# Is Personal Jurisdiction Constitutionally Self-Enacting?

**Author :** Lumen N. Mulligan

**Date :** May 7, 2019

A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, __ **Fla. L. Rev.** __ (forthcoming 2019), available at SSRN.

Federal Rule of Civil Procedure 4(k) generally limits the scope of a federal district court's personal jurisdiction to that of the state in which it sits. We have this paralleling of state- and federal-court personal jurisdiction despite the fact that the Fourteenth Amendment limits only the states' exercise of personal jurisdiction while it is the Fifth Amendment that presumptively regulates the federal exercise of that same power. Building upon this distinction, Benjamin Spencer, in his dual role as a preeminent procedural scholar and member of the Judicial Conference Advisory Committee on Civil Rules, argues that we should decouple federal and state court personal jurisdiction doctrine. You should give this short, but thought-provoking, essay a read not only because Spencer is one of the top proceduralists writing today, but because you could well be working with his revised Rule 4(k) soon.

Spencer defends a radical redrafting of Rule 4(k), suggesting as follows: "All process other than a subpoena may be served anywhere within the territorial limits of United States. Nothing in these Rules limits the personal jurisdiction of a district court." Under his proposal, federal courts would take personal jurisdiction by engaging in an *International Shoe* analysis that focuses upon contacts with the nation as a whole—not merely contacts with the state in which the federal court sits, as is the case under current practice.

The basic premise of Spencer's nationwide-contacts approach has great intuitive appeal. The contacts analysis under *International Shoe* focuses upon the relationship between the defendant and the relevant sovereign that empowers the court with authority. In state court, one rightly focuses on contacts between the forum state and the defendant, as the forum state is the relevant sovereign. By analogy then, in federal court the *International Shoe* contact analysis should focus upon contacts between the nation as a whole and the defendant, as it is the nation as a whole that acts as the relevant sovereign in such an instance. The Supreme Court flirted with the notion that nationwide contacts are relevant in a Fifth Amendment *International Shoe* analysis in the past, most prominently in Justice Kennedy's concurring opinion in J. McIntyre Machinery v. Nicastro and leaving the question open in other cases. But it has failed to reach a holding on this issue.

Spencer lays out several policy goals that his proposal would achieve. His revised Rule 4(k) eliminates the current state of affairs in which different federal district courts possess differing scopes of personal jurisdictional authority merely because they sit in different states. Eliminating this non-uniformity enhances efficiency, consistency, and predictability in civil litigation. His revised Rule 4(k) ensures that a federal forum exists in every state for the adjudication of civil suits that have federal subject matter jurisdiction. His revised Rule 4(k) avoids Rule 12(b)(2) dismissals of prima facie valid claims, which otherwise have subject matter jurisdiction and proper venue in federal court, where the forum state takes a different approach to personal jurisdiction. Finally, this nationwide personal jurisdiction approach is easier to understand and apply than our current forum-state-linked analysis.

Spencer provides a forceful rebuttal to potential *Erie*-based concerns with his approach. He acknowledges that his revised Rule 4(k) would create an outcome-determinative difference that could

induce forum shopping among state and federal courts. Nevertheless, Spencer notes that the Supreme Court does not treat outcome determination as a talisman and, moreover, *Erie* has never been applied to jurisdictional analyses.

Finally, Spencer contends that his proposed revisions do not require an Act of Congress. Relying upon his past work, Spencer argues that current Rule 4(k) is ultra vires under the Rules Enabling Act. The REA prohibits the Supreme Court from promulgating rules that speak to subject matter or personal jurisdiction. Current Rule 4(k) must go, in Spencer's view. The beauty of revised Rule 4(k) is that it does not speak to personal jurisdiction at all; rather, his revision takes the Rules "out of the business of delimiting the jurisdictional reach of the federal courts." In Spencer's view, with the current jurisdiction-delimiting version of Rule 4(k) struck, the federal district courts would have self-enacting personal jurisdiction flowing from the Fifth Amendment because he concludes that "federal courts do not require statutory authorization to exercise territorial jurisdiction over litigants."

It is at this last step—Spencer's posited self-enacting personal jurisdiction authority for federal courts flowing from the FifthAmendment—that procedural scholars should stay tuned. If we were discussing the Fourteenth Amendment's regulation of the state's ability to take personal jurisdiction, most would agree that personal "jurisdiction is not self-executing" and that federal due process does not compel states to open their courts. The crux of Spencer's argument is that personal jurisdiction in federal court should not be analyzed under the Fourteenth Amendment analysis, but the Fifth Amendment. Hence, he has room to make his contention.

This is not to say that we have a consensus that the Fifth Amendment self-enacts personal jurisdiction authority for the federal courts. Far from it. We face a dearth of case law on this Fifth Amendment point. And at least one scholar, in another great new article, takes the opposite position from Spencer on this point.

I, for one, look forward to Spencer's continued work on this very question of self-enacting personal jurisdiction authority for federal courts. It is bound to be a fascinating dialogue.

Cite as: Lumen N. Mulligan, *Is Personal Jurisdiction Constitutionally Self-Enacting?*, JOTWELL (May 7, 2019) (reviewing A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, __ **Fla. L. Rev.** __ (forthcoming 2019), available at SSRN), https://courtslaw.jotwell.com/is-personal-jurisdiction-constitutionally-self-enacting/.