiffs also claimed jurisdiction on the basis of Rhode Island's long-arm statute. R.I. GEN. LAWS § 9-5-33 (1956). The court never considered that basis for jurisdiction since it found § 1391(e) to be applicable. 74 F.R.D. at 400 n.23.

[16] 74 F.R.D. 382, 390–91 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The district court reasoned that the fourteenth amendment due process constraints regarding jurisdiction and the state courts as defined in International Shoe Co. v. Washington, 326 U.S. 310 (1945) (minimum contacts and substantial fairness) were not applicable to this set of facts. Such a test, the court ruled, was only applicable when jurisdiction was asserted over one outside the territorial limits of the sovereign. When Congress authorizes nationwide service of process, the court noted, the entire nation is its territory and therefore the proper due process test is that applied to intraterritorial jurisdiction. 74 F.R.D. at 391. That test, as defined in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), is notice which is reasonably calculated to inform the defendant of the pendency of the suit. 74 F.R.D. at 391.

officials of the federal government.[17] In *Driver v. Helms*,[18] the First Circuit affirmed except insofar as the district court held that section 1391(e) applied to former government officials.[19]

Section 1391(e) was enacted as the second half of The Mandamus and Venue Act of 1962[20] and defines venue in "[a] civil action in which a defendant is an officer or employee of the United States or an agency thereof acting in his official capacity or under color of legal authority."[21] It also provides for service of process beyond the territorial limits in which the action was brought.[22] Since its passage, the federal courts have struggled to define its scope.[23] The phrases, "[a] civil action" and "under color of legal authority," have raised the question whether the statute should be interpreted literally, such that section 1391(e) can be relied upon to effect in personam jurisdiction in virtually any civil action against a federal official, or whether it was only intended to supply jurisdiction in cases involving review of administrative acts and relief in the nature of mandamus.[24]

In order to fully understand the complexities of this problem, it is necessary to examine the circumstances surrounding the statute's

---

[17] 74 F.R.D. 382, 398–400 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979). The court pursuant to 28 U.S.C. § 1292(b) moved for an interlocutory appeal because its "resolution of the difficult jurisdictional question . . . involve[d] a controlling question of law as to which there [was] substantial ground for difference of opinion." *Id.* at 402. Twenty-five of the defendants joined in the appeal. Brief for Appellants, *supra* note 12, at 3 n.1.

[18] 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[19] *Id.* at 149–51.

[20] Act of Oct. 5, 1962, Pub. L. No. 87-748, §§ 1(a), 2, 76 Stat. 744. For the complete text of the statute, see note 13 *supra*. The first part expanded the subject matter jurisdiction of the federal district courts, outside of Washington, D.C., to include mandamus actions against federal employees, officials and agencies. 28 U.S.C. § 1361 (1976).

[21] 28 U.S.C. § 1391(e) (1976).

[22] *Id.* Service of process upon the United States or an officer or agency of the United States is governed by Rule 4(d)(4) and 4(d)(5) of the Federal Rules of Civil Procedure. Under Rule 4(f), however, such service of process is limited to the territorial limits of the state unless otherwise provided by statute or rules. The passage of section 1391(e) allowed for the disregard of the territorial limits of the state.

[23] *Compare* Blackburn v. Goodwin, 608 F.2d 919 (2d Cir. 1979) *with* Briggs v. Goodwin, 569 F.2d 1 (D.D.C. 1977), *cert. granted sub nom.* Stafford v. Briggs, 439 U.S. 1113 (1979).

[24] 28 U.S.C. § 1391(e) (1976). It is clear that section 1391(e) was not intended to apply to personal damage actions based on a purely private wrong, *i.e.*, an automobile accident caused by a postal employee on his way home from work. 577 F.2d 153. *See* note 112 *infra* and accompanying text.

introduction and its evolution into its present form. The legislation was first introduced by Idaho Congressman Homer Budge in 1958.[25] At that time, if someone wanted to compel a federal officer to perform an official duty, he had to travel to Washington, D.C. to initiate a mandamus action.[26] This inconvenience was the result of an "historic accident" by which only the federal courts of Washington, D.C. had original subject matter jurisdiction to issue writs of mandamus.[27] The problem was exacerbated by the doctrine of indispensable parties[28]—attempts to obtain declaratory or injunctive relief against a federal official would normally be dismissed for failure to join a superior officer stationed in Washington.[29] Persons residing outside

---

[25] H.R. 10892, 85th Cong., 2d Sess. (1958).

[26] 577 F.2d at 151.

[27] H.R. REP. NO. 1936, 86th Cong., 2d Sess. 2 (1960). *See* S. REP. NO. 1992, 87th Cong., 2d Sess. (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 2784; H.R. REP. NO. 536, 87th Cong., 1st Sess. (1961). *See also* 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1107 (1969); Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and Nonstatutory Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

The prohibition against federal district courts outside Washington, D.C. issuing writs of mandamus has its roots in the early decision of *Marbury v. Madison* which established that the Supreme Court did not have the power to issue a writ of mandamus to a federal official. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). A similar result was later reached in a case which considered the lower federal courts' mandamus power. McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813).

The restrictions on the federal courts' subject matter jurisdiction to issue writs of mandamus was relaxed slightly in *Kendall v. United States*, where the court held that the federal courts in the District of Columbia did have original jurisdiction to issue writs of mandamus. Kendall v. United States, 37 U.S. (12 Pet.) 524, 615–26 (1838). The predominant reason for that holding was that the courts in Washington, D.C. were not only federal courts but also the inheritors of the common law powers of the courts of Maryland, from which the District of Columbia was carved. 37 U.S. at 618–22. *See* Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103 (1801).

Congress, prior to 1962, had enacted a few statutes which granted mandamus power to the district courts in particular areas. *See, e.g.*, 15 U.S.C. § 49 (1914) (to enforce investigatory powers of Federal Trade Commission); 47 U.S.C. § 11 (1934) (to enforce orders of Federal Communications Commission). For a more complete list, see Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts*, 38 COLUM. L. REV. 903, 905 n.13 (1938). Of course, all federal courts could issue writs of mandamus ancillary to jurisdiction acquired from an independent source. Byse & Fiocca, *supra*, at 311–12.

[28] *See* FED. R. CIV. P. 19(a) and cases cited in 3 K. DAVIS, ADMINISTRATIVE LAW § 28.08 (1958 & Supp. 1965).

[29] 577 F.2d at 151.

of the District of Columbia, unable to obtain proper venue[30] or effect service of process[31] on out of state parties, were effectively denied judicial review of the conduct of federal government officials.[32] In order to correct this procedural inequity, Congressman Budge developed a plaintiff-oriented venue and service of process statute, House of Representatives Bill 10892,[33] which provided that civil actions against officials of the federal government sued in their official capacity could be brought in the district in which the plaintiff resided.[34] The legislation further provided that service of process could be made upon the local United States Attorney.[35]

H.R. 10892 was reintroduced during the next session of Congress as H.R. 10089.[36] It was sent to the Committee on the Judiciary who requested and received opinions regarding the legislation from various agencies, most notably the Judicial Conference of the United States and the Department of Justice. The Judicial Conference approved the bill in principle but recommended that the venue be broadened "to include the district in which the cause of action arose or in which the property involved in the action [was] situated."[37] The Department of Justice, however, was far less enthusiastic about the legislation. In a letter authored by Deputy Attorney General Lawrence Walsh, the Department emphasized two major problems with the bill.[38] First, the letter explained that the type of action de-

---

[30] Prior to 1962, venue in civil actions brought against federal officers or agencies was determined by 28 U.S.C. § 1391(b) (1976) because such suits usually involved a federal question. At that time, section 1391(b) stated that: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." Act of June 25, 1948, ch. 646, 62 Stat. 935. This section, however, was amended in 1966 to provide for venue also in the district where the claim for relief arose. Act of Nov. 2, 1966, Pub. L. No. 89-714, §§ 1, 2, 80 Stat. 1111. Section 1391(e) now supersedes section 1391(b) in regard to civil actions against federal officers, employees or agencies acting in their official capacity or under color of legal authority.

[31] *See* note 22 *supra*.

[32] *E.g.*, McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961); Lemmon v. Social Sec. Admin., 20 F.R.D. 215 (D.C.S.C. 1957).

[33] H.R. 10892, 85th Cong., 2d Sess. (1958).

[34] *Id.*

[35] *Id.*

[36] H.R. 10089, 86th Cong., 2d Sess. (1960).

[37] Letter from Warren Olney III, Director of the Judicial Conference of the United States, to Representative Emanuel Celler, Chairman of the Committee on the Judiciary, May 3, 1960, *reprinted in* H.R. REP. NO. 1936, *supra* note 27, at 5.

[38] Letter from Lawrence E. Walsh, Deputy Attorney General to Representative Emanuel Celler, Chairman of the Committee on the Judiciary (undated), *reprinted in* H.R. REP. NO. 1936, *supra* note 27, at 5–6 [hereinafter cited as Walsh Letter].

scribed in H.R. 10089, *i.e.*, against an officer in his *official capacity*, was often a mandamus action and, even under the new legislation, such suits could only be brought in Washington, D.C.[39] Although Representative Budge's legislation had solved the venue and service of process problems presented by the doctrine of indispensable parties, it had failed to correct the jurisdictional (subject matter) limitation prohibiting mandamus actions in the local federal courts.

Second, the letter noted that the bill, by stating "against an officer . . . in his *official capacity*,"[40] would not cover certain types of suits which were occasionally brought against a government official.[41] These were suits which, although pertaining to official conduct, were brought against an officer in his individual capacity.[42] The Department was apparently referring to the legal fiction created by the Supreme Court's decision in *Ex Parte Young*.[43] That fiction made possible suits against the government that had been traditionally barred by the doctrine of sovereign immunity.[44] By holding that an official who acts beyond the scope of his authority is stripped of his official capacity, the Supreme Court allowed suits, in essence against the United States, to be brought nominally against government officials.[45]

The letter contained two examples of the type of lawsuit that would not be covered by the proposed legislation.[46] The first was

---

[39] *Id.* at 6.

[40] H.R. 10089, 86th Cong., 2d Sess. (1960).

[41] Walsh Letter, *supra* note 38, at 6.

[42] *Id.*

[43] 209 U.S. 123 (1908). The Court in *Ex Parte Young* created this "stripping" fiction in the following passage:

> If the act which the state Attorney General 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.

Id. at 159–60. Although *Young* was an action to enjoin a state official, it also has been applied to federal officials. Larsen v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

[44] WRIGHT, LAW OF FEDERAL COURTS, 207–08 (3d ed. 1976).

[45] 209 U.S. at 159–60.

[46] Walsh Letter, *supra* note 38, at 6.

The Justice Department also pointed out a deficiency in the service of process. *Id.* This was corrected in the revised bill, H.R. 12622, by providing that the summons and complaint could be mailed beyond the territorial limits of the district. H.R. REP. NO. 1936, *supra* note 27, at 4. In view of the substantial deficiencies found in the legislation, the department declined to recommend its passage. Walsh Letter, *supra* note 38, at 6.

clearly a reference to the kind of suit permitted by the *Ex Parte Young* doctrine.[47] The second, however, contained confusing language which subsequently reappeared in the congressional reports and which ultimately became a major factor in the First Circuit's holding.[48] This example described suits in which damages are sought from an officer "personally" for actions allegedly "in excess of his official authority" but apparently taken "in the course of his official duty."[49]

In response to the criticism of H.R. 10089, the bill was revised and a new draft, H.R. 12622,[50] was introduced. The new legislation incorporated the broader venue provisions which had been suggested by the Judicial Conference.[51] More significantly, H.R. 12622 contained two major additions designed to correct the deficiencies described by the Department of Justice.[52] First, a new section was added in order to correct the mandamus problem.[53] This section, now 28 U.S.C. § 1361, granted all federal district courts original subject matter jurisdiction to "compel an officer or employee of the United States or any agency thereof to perform his duty."[54] The second significant addition was the phrase "or under color of legal authority."[55] H.R. 12622 would now be applicable to an officer "acting in his official capacity or under color of legal authority."[56] It appears that the phrase was included to encompass suits which Deputy Attorney General Walsh had described as brought against a federal official in his individual capacity.[57]

---

[47] *Id.*; *see* 209 U.S. at 159–60.

[48] Walsh Letter, *supra* note 38, at 6; S. REP. NO. 1992, *supra* note 27, at 3; H.R. REP. NO. 536, *supra* note 27, at 3; *see* 477 F.2d at 153–54.

[49] Walsh Letter, *supra* note 38, at 6.

[50] H.R. 12622, 86th Cong., 2d Sess. (1960).

[51] *Id.*

[52] H.R. 12622, 86th Cong. 2d Sess. (1960); H.R. REP. NO. 1936, *supra* note 27, at 9.

[53] H.R. 12622, 86th Cong. 2d Sess. (1960); H.R. REP. NO. 1936, *supra* note 27, at 9.

[54] H.R. 12622, 86th Cong. 2d Sess. (1960).

[55] *Id.*

[56] *Id.*

[57] H.R. REP. NO. 1936, *supra* note 27, at 3–4. The House Report explained the inclusion of the phrase "or under the color of legal authority" 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 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 an individual only to circumvent what remains of the doctrine of sovereign immunity.

Id. See H.R. REP. NO. 536, *supra* note 27, at 3–4 (similar language repeated).

The Committee on the Judiciary reviewed H.R. 12622 and recommended it favorably to the House of Representatives where it was passed unanimously.[58] Unfortunately, Congress adjourned before the Senate could take action.

During the next session of Congress, H.R. 1960,[59] which was identical to H.R. 12622, was passed unanimously by the House of Representatives.[60] The legislation was then sent to the Senate where its Committee on the Judiciary received a new evaluation from the Department of Justice.[61] In a critique, authored by Deputy Attorney General Byron White, the Department continued to find fault with the legislation. The letter began by questioning the wisdom of expanding the subject matter jurisdiction of the district courts to include mandamus but went on to outline certain improvements the Department deemed essential.[62] First, the Department criticized the language of section 1361 as being too broad and suggested that the wording refer specifically to the "mandamus" power.[63] The final wording of section 1361 reflected this suggestion.[64]

The Department also suggested that since section 1391(e) was intended to facilitate the review of official acts,[65] it should "be tied" to the Administrative Procedure Act which was the congressionally established vehicle for review of such conduct.[66] In so doing, the Department contended, there would be "less confusion" about the scope of section 1391(e) and suits for money judgments against offi-

---

[58] 106 CONG. REC. 18405–06 (1960). The Department of Justice never took an official position on H.R. 12622 in spite of the fact that it was requested to do so at the Hearings. H.R. REP. NO. 1936, *supra* note 27, at 4.

[59] H.R. 1960, 87th Cong., 1st Sess. (1961).

[60] H.R. 1960, 87th Cong., 1st Sess., 107 CONG. REC. 12157 (1961).

[61] Letter from Byron R. White, Deputy Attorney General to Senator James Eastland, Chairman, Committee on the Judiciary (Feb. 28, 1962), *reprinted in* S. REP. NO. 1992, *supra* note 27, at 5–7 *also reprinted in* [1962] U.S. CODE CONG. & AD. NEWS, *supra* note 27, at 2788–90 [hereinafter cited as the White Letter].

[62] White Letter, *supra* note 61, at 5–7.

[63] *Id.* at 6.

[64] 28 U.S.C. § 1361 (1976).

[65] H.R. REP. NO. 1936, *supra* note 27, at 1. *See* S. REP. NO. 1992, *supra* note 27, at 2 (similar language repeated); H.R. REP. NO. 536, *supra* note 27, at 1.

[66] White Letter, *supra* note 61, at 6. The department suggested that the following language be used in section 1391(e):

> (e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, § 10; 5 U.S.C. § 1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.

Id. at 7.

cers would unquestionably be eliminated from its purview.[67] This suggestion was made in the context of the Department's observation that section 1391(e) "covered an entirely different subject" from section 1361.[68] Although the Committee did not adopt this suggestion,[69] it did make other minor changes advocated by the Department.[70] The Committee recommended H.R. 1960, as amended, to the Senate. On September 20, 1962, the Venue and Mandamus Act was passed by both the House and the Senate and signed into law on October 5th by President Kennedy.[71] The statute has only been amended once to change the wording in section 1391(e) from "each defendant" to "a defendant," and to add a sentence which would allow for joinder of non-federal third persons.[72]

---

[67] *Id.* at 6.

[68] *Id.*

[69] *See* notes 101–07 *infra* and accompanying text.

[70] S. REP. NO. 1992, *supra* note 27, at 1, 2, 4. The Justice Department believed that the purpose of the legislation would be better served by making venue proper where the cause of action arose or where the property in the action was situated. The committee incorporated the suggestion so that the final version of section 1391(e) allowed venue where (1) a defendant 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 there is no real property involved. *Id.*

The department had also suggested that the following be added to the end of 1391(e): "This Act shall not apply to proceedings brought with respect to Federal Taxes." *Id.* at 7. The committee responded by adding the language "except as otherwise provided by law." *Id.* at 1, 2, 4.

[71] When President Kennedy signed the Mandamus and Venue Act, he made the following statement:

> I [h]ave today signed H.R. 1960 which corrects an historic anomaly in the jurisdiction of the United States courts. While the bill creates no new remedies, it will extend to all district courts the same jurisdiction heretofore enjoyed solely by the District Court for the District of Columbia to hear actions in the nature of mandamus against Government officials. Thus it will no longer be necessary for citizens throughout the country to come to the District of Columbia to maintain actions against government officials.

1962 PUB. PAPERS 738. The President's comments reflect his interpretation that Congress intended to limit section 1391(e) to actions in the nature of mandamus.

After section 1391(e) was passed, Deputy Attorney General Katzenbach sent a memorandum to the United States Attorneys to explain the applicability of section 1391(e):

> The venue provision is applicable to suits against Government officials and agencies for injunctions *and damages* as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take actions beyond the scope of his legal authority although purporting to act in his official capacity.

Memorandum from Deputy Attorney General Katzenbach to United States Attorneys (Jan. 18, 1963) (emphasis added). Brief for the United States, at 49 n.34, Colby V. Driver, No. 78-303 (U.S. 1979).

While this memorandum is not part of the legislative history, it is interesting to note the Deputy Attorney General's broad interpretation of the statute.

[72] Act of Oct. 21, 1976, Pub. L. No. 94-574, § 3, 90 Stat. 2721.

The Supreme Court has never directly faced the issue of the intended scope of section 1391(e). In *Schlanger v. Seaman*,[73] however, the Court observed in a footnote, that the words "a civil action" in the statute should not be construed to encompass a habeas corpus action.[74] It is not clear whether habeas corpus was excluded from the purview of section 1391(e) because of the special nature of that action or because the legislative history indicated that the phrase "a civil action" should not be construed literally.[75]

The circuit courts have had occasion to interpret the legislative history of section 1391(e) and have arrived at different conclusions. The Court of Appeals for the District of Columbia, in *Briggs v. Goodwin*,[76] reasoned much like the First Circuit in *Driver*. *Briggs* involved a personal damage action brought in Washington, D.C. against federal officials in their individual capacities for alleged constitutional violations. Since some of the defendants had been served in Florida by certified mail, the district court dismissed the case for improper venue and insufficiency of process.[77] The appellate court reversed, holding venue and process to be proper under section 1391(e).[78] It further held, like the *Driver* court, that such an interpretation of section 1391(e) did not violate the due process clause of the fifth amendment.[79]

The Second Circuit has construed the application of section 1391(e) far more narrowly. In *Natural Resources Defense Council, Inc. v. Tennessee Valley Authority*,[80] suit was filed in the southern district of New York by environmental protection organizations to enjoin certain actions of the T.V.A. The Authority's motion to dismiss for improper venue was denied[81] and an appeal was taken. Judge Friendly, in dictum, stressed that sections 1361 and 1391(e) "must be read together."[82] He observed that section 1391(e) was not intended

---

[73] 401 U.S. 487 (1971).

[74] *Id.* at 490 n.4.

[75] *Id.*

[76] 569 F.2d 1 (D.C. Cir. 1977), *cert. granted sub nom.* Stafford v. Briggs, 439 U.S. 1113 (1979).

[77] Briggs v. Goodwin, 384 F. Supp. 1228 (D.D.C. 1974).

[78] 569 F.2d at 5. *Cf.* Wu v. Keeney, 384 F. Supp. 1161 (D.D.C. 1974) (although section 1391(e) does not apply to former federal officials, it does apply to defamation suits against present federal officials). The circuit court in *Briggs* admitted that there were "divergent views on the relation of section 1391(e) to damage actions against federal officials." 569 F.2d at 5. For a sampling of such cases, see 569 F.2d at 5–6 n.43.

[79] 569 F.2d at 8–10.

[80] 459 F.2d 255 (2d Cir. 1972).

[81] 340 F. Supp. 400, 403–06 (S.D.N.Y. 1971).

[82] 459 F.2d at 258.

to apply to all civil actions against federal officials but only to those suits which previous to its enactment because of certain existing limitations on subject matter jurisdiction and venue could only be brought with assurance in Washington, D.C.[83] Likewise, in *Blackburn v. Goodwin*,[84] the Second Circuit interpreted the legislative history and concluded that section 1391(e) was not intended to supply jurisdiction in a personal damage action against a federal official.[85] This interpretation of section 1391(e) is in direct conflict with the position taken by the court of appeals in *Driver*.

The First Circuit in *Driver* began its analysis by considering the application of section 1391(e) to former officials.[86] The court concluded that, based on the plain meaning rule of statutory construction, section 1391(e) was only intended to effect in personam jurisdiction over present officials and employees of the federal government.[87] The statute provided, "[a] civil action in which 'a defendant *is* an officer or employee.' "[88] On its face, therefore, section 1391(e) did not include former officials. The court noted, however, that " 'deference to the plain meaning rule should not be unthinking nor blind.' "[89] Hence, the court felt it was necessary to examine the legislative history. The court held that, since the plain meaning of the statute did not bring about either an absurd result or a result that was clearly at variance with congressional policies, such plain meaning must prevail.[90]

---

[83] *Id.* at 258–59.

[84] 608 F.2d 919 (2d Cir. 1979).

[85] *Id.* at 925–26.

[86] 577 F.2d at 149–51. The only defendants who were government employees at the time of service of process were Richard Helms, James Schlesinger, William Colby, Cord Meyer, Richard Ober, Vernon Walters and Clarence Kelley. Driver v. Helms, 74 F.R.D. 382, 387 n.1 (D.R.I. 1977), *aff'd in part, rev'd in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted sub nom.* Colby v. Driver, 439 U.S. 1113 (1979).

[87] 577 F.2d at 150–51.

[88] *Id.* at 150 (emphasis by court) (quoting 28 U.S.C. § 1391(e) (1976)).

[89] 577 F.2d at 150 (quoting Massachusetts Financial Servs., Inc. v. Securities Investor Protection Corp., 545 F.2d 754, 756 (1st Cir. 1976).

[90] 577 F.2d at 150. The appellate court rejected the district court's contention that if a former official was not covered by section 1391(e), such an official could defeat an action against him by merely resigning. Judge Coffin stressed that by resigning an official would not escape liability, but merely prevent the plaintiff from bringing the action in the plaintiff's district. He could not imagine a career government official resigning for so little gain. *Id.* The court also rejected the district court's reasoning that former officials had to be included under section 1391(e) in order to effectuate the purpose of the legislation. Judge Coffin was not convinced "that Congress meant section 1391(e) to provide a net that could draw everyone connected with a governmental action into litigation in a particular district." *Id.*

The major issue before the court was whether section 1391(e) should be relied upon to effect in personam jurisdiction in a suit for damages against a federal official sued in his individual capacity.[91] Initially, it was noted that section 1391(e) simply states " '[a] civil action' " without any words of limitation.[92] Since *Driver* involved a " 'civil action' " and the defendants were alleged to have acted " 'under color of legal authority,' " the case fell within the literal terms of the statute.[93] Second, the Court pointed to the legislative history of the statute. Although acknowledging that section 1391(e) was originally intended to provide jurisdiction for certain types of actions, the court concluded that, by the time the legislation was enacted, "at least some of the members of [the] subcommittee did not want the bill limited to [such] a narrow purpose."[94] Judge Coffin supported this finding by highlighting certain dialogues from the hearings which indicated that a few committee members contemplated section 1391(e) being applied to any civil suit against government personnel arising out of their employment.[95]

The First Circuit's reliance on selected exchanges from the hearing is somewhat troubling for there are other exchanges which would support a contrary conclusion. For example, Representative Budge clearly stated that he had "no intention of bringing tort actions against individual government employees . . . [but only intended] to have review of their official actions take place in the United States District Court where the determination was made."[96] Congressman Dowdy

---

[91] *See id.* at 151.

[92] *Id.* at 151 (quoting 28 U.S.C. § 1391(e) (1976)).

[93] *Id.* at 151–52 (quoting 28 U.S.C. § 1391(e) (1976)).

[94] *Id.* at 152.

[95] *Id.* at 152–53. The first exchange cited by the court was one between Congressman Dowdy and Mr. Drabkin, the counsel for the subcommittee. While Mr. Drabkin stated that the legislation dealt with mandamus and petitions for review, Congressman Dowdy responded that he hoped that it would not be so limited. *Id.* at 152. *See Hearings on H.R. 10089 Before the Committee on the Judiciary*, 86th Cong., 2d Sess. 32 (1960) (unpublished) [hereinafter cited as *Hearings*]. Because these hearings were unpublished, many decisions regarding section 1391(e) were made without reference to them. *See* 577 F.2d at 152 n.16.

The second dialogue cited involved Mr. MacGuineas, a representative of the Department of Justice, and Congressmen Dowdy and Whitener. Congressman Dowdy suggested that perhaps section 1391(e) should be applied to all suits, and Congressman Whitener replied that he did not think "there was any doubt" about such a broad application. *Id.* at 152. *Hearings, supra*, at 53–54. The final dialogue involved Mr. MacGuineas and Congressman Whitener and was one in which Mr. MacGuineas indicated that section 1391(e) might be used in a slander suit against a congressman. In response, Congressman Whitener indicated that he thought that the bill would be properly applied in such situations. 577 F.2d at 152–53; *Hearings, supra*, at 55–58.

[96] *Hearings, supra* note 95, at 102.

concluded at one point that he did not think that section 1391(e) would be applicable to a suit for money damages against an official in his individual capacity.[97] It is apparent from these excerpts that little can be discerned about congressional intent by examining isolated comments. The Supreme Court has recognized that remarks made during legislative debate should be accorded "little weight" unless made by those who have prepared or drafted the legislation.[98]

Looking at the hearings in their totality, it appears that Congress did not intend general application of the statute, but rather enacted the statute to correct a particular "mischief."[99] This interpretation is buttressed by the House and Senate Reports which serve as summaries of the relevant conclusions established during the hearings.[100]

The court also cited passages from Deputy Attorney General White's letter as support for its broad interpretation of section 1391(e).[101] The statement that section 1391(e) "covered an entirely different subject" was apparently construed by the court as the Justice Department's acknowledgement that section 1391(e) was no longer tied to section 1361 and should therefore have broad application.[102] Judge Coffin expressly took note of the warning from the Department that if section 1391(e) was not clarified it might be construed to apply to "suits for money judgments against officers."[103] He inferred that since the Committee did respond to other suggestions in the Department's letter but did not respond to this particular warning, that such inaction could be construed as the Committee's affirmative choice to have section 1391(e) so applied.[104]

By focusing on a narrow passage from the Justice Department's letter, the First Circuit appears to have misconstrued the letter's overall meaning. The White letter was not advocating the broaden-

---

[97] *Hearings*, *supra* note 95, at 87.

[98] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203–04 n.24 (1976).

[99] *Cf.*, Liberation News Serv. v. Eastland, 426 F.2d 1379, 1383 (2d Cir. 1970) (section 1391(e) not intended to effect in personam jurisdiction over members of legislative branch).

[100] The House and Senate Reports narrowly define the purpose of the Mandamus and Venue Act as follows:

> The 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.

H.R. REP. NO. 1936, *supra* note 27, at 1. Similar language is repeated in S. REP. NO. 1992, *supra* note 27, at 2; H.R. REP. NO. 536, *supra* note 27, at 1.

[101] 577 F.2d at 153.

[102] *Id.*

[103] *Id.* *See* White Letter, *supra* note 61, at 6.

[104] 577 F.2d at 153–54.

ing of the scope of section 1391(e) but was merely suggesting what it considered a more appropriate limitation on its application.[105] Further, the court's inference that the Committee's inaction regarding the Department's suggestion was indicative of affirmative choice is not sound. Inaction is susceptible of many interpretations and, therefore, is of questionable value. For example, the Committee's rejection of the Department's suggestion could be construed as evidence of their continued intention to have sections 1361 and 1391(e) read together.[106]

Another justification advanced by the First Circuit was the fact that section 1391(e) was amended in 1976 to allow for the joinder of non-federal third parties.[107] The court reasoned that such amendments would not have been necessary if the statute were only applicable to mandamus actions.[108] Although this reasoning, like that derived from the White letter, would support a holding that section 1391(e) has a slightly broader application than strict mandamus, it does not provide support for holding that Congress intended the statute to be applicable to all civil actions against federal personnel.

A further contention of the court was that by adding "or under color of legal authority"[109] to the statute, Congress was manifesting its intention to have the statute "reach a variety of causes of action."[110] Judge Coffin concluded that the only suits which would not

---

[105] White Letter, *supra* note 61, at 6. The Department's letter recommended that the statute be linked to the Administrative Procedure Act. This would clearly preclude section 1391(e)'s application to individual damage suits brought against government officials.

[106] It should be noted that although the contents of the White letter from the Department of Justice can be enlightening, it does not reflect legislative intent.

[107] 577 F.2d at 154. *See* note 72 *supra* and accompanying text.

[108] 577 F.2d at 154. Section 1391(e) was amended to eliminate the confusion which had developed over whether the phrase "*each* defendant is an officer or employee of the United States" in 28 U.S.C. § 1391(e), should be construed literally. Such an issue was usually raised in a suit for injunctive relief as in Powelton Civic Home Owners Ass'n v. Department of Hous. & Urban Dev., 284 F. Supp. 809 (E.D. Pa. 1968). In *Powelton*, the plaintiffs, who were affected by a proposed urban renewal project, requested, among other things, a preliminary injunction restraining the federal defendants from distributing federal funds. Jurisdiction over the officials was premised on section 1391(e). This was exactly the type of suit in which section 1391(e) was intended to supply jurisdiction. It was a suit which could now be brought locally rather than in Washington, D.C. because section 1391(e) supplied jurisdiction. The defendants, however, attempted to defeat the application of section 1391(e) by arguing that since the plaintiffs had joined the Philadelphia Re-Development Authority, a local non-federal agency, as a party defendant, that the language of section 1391(e) ("*each* defendant is an officer or employee of the United States") precluded the use of that statute. 284 F. Supp. at 833. The court, in rejecting that argument, held that it would look not only to the literal meaning of the statute but also to its spirit and intent. *Id.*

[109] 28 U.S.C. § 1391(e) (1976).

[110] 577 F.2d at 153.

be within the purview of section 1391(e) would be "personal damage action[s] arising from purely private wrongs."[111]

The House and Senate Reports' explanation of the phrase, "under color of legal authority," cannot be reconciled with that of the First Circuit. The Reports clearly state that the phrase was added to the statute in order to bring within its scope "those cases where an action [was] 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."[112] The Reports further explained that these actions were "in essence against the United States but . . . brought against the officer or employee as an individual *only to circumvent what remain[ed]* of the *doctrine of sovereign immunity*."[113] Although the court acknowledged the pertinence of this passage, it concluded that it did not clearly preclude the result reached.[114]

The most persuasive authority cited by the First Circuit in support of its position was the following statement found in both the House and Senate Reports: " 'The 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.' "[115] This statement would appear to reflect an acknowledgment by Congress that section 1391(e) would provide venue in an action to obtain money damages from a federal official. The sentence on its face, however, is so contrary to the rest of the statements in the Reports, that one is compelled to seek an interpretation which would more logically justify its presence as a part of the whole. The essence of this sentence first appeared in the letter written by Deputy Attorney General Walsh on behalf of the Department of Justice.[116] He was describing one type of suit which would not be covered under Representative Budge's original legislation.[117] The sentence was subsequently incorporated into the Reports as a situation in which the inconvenient

---

[111] *Id.*

[112] H.R. REP. NO. 1936, *supra* note 27, at 3–4. Similar language is found in H.R. REP NO. 536, *supra* note 27, at 4. *See* note 57 *supra* and accompanying text.

[113] H.R. REP. NO. 1936, *supra* note 27, at 4 (emphasis added). Similar language is repeated in H.R. REP. NO. 536, *supra* note 27, at 4.

[114] 577 F.2d at 154.

[115] *Id.* at 153–54 (emphasis added) (quoting H.R. REP. NO. 1936, *supra* note 27, at 3); *see* S. REP. NO. 1992, *supra* note 27, at 3; H.R. REP. NO. 536, *supra* note 27, at 3.

[116] Walsh Letter, *supra* note 38, at 6.

[117] *Id. See* notes 46–49 *supra* and accompanying text.

venue problem arose.[118] An interpretation of this sentence which is more aligned with the content of the rest of the Reports is that which was proposed by petitioners in their brief to the Supreme Court,[119] and which is generally supported by the hearings.[120] The position asserted was that the damage suits referred to in the Reports were not personal damage actions as in *Driver*, but rather those in which a government official was compelled to pay monies from the government treasury which were owed to the plaintiff, *i.e.*, improperly collected taxes.[121] This explanation is reinforced by a later statement in the report which clearly indicated that regardless of the context in which the venue problem arose, section 1391(e) was applicable only to suits "which [were] in essence against the United States."[122]

When considering the legislative history of the Mandamus and Venue Act of 1962, the following conclusions are apparent. The purpose of the Act was to facilitate the review of administrative action by local federal courts.[123] In order to accomplish that objective, the statute granted subject matter jurisdiction in mandamus actions to the local federal courts and broadened the venue and service of process provision regarding federal employees, officials and agencies.[124] Section 1391(e) was intended to supply jurisdiction to suits which seek to enjoin a government official or compel him to perform a duty, which might involve, *inter alia*, the return of monies improperly held. What seems to underlie the First Circuit's holding is their contention that although the legislative history does not indicate that section 1391(e) was intended to apply to a *Driver* fact pattern, there is nothing in that history to preclude such an application.[125] Admittedly, the Re-

---

[118] S. REP. NO. 1992, *supra* note 27, at 3; H.R. REP. NO. 536, *supra* note 27, at 3; H.R. REP. NO. 1936, *supra* note 27, at 3.

[119] Brief for Petitioners at 18, Colby v. Driver, No. 78-303 (U.S. 1979).

[120] *Hearings*, *supra* note 95, at 87. When Judge Albert Maris, Senior Circuit Judge of the Third Circuit, representing the Judicial Conference, was questioned about suits against an official for money damages, he explained that the context in which such a situation might arise was in a suit against a collector who had monies which were improperly collected. *Id.*

[121] *See* Clackamas Cty. v. McKay, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). Other examples of such relief are actions to compel increased pay for federal employees, National Treasury Emp. Union v. Nixon, 429 F.2d 587 (D.C. Cir. 1970); to pay servicemen their reenlistment bonuses, Coala v. United States, 404 F. Supp. 1101 (D. Conn. 1975); or to recover benefits under a veteran's insurance policy, Kapourelos v. United States, 306 F. Supp. 1034 (E.D. Pa. 1969), *aff'd*, 446 F.2d 1181 (3d Cir. 1971).

[122] S. REP. NO. 1992, *supra* note 27, at 3; H.R. REP. NO. 536, *supra* note 27, at 3; H.R. REP. NO. 1936, *supra* note 27, at 3.

[123] S. REP. NO. 1992, *supra* note 27, at 1–2; H.R. REP. NO. 536, *supra* note 27, at 1–2; H.R. REP. NO. 1936, *supra* note 27, at 1–2.

[124] S. REP. NO. 1992, *supra* note 27, at 1–2; H.R. REP. NO. 536, *supra* note 27, at 1–2; H.R. REP. NO. 1936, *supra* note 27, at 1–2.

[125] 577 F.2d at 154. *See* text accompanying note 114.

ports do not contain an express exclusion of suits for money damages against officials in their individual capacities, however such a result is implicit because of the Congressional Reports' extensive explanation of the particular problems which the Act intended to rectify.[126] It seems clear that Congress intended section 1391(e) to have a limited application. The conclusion that the statute was not intended for a suit such as *Driver* is further strengthened by the circumstances existing at the time the legislation was drafted and finally enacted. During that period, 1958-1962, a suit against an official for money damages was not even a recognizable cause of action in the federal courts.[127]

Since the First Circuit found that section 1391(e) was properly relied upon to effect in personam jurisdiction in such a personal damage action, it was then compelled to resolve the question of whether such a grant of jurisdiction was violative of the due process clause of the fifth amendment.[128] Under Article III, section 1 of the Constitution, Congress has the power to create as few federal district courts as

---

[126] S. REP. NO. 1992, *supra* note 27, at 1–4; H.R. REP. NO. 536, *supra* note 27, at 1–4; H.R. REP. NO. 1936, *supra* note 27, at 1–4.

[127] Before 1971, an action to recover compensatory damages from a federal official had to originate in state court. Since such actions were not considered to raise federal questions, they were dismissed from federal court for lack of jurisdiction. 28 U.S.C. § 41(1) (1976). In *Bell v. Hood*, the Supreme Court held that a claim based on a violation of the fourth amendment would sustain federal jurisdiction. Bell v. Hood, 327 U.S. 678, 685 (1946). On remand, however, the district court held that when a federal official acts beyond his constitutional authority, he is acting in his individual capacity. Bell v. Hood, 71 F. Supp. 813, 817 (S.D. Cal. 1947). The result was that such causes of action would still be limited to state court. They could be, and often were, removed to federal court under 28 U.S.C. § 1442(a)(1) (1964).

A further problem was that prior to 1971 the federal courts were not vested with the authority to award money damages as a remedy for constitutional torts. Finally, the Supreme Court, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, held that acts beyond a federal agent's constitutional limitation would not change his federal status to that of private citizen. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971). It also held that a damage remedy was inferred in the Constitution. *Id.* at 396.

Bivens opened the door to the federal courts for the type of suit presented in *Driver*. The question arises, however, whether 28 U.S.C. § 1391(e) was intended to supply jurisdiction in such suits when they were generally non-existent in federal court at the time the legislation was being drafted (1958-1962). The Respondents argued that such suits were within the contemplation of the congressmen because they existed in state court and were on occasion, removed to federal court. Brief for Respondents, *supra* note 1, at 24–30.

[128] Before reaching the due process issue, the court considered appellant's argument that since § 1391(e), on its face, only referred to venue and service of process, it did not affect in personam jurisdiction and that jurisdiction would have to be established by some other mechanism. 577 F.2d at 155. The court, in rejecting that argument, reasoned that service of process was a vehicle by which the court obtained jurisdiction and therefore since the statute provided for nationwide service of process, it likewise affected jurisdiction. *Id.* at 155–56. The court held that when § 1391(e) was applicable, in personam jurisdiction was automatically established. *Id.* For cases that have held similarly, see id. at n.24.

it desires.[129] It is also well established that Congress can authorize a suit arising under federal law to be brought in any one of the inferior federal courts.[130] Congress has, on occasion, exercised its full powers and enacted statutes which allow for nationwide service of process and in doing so, created nationwide in personam jurisdiction. These statutes are the exception rather than the rule and are generally limited to areas where they are necessary in order to avoid multiple litigation, such as an interpleader action.[131] The general rule is that the in personam jurisdiction of the federal district court is bound by the jurisdictional limitations of the state in which it is located.[132] Although it is clear that Congress has extensive power in designing the federal judicial system, it is not clear what exact limitations the due process clause of the fifth amendment place on the exercise of that power.[133] Little has been written about the topic and while the Supreme Court has identified the issue, it has reserved decision.[134]

The court in *Driver* analyzed the due process issue in terms of territorial limits.[135] Their analysis was based on the basic premise that due process requirements are determined by geographical boundaries.[136] From that premise two due process standards have emerged. The Supreme Court held in *Milliken v. Meyer*[137] that, if a defendant is within the sovereign's territorial limits, then due process only requires that the defendant be given notice which is reasonably calculated to inform him of the pendency of the proccedings.[138] Later, in *International Shoe Co. v. Washington*,[139] the Court ruled that if a defendant is outside the sovereign's territory, then the " 'traditional notions of fair play and substantial justice' " require that the jurisdictional power be confined to those who have "minimum

---

[129] U.S. CONST. art. III, § I. Article III, section 1 states, in pertinent part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

[130] Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925). *See also* United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

[131] For a partial list of such statutes, see 2 MOORE'S FEDERAL PRACTICE §§ 4.32 (1), 4.33, 4.42 (1) n.27–44 (2d ed. 1979).

[132] FED. R. CIV. P. 4(f).

[133] It has been suggested that the reason these nationwide service of process statutes have not been subjected to significant challenges regarding the "reasonableness of requiring suit in a particular federal judicial district" is because the statutes were so narrowly drafted. Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WISC. L. REV. 9, 37.

[134] United States v. Scophony Corp., 333 U.S. 795, 804 n.13 (1948).

[135] 577 F.2d at 157.

[136] *Id.*

[137] 311 U.S. 457 (1940).

[138] *Id.* at 463.

[139] 326 U.S. 310 (1945).

contacts" with the sovereign.[140] In applying these standards to the federal sovereign, the First Circuit simply reasoned that since the defendant was within the United States and since section 1391(e) provided for nationwide service of process by certified mail, the defendants' rights to due process were not violated.[141]

The First Circuit's resolution of the due process issue follows well established case law. Underlying that issue, however, is a basic question, the answer to which remains unclear. That question is whether territorial considerations alone should determine the due process standards or whether "fairness" requires consideration of other factors as well. Looking for guidance at the line of cases which have defined the due process clause of the fourteenth amendment,[142] it appears that while territorial considerations have not been totally rejected,[143] they merely begin the inquiry which proceeds to an evaluation of "minimum contacts."[144] In the context of the fifth amendment, it appears that due process should limit the exercise of federal in personam jurisdiction to that which is fair and reasonable.[145] Defining that standard in the realities of the federal system should not, however, result in the same test which has been established for the exercise of state court jurisdiction—minimum contacts.[146] On the other hand, the fair and reasonable standard in the federal context should not be satisfied solely by the procedural due process requirement of notice.[147] While notice should be one of the factors considered, other factors worthy of consideration are: 1) the defendant's contacts with the forum; 2) the inconvenience to the defendant resulting from distant litigation; 3) the likelihood of mutliplicious litigation; 4) the probable situs of discovery; and, 5) the nature

---

[140] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457 (1940)).

[141] 577 F.2d at 157. Although the First Circuit acknowledged that a government official might be required to defend himself in a "far-away court," it contended that the defendant's protection against that unfairness was to have the suit transferred to a more convenient district pursuant to 28 U.S.C. § 1404(a). *Id.* It should be noted, however, that the protection accorded the defendant under 28 U.S.C. § 1404(a) is limited by the fact that the convenience of the plaintiff and the witnesses must also be considered in the judge's discretionary decision to transfer the case. 28 U.S.C. § 1404(a).

[142] *See* Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[143] *See* Hanson v. Denckla, 357 U.S. 235 (1958).

[144] *See* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203 (E.D. Pa. 1974).

[145] Foster, *supra* note 133, at 36.

[146] *See* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191 (E.D. Pa. 1974).

[147] *Id.* at 203.

of the activity upon which the litigation is based, especially in regard to the scope of the activity outside of the particular forum.[148]

Although the due process challenge to section 1391(e) is one of the issues before the Supreme Court, it will not be reached if the Court holds that Congress did not intend the application of section 1391(e) to a fact pattern as presented in *Driver*.[149] It is submitted that the legislative history requires such a holding considering the legislative debates, the House and Senate Reports and the circumstances at the time of the statute's enactment. It is apparent that the statute was only intended to facilitate the review of administrative acts which prior to its enactment could only be accomplished by filing suit in Washington, D.C. Further, the history implicitly indicates that an extension of the statute's scope beyond that narrow purpose is unwarranted.

Author's Note:

The United States Supreme Court, in Stafford v. Briggs, *48 U.S.L.W. 4138 (Feb. 20, 1980) (consolidating* Colby v. Driver), *reversed the First Circuit for reasons substantially identical to those contained in the above analysis. The Court held that 28 U.S.C. § 1391(e) does not apply to action for money damages brought against federal officials in their individual capacities. 48 U.S.L.W. 4138, 4142 (Feb. 20, 1980). The holding was based first, on the fact that sections 1361 and 1391(e) were enacted as one piece of legislation, The Mandamus and Venue Act of 1962. The Court concluded, therefore, that the "civil action[s]" mentioned in section 1391(e) must be limited by the mandamus actions as defined in section 1361.* Id. *at 4140. Second, the Court held that the legislative history compelled a narrow construction,* id. *at 4142, and, finally, that the inconvenient consequences which would result from a broad interpretation could not have been intended by Congress.* Id.

Marlene F. Cosentino

---

[148] *Id.* at 203-04.

[149] *See* Catholic Bishop of Chicago v. NLRB, 99 S. Ct. 1313 (1979). In this recent case the Court supported the general principle that a statute should be construed to avoid unnecessary constitutional decisions. *Id.* at 1322. Since "there is no clear expression of an affirmative intention [on the part] of Congress" to have § 1391(e) supply in personam jurisdiction to a *Driver* fact pattern, the constitutional issue should be avoided. *Id.* at 1320.