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WHICH WAY TO THE RIGHT COURT? THE USE OF FEDERAL TRANSFER STATUTES WHEN A COURT IS A PROPER VENUE BUT LACKS PERSONAL JURISDICTION

I. INTRODUCTION

Plaintiff has been injured in an automobile collision with defendant. Defendant resides in another state. His only contact with plaintiff's state was his trip which resulted in the collision with plaintiff.\(^1\) Plaintiff files suit in a federal district court of his state seeking more than $50,000 in damages. This court has subject matter jurisdiction over this action based on diversity of citizenship.\(^2\) In addition, venue is proper in the district where plaintiff resides.\(^3\) Personal jurisdiction, however, will be lacking if the defendant is not within the state\(^4\) or otherwise subject to the court's jurisdiction by his having established minimum contacts with the plaintiff's state.\(^5\)

If personal jurisdiction were lacking, the court would be con-

\(^1\) This situation is modeled after the hypothetical suggested by Justice Harlan in his dissent in Goldlawr, Inc. v. Heiman, 369 U.S. 463, 468 n.1 (1962) (Harlan, J., dissenting).
\(^2\) 28 U.S.C. § 1332(a)(1) (1989). The relevant portion of this statute reads: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between . . . (1) citizens of different States . . . ." Id.
\(^3\) Id. § 1391(a) (1982). This subsection reads: "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." Id.
\(^4\) Fed. R. Civ. P. 4(f). The relevant portion of this rule provides: "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held . . . ." Id.
fronted with a decision to either dismiss the case or transfer it to a proper court. If it would unduly prejudice plaintiff’s rights to dismiss the action, a court could transfer the action to a proper district. A transfer would be appropriate, for instance, if a subsequent filing of the action would be barred by the applicable statute of limitations. A court, however, would face a “nearly hopeless muddle of conflicting reasoning and precedent” in deciding which federal transfer statute should be used when a court is a proper venue but lacks personal jurisdiction.\(^6\)

On its face, section 1404(a) of Title 28 of the United States Code\(^8\) seems to require both venue and personal jurisdiction.\(^9\) In contrast, section 1406(a) appears to address instances when venue is improper.\(^10\) Neither statute appears to deal with the situation where a court is a proper venue but lacks personal jurisdiction.\(^11\) The courts, however, have interpreted both these statutes in order to sidestep the problem. Some courts read section 1404(a) to not require personal jurisdiction;\(^12\) other courts interpret section 1406(a) to apply when venue is proper.\(^13\) Still other courts find an inherent power to transfer actions in such instances by reading both statutes together,\(^14\) and some courts state that a transfer may be ordered by

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7. Although the decision on which statute to use may be difficult, one court has noted that the method used is of little concern to the participants in a lawsuit. Carty v. Health-Chem Corp., 567 F. Supp. 1, 2 (E.D. Pa. 1982).
8. All code sections referred to in the text of this comment are taken from Title 28 of the United States Code unless otherwise indicated.
9. 28 U.S.C. § 1404(a) reads: “For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” Many treatises indicate that this provision codifies or is modeled on the common law doctrine of forum non conveniens which requires both personal jurisdiction and venue. See, e.g., F. James & G. Hazard, CIVIL PROCEDURE § 2.11 (1985); J. Friedenthal, M. Kane & A. Miller, CIVIL PROCEDURE § 2.17 (1985). For the jurisdictional and venue requirements of the doctrine of forum non conveniens, see generally 15 C. Wright, A. Miller & E. Cooper, JURISDICTION 2D § 3828 (2d ed. 1986 & Supp. 1988).
10. 28 U.S.C. § 1406(a) reads: “The district court of a district in which is filed [a] case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” Several treatises affirm that section 1406(a) is only applicable when venue is improper. See, e.g., F. James & G. Hazard, supra note 9, § 2.11; C. Wright, LAW OF FEDERAL COURTS 257 (1983).
11. See Liaw Su Teng v. Skaaup Shipping Corp., 743 F.2d 1140, 1147 (5th Cir. 1984). The court cynically noted: “Sections 1404(a) and 1406(a) are both short, apparently clear, and seemingly mutually exclusive . . . . Yet, in law, as several poets have observed about life, things are not always what they seem.” Id.
12. See infra notes 31-35 and accompanying text.
13. See infra notes 63-68 and accompanying text.
14. See infra notes 105-13 and accompanying text.
using either statute. Finally, growing academic and judicial sentiment calls for the use of a recently enacted statute, section 1631 of Title 28 of the United States Code, which on its face applies to the instance where a court is a proper venue but lacks personal jurisdiction.

Section II of this comment will first discuss the methods which courts have used to transfer actions when courts lack personal jurisdiction but venue is proper. The three federal transfer statutes, their legislative histories, and the courts' differing interpretations of venue and jurisdictional requirements will be explored. This comment will survey how courts have construed and molded each statute, or the two statutes together, to fit situations in which a court is a proper venue but lacks personal jurisdiction.

Section III of this comment will describe the problem which arises from the current methods of judicial construction, and Section IV will analyze each of these constructions. The Supreme Court, in its *Goldlawr* decision, established the goal that each case should be decided on its merits and that the technicalities of venue and jurisdiction should not overwhelm the interests of justice. This comment will suggest that each solution facilitates these goals but in an overly difficult and complicated manner.

Finally, Section V of this comment will propose a new "catch all" federal transfer statute. This statute will ensure that each case is resolved on its merits and that the interests of justice are not stymied. In addition, this new statute will clarify the process of transferring actions between improper and proper courts.

II. Background

This section will first explore the evolution which gave rise to the codification of the federal venue statutes sections 1404(a), 1406(a), and 1631 of Title 28 of the United States Code. This section will follow the legislative history of each statute, will detail each statute's personal jurisdiction and venue requirements, and will describe how each statute has been applied to transfer actions when a court lacks personal jurisdiction but venue is properly laid.

A. The Development of Federal Transfers

Prior to 1948, the federal courts had no method to transfer ac-

15. See infra notes 114-17 and accompanying text.
16. See infra notes 93-104 and accompanying text.
tions which were brought in improper or inconvenient forums. Dismissal was the only option. In 1947, in the leading case of *Gulf
Oil Co. v. Gilbert,* the Supreme Court generally adopted the common law doctrine of forum non conveniens for the federal court system. Long at use in the state courts, this doctrine allows a competent court to dismiss an action when the action could have been brought in a more convenient court. A court can employ the doctrine of forum non conveniens to alleviate undue harassment of a defendant in a proper but inconvenient venue. To invoke this doctrine, the court needs personal jurisdiction over the defendant and venue must be proper.

In *Gilbert,* the plaintiff Gilbert, a resident of Virginia, brought an action in a New York district court for fire damage to property located in Virginia. Gulf, the defendant, was incorporated in Pennsylvania and had sufficient contacts with New York to allow the court to assert personal jurisdiction over it. Venue was properly laid in the district under a New York statute. Following New York precedent, the district court dismissed the case on the basis that the forum was inconvenient to the defendant. Finding that the New York precedent did not control, the Court of Appeals for the Second Circuit reversed and held that no basis existed for dismissal. Finally, the Supreme Court reversed the court of appeals and upheld the New York district court's dismissal. The Court noted that New York had no connection with the action, though personal jurisdiction and venue requirements had been met. By endorsing the doctrine of fo-


20. *See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3828. Earlier, the doctrine of forum non conveniens had been endorsed by the Supreme Court in one limited circumstance. *See Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933). The *Rogers* Court recognized that a court could decline jurisdiction in order that an out of state federal court would not involve itself in "suits relating to the conduct of internal affairs of foreign corporations." *Id.* at 131. *See also* Gilbert v. Gulf Oil Co., 153 F.2d 883, 884 (2d Cir. 1946). The doctrine of forum non conveniens "has a recognized ambit in both federal and local law to prevent exercise abroad of supervision over the 'internal affairs' of a corporation." *Id.*


22. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 504 (1947). The Court stated that "[t]he doctrine of forum non conveniens can never apply if there is an absence of jurisdiction or a mistake of venue." *Id.*
rum non conveniens, the Supreme Court left the plaintiff free to refile the suit in Virginia and extricated the defendant from an inconvenient forum. The Supreme Court did not address the issue of prejudice to the plaintiff's rights. Subsequently, the plaintiff was able to refile the action.

In 1948, under the influence of the *Gilbert* decision, Congress acted to authorize dismissal or interstate transfer between the federal courts when either route served the interest of justice. Congress enacted both section 1404(a) and section 1406(a) in order to bring about this goal.

B. 28 U.S.C. Section 1404

1. *The Statute and Legislative History*

Section 1404 was enacted to replace the doctrine of forum non conveniens in the federal courts. Subsection (a) reads:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The legislative history of this section is not particularly illuminating. According to the Revisor's Notes, section 1404(a) "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper."

Judicial decisions, however, have recognized that section 1404 is broader than the doctrine of forum non conveniens. The language of the statute allows for transfer as well as dismissal for cases brought in inconvenient forums. In addition, section 1404(a) uses different criteria than forum non conveniens to determine whether

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27. *See*, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 264 (1981). The Court found that "Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of forum non conveniens ... it was intended to be a revision rather than a codification of the common law." *Id.*
the transfer or dismissal should be granted. The doctrine of forum non conveniens necessitates that the court consider its "contacts" with the pending action; section 1404(a) requires only that the court consider the convenience of the parties and witnesses and the interests of justice.\textsuperscript{28}

Courts uniformly have stated that a lesser showing of inconvenience is required for section 1404 than that required by the doctrine of forum non conveniens.\textsuperscript{29} And, unlike the forum non conveniens doctrine, section 1404(a) applies to all civil actions before a federal court.\textsuperscript{30}

2. Case Law Interpretations of Jurisdictional Requirements for Section 1404(a)

Courts have not yet reached a consensus on whether section 1404(a) requires personal jurisdiction. A majority of courts have held that personal jurisdiction is not a prerequisite to invoking section 1404.\textsuperscript{31} These courts have ruled that the Supreme Court's decision in \textit{Goldlawr, Inc. v. Heiman},\textsuperscript{32} which held that transfers under section 1406(a) do not require personal jurisdiction, applies equally to transfers under section 1404(a).\textsuperscript{33}

This view is given strength by the Court's disposition of a companion case to \textit{Goldlawr}. \textit{Hohensee v. News Syndicate, Inc.}\textsuperscript{34} concerned the transfer of a case when venue was proper but personal jurisdiction over the defendant was lacking. This case was "re-

\begin{footnotesize}
\textsuperscript{28}See Kaufman, \textit{Observations on Transfers under Section 1404(a) of the New Judicial Code}, 10 F.R.D. 595, 598 (1951).
\textsuperscript{29}See, e.g., Norwood v. Kirkpatrick, 349 U.S. 29 (1955). The Court observed: When Congress adopted § 1404(a) it intended to do more than codify the existing law on forum non conveniens. . . . Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying. . . . [W]e believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience.
\textit{Id.}
\textsuperscript{30}See Kaufman, \textit{supra} note 28, at 598.
\textsuperscript{32}369 U.S. 463 (1962).
\textsuperscript{33}369 U.S. 659 (1962).
\textsuperscript{34}See, e.g., Berkshire, 328 F.2d 358 (3d Cir. 1964).
\end{footnotesize}
manded for consideration in light of Goldlawr . . . .”\(^{35}\)

A minority of courts have ruled that personal jurisdiction is necessary to invoke section 1404(a).\(^{36}\) These courts base their reasoning on the view that section 1404 was derived from the doctrine of forum non conveniens. They determine that section 1404(a), like the forum non conveniens doctrine, presupposes two forums which have personal jurisdiction over the defendant.\(^{37}\)

3. Case Law Interpretations of Venue Requirements for Section 1404(a)

Although it is well settled that the transferee court in a section 1404(a) motion must have jurisdiction and venue over the parties,\(^{38}\) some dispute remains as to whether venue is a requirement for the transferor court.\(^{39}\)

A majority of courts have held that application of section 1404(a) by the transferor court requires that that court be a proper venue for the action.\(^{40}\) These decisions are based on the view that section 1404(a) was derived from forum non conveniens which required that venue be proper,\(^{41}\) and that section 1404(a) is a companion section to section 1406(a), which was drafted to deal with instances when the transferor court was an improper venue.\(^{42}\)

35. \textit{Id.}


38. \textit{See} Hoffman v. Blaski, 363 U.S. 335 (1960). The transferee court must have personal jurisdiction and venue at the time the action is commenced, not just at the time the transfer is requested. \textit{Id. at 342.}


42. \textit{See}, e.g., \textit{Matra Et Manurhin}, 628 F. Supp. at 1534 n.2.
In contrast, a minority of courts see a section 1404(a) transfer as permissible when venue is improper in the transferor court. These courts often view a section 1404(a) transfer as based on an inherent power of the court and not on proper venue.

4. Case Law Applications of Section 1404(a) when the Court Lacks Personal Jurisdiction but Venue is Proper

In Koehring Co. v. Hyde Construction Co., the Fifth Circuit Court of Appeals dealt with a Mississippi plaintiff’s claim for breach of contract against a Wisconsin corporation for work on an Oklahoma plant. In a Mississippi district court, the defendant alleged that the court lacked personal jurisdiction and sought either dismissal or a transfer to an Oklahoma district court. The court of appeals overturned the Mississippi district court’s denial of the alternative motions and ordered a transfer under section 1404(a).

The court did not consider the question of whether personal jurisdiction existed in this instance but held that section 1404 allowed a transfer when the court lacked personal jurisdiction but venue was proper. The court focused on the Goldlawr Court’s discussion of the objectives of section 1406(a). This section was enacted out of “considerations of convenience and procedural reform,” and these same considerations, the Koehring court found, applied equally to section 1404(a). Consequently, the court stated, section 1404(a) should be interpreted broadly and personal jurisdiction over the defendant is not a requirement for invoking the statute.

In 1964, in United States v. Berkowitz, the Third Circuit also held that section 1404 allowed a transfer when venue was proper but the court lacked personal jurisdiction. In Berkowitz, the court of appeals considered a denial of a motion for transfer by the United States in a civil action to collect back taxes from the defendant.

The United States brought the action in Pennsylvania and served process on the defendant at the Philadelphia address which

44. See, e.g., Kalter, 202 F. Supp. at 952; see also Hodgdon, 556 F. Supp. at 75.
45. 324 F.2d 295 (5th Cir. 1963).
46. Id. at 296.
47. Id. at 298.
48. Id. at 297-98.
49. 328 F.2d 358 (3d Cir. 1964).
the I.R.S. had in its records. The defendant moved to dismiss, alleging that he had been a resident of New York for three years and had abandoned his residence in Pennsylvania. The district court denied the United States' motion to transfer the action to New York under section 1404(a). The court noted that while venue was properly laid in the transferor district, that court lacked personal jurisdiction; therefore, section 1404(a) was not applicable.

The court of appeals, however, found that the Goldlawr decision allowing transfers under section 1406(a) when the court lacked personal jurisdiction "conclusively settled" the question of the requirement for personal jurisdiction for section 1404(a).50 The court noted that both statutes were "companion sections, remedial in nature, enacted at the same time, and both dealing with the expeditious transfer of an action from one district or division to another."51

C. 28 U.S.C. Section 1406

1. Statute and Legislative History

Section 1406 was enacted along with section 1404 in 1948. Subsection (a) of section 1406 provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. 52

The Revisor's Note to the 1948 enactment states that this subsection "provides statutory sanction for transfer instead of dismissal, where venue is improperly laid."53 A 1949 amendment substituted "may" for "shall" in the original statute.54 The Senate Report, commenting on the change, stated:

It is thought that the provision [section 1406(a)] may be subject to abuse in that the plaintiff might deliberately bring a suit in a wrong division or district where he could get service on the defendant, and when the question of venue is raised the court is required to transfer the case to a court where 'it could have been brought.' However, in the meantime, service has been perfected on the defendant in the wrong venue, and it will carry

50. Id. at 361.
51. Id.
over into the new (and proper) venue.\textsuperscript{55}

Again, in a 1960 amendment which added subsection (c) to section 1406, the legislative history speaks of the statute as dealing with an "erroneously chosen venue."\textsuperscript{56}

2. \textit{The Goldlawr Decision: Section 1406 Does Not Require Personal Jurisdiction}

The Supreme Court, in \textit{Goldlawr, Inc. v. Heiman}, held that section 1406(a) does not require the court to have personal jurisdiction over the defendant in order to transfer the action to a proper court.\textsuperscript{57} In \textit{Goldlawr}, the plaintiff brought a private antitrust action against several defendants in Pennsylvania. After the defendants made motions to dismiss on the basis of lack of personal jurisdiction and improper venue, the Pennsylvania district court agreed to transfer the action to a New York district court pursuant to section 1406(a), finding that venue was, indeed, improper. The New York district court granted the defendants’ motions to dismiss because the Pennsylvania court, lacking personal jurisdiction, did not have the power to transfer the action under section 1406(a).

The Court of Appeals for the Second Circuit affirmed the New York district court decision. The Supreme Court reversed the court of appeals and noted:

Nothing in that language [of the statute] indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendant. And we cannot agree [with the court of appeals] that such a restrictive interpretation [requiring personal jurisdiction] can be supported by its legislative history . . . .\textsuperscript{58}

In light of this, the Court observed that "[t]he language of section 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not."\textsuperscript{59} The Court based its deci-

\textsuperscript{55} \textit{Id.} (emphasis added).

\textsuperscript{56} \textit{S. REP. No. 1894, 86th Cong., 2d Sess., reprinted in} \textit{1960 U.S. CODE CONG. & ADMIN. NEWS} (86 Stat.) 3583, 3585.

\textsuperscript{57} \textit{Goldlawr}, 369 U.S. at 466. \textit{See also Comment, Change of Venue in Absence of Personal Jurisdiction Under 28 U.S.C. 1404(a) and 1406(a), 30 U. CHI. L. Rev. 735 (1963).}

\textsuperscript{58} \textit{Goldlawr}, 369 U.S. at 465-66.

\textsuperscript{59} \textit{Id.} at 466. \textit{But see S. REP. No. 303, 81st Cong., 1st Sess. 1253 (1949)} (implying that personal jurisdiction is a requirement).
sion on a general concern for procedural simplification and a desire to remove "whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits."[60] "[T]ime-consuming and justice-defeating technicalities," the Court stated, relating to jurisdiction and venue must not overwhelm the interests of justice.[61]

3. Does Section 1406(a) Require Improper Venue?

The text of section 1406(a) refers to "laying venue in the wrong division or district."[62] Many courts and commentators read in this language its plain meaning and state that a prerequisite for invoking section 1406(a) is that venue must be improper.[63] Other courts have argued that, based on a broad reading of the language of the statute, improper venue is not required.

For example, the Fifth Circuit, in Dubin v United States,[64] gave a broad reading to the language of section 1406(a). In Dubin, the United States brought a civil action to collect unpaid taxes in an Ohio district court where the taxpayer had filed his return. Venue was properly laid, but the court was unable to obtain personal jurisdiction over the defendant because the defendant had moved his residence to Florida. The court granted the United States' motion to transfer the action to Florida under section 1406(a) where personal jurisdiction could be obtained. In the Florida district court, the defendant moved to quash service of process and transfer the action back to Ohio on the basis that the transfer under section 1406(a) was inappropriate due to proper venue in Ohio. The Florida district court denied the defendant's motions.

In upholding the district court's decision, the court of appeals...
felt that the language and legislative intent of section 1406(a) did not require that venue be improper. The court observed that "[t]he statute does not refer to 'wrong' venue, but rather to venue laid in a 'wrong division or district.' We conclude that a district is 'wrong' within the meaning of section 1406 whenever there exists an 'obstacle [to] ... an expeditious and orderly adjudication' on the merits.

The Eighth Circuit expanded upon this reasoning in Mayo Clinic v. Kaiser. In Mayo Clinic, the court of appeals considered an Illinois district court's transfer pursuant to section 1406(a) to a Minnesota district court on the plaintiff Kaiser's motion. The plaintiff, an Illinois resident, had brought a medical malpractice claim against the defendant Mayo Clinic, a Minnesota resident. Venue was proper in the Illinois district court. The defendant moved to quash service and dismiss the action for lack of personal jurisdiction in Illinois. The district court granted the motion to quash service and the motion to transfer to Minnesota. The defendant argued that a transfer under section 1406(a) was not permissible when venue was proper.

The court of appeals adopted the Dubin reasoning and held that section 1406(a) does not require that venue be improper. In addition, the court observed that "[c]ertainly a party who has totally wrong in selecting the forum would have no greater right of transfer under section 1406(a) than a party who has selected a forum which is wrong only because service of process cannot be obtained." 68

4. Case Law Applications of Section 1406(a) when the Court Lacks Personal Jurisdiction but Venue is Proper

A number of courts have viewed a transfer as appropriate under section 1406(a) when the court lacks jurisdiction but venue is proper. In Dubin v. United States, the Fifth Circuit held that a

65. Id. at 815 (quoting Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962)). The court quoted the Goldlawr decision: "The language and history of § 1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice." Id.

66. Id. (quoting Goldlawr, 369 U.S. at 466).

67. 383 F.2d 653 (8th Cir. 1967).

68. Id. at 655-56.

transfer was proper under section 1406(a) in such an instance. It based this decision on its finding that the statute's language did not require venue to be improper. Therefore, a court may apply the holding of Goldlawr to such a situation, when venue is proper and jurisdiction is lacking, and may use section 1406(a) to transfer a case.

D. 28 U.S.C. Section 1631

1. The Statute and Legislative History

Section 1631 was enacted by the Federal Courts Improvement Act of 1982. The statute reads:

Whenever a civil action is filed in a court as defined in section 610 of this title [28 U.S.C. section 610] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and the court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . . .

The statute provides for transfer between any court defined by 28 U.S.C. section 610. This section includes all district courts, appellate courts, the United States Claims Court, and the Court of International Trade.

The legislative history of section 1631 is brief. The text reads in part:

70. Dubin v. United States, 380 F.2d 813, 816 (5th Cir. 1967).
71. See supra notes 64-66 and accompanying text.
72. The Federal Courts Improvement Act was designed "to improve the quality of our Federal court system and to enhance citizen access to justice." S. REP. NO. 275, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 11.
74. This is at variance with a literal reading of the legislative intent. The legislative history states: "This provision is broadly drafted to allow transfer between any two Federal courts." S. REP. NO. 275, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 40 (emphasis added). But 28 U.S.C. section 610 does not cover all federal courts. Notably, the U.S. Supreme Court is omitted.
75. 28 U.S.C. § 610 (1984). This section reads:

As used in this chapter the word "courts" includes the courts of appeals and the district courts of the United States, the United States District Court of the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court, and the Court of International Trade.

Id.
Because of the complexity of the Federal court system and of special jurisdiction provisions, a civil case may on occasion be mistakenly filed in a court—either trial or appellate—that does not have jurisdiction. By the time the error is discovered, the statute of limitations or a filing period may have expired. Moreover, additional expense is occasioned by having to file the case anew in the proper court.

Section 301 [of the Federal Courts Improvement Act] adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper. . . . This provision is broadly drafted to allow transfer between any two Federal courts. 76

2. Case Law Decisions

Section 1631 allows a federal court which lacks jurisdiction over any civil action to transfer that action to another federal court in which jurisdiction is proper. 77 Yet, courts disagree on whether this statute pertains only to subject matter jurisdiction or to both subject matter and personal jurisdiction.

Many courts and commentators agree that section 1631 deals specifically with instances when a court lacks subject matter jurisdiction over a civil action. 78 For example, in Nose v. Rementer, 79 a Delaware district court observed that a Maryland district court’s order to transfer a personal injury case to Delaware when it lacked personal jurisdiction over the defendant was proper. 80

77. See generally Hempstead County & Nevada County Project v. Environmental Protection Agency, 700 F.2d 459 (8th Cir. 1983), for a proposed three-part test to determine if a transfer should be allowed under section 1631. The court stated:
First, the court where the action is originally filed must find that there is a want of jurisdiction; second, the court must determine if [the transfer] is in the interest of justice; and third, that court shall then transfer the action to any such court in which the action could have been brought at the time it was filed.
Id. at 462. See also Tayon, supra note 76, at 202. In addition, the author notes the court must consider whether it and the transferee court both fall within the definition of “court” provided by 28 U.S.C. § 610 (1984). Id.
78. See, e.g., Levy v. Pyramid Co., 687 F. Supp. 48 (N.D.N.Y. 1988); Nose v. Rementer, 610 F. Supp. 191 (D. Del. 1985). See generally 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827. The authors state that this statute “allows transfer if the federal court in which the suit was brought lacks subject-matter jurisdiction . . . .” 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 262 n.5.
80. Id. at 192.
court, nevertheless, found that the Maryland court had been in error to order the transfer pursuant to section 1631 instead of section 1404(a). The Delaware court commented that:

Although it is phrased in a manner which could be interpreted as meaning it is to apply to cases like this one, in which the transferor court lacks personal jurisdiction over the defendants, section 1631 appears from its legislative history to apply only to cases in which the transferor court lacks subject matter jurisdiction.

This view is strengthened by the fact that the Federal Courts Improvement Act, while enacting section 1631, repealed 28 U.S.C. sections 1406(c) and 1584. Section 1406(c) allowed a district court lacking subject matter jurisdiction over a claim properly before the former Court of Claims to transfer that action to the Court of Claims. Similarly, section 1584 allowed a court to transfer a civil action between the Court of International Trade and the district courts, courts of appeals, and the Court of Customs and Patent Appeals. Section 1631 superseded sections 1406(c) and 1584 by including within its coverage all courts under section 610.

A few courts, in contrast, have interpreted this provision more broadly to include personal jurisdiction as well as subject matter jurisdiction. In Ross v. Colorado Outward Bound School, Inc., the Tenth Circuit Court of Appeals held that section 1631 was applicable to transfers for want of personal jurisdiction.

In Ross, the plaintiff filed a civil action for wrongful death in a New York state court in 1978. The defendant then removed the action to a New York federal district court and moved to have the court dismiss the action for lack of personal jurisdiction. In 1985, more than six years later, the district court recognized that it lacked personal jurisdiction, and ordered a transfer pursuant to section 1406(a) to a Colorado district court which had personal jurisdiction over the defendant. The defendant moved for summary judgment, asserting that Colorado's statute of limitations barred the action. The

81. Id.
82. Id. at 192 n.1.
83. See Tayon, supra note 76, at 192-94.
84. See, e.g., Carty v. Beech Aircraft Co., 679 F.2d 1051 (3d Cir. 1982); Bentz v. Recile, 778 F.2d 1026 (5th Cir. 1985) (the Fifth Circuit Court of Appeals considered a transfer for lack of personal jurisdiction pursuant to section 1631, but did not reach the issue of its applicability); Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524 (10th Cir. 1987); MMR Holding Corp. v. Sweetser, 675 F. Supp. 326 (M.D. La. 1987).
85. 822 F.2d 1524 (10th Cir. 1987).
district court granted the motion and held that the action was commenced in Colorado on the date of the transfer.86

On the plaintiff's appeal, the court of appeals held that the transferor court should have used section 1631 since it lacked personal jurisdiction, and section 1631 provides by its terms that an action shall proceed in a transferee court based upon the date it was filed in the transferor court.87 In doing so, the court noted that section 1631 "gave broad authority to permit the transfer of an action between any two federal courts."88 The court observed that the intent of Congress was that this section should be broadly construed.89 In light of this, the court suggested that section 1631 should be construed to eliminate the tortured interpretations of sections 1404(a) and 1406(a).90 Further, it concluded that section 1631 was "specifically designed for cases transferred from one federal court to another for lack of jurisdiction [and section 1631] served to simplify the process and streamline its application."91

Several commentators support this view.92 These commentators note that on its face the statute does not restrict itself to subject matter jurisdiction and that the legislative history does not exclude personal jurisdiction for the statute's coverage. In addition, they agree that the purpose behind the Federal Courts Improvement Act was to simplify and to streamline the federal courts and a broad reading of section 1631 would best bring this about.

3. Applications of Section 1631 when the Court Lacks Personal Jurisdiction but Venue is Proper

In Ross v. Colorado Outward Bound School, Inc.,93 the Tenth Circuit Court of Appeals held that a transfer pursuant to section 1631 was required when the transferor court lacked personal juris-

86. Id. at 1525-26.
87. Id. at 1526.
88. Id.
89. Id. at 1527.
90. Id. See also Murphy v. Klein Tools, Inc., 693 F. Supp. 982, 986 (D. Kan. 1988). The Murphy court, following Ross, observed that "[t]his provision [section 1631] eliminates any further resort to an expansive interpretation of section 1406(a) for purposes of transferring a case for lack of jurisdiction," and that section 1631 "indicates Congress' intent to limit § 1406(a) to its express terms, that is, a transfer because of improper venue." Id.
91. Ross, 822 F.2d at 1527.
92. See, e.g., Seidelson, The Jurisdictional Reach of a Federal Court Hearing a Federal Cause of Action: A Path Through the Maze, 23 Duq. L. Rev. 323, 324 n.7, 335 (1985); Tayon, supra note 76, at 224.
93. 822 F.2d 1524 (10th Cir. 1987).
Commenting upon the New York district court’s use of section 1406(a) to transfer the case, the court noted that:

Although read closely, the language of § 1406(a) appears only to apply to those cases transferred for lack of proper venue, the statute has been construed in an extraordinarily broad manner; courts have held that actions commenced in a district court where venue is proper but where personal jurisdiction is lacking may be transferred to a proper forum.

The enactment on October 1, 1982 of § 1631, specifically designed for cases transferred from one federal court to another for lack of jurisdiction, served to simplify the process and streamline its application.

The Ross court thus rejected the expansive interpretations of section 1406(a) and, by implication, section 1404(a), and suggested that these statutes should be read literally. Section 1631, it held, should be used for all transfers when a court lacks personal jurisdiction.

In a more ambiguous decision, the Third Circuit Court of Appeals also used section 1631 to transfer a civil action for lack of personal jurisdiction when venue was proper. In Carty v. Beech Aircraft Corp., the court reversed a district court’s decision to deny the defendants’ motions to dismiss two wrongful death actions. The district court noted that it had appropriate subject matter jurisdiction over the case and that the defendants had “minimum contacts” with the forum to establish personal jurisdiction. In reversing the district court’s decision regarding personal jurisdiction, the court of appeals remanded the case and, without comment, noted that section 1631 permitted transfer for want of jurisdiction.

One circuit has left open the question of whether section 1631 applies to transfers for want of personal jurisdiction. In Bentz v.

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94. Id. at 1526.
95. Id. at 1527 (citing Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813 (5th Cir. 1967)).
97. See id. (“This provision [section 1631] also indicates Congress’ intent to limit § 1406(a) to its express terms, that is, a transfer because of improper venue.”).
99. Id.
100. Id. at 1053.
101. Id. at 1066 & n.17.
Recile, the Fifth Circuit considered the case of a plaintiff, a resident of Mississippi, who brought suit in a Mississippi state court to recover on two promissory notes of several Louisiana residents. The defendants removed the action to a Mississippi federal district court and moved to dismiss for lack of personal jurisdiction. The district court found that personal jurisdiction was lacking and transferred the action to a Louisiana federal district court pursuant to section 1631. The Louisiana court granted plaintiff's motion for summary judgment. In upholding the grant of summary judgment, the court of appeals noted that section 1631 may not be applicable to transfers for lack of personal jurisdiction, but specifically reserved this question. The court noted that, in any case, such a transfer would be valid under section 1404(a) or section 1406(a).

E. Transfer By Use of Both Section 1404(a) and Section 1406(a) or Either Section

Some courts have allowed a transfer of a civil action when venue is properly laid but they lack personal jurisdiction by stating that the court has an inherent power to order a transfer by reading both of the statutes together. Other courts have decided, on the other hand, that either section 1404(a) or section 1406(a) can be used.

In 1977, the court in Volk Co. v. Art-Pak Clip Art Service, considered the defendant's alternative motion to either dismiss for lack of personal jurisdiction and improper venue or have the action transferred pursuant to section 1404(a) or section 1406(a). In ordering the transfer, the court declined to consider whether the defendant was subject to personal jurisdiction or venue was properly laid. The court noted that it could transfer the action under section 1406(a) whether or not personal jurisdiction existed over the defendant, and under section 1404(a) whether or not venue was proper. Reading both sections together, the court held that the court possessed an inherent power to transfer the action in the interest of justice even if personal jurisdiction was lacking and venue was

102. 778 F.2d 1026 (5th Cir. 1985).
103. Id. at 1027.
104. Id.
106. Id. (following Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962)).
107. The court apparently relied on Kalter v. Norton, 202 F. Supp. 950 (S.D.N.Y. 1962), for the proposition that venue is not required for section 1404(a) transfers. This, however, is not clear. See Volk, 432 F. Supp. at 1179.
proper.\footnote{108}

The Second Circuit Court of Appeals further developed this line of reasoning in "Corke v. Sameiet M.S. Song of Norway."\footnote{109} In a diversity action brought in district court, the plaintiff alleged injuries caused by a shipboard accident and by the shipboard doctor.\footnote{110} The lower court dismissed the case for lack of personal jurisdiction; the plaintiff appealed. The court of appeals reversed, stating that a dismissal would prejudice the plaintiff's rights since the statute of limitations would bar recovery.

The court accepted the \textit{Volk} decision in order to sidestep the paradox required by a literal reading of the statutes and to avoid the "analytic difficulties" inherent in the \textit{Dubin} and \textit{Berkowitz} precedents.\footnote{111} The court suggested that \textit{Volk} "placed a judicial gloss on the statutory language, thereby curing Congress' defective draftsmanship."\footnote{112} This gloss would allow the court to use both statutes to transfer a civil action, in the interest of justice, when it lacked personal jurisdiction over the defendant, whether or not venue was properly laid in the district.\footnote{113}

Several courts have held that either section 1404(a) or section 1406(a) may be used to transfer in such circumstances. The Fifth Circuit Court of Appeals, in \textit{Aguacate Consolidated Mines, Inc. v. Deeprock, Inc.},\footnote{114} considered a district court ruling in an action for fraud and breach of contract. The lower court dismissed the suit for lack of personal jurisdiction. On appeal, the court of appeals noted that the action should be transferred because the action would now be prohibited by the statute of limitations. The court held that either section 1404(a) or section 1406(a) could be used to transfer a case in which the defendant was not subject to personal jurisdiction in the district in which venue was proper.

In \textit{Aguacate}, the defendant objected to a district court transfer under section 1406(a). The defendant argued that venue was proper and, therefore, section 1406(a) was not appropriate. The court noted that it had held in \textit{Dubin} that section 1406(a) did not require that

\footnotesize

108. \textit{Id.} at 1181.

109. 572 F.2d 77 (2d Cir. 1978).

110. \textit{Id.} at 78.

111. \textit{Id.} at 80.

112. \textit{Id.} at 80 n.9.

113. \textit{But see} 15 C. WRIGHT, A. MILLER & E. COOPER, \textit{supra} note 9, \S\ 3827 (citing Corke and Volk as supporting the statement that many courts have determined that either statute can be used).

114. 566 F.2d 523 (5th Cir. 1978).
venue be improper. Moreover, the court observed that this case could be properly transferred under section 1404(a) following Koehring which allows a court to transfer an action when it does not have personal jurisdiction over the defendant. The court of appeals held that either statute could be used in this situation and stated that "transfer of this case would advance the interest of justice and procedural simplification underlying sections 1406(a) and 1404(a)."

III. STATEMENT OF THE PROBLEM

For a federal district court to adjudicate a case brought before it, it must have subject matter jurisdiction, personal jurisdiction, and venue must be properly laid. Subject matter jurisdiction and personal jurisdiction are constitutional prerequisites for federal court adjudication. The venue requirement is purely statutory. Jurisdiction conveys the power to a court to hear an action; venue simply represents a statutory system to ensure the action is before a convenient court.

Congress and the courts have labored to provide relief to a plaintiff who has mistakenly brought his case before the wrong tribunal. The result, unfortunately, is more of a patchwork than a system.

Initially, courts were required to dismiss an action when the court lacked jurisdiction or venue was improper. In response to the Supreme Court's acceptance of the doctrine of forum non conveniens, Congress enacted 28 U.S.C. sections 1404(a) and 1406(a). Modeled after forum non conveniens, section 1404(a) appears to require both personal jurisdiction and venue. On the other hand, section 1406(a) on its face requires that venue be improper; the Supreme Court, in its Goldlawr decision, clearly stated that section 1406(a) does not require personal jurisdiction.

In consequence, a court can transfer an action if it has both

115. See supra notes 64-66 and accompanying text.
116. See supra notes 45-48 and accompanying text.
118. See, e.g., 28 U.S.C. § 1391 (1988) (diversity of citizenship, amount in controversy more than $50,000); Id. § 1331 (1982) (federal question); Id. § 1333 (admiralty, maritime and price cases); Id. § 1338 (patents and copyrights). See generally 15 C. Wright, A. Miller & E. Cooper, supra note 9, § 3827.
119. See supra notes 4-5.
personal jurisdiction and venue under section 1404(a) or if it lacks both personal jurisdiction and venue under section 1406(a). A court can also transfer a case when jurisdiction is proper but venue is incorrect under section 1406(a). Which statute should a court use when it lacks personal jurisdiction but venue is proper? Neither Congress nor the Supreme Court has spoken conclusively on this issue.

The lower federal courts, however, have actively tried to resolve this question. Some courts interpret section 1404(a) to not require personal jurisdiction; others read section 1406(a) to not require that venue be improper. Some courts suggest that both statutes read together will allow a transfer; others state that either statute may be used. Still other courts read 28 U.S.C. section 1631 to cover this situation.

IV. Analysis

This section will consider and discuss the merits of the methods courts have used to transfer actions when they lack personal jurisdiction but venue is proper. Each method will be analyzed to consider whether it can be supported by the language of the statute, by legislative history, or by the Supreme Court's Goldlawr decision.

A. Transfers Under Section 1404(a)

Congress intended section 1404(a) to replace the doctrine of forum non conveniens in the federal court system and modeled the new section after this doctrine.\(^{121}\) The doctrine of forum non conveniens requires that the court have personal jurisdiction over the defendant and that the court be a proper venue.\(^{122}\) Most courts, however, have construed section 1404(a) in a more expansive manner than the doctrine of forum non conveniens.\(^{123}\) Indeed, many courts have held that personal jurisdiction is not a prerequisite for invoking section 1404(a).\(^{124}\)

Several circuit courts of appeal have held that section 1404(a) is applicable to transfer an action over which a court lacks personal jurisdiction but in which venue is proper.\(^{125}\) In Koehring Co. v.

\(^{121}\) See supra notes 23-26 and accompanying text. See also Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980).
\(^{122}\) See supra note 22 and accompanying text.
\(^{123}\) See supra notes 27-30 and accompanying text.
\(^{124}\) See supra notes 31-35 and accompanying text.
\(^{125}\) See supra notes 45-51 and accompanying text.
Hyde Construction Co., the Fifth Circuit Court of Appeals stressed the Supreme Court's goals in construing section 1406(a) in the Goldlawr decision. The court found that "[t]he same considerations of convenience and procedural reform which prompted the enactment of section 1406(a) apply to section 1404(a), and there is no basis for distinguishing between them insofar as the rule enunciated in Goldlawr is concerned." In consequence, the court held that personal jurisdiction is not a requirement for a section 1404(a) transfer.

In adopting this precedent, the Court of Appeals for the Third Circuit added to the Koehring court's reasoning. In United States v. Berkowitz, the court of appeals found that the Supreme Court's decision in Goldlawr "conclusively settled" the question of the requirement for personal jurisdiction for section 1404(a). The court stated that the Goldlawr decision applied equally to section 1404(a), observing that sections 1404(a) and 1406(a) were "companion sections, remedial in nature, enacted at the same time, and both dealing with the expeditious transfer of an action from one district to another."

The Sixth Circuit Court of Appeals, however, has stated that not requiring personal jurisdiction for section 1404(a) "necessitates an overly simplified construction of the provision." This court observed that "[s]ection 1404(a) does not seem to provide for such a transfer [when the court lacks personal jurisdiction] in that section 1404(a), to the extent it is comparable to the doctrine of forum non conveniens, presumes the existence of two possible forums."

The view of the Sixth Circuit may be unnecessarily rigid. The Revisor's Notes to section 1404(a) state that this section "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the

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126. 324 F.2d 295 (5th Cir. 1963).
127. Id. at 297-98.
128. Id.
129. 328 F.2d 358 (3d Cir. 1964).
130. Id. at 361.
131. Id. See generally 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 265. (The authors, after observing that a number of courts have allowed transfers pursuant to section 1406(a), state that "the correct way" to transfer the action under section 1404(a) is to apply the Goldlawr decision.).
133. Id. The court also recognized the analytical difficulties in construing section 1406(a) to apply to instances when venue is correct, but felt bound to follow the earlier Sixth Circuit precedent of Taylor v. Love, 415 F.2d 1118 (6th Cir. 1969), cert. denied, 397 U.S. 1023 (1970). Martin, 623 F.2d at 474.
venue is proper." Most courts agree that section 1404(a) is broader than the doctrine it was meant to replace. Although the language of the legislative history suggests that section 1404(a) has the same requirements for personal jurisdiction and venue as the doctrine of forum non conveniens, courts have made a strong argument that the language of the statute may be read more flexibly than this doctrine.

B. Transfers Under Section 1406(a)

The legislative history to the enactment of section 1406(a) and its amendments is unambiguous on one point: section 1406(a) applies "where venue is improperly laid." A majority of courts take the language at its plain meaning and state that improper venue is a prerequisite to invoking section 1406(a). A substantial minority of courts assert that the language of section 1406(a) must be read in a broader manner.

In Dubin v United States, the Fifth Circuit Court of Appeals developed a broad reading of the language of section 1406(a). The court reviewed the legislative history of section 1406(a) and held that "a district is 'wrong' within the meaning of § 1406 whenever there exists an 'obstacle . . . an expeditious and orderly adjudication' on the merits." The Eighth Circuit Court of Appeals followed and amplified

134. See supra notes 25-26 and accompanying text.
135. See supra note 27 and accompanying text.
136. See supra notes 52-56 and accompanying text.
137. See supra note 63 and accompanying text.
138. See supra notes 64-68 and accompanying text.
139. See supra note 66 and accompanying text. In Dubin, 380 F.2d 813 (5th Cir. 1967), the Government brought a civil action to collect unpaid taxes and penalties in an Ohio district in which the taxpayer had filed his return. Venue was properly laid, but the district court was unable to obtain personal jurisdiction over the defendant because the defendant had moved his residence to Florida. The court granted the motion of the United States to transfer the action to Florida under section 1406(a) where personal jurisdiction could be obtained. The defendant moved to quash service of process and transfer the action back to Ohio on the basis that the transfer under section 1406(a) was inappropriate due to proper venue in the district court in Ohio. The court of appeals upheld the district court's denial of the defendant's motion. The court of appeals noted that dismissal in such an instance could result in a the plaintiff's case being barred by the statute of limitations merely because the plaintiff had made an erroneous judgment as to which court would have personal jurisdiction over the defendant.

140. The Dubin court stated that "[t]he language and history of § 1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice." Dubin, 380 F.2d at 815 (quoting Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962)).
141. Id. (quoting Goldlawr, 369 U.S. at 466).
this view in Mayo Clinic v. Kaiser. The court felt that "[c]ertainly a party who has been totally wrong in selecting the forum would have no greater right of transfer under § 1406(a) than a party who has selected a forum which is wrong only because service of process cannot be obtained."

This broad reading of section 1406(a) to include instances when venue is proper has been criticized for its "tortuous" reasoning. The statute is explicit in its reference to venue laid "in the wrong division or district." The Dubin court's suggestion that this reading is supported by the legislative history of section 1406(a) when illuminated by the Supreme Court's decision in Goldlawr is unworkable. The legislative history explicitly states that section 1406(a) applies when the transferor court is an improper venue. And although the Goldlawr Court was concerned with removing obstacles to the advancement of the interests of justice, these interests should not overcome the plain language of the statute.

In addition, the Dubin court's view that venue is "wrong" in a district or division because the court could not obtain personal jurisdiction over a defendant obscures the clear and considerable distinction between venue and personal jurisdiction. Undoubtedly, the

142. 383 F.2d 653 (8th Cir. 1967).
143. Id. at 655-56.
144. See Shong Ching Lau v. Change, 415 F. Supp. 627, 632 (E.D. Pa. 1976). The court remarked that "it appears to this Court that to transfer a case under § 1406(a), notwithstanding the fact that venue is properly laid in the transferor court's division or district, would necessitate a construction of that section which can only be described as tortuous." Id. at 632 n.9. See also Martin v. Stokes, 623 F.2d 469, 474 (6th Cir. 1980). In transferring an action under section 1406(a), the court admitted that "reliance on § 1406(a) necessitates an overly broad interpretation." Id. at 474.

But see 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 264. The authors state that the reasoning that allows transfers under section 1406(a) when a court lacks jurisdiction but venue is proper is "entirely sound." They state that "[i]f, as Goldlawr holds, transfer can be ordered of a case from a district where both venue and personal jurisdiction are lacking, it should follow a fortiori that there can be a transfer if venue is proper and only personal jurisdiction is lacking." 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 264-65. Earlier, however, the authors state that "[a] prerequisite to invoking § 1406(a) is that venue must be improper." 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 263. The authors note that "the correct way to achieve this result [transfer when the court lacks personal jurisdiction but venue is proper] is to apply the Goldlawr principle by analogy to transfers under 28 U.S.C.A. § 1404(a) . . . ." 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827, at 265.
146. See supra notes 53-56 and accompanying text.
147. See 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 9, § 3827. See also Corke v. Samelet M.S. Song of Norway, 572 F.2d 77, 79 (2d Cir. 1978). The Corke court summarized the reasoning of the Dubin court as follows: "[E]ven though venue was proper in Dubin . . . . it was laid in a 'wrong division or district' because the plaintiff could not obtain
“wrong” venue referred to in the statute means a court that is not an
appropriate venue under any applicable venue statute.

These criticisms are certainly correct. The legislative history of
section 1406(a), from its enactment in 1948 to its 1960 amend-
ment,\textsuperscript{148} makes clear that a prerequisite to invoking the section is
that venue be improper in the transferor court.

C. Transfers Under Both Section 1404(a) and Section 1406(a)
or Either Section

The District Court for the Southern District of New York, in
\textit{Volk Co. v. Art-Pak Clip Art Service},\textsuperscript{149} developed the view that
both section 1404(a) and section 1406(a) could be read together to
allow a transfer by a court which lacks personal jurisdiction, but in
which venue is properly laid. The Second Circuit Court of Appeals,
in \textit{Corke v. Sameiet M.S. Song of Norway},\textsuperscript{150} adopted and further
amplified this view. The court recognized that the \textit{Volk} reading
avoided the difficulties required by a literal reading of sec-
tion 1404(a) and section 1406(a).\textsuperscript{151} The \textit{Corke} court found that the
\textit{Volk} court had placed a “judicial gloss” on the language of the two
transfer statutes. This interpretation would give a court the power to
transfer an action using both statutes whether or not a court had
personal jurisdiction and whether or not venue was properly laid in
the division or district.\textsuperscript{152}

This view has strength because it escapes the necessity of overly

\textsuperscript{148} See \textit{supra} notes 53-56 and accompanying text.
\textsuperscript{149} 432 F. Supp. 1179 (S.D.N.Y. 1977).
\textsuperscript{150} 572 F.2d 77 (2d Cir. 1978).
\textsuperscript{151} See \textit{supra} notes 109-13 and accompanying text.
\textsuperscript{152} \textit{Volk}, 432 F. Supp. at 1181; \textit{Corke}, 572 F.2d at 80.
broad interpretations of section 1404(a) and section 1406(a). The legislative intent behind the two transfer statutes and the Goldlawr case provide a clear indication that issues of venue and personal jurisdiction should not overwhelm the interests of justice. Several courts have tried to apply this concern to the individual statutes; and, in doing so, they have stretched the language of those statutes beyond what they might reasonably bear. But by reading the two statutes together and adding a judicial gloss, a court can avoid the analytical problems inherent in the Berkowitz and Dubin precedents. This method, however, requires a court to base a transfer not on any specific statutory authority, but rather on an inherent power of the court. This lack of specific statutory authority could lead to different standards and unequal application of the rule by different courts.

D. Transfers Under Section 1631

The Tenth Circuit Court of Appeals held, in Ross v. Colorado Outward Bound School, Inc., that section 1631 is applicable to transfer an action when a court lacks personal jurisdiction but venue is proper.\(^{153}\) This court noted that, on its face, section 1631 applies to such situations and the general legislative history behind its enactment supports this reading.

This section, however, has been used largely by courts to transfer cases over which they lack subject matter jurisdiction. Further, some courts state that section 1631 applies only to subject matter jurisdiction.\(^{154}\) They cite the legislative history of the section which mentions only subject matter jurisdiction.\(^{155}\) Certainly, on its face section 1631 could be read to apply to situations where personal jurisdiction is lacking but venue is properly laid. It is unclear whether by mentioning only subject matter jurisdiction Congress intended to specifically exclude personal jurisdiction or whether Congress only wished to make clear that this new provision also dealt with subject matter jurisdiction. The legislative history contains language which supports both views.\(^{156}\)

\(^{153}\) See supra notes 93-96 and accompanying text.
\(^{154}\) See supra notes 78-83 and accompanying text.
\(^{155}\) See supra note 76 and accompanying text. See also 15 C. Wright, A. Miller & E. Cooper, supra note 9, § 3827, at 262. The authors state that the “suggestion . . . that the 1982 statute [section 1631] may have something to do with venue or personal jurisdiction . . . flies in the face of the language and the legislative history of the statute.” 15 C. Wright, A. Miller & E. Cooper, supra note 9, § 3827, at 262 n.5.
\(^{156}\) See supra note 76 and accompanying text.
V. Proposal

A. Background to the Proposal

The Supreme Court stated the goal for all further development in the area of federal transfers in its Goldlawr decision. This goal is to remove "whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits."\(^{157}\)

When Congress enacted sections 1404(a) and 1406(a) a court needed personal jurisdiction over the defendant in order to have the power to transfer an action to another court. This view completely eroded after the Goldlawr decision. Although jurisdiction and venue remain prerequisites for a court to have the power to adjudicate a suit, a court may transfer an action to a proper court if dismissing the case would frustrate an adjudication on the merits.

If procedural simplification exists as an objective, the current situation hinders the attainment of that goal. sections 1404(a) and 1406(a) are now outdated. The federal system requires a new statute, a "catch all" provision which would allow a court to dismiss or, in the interests of justice, transfer a case when the court lacks personal jurisdiction or is an improper venue.

B. Text of Proposed "Catch All" Federal Transfer Statute

This comment proposes that Congress amend Title 28 of the United States Code to add the following statute:

(a) A district court shall dismiss a case when it lacks jurisdiction over the subject matter, personal jurisdiction over any defendant, or when it is an incorrect venue.

(b) Nothing in subsection (a) shall prevent a district court from transferring any case filed before it for the convenience of the parties or witnesses to any other district or division where it might have been brought if such a transfer would be in the interests of justice.

(c) If a transfer is made under subsection (b), the case shall proceed in the court to which it was transferred as if it had been filed in that court on the date it was filed in the court which ordered the transfer.

C. Operation of the Proposed Statute

The law that the transferee court would use would remain the same as provided by current case law. This proposed statute would replace sections 1404(a) and 1406(a) and section 1631 to the extent that it allows a district court to transfer an action for want of subject matter jurisdiction.

Further, it will accomplish the goals set by the Supreme Court in its Goldlawr decision. First, it retains the idea that an action incorrectly filed in a wrong court should be dismissed if the plaintiff can refile in a proper court without prejudice to his rights. Second, the proposed statute allows a court to transfer any case incorrectly filed when such a transfer would be in the interest of justice. This subsection of the statute will remove those obstacles which "may impede an expeditious and orderly adjudication of cases and controversies on their merits," by allowing any improper court to transfer a case to a proper court. Thus, the proposed statute would avoid "time-consuming and justice-defeating technicalities." Finally, this proposed statute will simplify and remove all the uncertainties for an improper court when deciding how to transfer an action to a proper court.

D. Application of the Proposed Statute

The application of the proposed "catch all" federal transfer statute can be illustrated by considering the hypothetical suggested in the introduction to this comment. Briefly, we considered the plight of a plaintiff who had been injured in an automobile collision with defendant. The defendant resided in another state and defendant's only contact with plaintiff's state was his trip there which resulted in the accident. The plaintiff commenced an action in a federal district court in his state. This federal district court would be a proper venue; personal jurisdiction, however, would be lacking.

If this were the situation, the district court would be faced with a decision to dismiss the action or to transfer it to an appropriate federal district court. If the plaintiff's rights would not suffer

158. For background on choice of law principles for federal transfers, see generally 15 C. Wright, A. Miller & E. Cooper, supra note 9, § 3846.
160. Id. at 467 (quoting Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 517 (4th Cir. 1955)).
161. See supra notes 1-6 and accompanying text.
162. For general subject matter jurisdiction, personal jurisdiction, and venue requirements, see supra notes 2-5.
prejudice by a dismissal, the court would dismiss the action pursuant to subsection (a) of the proposed statute. If the statute of limitations had run, however, the plaintiffs rights would be adversely affected by a dismissal. If the court determines that a transfer would be in the interests of justice, the court would transfer the case under subsection (b). Subsection (c) provides that in the transferee court, the action would proceed as if it had been filed in that court on the date it was filed in the court that ordered the transfer.

Thus, this statute would ensure that the interests of justice are served by an appropriate dismissal or transfer. The court would have a single, clear, and efficient statute to apply to such situations and the interests of justice would not be hindered by time consuming technicalities.

VI. CONCLUSION

There is no dispute that a court has the power to transfer an action when it lacks personal jurisdiction over a defendant but venue is proper. The difficulty is, as we have seen, how to effect such a transfer.

A transfer using section 1404(a) calls for a broad reading of this statute's language. Although such a transfer does not violate the language of the statute, it is contrary to the statute's legislative intent. The legislative history indicates that section 1404(a) is meant to replace forum non conveniens which requires both personal jurisdiction and venue.

The application of section 1406(a) to such situations is more difficult. Some courts read the language of the statute to allow a court to transfer an action when the court is a proper venue. The language of the statute and legislative history clearly indicates, however, that a transfer under section 1406(a) is not permitted when venue is properly laid in the court.

Section 1631 on its face could apply to such instances. On the other hand, the legislative history of the statute and many courts indicate that section 1631 only applies to subject matter jurisdiction. Whether or not courts can utilize this provision to transfer an action for want of personal jurisdiction is presently uncertain.

The most analytically sound method that now exists to transfer a case when a court is a proper venue but lacks personal jurisdiction is to use both statutes and apply a judicial gloss. This approach eliminates the need to over read either section 1404(a) or section 1406(a). Nevertheless, this method requires a court to base its transfer not on any specific statutory authority but simply on an in-
herent power of the court. Without specific statutory authority, different courts could use diverse standards and apply this judge-made rule unequally.

To remedy such a situation, this comment proposes a new "catch all" transfer statute. A new statute would eliminate the need for a court to search for an appropriate basis to transfer an action when it lacks personal jurisdiction but when venue is proper. So that all cases may be decided on their merits, and so that courts spend less time on the technicalities of jurisdiction and venue, the proposed statute would allow a district court which lacks subject matter or personal jurisdiction, or a district court which is an improper venue, to transfer any case filed before it to a proper court where that case can be resolved on its merits.

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