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New York Law Journal

SECOND CIRCUIT REVIEW

Re-examining the Contours of Consent-Based Personal Jurisdiction

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June 26, 2024

In *Fuld v. PLO*, the U.S. Court of Appeals for the Second Circuit denied a petition to rehear *en banc* a pair of panel decisions addressing whether federal courts can exercise personal jurisdiction over foreign entities in suits brought under the Promoting Security and Justice for Victims of Terrorism Act of 2019 ("PSJVTA").

Judge Steven J. Menashi dissented from the denial of the *en banc* petition, joined by Chief Judge Debra Ann Livingston, Judge Michael H. Park, and Judge Richard J. Sullivan. Judge Joseph F. Bianco—a member of the original panel that issued the underlying decisions—wrote a separate concurrence.

This appeal reexamines the contours of consent-based personal jurisdiction and deepens the debate over whether the Fifth and Fourteenth Amendments impose different due process limits.

The Origin of the Case and the Evolution of the PSJVTA

The petition for *en banc* review arose from two cases with complicated procedural histories. In each case, victims—or relatives of victims—of terrorist attacks in Israel sued the Palestine Liberation Organization ("PLO") and the Palestinian Authority ("PA") under the Anti-Terrorism Act ("ATA"), which provides a remedy against "any person who aids and abets" terrorism "by knowingly providing substantial assistance" to perpetrators of terrorist attacks. The victims prevailed in district court, but a Second Circuit panel reversed, holding that federal courts lack personal jurisdiction over the PLO and the PA.

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In response, Congress enacted the Anti-Terrorism Clarification Act of 2018 ("ATCA"), which "deemed" defendants as "hav[ing] consented to personal jurisdiction" upon receiving certain forms of American assistance or headquartering their offices in the United States. Ultimately, however, the Second

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Circuit again ruled against the plaintiffs, this time finding that the plaintiffs failed to meet ATCA's "factual predicates."

Congress tried again to craft a legislative solution, enacting the PSJVTA in 2019. Codified in relevant part at 18 U.S.C. § 2334(e), the statute expressly defines "defendant" to include the PLO, the PA, or any successor or affiliate of those entities. It likewise mandates that such defendants "shall be deemed to have consented to personal jurisdiction" if they (1) make payments to designees or families of terrorists whose acts injured or killed Americans; or (2) undertake certain activity within the United States.

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For a third time, the victims returned to federal court. In the underlying actions, the plaintiffs argued that either prong of the PSJVTA sufficed to establish personal jurisdiction, given that the PLO and the PA each (1) continued to pay terrorists—and terrorists' families—who killed or injured American nationals; and (2) used American offices for non-UN business.

But the district courts disagreed, holding the PSJVTA unconstitutional. And in each case, a unanimous Second Circuit panel—comprised of Judge Bianco and Judge Pierre N. Leval, with District Judge John G. Koeltl sitting by designation—affirmed. Acknowledging that the terror attacks at issue were "unquestionably horrific," the panel maintained that the PSJVTA's predicate activities cannot constitute consent, as they fail to confer "any rights or benefits on the defendants in return." For that reason, the panel concluded that the PSJVTA's provision for "deemed consent" exceeded the limits of the Due Process Clause of the Fifth Amendment.

The Dissent

Plaintiffs thereafter sought *en banc* review, but a majority of the active judges of the Second Circuit voted to deny the petition. Still, that *en banc* denial divided the Court, prompting an impassioned dissent that focused on three primary arguments.

First, the dissent looked to the Supreme Court's recent decision in *Mallory* v. *Norfolk Southern Railway Co.*, which held that the Due Process Clause of the Fourteenth Amendment does not prohibit States from requiring that out-of-state corporations consent to personal jurisdiction as a condition for conducting in-state business.

In the dissent's view, *Mallory* confirms that deemed-consent statutes do not require an exchange of benefits so long as the consent is knowing and voluntary and the conduct at issue has a nexus to the forum. Because the PLO and the PA acted voluntarily with knowledge that its actions would subject it to federal court jurisdiction, the dissent reasoned, either prong of the PSJVTA sufficed to establish consent to personal jurisdiction.

Second, the dissent argued that, even if the panel below were correct that due process under the Fifth Amendment demands a reciprocal benefit to establish jurisdiction through a deemed-consent statute, the PSJVTA met that standard. According to the dissent, the PLO and the PA faced a choice: refrain from maintaining an office and engaging in covered activity within the United States, or consent to personal jurisdiction.

By opting for the former, the defendants received the requisite benefit. And any argument to the contrary relies on a "strange" theory: that a party can obtain a benefit *only* if the forum state affirmatively blesses its conduct.

Such a theory, the dissent emphasized, would mean that the Constitution protects foreign entities from federal court jurisdiction if they conduct *illegal*—but not legal—activities in the United States. Abandoning *Mallory*'s straightforward rule for establishing

consent-based jurisdiction, the dissent concluded, engenders "needless confusion and absurd results."

Third, the dissent explained that the Fifth Amendment does not leave Congress powerless to afford relief to American victims of international terrorism, because its Due Process Clause does *not* limit federal courts in the way that the Fourteenth Amendment restricts state courts. Noting that the Supreme Court's decision in *Bristol-Myers Squibb* v. *Superior Court of California* reserved judgment on the topic, the dissent pointed to recent scholarship—along with opinions by Fifth, Ninth, and D.C. Circuit judges—suggesting that the Fifth Amendment does *not* impose such limits.

And turning to history, the dissent highlighted that, in the early republic, the Fifth Amendment did not limit the exercise of personal jurisdiction and that Congress could extend personal jurisdiction by statute. The dissent engaged in a functional analysis, finding that neither of the twin goals of personal jurisdiction—preserving federalism and protecting liberty interests from inconvenient forums—is implicated to the same extent by the federal government as by state governments.

The Concurrence

Responding to the dissent, Judge Bianco's concurrence addressed those three arguments.

First, Judge Bianco rejected the idea that the panel below created a reciprocal benefit requirement. Instead, he maintained, the panel merely offered reciprocal benefits as *one* of several ways to manifest consent—none of which the PSJVTA met. Going one step further, Judge Bianco offered a narrower reading of *Mallory*, arguing that the Supreme Court has never used an "undefined nexus" to a forum as a means of imputing consent to jurisdiction. And for good reason, he insisted, lest Congress subject foreign entities to personal jurisdiction anytime such entities knowingly and voluntarily engage in conduct related to the United States.

Second, Judge Bianco defended the panel's view that unlawful activity cannot qualify as a sufficient basis on which to find jurisdiction-conferring benefits. Because the PLO and the PA are prohibited from conducting domestic business other than as permitted by the UN Headquarters Agreement, Judge Bianco emphasized that establishing consent to jurisdiction based on such activity impermissibly uses the denial of a due process right as a "penalty" for unlawful conduct.

Third, Judge Bianco stressed that, for over forty years, the Second Circuit has viewed the Due Process Clauses of the Fifth and Fourteenth Amendments as congruent. And so without intervening Supreme Court guidance, he claimed, recent scholarship to the contrary cannot alone overcome *stare decisis*, especially given that the Fifth, Sixth, Seventh, Eleventh, D.C., and Federal Circuits share the Second Circuit's longstanding view. Otherwise, Judge Bianco warned, the entire body of Fourteenth Amendment caselaw could be jettisoned in Fifth Amendment cases, leaving in its wake a destabilized personal jurisdiction doctrine.

Conclusion

The Second Circuit's denial of *en banc* review marked the latest development in a saga that extends well over a decade. But the case appears poised for Supreme Court review—and not only because the invalidation of a federal statute often suffices to grant certiorari.

This case presents the Supreme Court with an opportunity to clarify the limits on personal jurisdiction set forth in its recent *Mallory* decision. And it also raises the issue as to whether the Due Process Clauses of the Fifth and Fourteenth Amendments impose different due process limits.