

Will the Supreme Court Upend the Jurisdictional Landscape?



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February 25, 2025, 11:04 AM

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Many defendants with no connection to the jurisdiction in which they are sued may assert a personal jurisdiction defense to avoid defending against claims in far-flung courts. In cases brought under state law, this defense is often rooted in the Fourteenth Amendment because the Fourteenth Amendment protects against unconstitutional acts by *states* rather than the federal government. But when a defendant raises a personal jurisdiction defense to resist the federal government's alleged misconduct, the Fifth Amendment—not the Fourteenth—applies. So in cases brought in federal court under federal law, such as the Sherman Act, the Fifth Amendment typically sets the limits. For years, courts have assumed that the Fifth and Fourteenth Amendments provide the same personal jurisdiction protections. But that may change.

The Supreme Court is poised to consider the issue this term in *Fuld v. Palestine Liberation Organization*. The plaintiffs—victims of terrorist attacks and their family members—have sued the PLO, which the plaintiffs say is subject to personal jurisdiction under a statute that Congress passed to subject the PLO to jurisdiction in federal court in terrorism cases. The plaintiffs lost before the Second Circuit, which concluded that the jurisdictional statute, the Promoting Security and Justice for Victims of Terrorism Act (PSJVTA), was unconstitutional, applying traditional personal jurisdiction case law, which does not vary based on whether the Fifth or Fourteenth Amendment applies.

In the Supreme Court, the plaintiffs urge a new approach. They argue that, unlike the Fourteenth Amendment, the Fifth Amendment actually doesn't limit Congress's ability to subject foreign defendants to claims in federal courts for conduct occurring abroad. On the contrary, the plaintiffs say, the Fifth Amendment allows courts to exercise jurisdiction over a defendant in any matter over which Congress has the power to legislate, as long as the defendant receives traditional procedural protections (e.g., a fair judge) and as long as the statute authorizing suit, in this case the PSJVTA, isn't arbitrary or irrational.

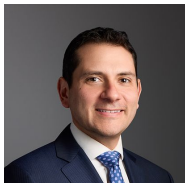
Adopting this approach would radically alter the jurisdictional landscape and shrink the Fifth Amendment protections relative to their Fourteenth Amendment counterparts. Foreign defendants and defendants in antitrust cases, among others, where the Fifth Amendment applies have long relied on an ample body of jurisdictional case law to resist lawsuits. But that case law goes out the window if the only questions under the Fifth Amendment are whether the statute in question is arbitrary and whether the defendant receives standard procedural protections.

So will the Court hollow out a core jurisdictional defense in Fifth Amendment cases? Not necessarily. The Court may decline to reach the question: if it decides that the statute in question is constitutional even under the Fourteenth Amendment, then it can dodge the question of whether the Fifth Amendment is less protective. The Court can also take a middle-ground approach. In its brief defending the constitutionality of the PSJVTA, the federal government urged the Court to hold that the Fifth Amendment is more flexible than the Fourteenth but not to decide how far the Fifth Amendment goes — only to rule that the PSJVTA is constitutional under that more flexible standard.

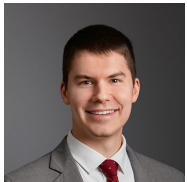
Given what's at stake, anyone who litigates claims under federal statutes should be keeping an eye on this case, which could decide the fate of personal jurisdiction defenses in their cases. The Court will hear oral argument on April 1 and decide the case by early July. We'll be following it closely.



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