

stated by the Court of Appeals, *ibid.*, 578 F.2d, at 431: "The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today, for that matter concerns the security of the United States. The mere lapse of time is not decisive."

I disagree, however, with the holding of the District Court, affirmed by the Court of Appeals, that respondent Barron was entitled to summary judgment. In my view the evidence raised a genuine issue of fact respecting the existence of actual malice on his part. I would therefore reverse the judgment of the Court of Appeals and remand to the District Court for trial of that issue.



443 U.S. 173, 61 L.Ed.2d 464

David H. LEROY, Attorney General of
Idaho, et al., Appellants,

v.

GREAT WESTERN UNITED
CORPORATION.

No. 78-759.

Argued April 17, 1979.

Decided June 26, 1979.

Appeal was taken from an order of the United States District Court for the Northern District of Texas, Robert M. Hill, J., 439 F.Supp. 420, declaring the Idaho takeover statute unconstitutional. The Court of Appeals, Wisdom, Circuit Judge, 577 F.2d 1256, affirmed, and appeal was taken. The Supreme Court, Mr. Justice Stevens, held that: (1) provision of Securities Exchange Act giving federal district court exclusive jurisdiction over suit brought "to enforce any * * * duty created" by the Act did not establish venue in Northern District of Texas with respect to action brought by corporation with principal place of business in Texas challenging the Idaho takeover statute, since section of the Act affecting states' authority with respect to securities regulation did not impose any "duty" upon

the states, and (2) venue of action was not proper in the Northern District of Texas under statute allowing venue in "the judicial district * * * in which the claim arose," since the District of Idaho, where actions forming the basis for the claim took place, was the only one in which "the claim arose" within meaning of the statute.

Reversed.

Mr. Justice White dissented and filed opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

Opinion after remand, 5 Cir., 602 F.2d 1246.

1. Federal Courts ⇌ 29, 97

The question of personal jurisdiction, which goes to the court's power to exercise control over parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum; on the other hand, neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of defendant, rather than absolute strictures on the court, and both may be waived by parties.

2. Federal Courts ⇌ 29, 97

When there is sound prudential justification for doing so, a court may reverse the normal order of considering personal jurisdiction and venue.

3. Federal Courts ⇌ 451

On appeal from order declaring Idaho takeover statute unconstitutional on ground that it was preempted by the Securities Exchange Act, Supreme Court would reverse the normal order of considering personal jurisdiction in advance of venue, since otherwise, the Court would have to decide a constitutional law question not previously decided as to whether personal jurisdiction was properly obtained under the Texas long-arm statute.

4. Securities Regulation ⇌ 133

Provision of Securities Exchange Act giving federal district court exclusive jurisdiction over suit brought "to enforce any * * * duty created" by the Act did not

establish venue in Northern District of Texas with respect to action brought by corporation with principal place of business in Texas challenging the Idaho takeover statute, since section of the Act affecting states' authority with respect to securities regulation did not impose any "duty" upon the states. Securities Exchange Act of 1934, §§ 27, 28(a), as amended 15 U.S.C.A. §§ 78aa, 78bb(a); 28 U.S.C.A. § 1391(b).

5. Federal Courts ⇐71

In enacting statute allowing venue in "the judicial district * * * in which the claim arose," Congress did not intend to provide for venue at the residence of plaintiff or to give that party an unfettered choice among a host of different districts; rather, it restricted venue either to residence of defendants or to "a place which may be more convenient to the litigants," i. e., both of them, "or to the witnesses who are to testify in the case." 28 U.S.C.A. § 1391(b).

6. Federal Courts ⇐71

The broadest interpretation of statute allowing venue in "the judicial district * * * in which the claim arose" is that in the unusual case in which it is not clear that claim arose in only one specific district, plaintiff may choose between those two districts that with approximately equal plausibility may be assigned as the locus of the claim. 28 U.S.C.A. § 1391(b).

7. Federal Courts ⇐74

Venue of action brought against Idaho officials by corporation with principal place of business in Texas challenging Idaho takeover statute was not proper in the Northern District of Texas under statute allowing venue in "the judicial district * * * in which the claim arose," since the District of Idaho, where actions forming the basis for the claim took place, was the only one in which "the claim arose" within meaning of the statute. 28 U.S.C.A. § 1391(b).

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

reading the syllabus. *Syllabus* * * *

After publicly announcing its intent to make a tender offer to purchase shares of stock of a company having substantial assets in Idaho, appellee, a Texas-based corporation which is also engaged in business in New York and Maryland, filed the informational schedule with the Securities and Exchange Commission required by the Securities Exchange Act of 1934 (1934 Act), as amended by the Williams Act, and also filed documents in Idaho in an attempt to satisfy that State's takeover statute. When Idaho officials objected to the filing and delayed the effective date of the tender offer, appellee brought an action in the Federal District Court for the Northern District of Texas against the officials responsible for enforcing Idaho's takeover law, seeking a declaration that the state law was invalid insofar as it purported to apply to interstate tender offers to purchase securities traded on a national exchange. The District Court held that personal jurisdiction over the Idaho defendants had been obtained under the Texas long-arm statute, and that venue could be sustained under the special venue provision in § 27 of the 1934 Act giving federal district courts exclusive jurisdiction of actions brought to enforce "any liability or duty created" by the Act. The court then went on to hold that the Idaho takeover statute was pre-empted by the Williams Act and placed an impermissible burden on interstate commerce. The Court of Appeals affirmed, holding, *inter alia*, that venue was authorized by § 27 of the 1934 Act, because Idaho's enforcement attempt, by conflicting with the Williams Act, constituted a violation of a "duty" imposed by § 28(a) of the 1934 Act (which provides that nothing in the Act shall affect a state securities regulatory agency's jurisdiction over any security or person insofar as it does not conflict with the Act), and that venue was also proper under 28 U.S.C. § 1391(b) (which permits actions not founded solely on diversity of citizenship to be brought in a district where the claim arose). See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

statute, 28 U.S.C. § 1391(b),⁸ because the defendants obviously did not reside in Texas and the claim arose in Idaho rather than in Texas. Nonetheless, it decided that venue could be sustained under the special venue provision in § 27 of the Securities Exchange Act of 1934 (1934 Act). 48 Stat. 902, as amended, 15 U.S.C. § 78aa. See nn. 9 and 10, *infra*, and accompanying text.

On the merits, the District Court held that the Idaho Corporate Takeover Act is pre-empted by the Williams Act and places an impermissible burden on interstate commerce. It granted injunctive relief that enabled Great Western to acquire the desired Sunshine shares in the fall of 1977. 439 F.Supp., at 434-440. That acquisition did not moot the case, however, because the question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed.

¹¹⁷⁹ A divided panel of the Court of Appeals for the Fifth Circuit affirmed. The court sustained federal subject-matter jurisdiction on the same four grounds relied upon by the District Court. See n. 6, *supra*. It then advanced alternative theories in support of both its determination that the District Court had personal jurisdiction over the defendants and its conclusion that venue lay in the Northern District of Texas. First, it noted that the Texas long-arm statute authorized the assertion of personal jurisdiction over nonresidents to the fullest

8. Section 1391(b) provides:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

9. "The district courts of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any

extent allowable under the Due Process Clause of the Fourteenth Amendment. It then held that an Idaho official who seeks to enforce an Idaho statute to prevent a Texas-based corporation from proceeding with a national tender offer has sufficient contacts with Texas to support jurisdiction. Second, it held that jurisdiction was available under § 27 of the 1934 Act,⁹ which gives the federal district courts exclusive jurisdiction over suits brought "to enforce any . . . duty created" by the Act. It based this holding on the theory that Idaho's enforcement attempts, by conflicting with the Williams Act, constituted a violation of a "duty" imposed by § 28(a) of the 1934 Act.¹⁰ It relied on the same reasoning to support its conclusion that venue was authorized by § 27 of the 1934 Act. Finally, disagreeing with the District Court, the Court of Appeals concluded that venue in the Northern District of Texas was also proper under the general federal venue provision, 28 U.S.C. § 1391(b), because the allegedly invalid restraint against Great Western occurred there and it was accordingly "the judicial district . . . in which the claim arose." *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1265-1274. On the merits, the Court of Appeals agreed with the analysis of the District Court. *Id.*, at 1274-1287.

We noted probable jurisdiction of the appeal. 435 U.S. 1065, 99 S.Ct. 829, 59 L.Ed.2d 90. Without reaching either the

violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . ." 15 U.S.C. § 78aa.

10. Section 28(a), as set forth in 15 U.S.C. § 78bb(a), provides in pertinent part:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

¹¹⁸⁰

Cite as 99 S.Ct. 2710 (1979)

merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the Northern District of Texas.

[1, 2] The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum. See generally C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3801, pp. 5-6 (1976) (hereinafter Wright, Miller & Cooper). On the other hand, neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties. See *Olberding v. Illinois Central R. Co.*, 346 U.S. 338, 340, 74 S.Ct. 83, 85, 98 L.Ed. 39; *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 167-168, 60 S.Ct. 153, 154-155, 84 L.Ed. 167. Accordingly, when there is a sound prudential justification for doing so, we conclude that a court may reverse the normal order of considering personal jurisdiction and venue.

[3] Such a justification exists in this case. Although for the reasons discussed in Part II, *infra*, it is clear that § 27 of the 1934 Act does not provide a basis for personal jurisdiction, the question whether personal jurisdiction was properly obtained pursuant to the Texas long-arm statute is

1181 ¹¹ E. g., *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977). Appellants argue that this construction is only applicable to private commercial defendants and should not govern either in a suit against the agents of another sovereign State or in one against persons who are not engaged in commercial endeavors. Both the District Court and the Court of Appeals, however, have concluded that the statute does extend to the limits of the Due Process Clause in this case, and it is not our practice to re-examine state-law determinations of this kind. E. g., *Butner v. United States*, 440 U.S. 48, 57-58, 99 S.Ct. 914, 919, 59 L.Ed.2d 136;

more difficult. Indeed, because the Texas Supreme Court has construed its statute as authorizing the exercise of jurisdiction over non-residents to the fullest extent permitted by the United States Constitution,¹¹ resolution of this question would require the Court to decide a question of constitutional law that it has not heretofore decided. As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions. We find it appropriate to pretermitt the constitutional issue in this case because it is so clear that venue was improper either under § 27 of the 1934 Act or under § 1391(b) of the Judicial Code.

II
[4] The linchpin of Great Western's argument that venue is provided by § 27 of the 1934 Act is its interpretation of § 28(a) of that Act. See nn. 9, 10, *supra*. It reads § 28(a) as imposing an affirmative "duty" on the State of Idaho, the violation of which may be redressed in the federal courts under § 27. As Mr. Justice Frankfurter said of a similar argument in a similar case, however, "[t]his is a horse soon curried." *Olberding, supra*, 346 U.S., at 340, 74 S.Ct., at 85.

The reference in § 27 to the "liabilit[ies] or dut[ies] created by this chapter" clearly corresponds to the various provisions in the 1934 Act that explicitly establish duties for certain participants in the securities market or that subject such persons to possible actions brought by the Government, the Securities and Exchange Commission, or private litigants.¹² Section 28(a) is not such

¹¹⁸² *Bishop v. Wood*, 426 U.S. 341, 345-346, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 and n. 8; *Propper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1341-1342, 93 L.Ed. 1480.

¹² E. g., § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) ("It shall be unlawful for any person to solicit any proxy in contravention of such rules and regulations as the Commission may prescribe") (emphasis added); § 16(b), 15 U.S.C. § 78p(b) ("For the purpose of preventing the unfair use of information which may have been obtained by [the] beneficial owner [of 10% of any class of equity security], director, or officer by reason