Fordham Law Review Online

Volume 88 Article 9

2019

Novel Perspectives on Due Process Symposium: A Commentary on Ingrid Wuerth's *The Due Process and Other Constitutional Rights of Foreign Nations*

David P. Stewart
Georgetown University Law Center, nstewart14@law.fordham.edu

A COMMENTARY ON INGRID WUERTH'S *THE DUE PROCESS AND OTHER CONSTITUTIONAL RIGHTS OF FOREIGN NATIONS*

*David P. Stewart**

Are foreign States and governments (and their state-owned enterprises) "persons" for constitutional purposes? Do they—should they—have "due process" rights under the U.S. Constitution? Ingrid Wuerth's thoughtful and thoroughly researched article addresses those important questions from both the historical and doctrinal perspectives and proposes an innovative approach to resolving the issues.

The following commentary provides additional background and context, briefly tracing the origins and history of relevant U.S. case law and noting some of the practical implications of answering the questions affirmatively or negatively, particularly in light of the various exceptions to U.S. jurisdiction under the Foreign Sovereign Immunities Act. It provides an assessment of Wuerth's analysis and offers some comments on the possible implications of her approach.

INTRODUCTION

Are foreign states and governments entitled to due process in U.S. courts? What about their state-owned enterprises (SOEs)?

It might seem that the answer should be straightforward: since "due process" is constitutionally mandated, are not all parties to a suit—all litigants regardless of their status—entitled to fair and equal treatment? It turns out that the answer is neither as simple nor obvious as one might think, and indeed the question has recently become the subject of sharp disagreement and contentious litigation. It raises difficult issues of constitutional law, with significant implications not only for litigants and their lawyers, but also for the management of U.S. foreign policy.

That debate forms the backdrop for Professor Wuerth's carefully researched and closely argued analysis in *The Due Process and Other*

* David P. Stewart is Professor from Practice at Georgetown University Law Center in Washington, D.C., where he teaches in the area of international and transnational law and co-directs the Global Law Scholars program. A graduate of Yale Law School (J.D.) and New York University School of Law (LL.M.), he served for over thirty-two years in the Office of the Legal Adviser at the U.S. Department of State. He is former President of the American Branch of the International Law Association and, with Professor Wuerth, was a Co-Reporter for the Restatement (Fourth) of the Foreign Relations Law of the United States.

Constitutional Rights of Foreign Nations,[1] about which I offer some comments below. But first, to put things in context for those who may not be familiar with the issues, it may be useful to sketch briefly the origins and contours of the question.

I. THE *KATZENBACH* AND *WELTOVER* DECISIONS

The tale begins (for our purposes) at an unlikely time and in an unexpected context—the domestic civil rights movement of the 1960s.

At the height of that movement, South Carolina challenged the constitutionality of the 1965 Voting Rights Act, inter alia on the ground that its provisions exceeded the powers of Congress and encroached on an area reserved to the States by the U.S. Constitution. In *South Carolina v. Katzenbach*,[2] the U.S. Supreme Court rejected that challenge, in particular the State's contention that portions of the Act—as applied to it—violated its constitutional rights to due process. Among other things, the Supreme Court said that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."[3]

In making that statement, the Court was of course addressing the issue in a domestic context involving the balance of authority between the federal government and the constituent States of the Union, and more particularly the rights of a State with respect to the constitutional authority of Congress (thus implicating the separation of powers doctrine).

Twenty-six years later, the Court had occasion to refer to its statement in *Katzenbach* in a very different context—this time involving the rights of a foreign state embroiled in litigation in federal court brought by the United States and foreign parties under the Foreign Sovereign Immunities Act of 1976 (FSIA).[4] In *Republic of Argentina v. Weltover, Inc.*,[5] various holders of bonds issued by the Republic of Argentina and its central bank as part of a currency stabilization plan brought a breach of contract action against that

1. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019).

2. 383 U.S. 301 (1966). The Court upheld provisions of the federal Voting Rights Act of 1965 (pertaining to suspension of eligibility tests or devices, review of proposed alteration of voting qualifications and procedures, appointment of federal voting examiners, examination of applicants for registration, challenges to eligibility listings, termination of listing procedures, and enforcement proceedings in criminal contempt cases) as appropriate means for carrying out Congress' constitutional responsibilities under the Fifteenth Amendment and consonant with all other provisions of the Constitution. *See id.* at 308.

3. Id. at 323–24 (citing International Shoe Co. v. Cocreham, 164 So. 2d 314, 322 n.5 (La. 1964); *cf.* United States v. City of Jackson, 318 F.2d 1, 8 (5th Cir. 1963)). In consequence, the Court narrowed its consideration to the question whether, in enacting and applying the statute, Congress had exercised its "powers under the Fifteenth Amendment in an appropriate manner with relation to the States." *Id.* at 324.

4. Pub. L. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330 and 1605 et seq.).

5. 504 U.S. 607 (1992).

government as a result of its unilateral extension of the time for payment on the bonds.

The case was brought under the FSIA's "commercial activities" exception to foreign sovereign immunity, which specifies that in order for the court to have jurisdiction, the acts in question must have had a "direct effect" in the United States.[6] The Argentine government and its central bank sought dismissal of the action on the ground that the exercise of personal jurisdiction over them violated due process. More specifically, they argued that the Due Process Clause of the Fifth Amendment required the court to construe that provision as embodying the "minimum contacts" test of *International Shoe Co. v. Washington*.[7]

The Court disagreed. As a general matter, it noted, the exercise of personal jurisdiction is consistent with due process in any case where a defendant has sufficient contacts with the United States to satisfy the criteria set forth in *International Shoe Co.*[8] In affirming the lower courts' rejection of Argentina's argument, the Court said:

> Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, *cf. South Carolina v. Katzenbach,* 383 U.S. 301, 323–324, 86 S. Ct. 803, 815–816, 15 L. Ed. 2d 769 (1966) (States of the Union are not 'persons' for purposes of the Due Process Clause), we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test.[9]

Even though the Court did in fact make a "minimum contacts" assessment, the introductory clause of this statement and its reference to *Katzenbach* have been taken to indicate that—at least for due process jurisdictional purposes—foreign states can and should be analogized to States of the Union and treated similarly. As Wuerth notes, "[b]ased on this dicta from *Weltover*, lower courts have since uniformly held that foreign states are not 'persons' protected by the Fifth Amendment's Due Process Clause."[10]

II. WHY IS THE QUESTION IMPORTANT?

Leaving aside the dubious nature of the equivalence underlying the Court's assumption (foreign states and governments are obviously *not* "like" States of the Union), why does this statement matter? What difference does it make in practice? Surely, *Katzenbach* and *Weltover* cannot mean that foreign states, governments, and their SOEs get no "due process" when they sue or are sued?

Of course not, but here is where the issue gets a bit technical, because a more precise answer (*how much* due process, judged by *which standards*?)

---

6. 28 U.S.C. § 1605(a)(2).
7. 326 U.S. 310, 316 (1945).
8. *Weltover*, 504 U.S. at 619.
9. *Id.*
10. Wuerth, *supra* note 1, at 647 (citing Corporacíon Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92, 103 (2d Cir. 2016)).

depends on where the case is brought and the particular jurisdictional basis for the suit in question. State courts are of course open to suits by and against foreign states, SOEs, and individuals on the basis of state law, which (in respect of jurisdiction as well as substance) varies to some degree from state to state. The protections of the Fourteenth Amendment will necessarily apply, and as developed by the federal courts over the years, the standards for assessing the constitutional validity of State court authority depend on the extent of the defendant's connections with the jurisdiction in the given case.[11]

In practice, however, most suits involving foreign states and SOEs are brought in federal courts. Those courts exercise two types of jurisdiction: so-called "diversity jurisdiction," in which the case rests for most purposes on State law, and "federal question" jurisdiction, in which the case rests on federal law. In both situations, the sufficiency of the jurisdictional nexus is judged by Fifth Amendment standards.[12]

That raises yet another difficult question: is there any difference between the "due process" standards of the Fifth and Fourteenth Amendments? As relevant to present purposes, the two are textually virtually identical. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law," while the Fourteenth Amendment directs that no State of the Union may "deprive any person of life, liberty, or property, without due process of law."[13]

Yet some argue that there is a significant difference in the extent of due process that each provides. The contention is that the constraints of the Fourteenth Amendment are necessarily stricter than those of the Fifth Amendment, at least in the jurisdictional sense. The reasoning is that the former was grounded in concepts of federalism and intended to avoid conflicts between the States, a concern not relevant to the Fifth Amendment,

---

11. In *Weltover*, the Court applied the then applicable "minimum contacts" test for the exercise of what is known as "specific" (or conduct-based) jurisdiction, which rests on the territorial connection of the relevant activity of the defendant and requires that the dispute(s) in question must arise out of or be related to the defendant's particular contacts with the forum. 504 U.S. 607 at 619. In such cases, the Supreme Court stated in *Walden v. Fiore*, 571 U.S. 277, 284 (2014), "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." By distinction, a foreign defendant may be subject to "general" (or "all-purpose") jurisdiction when its connections with the forum are sufficiently extensive ("so continuous and systematic") that it can be considered "at home" in that jurisdiction, and it can therefore be subject to suit on essentially any claim. *See* Daimler AG v. Bauman, 571 U.S. 117, 127 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). Foreign states, governments and SOEs are highly unlikely to be "at home" in a U.S. jurisdiction, so that most cases against them must necessarily rely on "specific jurisdiction." See, for example, the discussion in *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016), *cert. denied sub nom. Sokolow v Palestine Liberation Organization*, 138 S.Ct. 1438 (2018).

12. While it may seem obvious that the Fifth Amendment should govern in "federal question" cases, it is an oddity of constitutional jurisprudence that it also applies in "diversity" cases, where the territorial reach of the district court's *in personam* jurisdiction rests not on federal law but on the relevant State "long arm" statute by virtue of the Federal Rule of Civil Procedure 4(k). For a proposal to change that arrangement, see Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979 (2019).

13. U.S. CONST. amends. V, XIV.

which in its origin was more concerned with the relationship between the federal government and foreign nations respectively.[14] If that is true, then the federal government, subject only to the narrower constraints of the Fifth Amendment, is constitutionally able to exercise significantly broader extraterritorial jurisdiction over foreign states, governments, and their SOEs than the States could under the Fourteenth Amendment.[15]

And indeed, that is the problem. If foreign states and governments, and by extension their SOEs, are not entitled to constitutional "due process" protections—at least not in the personal jurisdictional "minimum contacts" sense—then they are potentially vulnerable to suit in U.S. courts in circumstances where other "persons," such as non-state entities, are not. Put differently, the prospect is that the U.S. Congress might have the authority to extend the jurisdictional reach of U.S. law to foreign states, governments, and SOEs far beyond the limits that otherwise apply in suits against foreign individuals and entities, such as corporations.[16]

III. WHAT ABOUT JURISDICTIONAL IMMUNITY?

Just a moment, you might say. Are foreign states and governments not generally immune from the jurisdiction of U.S. courts (federal and state) under the FSIA?[17] If so, why does it matter if they are not protected (jurisdictionally) by a "minimum contacts" rule to the extent required by the Fourteenth Amendment?

Yes, they are entitled to jurisdictional immunity under the FSIA, subject to a number of exceptions. The statute itself contains no explicit minimum contacts rule; uniquely, it combines subject matter jurisdiction and personal jurisdiction by providing that service of process and a cause of action covered by one of the exceptions to immunity specified in the statute establishes both. Even though Congress took care, in enacting the statute, to acknowledge (and

14. *Cf.* Waldman v. Palestine Liberation Organization, 835 F.3d 317, 329–30 (2d Cir. 2016), *cert. denied sub nom.* Sokolow v. Palestinian Liberation Organization, 138 S. Ct. 1438 (2018).

15. Another line of argument contends that non-resident aliens lacking property in or connections with the United States are covered by neither Amendment, and in effect have no constitutional rights, enabling the U.S. Government to assert even broader jurisdictional authority. *See* GSS Group Ltd v. National Port Authority, 680 F.3d 805, 815–17 (D.C. Cir. 2012); Austin Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 33 (2006) ("the Fourteenth and Fifth Amendments do not protect foreign defendants from jurisdictional assertions"); *cf.* Mark Christopher, Note, *Holding Supporters of Terrorism Accountable: The Exercise of General Jurisdiction over the PA and PLO in a Post-*Daimler *Framework*, 45 GA. J. INT'L & COMP. L. 99 (2016); Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA J. INT'L L. 97 (2019).

16. Whether, and to what extent, congressional authority to do so might be restricted by international law is another debated topic, beyond the scope of the present discussion. *Cf.* Aaron Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325 (2018).

17. Foreign Sovereign Immunities Act, Pub. L. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330 and 1605 et seq.)

conform to) the then prevailing notions of jurisdictional due process,[18] over time the list of exceptions has grown in numbers, substance, and (most relevantly) extraterritorial reach. Today it covers a number of circumstances in which suits can be brought against foreign states and governments in U.S. courts that (depending on the specific circumstances) arguably could *not* be brought if judged by "normal" (or contemporary) Fourteenth Amendment due process standards.[19]

So long as foreign states, governments, and their SOEs are not "persons" entitled to constitutional due process, the more relaxed jurisdictional standards applicable to suits under the statute are not subject to constitutional challenge.

For example, under one prong of the "commercial activities" exception, U.S. courts have jurisdiction over suits against foreign states, governments, and SOEs that arises from acts occurring outside United States territory in connection with their commercial activities outside the United States. However, the act in question must cause "a direct effect in the United States"[20]—without regard to whether the defendant has a sufficient presence in or connection to the United States that "normal" due process principles would otherwise require.[21]

The so-called "expropriation exception" permits suits based on the "takings" by a foreign government of rights in property in its own country when the taken property (or any property exchanged for such property) is "present in the United States in connection with a commercial activity carried on in the United States by the foreign state."[22] That exception has, for example, recently been interpreted to cover "genocidal takings" committed

18. *See, e.g.*, H.R. REP. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."). *See also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. On Administrative Law and Governmental Relations of the House Comm. On the Judiciary*, 94th Cong. 31 (1976) (statement of Bruno A. Ristau) ("[T]he long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.' The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.").

19. For example, under the "expropriation, arbitration or expropriation exceptions" as discussed below.

20. 28 U.S.C. § 1605(a)(2).

21. *See, e.g.*, Rote v. Zel Custom Manufacturing LLC, 816 F.3d 383 (6th Cir. 2016), *cert. denied sub nom.* Direccion Gen. de Fabricaciones Militares v. Rote, 137 S. Ct. 199 (2016). *See also* Jacqueline M. Fitch, *If the Shoe Fits: Rethinking Minimum Contacts and the FSIA Commercial Activity Exception*, Note, 75 WASH. & LEE. L. REV. ONLINE 123 (May 9, 2019) (endorsing the Sixth Circuit's denial of due process under the FSIA's "direct effect" clause and arguing against a "minimum contacts" requirement for commercial activities suits against foreign states). For a contrary view, see Karen Halverson, *Is a Foreign State a "Person"? Does It Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115 (2001).

22. 28 U.S.C. § 1605(a)(3).

abroad by foreign governments against their own citizens as well as third-country nationals.[23]

The statute's "arbitration exception"[24] can be read to allow suits in U.S. courts to enforce arbitral agreements between foreign sovereign parties concerning commercial activities having no connections to the United States, and arbitration awards rendered pursuant to such agreements, so long as the agreement or award is covered by a relevant multilateral treaty to which the United States is a party.[25]

Even the most territorially focused of all the FSIA exceptions—the "non-commercial tort exception,"[26] which has been consistently interpreted by U.S. courts to require the "entire tort" to have occurred within the United States—has been under pressure from plaintiffs seeking to apply it to torts resulting from actions of foreign states, governments, and SOEs occurring at least in part—if not entirely—in other countries.[27]

IV. THE STATE-SPONSORED TERRORISM EXCEPTION

Perhaps most importantly, the "state-sponsored terrorism" exception[28] removes the immunity of foreign states that have been designated as "state sponsors" in cases seeking damages for personal injury or death caused by certain specified acts of terrorism committed outside the United States if the claimant is a U.S. national, a member of the U.S. armed forces, or a U.S. government employee or contractor (or "the legal representative" of such persons, without regard to their nationality).[29] In such cases, the jurisdictional nexus is supplied not by any territorial connection between the United States and the specific acts in question but solely by the nationality of the victims.

---

23. Simon v. Republic of Hungary, 812 F.3d 127, 145 (D.C. Cir. 2016); Philipp v. Fed. Rep. Germany, 925 F.3d 1349 (D.C. Cir. 2019) (Katsas, J., dissenting).

24. 28 U.S.C. § 1605(a)(6).

25. *See, e.g.*, TMR Energy Limited v. State Property Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005) (enforcing Swedish arbitral award in favor of Cypriot company against Ukraine SOE involving contract with no U.S. nexus). *But see* Base Metal Trading v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208 (4th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002) (finding that the property involved also had to have some connection with the cause of action and denying enforcement). *Cf.* Glencore Grain Rotterdam v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1122 (9th Cir. 2002) (finding that the New York Convention does not abrogate the requirement of personal jurisdiction).

26. 28 U.S.C. § 1605(a)(5).

27. *See, e.g.*, Doe v. Federal Democratic Republic of Ethiopia, 851 F.3d 7 (D.D.C. 2017). *See also* Benjamin Kurland, *Sovereign Immunity in Cyber Space: Towards Defining a Cyber-Intrusion Exception to the Foreign Sovereign Immunities Act*, 10 J. NAT'L SECURITY L. & POL'Y 255, 267–68 (2019) (proposing a new cyber-intrusion exception to the FSIA permitting actions for cyber-intrusion "regardless of the location of the tortfeasor").

28. 28 U.S.C. § 1605A.

29. *See id.* In contrast, the newest anti-terrorism provision (commonly referred to as "JASTA") rests on a much clearer territorial nexus: it removes foreign state immunity in suits by U.S. national arising out of acts of international terrorism that *occur in the United States* and "a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred." 28 U.S.C. § 1605B(b).

Over time, a number of lawsuits have been brought by U.S. victims under the FSIA's "state-sponsored terrorism" exception seeking damages from the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO) on the basis of their alleged involvement in various attacks abroad. If those entities qualified as "foreign states," the suits would be governed by the relaxed jurisdictional standards of the "state-sponsored terrorism" exception. U.S. courts have repeatedly held, however, that because Palestine is not recognized by the United States as a foreign state, neither the PA nor the PLO is subject to suit in U.S. courts under the provisions of the FSIA.[30]

Strong congressional support for providing civil remedies in U.S. courts for U.S. nationals injured or killed in terrorist acts abroad led to the enactment of the federal Anti-Terrorism Act (ATA), adopted as part of the so-called Patriot Act of 2001.[31] It authorizes U.S. nationals to bring civil claims for injuries and losses "by reason of an act of international terrorism"[32] which "occur[s] primarily outside the territorial jurisdiction of the United States, or transcend[s] national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."[33] The principal argument for the assertion of such extraterritorial jurisdiction by the United States is that protecting American citizens from attacks abroad—and providing them judicial remedies when they are attacked—is justified by "vital U.S. interests."[34]

In consequence, unable to pursue the PA and PLO under the FSIA, plaintiffs sought to hold them liable under the ATA's civil remedies provisions. The issue then arose whether either the PA or the PLO has sufficient connections to the United States to satisfy the relevant requirements of "due process." To date, the courts have answered in the negative.

For example, in *Waldman v. Palestine Liberation Organization*,[35] the Second Circuit held that the two entities do enjoy full due process protection. In civil cases, the Due Process Clause of the Fifth Amendment (applicable, the court said, because the action rests on a federal statute) does subject the United States to the *same* territorial limitations as the Fourteenth Amendment imposes on individual States. The court also concluded that under the factual circumstances of the case it could not permit either (i) the exercise of "general jurisdiction" in light of the Supreme Court's decision in *Daimler* or (ii) the exercise of "specific jurisdiction" because there was "no basis to conclude

30. *See, e.g.*, Ungar v. Palestine Liberation Organization, 402 F.3d 274 (1st Cir. 2005); Sokolow v. Palestine Liberation Organization, 583 F. Supp. 2d 451 (S.D.N.Y. 2008).

31. H.R. 3162, 107th Cong. (Oct. 23, 2001), codified at 18 U.S.C. § 2331.

32. 18 U.S.C. § 2333(a).

33. 18 U.S.C. § 2331(1)(C).

34. *Cf.* Brief of United States Senators Charles E. Grassley et al. as *Amici Curiae* in Support of Petitioners at 4, Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451 (S.D.N.Y. 2008) (No. 16-1071).

35. 835 F.3d 317 (2d Cir. 2016), *cert. denied sub nom.* Sokolow v. Palestinian Liberation Organization, 138 S. Ct. 1438 (2018).

that the defendants participated in these acts *in the United States* or that their liability for these acts resulted from their actions that did occur *in the United States*."[36]

To much the same effect was the trial court's decision in *Safra v. Palestinian Authority*,[37] holding that the Palestinian Authority has due process rights and categorically rejecting "decades-old cases reasoning that the Palestine Liberation Organization has no rights because it is outside of the constitutional structure of the United States."[38] The court also concluded that it lacked general jurisdiction under the *Daimler*/*Goodyear* framework, as well as specific jurisdiction under the minimum-contact standards articulated in *Walden v. Fiore*.[39]

In *Livnat v. Palestinian Authority*,[40] the D.C. Circuit observed that "no court has ever held that the Fifth Amendment permits personal jurisdiction without the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with respect to States."[41] It explicitly rejected the argument that because the PA "functions as a government" it should be deemed (like foreign states) not to be a "person" for purposes of the Fifth Amendment's Due Process Clause. It emphasized that "[t]he rule in *Price*—that foreign states are not 'persons' under the Due Process Clause—applies only to *sovereign* foreign states."[42] Since plaintiffs had not satisfied the requirements of personal jurisdiction, the court affirmed dismissal of their action.[43]

Eventually, these decisions (with which the federal government has concurred)[44] prompted the Congress to amend the ATA to overcome the jurisdictional hurdles. It did so by specifying certain conditions under which a defendant can be "deemed" to have consented to personal jurisdiction in actions under 18 U.S.C. § 2333(a).[45] In doing so, the House specifically

36. *Id.* at 337 (emphasis added). The Court also held that the PLO and PA had not waived their objections to suit in the United States. *Id.* at 328. *See generally* Kent A. Yalowitz, *The Constitutional Power of Congress to Provide for Extraterritorial Jurisdiction in Civil Anti-Terrorism Matters*, 29 IND. INT'L & COMP. L. REV. 369 (2019).

37. 82 F. Supp. 3d 37 (D.D.C. 2015), *aff'd sub nom.* Livnat v. Palestinian Authority, 851 F.3d 45 (D.C. Cir. 2017), *cert. denied*, 139 S.Ct. 373 (2018).

38. *Id.* at 45.

39. *Id.* at 47–53 (citing Walden v. Fiore, 571 U.S. 277 (2014)).

40. Livnat v. Palestinian Authority, 851 F.3d 45 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 373 (2018).

41. *Id.* at 54.

42. *Id.* at 49 (referring to the D.C. Circuit's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002)) (emphasis added).

43. *See* Estate of Klieman by & through Kesner v. Palestinian Authority, 923 F.3d 1115 (D.C. Cir. 2019) (following the holding in *Livnat*).

44. The Executive Branch has agreed that under the prevailing approach, only States of the Union are placed outside the category of "persons" so that foreign non-state entities are not barred from seeking due process protections. *See* Brief for the United States as Amicus Curiae at 9, Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451 (S.D.N.Y. 2008) (No. 16-1071).

45. *See* Anti-Terrorism Clarification Act, Pub. L. No. 115-23, 132 Stat. 3183 (2018) (amending the statute to add 18 U.S.C. § 2334(e), which provides that a defendant will be "deemed to have consented to personal jurisdiction in such civil action" if that defendant

stated that "[c]arrying out or assisting an act of international terrorism that injures or kills American citizens abroad should be, in and of itself, sufficient to establish personal jurisdiction in U.S. courts."[46]

The point, of course, is that at least in the terrorism context, the limitations of the Fifth and Fourteenth Amendments have been seen as presenting an obstacle to efforts to obtain justice for U.S. nationals, and the *Katzenbach*/*Weltover* "states are not persons" approach[47] curtailing the rights of the defendants appears to offer a better avenue by which to allow victims to seek recovery for injuries caused by acts of terrorism abroad.

V. WUERTH'S ANALYSIS

To date, the U.S. Supreme Court has left open both questions: (i) whether, for purposes of constitutional due process, foreign states, governments and SOEs are (or are not) "persons," and (ii) whether the Fifth Amendment imposes the same due process limits on a federal court's exercise of personal jurisdiction as the Fourteenth Amendment does on state courts.[48] However, no serious challenge has recently been brought to the proposition that foreign states (like States of the Union) are *not* persons and thus do not enjoy the benefits of the due process clauses of the Fifth or Fourteenth Amendments. Tellingly, the recently published Restatement (Fourth) of Foreign Relations Law of the United States does not take a definitive position on either question, even though it addresses issues of jurisdiction and sovereign immunity at some length.[49]

Wuerth speaks directly to that doctrinal gap.

In a nutshell, her article argues that (i) foreign states, governments, and their SOEs *are* "persons" and *are* entitled to due process under Article III as well as the Fifth Amendment, and (ii) accordingly, federal courts should have

---

accepts certain forms of assistance under the Foreign Assistance Act of 1961 or establishes or maintains "any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States").

46. H.R. Rep. No. 115-858, at 6 (2018). Thus far, plaintiffs do not seem to have much greater success under the new statute. *See, e.g.*, Waldman v. Palestine Liberation Organization, 925 F.3d 570 (2d Cir. 2019). For an alternative proposal, see Arnowitz Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 791 (2012).

47. *See supra* notes 1, 4 and accompanying text.

48. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017) ("In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.")

49. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 454 cmt. f (AM. LAW INST. 2018) ("Under U.S. law, the exercise of jurisdiction by courts in the United States is subject to the Due Process Clauses of the Fifth and Fourteenth Amendments. Due process requires that in order to adjudicate claims against a defendant, the defendant must have minimum contacts with the forum [citing to section 422 on Personal Jurisdiction in general], but several lower courts have held that foreign states are not constitutionally protected by the Fifth Amendment. Courts have nevertheless interpreted the FSIA as requiring a nexus between the foreign state and the United States that would satisfy or exceed constitutionally based due-process protections."); *see also* Reporters' Note 9, entitled "state long-arm statutes and due process," collecting relevant decisions.

power over them, like all other defendants, only when they meet the same jurisdictional requirements and have been given notice on a basis comparable to the rules applicable to private actors.[50]

Her path to these conclusions, however, does not rest on a resolution of the relative scope of the protections afforded by the Fifth and Fourteenth Amendments. Rather, she finds the basis for a solution in the history and text of Article III, a faithful reading of which—she contends—demonstrates the Founders' intent to afford due process protections to foreign states. As a result, she concludes, "[f]ederal courts only have power over defendants to whom notice is provided and over whom the court has jurisdiction, and these limitations apply to all defendants."[51]

The structure of her argument is at once doctrinal ("originalist"), historical, and pragmatic. Her point of departure is the fact that Article III, Section 2 explicitly extends the "judicial Power" of the United States to controversies involving foreign states (which she denominates "foreign-state diversity jurisdiction") and assigns cases between foreign states and U.S. States to the Supreme Court's original jurisdiction.[52] That means, in her view, that "foreign states are not categorically excluded from separation-of-powers protections, that the Constitution was intended to benefit foreign states as a way of ensuring peace and prosperity for the United States, and that foreign states are not entirely outside the structure of the federal government."[53]

To the contrary, she contends, foreign states were, and remain, "unequivocally drawn into the fabric of the Union for the very purpose of protecting them and limiting international conflict."[54] Those protections, she says, are "baked into Article III"[55] and are therefore not dependent on Congressional implementation—since the Supreme Court's original jurisdiction is "self-executing" and (unlike its appellate jurisdiction) not subject to legislative limitation.[56] Thus, foreign states have due process rights and are protected by "separation of powers."[57]

Several consequences flow from these conclusions, most importantly that, even though the protections derived from Article III may not be entirely co-extensive with those of the Fifth Amendment, they place foreign states on

50. Although the title of Wuerth's article refers to "The Due Process and Other Constitutional Rights," her focus is on the former and, while hinting at "equal protection," she does not elaborate on what "other" rights may be at issue.

51. Wuerth, *supra* note 1, at 690. To be sure, she also concludes that foreign states are also entitled to due process under the Fifth Amendment, which—viewed in its proper historical light—"meant a territorially restricted power to compel attendance before the court, linking the term to personal jurisdiction." *Id.*

52. U.S. CONST. art. III, § 2. Under the Eleventh Amendment, of course, suits against one of the constituent States by citizens of another State, or "Citizens or subjects of any Foreign State," were excluded from the "Judicial Power of the United States." *Id.*

53. Wuerth, *supra* note 1, at 637.

54. *Id.* at 639.

55. *Id.* at 638.

56. *Id.* at 660, 689–90 ("The wholesale exclusion of foreign states from constitutional protections when they face suit in the United States cuts against the grain of Article III").

57. *Id.* at 689.

"an equal footing" with foreign corporations.[58] Properly read, she contends, Article III "provides procedural protections to all litigants in federal court, including foreign states,"[59] because of the necessary relationship between "jurisdiction" and "notice" as understood in their historical context.[60] She argues that "Article III's conferral of 'judicial power' over 'cases' means that federal courts must have personal jurisdiction and must give notice to all defendants, whether or not they are protected by due process."[61] These protections, she concedes, may be minimal, but they are also not nothing. "Congress may, of course, afford foreign states greater jurisdictional protections than the Constitution requires . . . . [Moreover], due process provides protections beyond personal jurisdiction."[62]

For instance, she suggests that foreign states should be "constitutionally entitled not only to due process protections but also to assistance of counsel, the right to a jury trial, and protection against double jeopardy."[63]

To be sure, Wuerth also asserts that the Fifth Amendment applies to and protects foreign states much as it does foreign corporations.[64] She finds evidence indicating that—from the Founding until the enactment of the FSIA—"courts, litigants, Congress, scholars, and the U.S. government all reasoned or assumed that the Due Process Clauses (and thus the minimum contacts analysis) applied to foreign states."[65]

She also notes that "[d]uring congressional deliberation about the FSIA, executive branch officials repeatedly referred to the due process rights of foreign sovereigns."[66] *Weltover* and its progeny, in her view, altered that understanding by (wrongly) excluding foreign states from the definition of "persons," rendering them "vulnerable to political action by the majority in ways that domestic states are not."[67]

---

58. *Id.* at 687 ("[F]oreign states share constitutionally significant attributes not just with corporations, but also with U.S. states.").

59. *Id.* at 655.

60. *Id.* at 675 (referring to Serv. of Process on a British Ship-of-War, 1 U.S. Op. Att'y Gen. 87, 88 (1799), Wuerth explains that "[t]he connections between 'process,' personal jurisdiction, and the territorial limits of sovereign power are clear from the 1799 Opinion of the U.S. Attorney General").

61. *Id.* at 673–74.

62. *Id.* at 683–84, 685 (including "notice" requirements).

63. *Id.* at 689.

64. "[F]oreign states and private foreign corporations are on equal due process footing, contrary to a long line of lower court cases drawing a constitutional distinction between them." *Id.* at 637–38. For purposes of the Fifth Amendment, she argues that states should be considered "persons" entitled to due process and should stand on the same footing as private foreign corporations, citing the Second Circuit to the effect that "the constitutional distinction between foreign states and corporations 'rests on the principle that due process rights can only be exercised by persons, including corporations, which are persons at law.'" *Id.* at 650 (citing to *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploracion y Produccion,* 832 F.3d 92, 103 (2d Cir. 2016)).

65. *Id.* at 644. In support, she refers inter alia to the Supreme Court's decision in *The Santissima Trinidad*, 20 U.S. 283, 353 (1822). *See* Wuerth, *supra* note 1, at 673.

66. *Id.* at 646.

67. *Id.* at 649.

Wuerth does not, however, give a concise definition of exactly what Fifth Amendment due process would provide in the case of foreign states, other than suggesting that it was historically more limited than understood today.[68] She opposes the incorporation of Fourteenth Amendment concepts (which she describes as a "mess"[69]), acknowledges that Congress controls the extent of "personal jurisdiction" under the Fifth Amendment,[70] and observes that "Congress may, of course, afford foreign states greater jurisdictional protections than the Constitution requires."[71]

VI. THE BROADER CONTEXT

It is difficult to argue with Wuerth's conclusion that "when foreign states and related entities face suit in the United States, whether a criminal action brought by federal prosecutors or a civil case based on an exception to the FSIA, basic litigation-related constitutional protections should generally apply."[72] As she points out, the contrary approach makes no sense and indeed offends basic constitutional precepts. She rightly asserts that "[t]he wholesale exclusion of foreign states from constitutional protections when they face suit in the United States cuts against the grain of Article III, which explicitly brought foreign entities into the federal judicial system with the intention of protecting them."[73]

On one level, deriving those rights from Article III has the benefit of moving the debate beyond the question of whether foreign states are properly considered "persons" and instead connecting the issue of "personal jurisdiction" with the very notion of "judicial power." Clearly, it is correct to emphasize that notice and opportunity to appear are fundamental to any legitimate exercise of personal jurisdiction. It may also be faithful to the intent of the Founders in giving the Supreme Court "foreign state diversity jurisdiction" as a way of helping the fledgling United States to avoid violations of international law, including treaty commitments.[74] Moreover, anchoring the proposition in "separation of powers" doctrine provides some measure of protection against legislative encroachment.

Yet it does not provide a complete answer. If whatever rights can be derived directly from Article III are only "minimal," how might they be articulated and by whom—Congress or the courts? Wuerth's solution is to acknowledge that foreign states and governments (and their SOEs) are indeed properly considered "persons" at least for purposes of litigation in U.S. courts

68. *Id.* at 690 ("Cases involving foreign sovereigns illustrate that Fifth Amendment 'process' meant a territorially restricted power to compel attendance before the court, linking the term to personal jurisdiction.")

69. *Id.* at 682.

70. *Id.* at 637.

71. *Id.* at 683–84.

72. *Id.* at 689.

73. *Id.* at 689–90. Of course, at the time of the Founding and for nearly two hundred years after, foreign states enjoyed "absolute immunity" and thus would be subject to U.S. jurisdiction only by consent—a sharp distinction from the current situation. *See id.* at 670.

74. *Id.* at 655.

and are thus entitled to enjoy the same rights under the Fifth Amendment as foreign corporations enjoy (if not all litigants). Clearly, the Fifth Amendment offers a more solid basis than Article III on which to decide such questions and is more rationally related to the challenges of foreign state litigation than the Fourteenth Amendment.

Yet the Fifth Amendment, as Wuerth concedes, has not been interpreted necessarily to include a "minimum contacts" analysis in the same fashion as the Fourteenth Amendment has.[75] What might be required for personal jurisdiction is therefore whatever Congress might say is required, so long as it does not fall beneath whatever floor Article III establishes and does not discriminate against foreign states.[76] Thus (if I follow the argument correctly), for purposes of personal jurisdiction, Article III and the Fifth Amendment together impose only certain minimal standards and if Congress imposes some requirements for individuals, or at least for foreign corporations, it must impose the same requirements for foreign states.

Such a rule of "equivalence" (perhaps rooted in the "equal protection" doctrine) would prevent discriminatory treatment of foreign states but would not seem to resolve the issue of extraterritorial jurisdiction or indicate what might be done to protect foreign states, governments, and SOEs from particularly expansive assertions of extraterritorial jurisdiction. If the Constitution itself does not dictate rules circumscribing assertions of personal jurisdiction in the sovereign context, and if (as Wuerth concedes) "Congress is not limited by 'minimum contacts' in determining the jurisdiction of federal courts over any kind of defendant, whether public or private,"[77] then what constrains a legislative grant of judicial jurisdiction over people (including governments), places, and activities entirely outside the United States simply (for example) on the basis that it would serve "vital U.S. interests" however they might be defined at any given juncture?

To put it otherwise, even if Article III and the Fifth Amendment require (i) some minimal "'positivist' personal jurisdiction protections"[78] and (ii) consistent application of personal jurisdiction principles, one has to wonder whether the Congress would be inclined towards a less aggressive or more protective approach than, say, it has recently adopted in respect of the FSIA or the ATA. It is possible that having to impose the same requirements on (or protections for) private litigants as for foreign states and governments and their SOEs might act as a constraint for practical reasons.

Absent such legislation, it is conceivable that, in a given litigation, a court might be induced to look to Article III rather than either the Fifth or Fourteenth Amendments in deciding about the propriety of a given jurisdictional assertion (say, by embracing Wuerth's analogy between

75. *Id.* at 683.

76. For an argument that Congress should enact legislation conferring due process rights on foreign state-owned corporations, see Frederick Watson Vaughn, *Foreign States are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913 (2011).

77. Wuerth, *supra* note 1, at 679.

78. *Id.* at 685.

foreign governments and foreign corporations), but it seems a somewhat risky—and perhaps fairly remote—possibility.

At the same time, Wuerth's approach wisely avoids the dangerous implications of the broad-brush argument that all foreign states and governments (and their SOEs) are "persons" for all constitutional purposes and necessarily have the same constitutional rights as all other "persons" under U.S. law. Some years ago, Professor Lori Fisler Damrosch articulated the compelling reasons why that broad proposition must be approached with great caution, especially when it intrudes upon "plenary power of the political branches to determine national policy with respect to foreign states."[79] She distinguished between questions concerning the involvement of foreign states in judicial proceedings on the one hand, and efforts by foreign states to use the judicial process to interfere with the political process, especially to challenge decisions taken by the political branches with respect to the foreign relations of the United States.[80] To the extent that Wuerth's approach is limited to the former—to issues of "litigation-related protections in federal court" including jurisdiction—it avoids that pitfall.[81]

As Damrosch and others also recognize, arguments at the other extreme—that foreign states, governments, and their SOEs have no constitutionally recognized rights, including no due process rights—are equally flawed and dangerous. As one commentator recently observed,[82] denying foreign states due process protections not only violates basic constitutional principles but threatens to strain diplomatic relations:

> [b]y firmly establishing constitutional protections for foreign states, the Supreme Court will not only remedy the "lack of coherence" of circuit court decisions, but also limit court interference in U.S. foreign policy and bilateral relations by restricting courts' ability to obligate countries to court and thus to enter judgments against these countries.[83]

Wuerth's article contributes helpfully to the effort to give substance to the "middle ground" between the "all rights" and "no rights" extremes.

---

79. Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 486 (1987).

80. *Id.* at 486–87.

81. In this context, the separation of powers argument carries some serious potential consequences. If foreign states and governments are deemed "persons" for all constitutional purposes, and if in consequence they are recognized as having the right (or "standing") to raise separation of powers issues in litigation, they would be empowered to ask the courts to limit the political branches' foreign relations powers. Since—unlike States of the Union—they are by definition not part of the U.S. political structure, that possibility seems inappropriate, even dangerous. In any event, the extent to which the "separation of powers" doctrine actually gives anyone other than the political branches of the federal government and States of the Union a constitutional "right" is open to question.

82. *See, e.g.*, Laura J. Rosenberger, *Our Allies Have Rights, Too: Judicial Departure from In Personam Case Law to Interference in International Politics*, 5 NAT'L SEC. L. J. 307 (2017).

83. *Id.* at 334.