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# Continuing Work on the Civil Rules: The Summons

*Paul D. Carrington\**

The committee responsible for reform of the Civil Rules continues its work. The aim of this article is to illuminate its prospects for reform of one rule, Rule 4. Rule 4 is selected for discussion because it is important and because it is a candidate for substantial revision in the near future. I hope to evoke helpful comment that will enhance the quality of those revisions, while also perhaps shedding some light on the contemporary process of rule revision.

It is apparent, but deserves emphasis, that the Reporter does not speak for the Advisory Committee on the Civil Rules, much less for the Standing Committee, and still less, if that is possible, for the remainder of the hierarchy responsible for rulemaking, including the Judicial Conference, the Supreme Court, and the Congress. Of course, no warranty is tendered with these remarks, nor are they intended as significant legislative history.

## I. The Current Condition of Rule 4

Presently entitled "Service of Process", Rule 4 is one of the rules most frequently amended over the past fifty years.<sup>1</sup> One of its most recent amendments was by an Act of Congress that materially departed from the recommendation of the United States Supreme Court and of those lower in the hierarchy of rulemaking.<sup>2</sup> As a composite, the amendments to date are not an artistic success, and the present text of the Rule is not easy reading. Some of what seems to be said in some parts of the Rule seems to be taken back by later provisions.<sup>3</sup> There are perhaps too many subsections, and some of them may be unnecessary, such as the wordy provision bearing on the amendment of a summons.<sup>4</sup> Other provisions may be anachronistic, such as that requiring the federal summons in some circumstances to conform in style to that of the local state court.<sup>5</sup>

More fundamentally, Rule 4 reflects that at the time of its drafting, service of process was perceived primarily as a means of asserting jurisdiction over the person against whom a claim was made. More recent decades have witnessed the near universalization of "long-arm" legislation employing means other than personal service to establish the terri-

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\* Professor of Law, Duke University; Reporter, Advisory Committee on the Civil Rules, Judicial Conference of the United States. The draft Rule 4 appended to this article has in earlier iterations been the subject of suggestion, criticisms, and comments by many committee members, friends, and advisors, far too many to name them all. Helpful beyond any possible professional duty have been Robert Casad, Kevin Clermont, Edward Cooper, and Alvin Rubin.

1 Rule 4 has been amended in 1963, 1966, 1980, 1983, and 1987.

2 Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

3 Particularly troubling to the novice reader is the interrelation of subdivisions (e), (f), and (i).

4 FED. R. CIV. P. 4(h).

5 *Id.* at 4(b).

torial jurisdiction of federal as well as state courts. Increasingly, the chief function of service of the summons and complaint is to provide constitutionally required notice that a claim has been made.

Moreover, the Rule is weak in its dated recognition of the complexities encountered in litigation against defendants residing in other countries, taking no notice of the Hague Convention governing service of judicial documents in many countries important to federal litigants.

Thus, in a number of respects, Rule 4 is showing its age. Accordingly, the Civil Rules Committee has been adjured to rewrite the Rule from stem to stern to provide greater clarity and coherence. This suggestion may be adopted if the Committee makes recommendations responding to many of the other suggestions that are now pending. Suggestions have come from diverse sources, including a congressman, the Department of Justice, a private corporate counsel, a group of international lawyers, an organization of process servers, the Supreme Court, a circuit judge, and several law professors.

If the Rule is rewritten, it is not unlikely that its title will be changed. Although entitled "Service of Process," almost the entire text of the Rule bears on the service of a summons and complaint. Occasional provisions do apply to other process.<sup>6</sup> It would be an apparent help to the reader to isolate these occasional provisions in a separate Rule, perhaps Rule 4.1, entitled "Service of Other Process."<sup>7</sup>

## II. Encouraged Waiver of Service of the Summons and Complaint

Rule 4 as written reflects an expectation that the defendant will avoid service of the summons and complaint, if possible, in order to impede the progress of the action and impose hardship on the plaintiff. This assumption of adversarial hostility pervades not only the prescriptions of modes of service, but also the threatening text of the summons as prescribed in subdivision (a). In many cases, these assumptions remain valid, but for many cases, they are not: many defendants today have no possibility of evading the jurisdiction of the court and no good reason therefore to avoid notice of suit, and there is accordingly in such cases little reason to elevate hostility by commencing the action with the threatening language of the traditional subpoena. Thus, in many cases in which local service of a summons and complaint is not essential to the assertion of territorial jurisdiction over the person of the defendant, a knowledgeable defendant may be willing to receive the essential information without making a fuss, especially if the costs saved are the defendant's own.

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6 For example, a 1963 amendment added to subdivision (f) the clause: "and persons required to respond to an order of commitment for civil contempt may be served at the same places," to wit within the 100-mile "bulge." According to the Advisory Committee's Note, the aim was to overrule three decisions of district courts limiting the reach of the contempt power. See, e.g., *Graber v. Graber*, 93 F. Supp. 281 (D.D.C. 1950). See also FED. R. Civ. P. 4(f) advisory committee's note (1963).

7 For a proposed new Rule 4.1, see *infra* p. 757.

This last is the essential insight of the 1983 revision of Rule 4 by Congress<sup>8</sup> that is embodied in the present subparagraph (c)(2)(C). The provision was not recommended by the rulemakers, but was adapted by Congress from California law.<sup>9</sup> The rulemakers had recommended the use of certified or registered mail as a means of service.<sup>10</sup> Although this method has been in use for service abroad since 1963, at least if dispatched by the clerk of the court,<sup>11</sup> Congress was persuaded that too many return receipts are illegible to make this device suitable for general use.<sup>12</sup> While the provision enacted by Congress is often referred to as authorizing service of process by mail, this is misleading because neither the dispatch nor the receipt of the mail is effective to impose the jurisdiction of the court on the defendant or even to satisfy the notice requirements of Rule 4 because the assent of the defendant is required.<sup>13</sup>

The essential feature of this provision is the acknowledgment by the defendant to the plaintiff of receipt of the summons and complaint. The defendant is encouraged to make such an acknowledgment by the provision that a defendant failing to make a timely return shall bear the costs of regular service. This is a recognition of a duty of the defendant to avoid unnecessary costs of service. While the introduction of this technique into the federal practice may not have been wholly free of difficulty,<sup>14</sup> it appears to have saved some costs, and may also have eased hostilities in some cases commenced by a cooperative effort to save cost. The concept is essentially sound, but it needs polish.<sup>15</sup>

Several changes in this feature of Rule 4 seem worthy of consideration at this time. First, the issuance and delivery of a traditional summons is not necessary to effect notice to the defendant of the subject of the action. Because the formal summons may in some cases be unnecessarily hostile, and also because a delivery of such a threat outside the jurisdiction of the court may be more offensive to the sovereignty of the place in which it is delivered, it makes sense to dispense with the summons altogether when the court is proceeding with the assent of the defendant. It would be thus equally effective and less harmful to deliver to the plaintiff a copy of the complaint with a letter explaining that the complaint has been filed and will be served with a summons, but only if such service is made necessary by a refusal to waive such service. Retained would be the essential idea that a defendant unnecessarily imposing the costs of issuance and service of a summons must bear the unnecessary cost so incurred.

8 Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

9 CAL. CIV. PROC. CODE § 415.30(a) (West 1973).

10 See Amendments to Federal Rules of Civil Procedure, 93 F.R.D. 255, 259-60 (1982).

11 FED. R. CIV. P. 4(i)(1)(D).

12 H.R. 7154, 97th Cong., 2d Sess., 128 CONG. REC. H9848, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4437, 4439.

13 The effective date of service under the present provision is by no means clear, but it is certain that nothing of consequence has happened until the acknowledgment is returned to the sender.

14 For a survey of the complaints, see generally Note, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 IND. L.J. 217 (1986).

15 For a review of problems with the present rule, see generally Sinclair, *Service of Process: Re-thinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987).

Secondly, it would be useful to articulate this operative premise of the provision, that the defendant has a duty to avoid imposing unnecessary costs on the plaintiff. Openly stated, the principle is kin to that underlying recent changes in Rules 11 and 16.<sup>16</sup> It is a corrective for a long tradition of non-cooperation that probably had roots in the older law requiring that the defendant be physically subjected to the power of the court's officers,<sup>17</sup> a tradition that has long rewarded evasion of service by uncooperative defendants. In any event, the custom of avoiding the process server is entrenched and sometimes wasteful.

To be sure, there is no purpose to deter a defendant from asserting a substantial challenge to the territorial jurisdiction of the court. A third revision would perhaps therefore be explicit that an acknowledgment of receipt of a summons is not a waiver of any jurisdictional objections that the defendant may be entitled to make.<sup>18</sup> It is not unlikely that some defendants have failed to accept "service by mail" under the present provision because of fear that such acceptance might waive substantial jurisdictional defenses and objections. No such important consequence attaches to the acknowledgment under the present rule, and it is not "good cause" for a failure to return the acknowledgment (or waiver as it would become) that the defendant chooses to assert objections to the jurisdiction of the court or the venue.<sup>19</sup>

Fourth, the availability of waiver of service should perhaps be extended, nationwide or even worldwide. The present Rule limits this form of service to cases in which the defendant can be served within the forum state.<sup>20</sup> As Robert Casad has observed,<sup>21</sup> there is no good reason not to use this form of service as a universal alternative. If the device is to be used outside the United States, a somewhat longer period of return is needed, perhaps thirty days instead of twenty.<sup>22</sup>

The use of postal channels to effect service of process may be objectionable under the Hague Convention, if it is contrary to local law.<sup>23</sup> Germany, for example, does object to the use of its postal system for that purpose; but it extends its own service of process by non-compulsory methods and even by publication.<sup>24</sup> Given its consensual nature, transmission of what is merely an invitation to waive compliance with formal

16 See FED. R. CIV. P. 11, 16 advisory committee's note (1983) (explaining the need for more cooperation by counsel).

17 Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296-308 (1956).

18 Waiver of the defense of lack of personal jurisdiction has always been easy. See, e.g., FED. R. CIV. P. 12(h)(1); cf. *National Equip. Rental, Ltd. v. Szukhent* 375 U.S. 311, 316 (1964); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982).

19 E.g., *Allright Mo., Inc. v. Billeter*, 631 F. Supp. 1328, 1330 (E.D. Mo. 1986).

20 See R. CASAD, *JURISDICTION IN CIVIL ACTIONS* S5-13 (1983 & Supp. 1986) and cases cited therein. But see *United States v. Union Indem. Ins. Co.*, 109 F.R.D. 153 (E.D.N.Y. 1986).

21 R. CASAD, *supra* note 20, at S5-12.

22 Twenty days is allowed under FED. R. CIV. P. 4(c)(2)(C)(ii).

23 See Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, art. 10(a), 20 U.S.T. 361, 363, reprinted in 28 U.S.C.A. Rule 4, at 123 (West Supp. 1988).

24 See Heindenbergh, *Service of Process and The Gathering of Information Relative to a Law Suit Brought in West Germany*, 9 INT'L LAW 75 (1975).

service requirements should give no offense to the sovereignty of any foreign nation.

Waiver of service may be an especially economic device with respect to international litigation. The only adverse consequence visited upon a party declining the invitation to waive service is the imposition of the necessary costs of formal service, but these can be substantial where the foreign country requires translation into the local language as a condition of the use of its facilities in effecting service.<sup>25</sup>

It is possible that some nations may be offended by the use of their mails<sup>26</sup> but not by private carriers of messages, or perhaps by electronic transmissions. Although such methods of communication are generally more costly than ordinary first class mail such as the present rule authorizes, there may be situations in which other means of transmission are useful. A fifth revision might therefore allow for the use of alternative methods of communication provided that they are not less speedy or reliable than first class mail.

A sixth change that may be needed is a clarification of the effective date of service when it is effected by the waiver method. The present Rule has proved troublesome in its ambiguity in this respect, perhaps resulting in one or more lawyers missing a statute of limitations in the belief that process had been served when it had not.<sup>27</sup> In part, the present difficulty derives from the format of the present Rule and its nomenclature in describing the method as a "service by mail," when the true nature of the event is rather a request for an acknowledgment that, if returned, would operate in lieu of service. There are a number of events which might reasonably be regarded as the effective date of commencement for limitations and other purposes when this kind of consensual method is used, but the one which presents no problem of later proof is the date of filing of the waiver, the final event in the sequence. The use of that date also has the advantage in international litigation that it adds emphasis to the point that American process is not being served in the foreign country when and if the person found there chooses to return an acknowledgment of receipt and thereby reduce the costs of a proceeding in our courts.<sup>28</sup> The device of waived service is not suitable to circumstances in which a statute of limitations or the time for service<sup>29</sup> is about to run. Unless there is ample time, a plaintiff must proceed to the formal methods of service normally required to effect service without waiver.

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<sup>25</sup> It is not necessarily the case that service pursuant to the Convention is expensive. The Convention authorizes the use of the method known as *remise simple*. This method requires the central authority to transmit the summons and complaint to the local police station. The police officer then calls the defendant and invites him or her to come to the station to pick up the summons. If the defendant does so, there is no charge by the government for service.

<sup>26</sup> REPORT OF THE UNITED STATES DELEGATIONS TO THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL COMMERCIAL MATTERS, Nov. 21-25, 1977, 17 I.L.M. 312, 317 [hereinafter REPORT].

<sup>27</sup> E.g., *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

<sup>28</sup> See REPORT, *supra* note 26, at 316-17.

<sup>29</sup> FED. R. CIV. P. 4(j).

Appended to this article is a draft of a new Rule 4. Illustrative of the proposals just advanced is the text subdivision (d) of that appendix.

### III. Nationwide Service of Process in Federal Question Cases

#### A. *Historic Conformity of Federal Practice to State Law*

An important feature of Rule 4 as it appeared in 1938 was its fidelity in several important respects to local state law. The pattern of federal court dependence on state practice dated from the first Judiciary Act of 1789;<sup>30</sup> chapter 20 of that Act established district boundaries generally conforming to those of the states. In 1792, Congress enacted a Process Act explicitly requiring conformity to state law in regard to service of process.<sup>31</sup> Conformity to state law in such matters of adjective law was functional in the early years of the republic in part because of the highly localized nature of the profession (if one can call Jacksonian-era American lawyers professionals)<sup>32</sup> and in part because of the absence of federal policy to be implemented by more effective service. While the creation of a federal question jurisdiction in 1875<sup>33</sup> and the sweep of federal substantive policy created by Congress in the ensuing decades thrust the federal courts into the role of federal law enforcers, no change was effected in the law governing the summons. Thus, despite legendary complexity,<sup>34</sup> federal law regarding service of process lacked character of its own until 1938.

With appropriate diffidence, the 1938 rulemakers ventured to provide a general federal law governing the service of a summons, but with substantial incorporation of state law. While the emergence of a national bar organized under the banner of the American Bar Association was a significant force underlying and causing the adoption of the Rules Enabling Act of 1934,<sup>35</sup> it was still true in 1938 that few lawyers ventured to distant forums to litigate. Indeed, licensing law was a serious obstacle to any advocates tempted to do so.<sup>36</sup> In the environment of 1938, it was sensible to retain, as a general theme of Rule 4, a reference to state law.

It was, nevertheless, a significant feature of Rule 4 that it extended the reach of the federal process server in multi-district states to the limits of the state.<sup>37</sup> It was debatable in 1938 whether this extension of the reach of federal process was authorized by the Rules Enabling Act,<sup>38</sup> but it is now generally accepted as an appropriate exercise of the rulemaking process, if only because the reform was congruent with federal venue

30 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

31 Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

32 For skepticism, see C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1913); 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965).

33 Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

34 See generally Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036-42 (1982).

35 *Id.* at 1043-68.

36 See Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978); cf. Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985).

37 FED. R. CIV. P. 4(f).

38 See Burbank, *supra* note 34, at 1168-71; Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 73-93 (1988).

law.<sup>39</sup> Its validity was upheld in *Mississippi Publishing Corp. v. Murphree*.<sup>40</sup> The effect of this provision was, however, only to make the federal court as effective as a state court in the reach of its enforcement power. A similar aim was served by the further extension of the federal reach in the 1963 amendments authorizing the use of state long-arm law and quasi in rem jurisdiction in the federal courts.<sup>41</sup>

The 1938 Rules did, however, break ground in establishing some federal modes of service. One example is the provision in subdivision (d)(1) providing for service of a summons at the abode of the defendant. In those states having no such provision, this was an extension of the federal reach beyond that available to the neighboring state court.

Heavy dependence on state law governing the service of a summons now seems anachronistic. In part, this is because of the evolution of constitutional law governing the effectiveness of a summons, or the amenability of a defendant to service of process; the transition signalled by *International Shoe Co. v. Washington*,<sup>42</sup> making defendants amenable to service wherever the exercise of sovereignty accords with "fair play," called into question a major premise of Rule 4's reliance on state law. In converting the issue of amenability from one controlled by the mechanics of service to a moral issue, the Supreme Court has incidentally removed an important 1938 assumption regarding the consequences of sufficiency of service to meet the requirements of Rule 4.

The rising itinerancy of lawyers and their clients is an additional major change in the practical context in which Rule 4 functions. An aim of the Rules Enabling Act was to facilitate the development of the national bar,<sup>43</sup> a goal that has been materially advanced in fifty years. With lawyers and parties moving as freely as they do across state lines, the application of local standards is less appropriate. Moreover, the tendency of state practice to conform to federal standards, in respect to matters such as the provision for abode service,<sup>44</sup> has made local differences seem more idiosyncratic to those itinerants to whom they might be applied.

### B. Contemporary Utility of Nationwide Service of Process

The time may therefore have come for at least partial displacement of state long-arm legislation as a measure of the reach of federal process. As long ago as 1954, Edward Barrett suggested the inutility of state boundaries as limitations on the federal reach.<sup>45</sup> Since Professor Bar-

39 Whitten, *supra* note 38, at 86-93.

40 326 U.S. 438 (1946). See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Kurland, *The Supreme Court, the Due Process Clause and In Personam Jurisdiction of the State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

41 Illinois led the way with long-arm legislation in 1955. 1955 Ill. Laws 2245. Rule 4(e) was amended in 1963 to permit service outside the state to the extent authorized by local state law. Absent this amendment, state courts would have been more effective in enforcing some federal rights than would federal courts sitting in the same place. See FED. R. CIV. P. 4(e) advisory committee's note (1963).

42 326 U.S. 310 (1945).

43 Burbank, *supra* note 34, at 1042-45.

44 FED. R. CIV. P. 4(d)(1).

45 Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 628-29 (1954).



rett's writing, the environment has materially changed. Venue legislation has been liberalized by Congress to provide a wider choice of forum,<sup>46</sup> but the choice thus created may sometimes be blocked by the plaintiff's inability to effect service of process in conformity with the law of a state in which a correct federal venue is available. At the same time, the venue law has been amended to provide for transfers for convenience,<sup>47</sup> thus protecting the defendant from substantial abuse resulting from the exercise of the venue choices thus opened to the plaintiff, and making less necessary or even useful the constraints resulting from the application of local state law to limit the reach of federal process. Moreover, Congress has explicitly provided for nationwide service of process in federal actions brought to enforce a growing number of federal laws,<sup>48</sup> without, it seems fair to say, developing any coherent division between those federal rights that can be enforced with nationwide service of process and those that cannot.

Writing in the same vein as Professor Barrett, David Currie fifteen years later made with even greater force the point that there is a substantial redundancy between federal venue law and the operation of Rule 4 as a constraint on the reach of federal process.<sup>49</sup> The relation between state and federal law is always complex, but Professor Currie is right that this is an area in which the complexity performs no useful service. The fifth and fourteenth amendments, federal venue law, and state long-arm legislation all serve similar aims and protect similar interests. Elimination of the state boundary as a constraint on the reach of federal process as now provided in Rule 4 could significantly simplify federal practice, and might also amplify enforcement of federal law in cases in which state long-arm legislation is presently an impediment.

The unnecessary complexity of the present law is illustrated with respect to service of process on a corporation having a "managing agent" amenable to service of process under the present subdivision (b)(3). There being no language in the present Rule 4 to the contrary, it appears to be correct that the only constraints on effective territorial jurisdiction of the federal court over a corporation served through such an agent are those provided in federal legislation. If the case be one in which the federal jurisdiction is based on the federal source of the claim, the sufficiency of contact with an alien corporation served through its managing agent is defined by a federal standard that is uniform among the dis-

46 Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744; Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111.

47 Act of Oct. 18, 1962, Pub. L. No. 87-845 § 3(a), 76A Stat. 698.

48 *E.g.*, action by Commodities Future Trading Commission, 7 U.S.C. § 13a (1982); action against a corporation under the antitrust laws, 15 U.S.C. § 22 (1982); actions arising under securities laws, 15 U.S.C. § 77v (1982); actions alleging copyright infringement, 17 U.S.C. § 502 (1982); civil RICO actions, 18 U.S.C. § 1965 (1982); civil interpleader actions, 28 U.S.C. § 2361 (1982). *Cf.* Bankr. R. 7004. *See generally* R. CASAD, *supra* note 20, ¶ 5.03.

49 Currie, *The Federal Courts and the American Law Institute (Part 2)*, 36 U. CHI. L. REV. 268, 299-311 (1969). *See also* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 430-43 (1981).

tricts.<sup>50</sup> On the other hand, if the federal jurisdiction is based on the citizenship of the parties, state law controls.<sup>51</sup> A similar divergence exists with respect to the sufficiency of service of process within the 100-mile "bulge" created by the 1963 amendment to subdivision (f).<sup>52</sup>

As noted, the use of state law to measure the reach of federal process can be an impediment to the enforcement of federal law as well as a source of needless complexity. Illustrative is the recent case of *Omni Capital International v. Wolff & Co.*<sup>53</sup> The claim at issue was one implied from the Commodity Exchange Act,<sup>54</sup> an enactment containing no provision for service of process. The district court found the defendant to have sufficient contacts with the United States to be amenable to service of process within the constraints of fairness imposed by the fifth amendment, but to lack sufficient contact with Louisiana, the state in which the federal court sat, to be amenable to long-arm jurisdiction of Louisiana courts. A substantial minority of the Fifth Circuit sitting en banc was prepared to find a federal common law authority to serve the summons on Wolff in England, in order to correct what they found to be a "bizarre hiatus in the [Federal] Rules."<sup>55</sup> The Supreme Court affirmed the holding of the lower courts that the summons could not be served except in conformity with Louisiana law and the fourteenth amendment, disavowing the power to create a federal long-arm by the methods of the federal common law. The Court affirmed the dismissal of the case, but remanded the issue to Congress and the rulemakers, acknowledging that a rule change might "well serve the ends of the CEA [Commodity Exchange Act] and other federal statutes."<sup>56</sup>

Justice Blackmun's opinion suggests that such a revision might be "narrowly tailored."<sup>57</sup> Perhaps it could be, but a narrow textual amendment to Rule 4 has not yet been successfully drafted. If "narrow" means limited to claims arising under the Commodity Exchange Act, the amendment would not be a "general" rule of practice and procedure within the power of rulemakers to prescribe under the Rules Enabling Act.<sup>58</sup> If the "bizarre hiatus" is to be filled by an amendment to Rule 4, it would be necessary, and perhaps provident, to simply remove from Rule 4, at least in federal question cases, the strictures of state law which are imposed by the incorporating clause of subdivision (e).

A change of this kind would have the merit of simplifying federal practice by eliminating a redundant level of constraint on the plaintiff's

50 *Terry v. Raymond Int'l Inc.*, 658 F.2d 398 (5th Cir. 1981), cert. denied, 456 U.S. 928 (1982); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdiction Standard*, 95 HARV. L. REV. 470 (1981).

51 See R. CASAD, *supra* note 20, ¶ 3.01(b).

52 *Quinones v. Pennsylvania Gen. Ins. Co.*, 804 F.2d 1167 (10th Cir. 1986); *Coleman v. American Export Isbrandtsen Lines*, 405 F.2d 250, 252 (2d Cir. 1968).

53 108 S. Ct. 404 (1987).

54 The Grain Futures Act., Pub. L. No. 331, 42 Stat. 998 (1922) (codified as amended at 7 U.S.C. §§ 1-24 (1982)).

55 *Point Landing, Inc. v. Omni Capital Int'l Ltd.*, 795 F.2d 415, 428 (5th Cir. 1986), *aff'd*, 108 S. Ct. 404 (1987).

56 108 S. Ct. 404, 413 (1987).

57 *Id.*

58 28 U.S.C. § 2072 (1982).

choice of forum in federal question cases. Such a change would be effected by the appended draft of Rule 4.

### C. *Alternative Constraints on Forum Selection*

While the importance of this change can be exaggerated in some minds, there is no doubt that it would place additional emphasis on the other constraints on forum selection. The constitutional limitations on the federal reach have rarely been tested, but it can be assumed that the fifth amendment requires affiliating contacts between a defendant and the United States sufficient to give moral justification to the exercise of federal sovereignty over the defendant.<sup>59</sup> It seems also likely that the fifth amendment prevents a forum selection that is so unreasonably inconvenient to the defendant as to be a denial of "fair play and substantial justice."<sup>60</sup>

As noted, also constraining the choice of the federal claimant's forum is the federal venue legislation. For claims arising under federal law, unless Congress has otherwise provided, or unless the defendant is an alien, a claim must be made in the district in which the claim arose or in which the defendant resides.<sup>61</sup> Given this limitation, the requirement of conformity to state long-arm legislation is normally without practical consequence as a constraint. This is true as well even if the defendant is a corporation,<sup>62</sup> except in a case brought in a district in which the defendant is doing business to assert a claim arising from unrelated business activity occurring in a distant district. In such a case, to the extent that state long-arm law and/or the fourteenth amendment limit the forum to specific, not general, jurisdiction over the defendant,<sup>63</sup> the absence of the Rule 4 incorporation of state law could make a difference, opening a new choice of forum to a plaintiff.

More substantial might be the effect on claims brought against aliens, for the venue statute imposes no limitation on the choice of forum available to a plaintiff asserting claims against such a defendant.<sup>64</sup> It is also true that some special federal venue provisions authorize claims to be brought in the district in which the plaintiff resides. Yet even in these situations, the provision of federal venue law providing for transfers for convenience<sup>65</sup> affords protection against abusive choices of forum and assures compliance of federal forum selection law with the dictates of the

59 *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977).

60 *DeJames v. Magnificence Carriers*, 654 F.2d 280, 286 n.3 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Kolb v. Chrysler Corp.*, 357 F. Supp. 504 (E.D. Wis. 1973); see *Clermont*, *supra* note 49, at 437-41; Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. REV. 1 (1984); but see *Smith v. Montgomery Ward & Co.*, 567 F. Supp. 1331, 1336 (D. Colo. 1983); *Keystone Publishers Serv. Inc. v. Ross*, 747 F.2d 1233 (8th Cir. 1984) (*per curiam*).

61 28 U.S.C. § 1391(b) (1982).

62 See *id.* § 1391(c).

63 *E.g.*, *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984). See generally von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988).

64 28 U.S.C. § 1391(d) (1982).

65 *Id.* § 1404(a).

fifth amendment.<sup>66</sup> Those cases in which the plaintiff maintains a choice of forum that would not be open to the plaintiff under the present Rule 4 are thus fewer in number than one might at first suppose, and are by definition cases in which the plaintiff's choice is not unfair or unduly inconvenient to the defendant.

Significant perhaps in some cases would be a shift in the responsibility of the defendant for making a timely challenge to the plaintiff's choice of forum. Because a default judgment entered by a court having no territorial jurisdiction is subject to collateral attack,<sup>67</sup> a defendant today receiving a summons from a distant and inappropriate federal forum may ignore a summons and hope to challenge the jurisdiction of the court in a later action to enforce the default judgment in a more appropriate forum.<sup>68</sup> If by amendment of Rule 4, the forum selection constraint is derived wholly from the venue statute and not from conceptions of territorial jurisdiction, then the defendant cannot ignore the summons, but will be obliged to make in the distant forum a motion for transfer as the proper means to contest the forum selection. Given the contemporary transiency of counsel, this is not the obstacle that it might once have been, and given the extensions of state long-arm jurisdiction, it would be a very rare case in which the defendant could confidently suppose that a later challenge to the jurisdiction of the court would be effective.<sup>69</sup> It is, moreover, an appropriate application of the principle of "first things first" to require the defendant to be forthcoming early with a challenge to the forum selection made by the plaintiff.<sup>70</sup>

An amendment to Rule 4 providing for nationwide service of federal process would likely create a more hospitable environment for motions for transfer.<sup>71</sup> Courts knowing that the more arbitrary restraints on choice of forum have been loosened a notch would be likely to give a bit closer scrutiny to such motions, thereby balancing the effect of the reform by favoring defendants who may be adversely affected by the change. Thus, the overall effect would be not only to reduce the number of constraints on plaintiffs' choice of forum, but also to improve the fairness of those remaining, directing attention to the real interests of the parties in the issue of forum selection, and away from the formal sufficiency of the relationship between the defendant and the state in which the federal court sits. With increased emphasis on the importance of the right to a transfer to avoid unfairness, it is also likely that somewhat closer scrutiny to transfer rulings of district courts will be applied by courts of appeals. Appellate review of such rulings has in the past been quite sparing,<sup>72</sup> but perhaps in part because transfer was seen as a sub-

66 See *supra* note 60.

67 RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

68 *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 525 (1931).

69 See, e.g., *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151 (5th Cir. 1974).

70 Cf. *Arrowsmith v. United Press Int'l*, 430 F.2d 219, 221 (2d Cir. 1962).

71 For a collection of recent cases applying section 1404, see R. CASAD, *supra* note 20, ¶ 5.06[1], S5-34 to -35.

72 E.g., *Whitten*, *supra* note 38, at 103-15.

stantially redundant part of the elaborate apparatus of federal forum selection law.

#### D. *Rulemaking Authority*

It will doubtless occur to some minds to question whether a change in the rule resulting in nationwide service of process in federal question cases is a change properly made by rulemaking. Several thoughtful scholars have raised the question of authority under the Rules Enabling Act.<sup>73</sup> The Supreme Court upheld Rule 4 against an early challenge of this kind,<sup>74</sup> and has recently intimated that such a revision is within the rulemaking power.<sup>75</sup> Insofar as the change affects only the mode of service, it would seem that the issue of rulemaking power has been resolved, but the question may remain open insofar as the issue is the effect of a revised rule on the amenability of a defendant to the territorial jurisdiction of a distant federal forum. It is imaginable that a rule amendment would be held valid to alter the mode of service of the summons and complaint, but not effective to alter the principles governing the amenability of a defendant to the territorial jurisdiction of the federal court. Such a holding would leave the courts to solve the issue of amenability by the means of the federal common law, as informed by federal legislative history, state law analogues, and constitutional considerations, much in the manner that the federal courts presently tease out the federal law of limitations of action.<sup>76</sup> Perhaps this would be a satisfactory approach, but it would be somewhat unsettling.

Moreover, as Charles Wright noted some years ago, there is a question also of practical political judgment regarding the wisdom of effecting substantial change in the territorial jurisdiction of the federal courts by rule of court.<sup>77</sup> Congress has enacted many laws providing for nationwide service of process<sup>78</sup> and has enacted many more with no such provision. Given that this is so, it may be provident to leave the final choice to Congress. A means to do so would be to propose for congressional enactment a single sentence of a revised Rule 4 that is explicit in conferring nationwide territorial jurisdiction on all federal courts. This is what is suggested with respect to the first sentence of subdivision (k) of the appended draft Rule 4.

#### E. *Secondary Effects of a Provision for Nationwide Service*

Provision for nationwide service in federal question litigation would justify several significant simplifications of federal practice and would ad-

73 *E.g.*, *A. Olinick & Sons v. Dempster Brother, Inc.* 365 F.2d 439 (2d Cir. 1986); *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS. 13, 99-108 (P. Carington ed., Spring 1984).

74 *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946).

75 *Omni Capital Int'l v. Wolff & Co.*, 108 S. Ct. 404, 411-13 (1987).

76 *See, e.g.*, Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829 (1983).

77 Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 575 (1967).

78 *See supra* note 48. For a compilation, *see* C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1118, 1125 (1987).

vance the aim of national uniformity in federal practice. Thus, one respect in which the aim of national uniformity might be advanced would be to abandon the requirement that the form of a federal summons be conformed to state law whenever resort is made to state long-arm law.<sup>79</sup> When added in 1963, this requirement had the virtue of symmetry. While that virtue abides, the provision is now an unnecessary complexity and perhaps even a trap for the federal lawyer unaware of a possible idiosyncrasy of form in the summons used in local state courts. This is especially so if, as suggested, dependence on state law is in other respects diminished. The appended draft would eliminate the reference to state law from subdivision (a) of the Rule.

Extension of the federal reach would facilitate other eliminations of dependence on state law. Thus, another perhaps dispensable use of state law is presently set forth in subdivision (c) authorizing service "pursuant to the law of the state in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State."<sup>80</sup> If ample and effective means of service are otherwise provided in Rule 4, as would appear to be the case if the federal reach is extended across the country, it may no longer be necessary to authorize the use of extraordinary methods of service that may on occasion be available in the courts of a particular state. The appended draft would drop the general incorporation of state law to effective service.

Consideration of the elimination of this provision calls attention to the one use of the provision that is common in several states. In several states, provision is now made for service of process on individuals at the workplace.<sup>81</sup> Such a mode of service should perhaps be considered for explicit inclusion in the Federal Rules; it may be especially useful in those situations, now common, in which an individual defendant resides in an abode on an upper story of a building that is guarded to exclude unwelcome persons such as process servers. On the other hand, publicizing a defendant's legal problems at her or his workplace might be a means to inflict harm on the defendant, and it is not clear that there is a person at all workplaces who has sufficient responsibility and discretion to bear the responsibility of notifying the defendant of the service.

The question raised is whether it remains necessary or desirable to conform federal practice to state law with respect to such matters. If workplace service is a good tool, perhaps it should be available in all federal districts. On the other hand, to the extent that the privacy interest is a paramount consideration, it may be appropriate to retain the reference to state law in order that federal practice can conform to what may be perceived to be a state substantive policy. The appended draft would make the latter choice.<sup>82</sup>

<sup>79</sup> FED. R. CIV. P. 4(b).

<sup>80</sup> *Id.* at 4(c)(2)(C)(i).

<sup>81</sup> *E.g.*, CAL. CIV. PROC. CODE § 415.20 (West 1973); OR. R. CIV. P. 7(d)(2)(c) (1988); 42 PA. CONS. STAT. ANN. § 402 (Purdon 1987); R.I. GEN. LAWS § 9-5-35 (1985).

<sup>82</sup> Subdivision (e)(3)(B).

An additional level of complexity resulting from the incorporation of state law is the anachronism of quasi in rem jurisdiction. Also added in 1963, a provision of subdivision (e) authorizes the seizure of property in conformity with state practice as a means of asserting federal territorial jurisdiction.<sup>83</sup> The constitutionality of this mode of asserting jurisdiction is now questionable,<sup>84</sup> except in those cases in which territorial jurisdiction could be asserted by more direct and appropriate methods elsewhere provided in Rule 4, but for the state boundary limits on the alternative methods. The need for this anachronism in federal practice would be substantially obviated if nationwide service of process were generally available.

### F. *Conformity and Diversity Jurisdiction*

If federal practice can in these ways be materially simplified in cases arising under federal law, it seems unlikely that the same benefits can be secured in cases in which jurisdiction is based on the citizenship of the parties. Where it is state law that is to be enforced, there are substantial difficulties in establishing a uniform national reach for the federal server of the summons. To do so would cut deeply against the grain of *Erie Railroad Co. v. Tompkins*,<sup>85</sup> and would provide a powerful incentive to forum-shop, so great that it might raise the very ghost of Justice Frankfurter.<sup>86</sup> Arguably, such an extension of a federal long-arm in a diversity case would present a serious constitutional issue.<sup>87</sup>

If the federal arm should not be longer than the state arm when state law is being enforced, it may nevertheless be possible, without serious affront to state sovereignty, to employ a federal rather than a state ceremony for the celebration of the exercise of power over a defendant haled into a federal court. To the extent that Rule 4 governs only the ceremony or the manner of service, there is little need for conformity even when state law provides the basis of the claim. It may therefore be appropriate to use the same federal ceremonies wherever in the United States federal process is served, and whatever law may provide the basis for the claim that the defendant is summoned to answer, provided that it is made clear that a claim not arising under federal law shall be dismissed for want of jurisdiction over the person or property of the defendant if it would have been dismissed for that reason in the local state court. Subdivision (k) of the appended draft rule so provides.

The relative simplicity of the scheme suggested here is marred by the problem of pendent claims. If the federal arm is longer for a claim arising under federal law than it is for a claim arising under state law, what is its length in actions in which both kinds of claims are asserted? If the plaintiff can lengthen the federal arm in a diversity case by imagining

83 For contemporary comment on the 1963 amendment, see Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

84 See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

85 304 U.S. 64 (1938).

86 Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10, *reh'g denied*, 326 U.S. 806 (1945).

87 See Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963); cf. *Rogers v. Icelandic/Flugleider Int'l*, 522 F. Supp. 670 (E.D. Pa. 1981).

a federal legal theory to which the state law claim can be appended, this would seem likely to happen in more than a few cases, thereby lengthening federal dockets in unwelcome respects. For this reason, it may be appropriate to provide for dismissal of pendent claims that would be dismissed if brought separately in the local state court, even if those claims present factual and legal issues presented by the claim arising under federal law to which those constraints would no longer apply. Thus, a plaintiff with pendent claims would be forced to choose either to pursue both claims in a federal court sitting in a state having territorial jurisdiction over the defendant or his property or else to forego the convenience of simultaneous assertion of the related state and federal law claims, presenting them in separate proceedings that may give rise to the application of the law of issue preclusion.<sup>88</sup>

This approach contrasts with the familiar doctrine of pendent jurisdiction applied to extend the subject matter jurisdiction of federal courts to state law claims that are closely related to claims within the federal jurisdiction.<sup>89</sup> The familiar principle serves to enable federal plaintiffs to employ a federal forum without suffering the inconvenience or possible disadvantage that may result from separate pursuit of a related state claim. That principle has been applied in some cases to extend personal jurisdiction under state long-arm legislation to related claims not specifically included in the controlling long-arm law.<sup>90</sup> Either of these applications of the principle may be entirely sound, but when combined in the same case, they seem to overextend the federal reach. It would be too much to assert pendent jurisdiction over a related claim that could not be brought alone either in a federal court to which it is now presented or to the local state court, but could without joinder be brought only in a distant non-federal forum. The appended draft accordingly would exclude the operation of "double pendent" jurisdiction.<sup>91</sup>

#### IV. Transnational Litigation

The 1938 Rules were silent as to the means of service available to summon a defendant abroad;<sup>92</sup> this feature reflected the expectation that there could be no service effected outside the boundaries of the sovereign state, an expectation rooted in nineteenth century conceptions of territorial jurisdiction embodied in the Supreme Court's decision in *Pennoy v. Neff*.<sup>93</sup> Moreover, it seems even more important in the international context that exercise of dominion over the defendant proceed in a manner that does not offend the sovereignty of a foreign power.<sup>94</sup> In

<sup>88</sup> See generally RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 28 (1982).

<sup>89</sup> *Hurn v. Ousler*, 289 U.S. 238 (1933); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

<sup>90</sup> *E.g.*, *Mack Trucks Inc. v. Arrow Aluminum Castings Co.*, 510 F.2d 1029 (5th Cir. 1975); see generally R. CASAD, *supra* note 20, ¶ 4.07.

<sup>91</sup> Subdivision (k).

<sup>92</sup> See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L. J. 515, 523-37 (1953).

<sup>93</sup> 95 U.S. 714 (1878).

<sup>94</sup> Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1040 (1961); Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1075-86 (1965).



1963, the Rule was amended to add subdivision (i) prescribing the methods of service of process abroad.<sup>95</sup>

Even in 1963, service on persons outside the United States was diffi-  
culty prescribed only "[w]hen federal or state law . . . authorizes service  
. . . to be effected upon the party in a foreign country."<sup>96</sup> On occasion,  
service abroad has been held to be improper for lack of such statutory  
authority.<sup>97</sup> Such authority has, however, been found to exist by implica-  
tion.<sup>98</sup> Most state long-arm laws can be deemed to provide general au-  
thority.<sup>99</sup> Given the substantial increase in the number of international  
transactions and events that are the subject of litigation in the federal  
courts, it is appropriate now to infer a general legislative authority to use  
familiar methods of service on defendants abroad, whether the claim  
arises under federal or state law. As the *Omni Capital*<sup>100</sup> case illustrates,  
the considerations supporting the use of nationwide service of process  
are equally applicable where the alleged wrongdoer is abroad.

The Hague Convention on the Service Abroad of Judicial and Extra-  
judicial Documents entered into force for the United States in 1969.<sup>101</sup>  
Now signed by over thirty countries,<sup>102</sup> this Convention provides inter-  
nationally agreed methods of service of process, generally employing of-  
ficials of the government of the country in which service is effected. The  
Supreme Court has now held that this Convention is mandatory and its  
methods must be employed when process is being sent into a signatory  
nation.<sup>103</sup> This decision may well be reinforced by decisions of courts  
outside the United States refusing to give effect to American judgments  
based on proceedings not commenced in accordance with an applicable  
treaty such as the Convention.<sup>104</sup> In that case, however, service was ef-  
fected by delivery of the summons to an agent in the United States; it  
therefore involved no "occasion to transmit a judicial or extrajudicial  
document for service abroad."<sup>105</sup> The result seems sound; international  
corporations and businessmen should be amenable to territorial jurisdic-  
tion of American courts to the same degree as interstate corporations  
and businessmen with whom they compete in the American economy.  
Indeed, it does not appear that the Hague Service Convention was ever

95 The rule was effective January 21, 1963; its development was part of the Columbia University School of Law Project on International Procedure. See generally Smit, *supra* note 94.

96 FED. R. CIV. P. 4(i).

97 *E.g.*, *Martens v. Winder*, 341 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 947 (1965).

98 *E.g.*, *SEC v. VTR, Inc.*, 39 F.R.D. 19 (S.D.N.Y. 1966).

99 *E.g.*, *Marston v. Grant*, 351 F. Supp. 1122 (E.D. Va. 1972).

100 *Omni Capital Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

101 Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, reprinted in 28 U.S.C.A. Rule 4, at 121 (West Supp. 1988).

102 As of 1987, the nations ratifying the Convention are Antigua and Barbuda, Barbados, Belgium, Botswana, Cyprus, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Germany, Greece, Israel, Italy, Kiribati, Luxembourg, Malawi, Netherlands, Nevis, Norway, Portugal, Seychelles, Spain, St. Kitts, St. Lucia, St. Vincent, Sweden, Turkey, the United Kingdom and the United States.

103 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104 (1988).

104 See generally, Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany and England*, 7 LAW & POL'Y INT'L BUS. 325, 340-41 (1987).

105 Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, art. 1, 20 U.S.T. 361, 362, reprinted in 28 U.S.C.A. Rule 4, at 122 (West Supp. 1988).

intended as a limitation on the territorial jurisdiction of courts.<sup>106</sup> It should, therefore, have no application when service can be effected without intrusion on foreign soil.<sup>107</sup>

To reflect the decision of the Supreme Court, it may be useful to amend the Rule to make it clear that internationally agreed means are to be used when applicable, but that modes of service not requiring intrusion on foreign soil may always be employed to effect service on international defendants who are amenable to territorial jurisdiction in a federal court.<sup>108</sup> The appended draft would so provide.<sup>109</sup>

It may also be useful to consider a limitation of time on service by treaty methods. Some smaller states, especially, may be particularly prone to be protective of their nationals by taking unconscionable periods of time to effect service. The Hague Convention itself does provide a time limit of six months;<sup>110</sup> when that period has elapsed without service by a central authority, alternative non-treaty methods of service are authorized. The draft rule appended to this article would authorize the court to approve an alternative method of service after such a period of time.<sup>111</sup>

Although constitutionally required in any case,<sup>112</sup> the provision in the present subparagraph (i)(1)(B) requiring effective notice should be made explicitly applicable to all forms of service abroad. The Hague Convention does indeed conform to the due process clause of the fifth amendment in requiring effective notice of the commencement of the action, and it would be redundant to articulate a requirement of notice for proceedings commenced through the means provided by the Convention.<sup>113</sup> Thus, the Convention provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered.<sup>114</sup> The Convention also enables a judge to extend the time for

106 See Amram, *The Proposed International Convention on The Service of Documents Abroad*, 51 A.B.A. J. 650 (1965); COMMITTEE ON INT'L LAW, *THE HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS*, 22 REC. ASS'N OF N.Y.C. 280 (1967).

107 It also appears to have no application if the defendant's address is unknown. Note, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention*, 39 OKLA. L. REV. 287, 288 (1986).

108 As noted above, this is a consideration in drafting the provision for waiver of service, which would accomplish the required notice to the defendant without intrusion of American process on foreign soil. That provision is not intended to circumvent the Convention, but to take proper account of the sensitivities of foreign sovereigns which are properly expressed in that treaty.

109 Subdivision (e)(4).

110 Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, art. 15, 20 U.T.S. 361, 364, reprinted in 28 U.S.C.A. Rule 4, at 123 (West Supp. 1988).

111 Subdivision (e)(5).

112 *E.g.*, *Greene v. Lindsey*, 456 U.S. 444 (1982); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

113 One aim of the Convention was to discourage the use of the French practice of *au parquet* service, which did not always assure adequate notice. See Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 INT'L LAW 650 (1967). There are, however, imaginable uses of the Convention which might raise a due process-notice issue. For example, the Convention authorizes the use of the French language; if the defendant cannot read a summons in French, it would be a denial of due process to render a default judgment on the basis of the defendant's failure to respond. *E.g.*, *Julen v. Larsen*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).

114 See *supra* note 110.

appeal after judgment if the defendant shows either a lack of adequate notice to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.<sup>115</sup> But, where service is effected outside the United States by other means, it may be a useful caution to specify the need for notice, as the present Rule does.

Two other changes in the provisions bearing on service abroad are illustrated in the appended draft.<sup>116</sup> The present Rule refers only to letters rogatory; letter of request is a synonymous term, now in more common usage, that should be added to the Rule.<sup>117</sup> It would also be appropriate to authorize, when needed, service of process by American diplomatic and consular officers. Such service is presently authorized by the Foreign Sovereign Immunities Act,<sup>118</sup> but the State Department does occasionally authorize consular officers to serve this role in circumstances other than service on a foreign government,<sup>119</sup> and the practice is permitted under the Hague Convention.<sup>120</sup>

## V. Other Matters

### A. *The Role of the United States Marshal*

The 1938 Rule provided for service of process by a United States marshal or a deputy United States marshal as the norm.<sup>121</sup> Participation by a deputy marshal has become a rare event, generally limited to situations in which a law enforcement presence is necessary, or where Congress has required the marshal's office to make service, as when the proceeding is *in forma pauperis*<sup>122</sup> or commenced by a seaman.<sup>123</sup> The trend appears to be the result of higher costs in the marshal's office than are incurred by other persons effecting service, resulting in a general unavailability of deputy marshals to make service at prices that are competitive. In short, it seems that marshals' salaries are higher than needs to be paid to hire persons who are able to effect service of process. It is possible that other facts are at play, such as the professional status of marshals who find service of a summons to be demeaningly easy, or a slight tension between the Justice Department and the federal judiciary over control of these officers.<sup>124</sup>

One situation in which it appears that the marshal may no longer be needed is in actions brought by the United States. The United States,

115 Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, art. 16, 20 U.S.T. 361, 364, *reprinted in* 28 U.S.C.A. Rule 4, at 124 (West Supp. 1988).

116 Subdivision (e)(5).

117 The letter of request is the only means of service that is lawful in Switzerland. Norlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 641 (1980).

118 28 U.S.C. § 1608(a)(4) (1982). See also 22 C.F.R. § 93.1 (1987) (State Department authority for such service).

119 22 C.F.R. §§ 92.86-92.90 (1987).

120 Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, art. 8, 20 U.S.T. 361, 363, *reprinted in* 28 U.S.C.A. Rule 4, at 122, (West Supp. 1988).

121 FED. R. CIV. P. 4(c)(1).

122 28 U.S.C. § 1915 (1982).

123 *Id.* § 1916.

124 For a history and discussion of the effort to reduce the role of marshals, see Sinclair, *Service of Process: Rethinking the Theory and Procedure of Service of Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987).

like other civil litigants, could be permitted to designate any person who is not less than eighteen years of age and not a party to serve its summons.<sup>125</sup> Parallel changes could be made in the Admiralty Rules<sup>126</sup> and in Rule 69.<sup>127</sup>

### B. *Service on the United States*

The Department of Justice has thus far resisted the use of acknowledged service in actions brought against the United States. It has been the position of the United States that the daily mail received by some offices of the United States Attorneys is too great to enable it to make timely acknowledgments of the receipts of summonses. Not everyone has accepted this as a sufficient reason<sup>128</sup> and at least one congressman has introduced legislation to impose the device on an unwilling Justice Department.<sup>129</sup> As a compromise, the Justice Department has proposed that the Rule be amended to authorize the use of registered or certified mail in actions against the United States. The problem of the indecipherable signature seems less important when the signature is that of a federal employee, and the requirement of a return receipt helps the United States Attorney's office to sort its mail. Such an amendment seems likely to be proposed.

At the same time, there remains a difficulty in the extent to which the present Rule imposes costs of service on plaintiffs suing the United States. In no such case can there be a serious question about the territorial jurisdiction of the federal court over the defendant; the only function of the summons is to assure proper notice to the government. Yet the technicality of the requirements are such that it is not an exceptional event for an Assistant United States Attorney, while in possession of a summons, to move for dismissal because the plaintiff has not correctly served all those federal officers entitled under the Rule to receive a copy of the summons and complaint.<sup>130</sup> It would be congruent with the general principle that the defendant has a duty to avoid imposing unnecessary costs on the plaintiff to delete the requirement in subdivision (d)(4) that the plaintiff serve not only the local United States Attorney, but also the Attorney General, and sometimes other federal officers or agencies. Such a change would leave the United States with a duty of self-notification. Given the availability of computerized mail and other modern technologies, it is hard to see why the cost and risk of multiple service should be imposed on the plaintiffs suing the United States, many of whom are social security or other benefit claimants who may be indigents or near-

<sup>125</sup> Compare FED. R. CIV. P. 4(c)(2)(C).

<sup>126</sup> See Admiralty Rules C and E.

<sup>127</sup> FED. R. CIV. P. 69 provides for the execution of judgments, an activity that can be performed by federal offices other than deputy marshals.

<sup>128</sup> Letter from Herbert E. Hoffman to Paul D. Carrington, Reporter to Advisory Committee on Civil Rules (Nov. 17, 1987).

<sup>129</sup> H.R. 1743 99th Cong., 1st Sess. (1985).

<sup>130</sup> See FED. R. CIV. P. 4(d)(4).

indigents. The draft rule in the appendix would delete the requirement for multiple service of a summons on the United States and its officers.<sup>131</sup>

One can in fact readily imagine dispensing altogether with the requirement of service of process on the United States. It is, after all, unseemly for the government to dispute the jurisdiction of its own courts. Could it not notify itself of its own judicial activity? This would impose a duty of communication on the office of the clerk where the action is filed as well as on the United States Attorney. The risk of injury to the United States or the taxpayers resulting from such a change should be assessed in light of the special position of the United States with respect to default judgments, which are essentially unavailable when the federal treasury is exposed.<sup>132</sup> I stop short of advocating so radical a rule at this time.

### C. *Orders of Commitment*

As noted, a revised rule should separate the summons from other process occasionally mentioned in the present provisions of Rule 4. A draft of a Rule 4.1 is also appended to this article in order to illustrate what is suggested.

A question does arise with respect to one such process, the order of commitment for civil contempt. Until 1938, such an order could be served only in the district in which the court sat.<sup>133</sup> In its 1938 form, Rule 4(f) authorized service anywhere in the state, but this did not extend the reach of enforcement of an injunction outside the District of Columbia. This created a minor crisis when it was discovered that a person in violation of a court order issued in the District could not be served for the purpose of enforcement even in a neighboring Virginia county.<sup>134</sup> Accordingly, when the 100-mile "bulge" was created in 1963, it was made applicable to such proceedings.

A contemnor found anywhere in the United States is subject to criminal contempt sanctions<sup>135</sup> if not civil. There is no good reason to prefer criminal to civil sanctions in dealing with a fugitive contemnor, so perhaps Rule 4.1 should provide nationwide reach of process to compel compliance with federal court injunctions, at least where federal law is being enforced.

## VI. Conclusion

Manifestly, if all of these suggestions are to be adopted, Rule 4 will change materially in its appearance. This is reflected in the draft rules and form appended to this article. While this draft rule has no official status whatever, not even as the preferred vision of the Reporter, it is offered as a target for comment and criticism.

131 Subdivision (h).

132 See FED. R. CIV. P. 55(e).

133 *In re Graves*, 29 F. 60 (N.D. Iowa 1886).

134 *Graber v. Graber*, 93 F. Supp. 281 (D.D.C. 1950).

135 A person found guilty of contempt is subject to arrest in any district under 28 U.S.C. § 3041 (1982), and can thereafter be removed to the district in which punishment is imposed pursuant to FED. R. CRIM. P. 40. Contempt sanctions can be imposed only by the court issuing the decree that was defied. *Ex parte Bradley*, 74 U.S. 366 (1869).

Its presentation in this form is a part of an effort to make rulemaking as open a process as it can be. The Advisory Committee does read its mail, and its meetings are open. Alas, even with respect to a matter as important as Rule 4, public interest in the work of rulemaking is low.

This is, of course, quite as our forebears intended. A proposed rule evoking a high level of interest on the part of groups whose identities are extrinsic to the judicial process was never perceived to be the stuff of technocratic rulemaking, and such a proposal should be abandoned or referred by the rulemakers to a politically accountable organ of the government, presumably Congress.<sup>136</sup>

Yet there abides a realm for us technocrats who strive to bring the Rules closer to the stated objective of assuring the "just, speedy, and inexpensive determination of every action,"<sup>137</sup> but we need all the help we can get.

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<sup>136</sup> This is the essential intent of the Rules Enabling Act in constraining the effect of rules modifying substantive rights. *See generally* Carrington, "Substance" and "Procedure" in the Rules Enabling Act, (forthcoming in the 1989 DUKE L.J. (early draft submitted to the Section on Civil Procedure of the Association of American Law Schools, Miami Beach, Florida, January 9, 1988).

<sup>137</sup> FED. R. CIV. P. 1.

### Appendix. Draft Rule 4. Summons

(a) **Issuance.** Upon the filing of the complaint, the clerk shall issue and deliver to the plaintiff a summons to each party against whom a claim is made.

(b) **Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(c) **Service: By Whom Made.** The plaintiff shall be responsible for service of a summons and complaint within the time allowed under subdivision (m) of this rule. Service may be effected by any person who is not a party and is not less than 18 years of age, provided that the court may at the request of the party responsible for service direct that service be effected by a person or officer (who may be a United States marshal or deputy United States marshal) specially appointed by the court for that purpose. A special appointment shall be made when the party seeking service is authorized to proceed *in forma pauperis* pursuant to Title 28, U.S.C. § 1915, or a seaman authorized to proceed under Title 28, U.S.C. § 1916.

(d) **Request to Waive Summons.**

(1) A defendant may waive the service of a summons without prejudice to any jurisdictional defense or any objection except to insufficiency of process or insufficiency of service. A defendant has a duty to avoid unnecessary costs of service of a summons in an action of which the defendant is fully notified. With respect to an individual other than an infant or incompetent person or with respect to a domestic or foreign corporation or a partnership or other unincorporated association that is subject to suit under a common name, the court shall impose the costs of effecting service on a defendant failing to comply with a request for a waiver of service of a summons made according to the following paragraph (2), unless good cause be shown.

(2) A request for a waiver is effective to shift responsibility for the costs of service of a summons under the preceding paragraph (1) if it

- (A) is in writing and addressed to the defendant through first-class mail or other equally reliable means;
- (B) informs the defendant of the consequences of compliance and of a failure to comply with the request;
- (C) allows the defendant a reasonable time to comply, which shall be at least 20 days, or 30 days if the defendant is addressed outside any judicial district of the United States; and
- (D) provides the defendant with a prepaid means of compliance in writing.

(3) When a waiver is filed with the court, the action shall proceed as if a summons and complaint had been served at the time of filing and no proof of service shall be required.

(4) The costs to be imposed on a defendant under paragraph (1) for failure to comply with a request for a waiver of service of a summons shall include the costs of issuance under subdivision (b) and of service under subdivision (e) or (g) of this rule and the costs, including a reasonable attorney's fee, of any motion required to collect such costs of service.

**(e) Service upon Individuals.** Unless otherwise provided by federal law, service upon an individual from whom an acknowledgment of receipt has not been obtained and filed, other than an infant or an incompetent person, shall be effected as follows:

(1) By delivering a copy of the summons and of the complaint to the individual personally within any judicial district of the United States; or

(2) By leaving copies thereof at the individual's dwelling house or usual place of abode within any judicial district of the United States with some person of suitable age and discretion then residing therein; or

(3) By delivering within any judicial district of the United States a copy of the summons and of the complaint:

(A) to an agent authorized by appointment or by law to receive service of process; or

(B) to the office or place of business of the individual to the extent and in the manner prescribed by the law of the state in which the service is effected for service in that state in an action brought in any of its courts of general jurisdiction; or

(4) In a foreign country, provided that service is reasonably calculated to give notice, by any means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents or any other applicable treaty or convention; or

(5) In a foreign country, if internationally agreed means of service are unavailable or ineffective, and provided that service is reasonably calculated to give notice:

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

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

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

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

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

(F) as otherwise directed by order of the court.

**(f) Service Upon Infants and Incompetent Persons.** Service upon an infant or incompetent person shall be effected within any judicial district of the United States in the manner prescribed by the law of the state in



which the service is effected for service in that state in an action in any of its courts of general jurisdiction. An infant or an incompetent person in a foreign country shall be served in the manner prescribed for other individuals by paragraph (e)(4) or subparagraph (e)(5)(A) of this rule.

**(g) Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, and from whom an acknowledgment has not been obtained and filed, shall be effected within a judicial district of the United States by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. A corporation, partnership, or association shall be served in a foreign country in the manner prescribed for individuals by paragraphs (e)(4) and (e)(5) of this rule.

**(h) Service upon the United States.** Service upon the United States shall be effected by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney.

**(i) Service upon Officers, Agencies, or Corporations of the United States.** Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by subdivision (h) of this rule and by sending a copy of the summons and of the complaint by registered or certified mail to such officer, agency, or corporation.

**(j) Service upon State or Local Governments.** Service upon a state or municipal corporation or other governmental organization thereof subject to suit shall be effected by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons upon any such defendant.

**(k) Territorial Limits of Effective Service.** With respect to a claim arising under federal law or subject to the federal interpleader jurisdiction, service of a summons pursuant to this rule shall be effective to assert jurisdiction over the person of the defendant, unless the Constitution or a statute of the United States otherwise provides. With respect to other claims, service of a summons shall not be effective to assert jurisdiction over the person or property of a defendant that is not subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is held, except that a party joined under Rule 14 or Rule 19 shall also be amenable to service that is effected at a place

within a judicial district of the United States and not more than 100 miles from the place from which the summons issues.

(l) **Return of Service.** If service is effected by filing an acknowledgment of receipt of the summons and complaint, no further proof of service is required. The person otherwise effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made outside any judicial district of the United States, proof may be made as prescribed by an applicable treaty or convention, or if service is made pursuant to paragraph (e)(5), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of service.

(m) **Time Limit for Service.** If service of the summons and complaint is not made within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative after notice to such party or upon motion. This subdivision shall not apply if the defendant is not an inhabitant of and cannot be found within any judicial district of the United States.

(n) **Service of Summons Not Feasible.** Upon a showing that the plaintiff cannot with reasonable efforts serve the defendant with a summons in any manner authorized by this rule, the court may assert jurisdiction over any assets of the defendant found within the district by seizing the assets under the circumstances and in the manner prescribed by the law of the state in which the district court sits.

#### Rule 4.1 Service of Other Process

(a) **Generally.** Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45, shall be served by a United States marshal or a deputy United States marshal, or by a person specially appointed for that purpose. Such process may be served anywhere within the territorial limits of the state in which the district is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.

(b) **Enforcement of Orders: Civil Contempt.** An order of commitment of a party, or an order to a party to show cause why the party should not be committed for civil contempt of a decree or injunction issued to enforce the laws of the United States may be served in any district. Such an order of commitment or to show cause served on any person not previously served as a party to an action or for civil contempt of a court order not issued to enforce the laws of the United States shall be served in the state in which is located the court issuing the order to be enforced or elsewhere within the United States and not more than 100 miles from the place in which the order to be enforced was issued.

**Form 1A. Request for Waiver and Waiver of Service of Summons***Request for Waiver of Service of Summons*

To: \_\_\_\_\_ [Fill in name and address of person who would be served by a summons if service were necessary.]

A complaint has been filed in the legal action of \_\_\_\_\_ v. \_\_\_\_\_. The complaint has been filed in the United States District Court for the \_\_\_\_\_. It has been assigned docket number \_\_\_\_\_.

A copy of that complaint is attached to this request. It asserts a claim against you or a person on whose behalf you are asked to comply with this request. The person, if any, on whose behalf you are asked to comply is \_\_\_\_\_. [If applicable fill in name of the defendant who could be served by delivery of a summons to the addressee of this request.]

In order to save legal costs, you are hereby asked to waive service of a summons in this legal action. You may do so by completing this form and returning it to me by the means here provided on or before the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_. [Fill in date, allowing at least 20 days from the date of dispatch of this request, or 30 days if the addressee is not in the United States.]

In complying with this request, you will retain any defense or objections you may have except any that might bear on the sufficiency of a summons or on the sufficiency of service of the summons and complaint. You will retain any rights you may have to object to the jurisdiction of the court or the venue in which the action has been brought. If you comply, your waiver will be filed with the court and no summons will be issued against you or the person on whose behalf you are receiving this request.

Please be advised that you will then be required to file an answer to the complaint within 20 days from the date of filing of this waiver of service of a summons, and if you fail to do so, a judgment by default will be taken against you for the relief demanded in the complaint.

If you do not comply with this request on or before the date designated above, it will be necessary to incur the costs of issuance and of service of a summons and complaint on you. You or the person on whose behalf you are receiving this request will be required to pay those costs unless you can show good cause for your failure to comply. It is not sufficient cause to refuse this request that you believe the claim made against you be unjust or unfounded, or that the action has been brought in an improper venue or in a court that lacks jurisdiction over the subject matter of the action or over your person or property.

I affirm that this request is being sent to you on behalf of the claimant this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Signature of Plaintiff's Attorney

*Waiver of Service of Summons*

I acknowledge receipt of this request for a waiver and hereby waive the service of a summons and complaint in the action described above,

retaining any defenses or objections I may have other than any possible objection to the sufficiency of a summons or of the service of process.

Signature of Addressee

Date: \_\_\_\_\_

Relationship to Defendant, if  
responding on behalf of another  
person: \_\_\_\_\_