THE EXERCISE OF PERSONAL JURISDICTION OVER SOME FOREIGN STATE INSTRUMENTALITIES MUST BE CONSISTENT WITH DUE PROCESS

Gosia Spangenberg

Abstract: The Fifth Amendment’s Due Process Clause places limitations on courts’ judicial power. Due process concerns arise when a forum exercises personal jurisdiction over a nonresident defendant for actions carried on outside the forum’s territory. Those concerns are alleviated when the defendant has adequate “minimum contacts” with the forum. Although foreign states are presumed to be immune from the jurisdiction of U.S. courts, the Foreign Sovereign Immunities Act (FSIA) grants U.S. courts jurisdiction over foreign states under certain circumstances. Several FSIA exceptions to foreign state immunity extend to conduct that occurs outside of the U.S. Moreover, the jurisdictional nexus requirements associated with some of those exceptions do not necessarily satisfy due process requirements. Seemingly, the exercise of personal jurisdiction under the FSIA would have to be consistent with the requirements of due process embodied in the “minimum contacts” test. However, in contrast to corporations, foreign states, like U.S. states, are not “persons” within the meaning of the Due Process Clause and thus are not entitled to its protections. Nevertheless, because the FSIA’s definition of “foreign state” is broad, some entities that fall within its scope will be entitled to constitutional treatment different from that of a foreign state. This Comment argues that some foreign state instrumentalities are in fact “persons” entitled to a constitutional personal jurisdiction defense. Accordingly, even when a court has jurisdiction under the FSIA, the court’s exercise of personal jurisdiction over an instrumentality that is created as a separate juridical entity not extensively controlled by a foreign state must be consistent with the requirements of the Due Process Clause, provided that such separate treatment does not result in fraud or injustice.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution limits courts’ exercise of judicial power over “persons.”1 One effect of this limitation is that non-resident entities that qualify as “persons” can generally be haled into court for actions carried on outside of the forum’s territory only when they have sufficient “minimum

contacts” with the forum. Conversely, entities that do not qualify as “persons” are not entitled to the protections embodied in the “minimum contacts” test.

The distinction between persons and non-persons has unique applications with respect to U.S. courts’ exercise of jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA), which permits plaintiffs to sue foreign states and their instrumentalities in U.S. courts. Although foreign states, like U.S. states, are not considered “persons” within the meaning of the Due Process Clause, courts presume that foreign state instrumentalities should be treated as juridical entities separate from foreign states. Thus, although foreign states are not “persons,” foreign state instrumentalities that are not extensively controlled by a foreign state may be “persons” for due process purposes, provided that such separate treatment does not result in fraud or injustice.

Instrumentalities that qualify as “persons” should be able to raise a personal jurisdiction defense when haled into a U.S. court. However, because the FSIA authorizes nationwide and worldwide service of process, making the relevant forum for a “minimum contacts” analysis of such instrumentalities the entire country, a court will lack personal jurisdiction over such an instrumentality only in limited circumstances. Such limited circumstances would arise if an instrumentality lacked

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2. See Int’l Shoe, 326 U.S. at 316.
5. Id. § 1603(a) (defining “foreign state” to include its political subdivisions, agencies, and instrumentalities); id. § 1605 (providing exceptions to foreign state immunity).
8. See TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301–02 (D.C. Cir. 2005) (following Bancec and holding that a foreign state agency over which a foreign state has plenary power is not entitled to constitutional status different from that of the foreign state).
9. Id. at 301.
10. See Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) (stating that the relevant forum in an FSIA action is the entire U.S.); see also SEC v. Carrillo, 115 F.3d 1540, 1543 (11th Cir. 1997) (explaining that the relevant forum is the entire U.S. when a federal statute provides for worldwide or nationwide service of process), dismissed on other grounds, 325 F.3d 1268 (11th Cir. 2003).
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“minimum contacts” with the U.S.\textsuperscript{11} when neither service of process nor the conduct underlying the action occurred in the U.S.\textsuperscript{12}

Part I of this Comment describes the Due Process Clause’s personal jurisdiction requirement, as well as the availability of the personal jurisdiction defense to various entities. Part II illustrates that not all constitutional protections are available to foreign defendants. Part III compares the FSIA nexus requirements to the constitutional “minimum contacts” requirement and concludes that satisfying the former does not always satisfy the latter. Part IV discusses that the law presumes that instrumentalities are separate juridical entities from foreign states. Finally, Part V argues that some foreign state instrumentalities may be entitled to a personal jurisdiction defense derived from the Due Process Clause.

I. THE EXERCISE OF PERSONAL JURISDICTION MUST BE CONSISTENT WITH THE DUE PROCESS CLAUSE

The Fifth Amendment’s Due Process Clause controls courts’ exercise of personal jurisdiction over defendants.\textsuperscript{13} Generally, a court’s exercise of personal jurisdiction is constitutional when a nonresident defendant has “minimum contacts” with the forum.\textsuperscript{14} However, this Due Process Clause safeguard does not extend to entities that do not qualify as “persons,” such as U.S. states and foreign countries.\textsuperscript{15}

\textbf{A. The Due Process Clause Constrains a Court’s Exercise of Personal Jurisdiction}

The Fifth Amendment to the U.S. Constitution provides that no person shall be “deprived of life, liberty, or property, without due

\footnotesize{\textsuperscript{11} See Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (defining the “minimum contacts” test); infra Part V.B (arguing that the personal jurisdiction defense is available to an instrumentality that has no previous voluntary contacts with the U.S.).}


\footnotesize{\textsuperscript{14} Int’l Shoe, 326 U.S. at 316.}

process of law.” This language, known as the Due Process Clause, controls courts’ exercise of personal jurisdiction over defendants and therefore imposes limitations on courts’ judicial power. In *Pennoye v. Neff*, the United States Supreme Court stated that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be... an illegitimate assumption of power.” Thus, courts must exercise personal jurisdiction over defendants in accordance with due process limitations.

**B. The Exercise of Personal Jurisdiction over a Defendant Who Has “Minimum Contacts” with a Forum Satisfies the Due Process Clause**

Due process concerns arise in cases that involve extraterritorial conduct and nonresident defendants. In such circumstances, a court can exercise personal jurisdiction in line with the requirements of the Fifth Amendment when the defendant has “minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” In addition, a court can exercise personal jurisdiction when a cause of action arises out of an activity that a defendant carried on within the forum, when the defendant waives the personal jurisdiction defense by appearance or consent, or when the defendant is served with process while physically present in the forum.

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16. U.S. CONST. amend. V.
17. See Ins. Corp. of Ir., 456 U.S. at 702.
18. 95 U.S. 714 (1877).
19. Id. at 720. In *Pennoye*, statements regarding the Fourteenth Amendment are technically dicta as the case involved a judgment rendered two years prior to the adoption of the Fourteenth Amendment and was resolved on the principles of public law. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 616–17 (1990).
20. See Ins. Corp. of Ir., 456 U.S. at 702.
21. See *Helicopteros Nacionales de Colom.*, S.A. v. Hall, 466 U.S. 408, 414 & n.9 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)) (explaining that a court has constitutionally valid “general jurisdiction” if the defendant has sufficient contacts with the forum).
23. *Helicopteros Nacionales*, 466 U.S. at 414 & n.8 (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (explaining that a court has constitutionally valid “specific jurisdiction” over a defendant when a cause of action arises out of an activity carried on within the forum).
24. *Ins. Corp. of Ir.*, 456 U.S. at 703–04.
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present in the forum.\textsuperscript{25}

The foundation for “minimum contacts” is established when a
defendant engages in activities within the forum, thereby invoking “the
benefits and protections of [the forum’s] laws.”\textsuperscript{26} Such a defendant can foresee being “haled into Court” in that forum.\textsuperscript{27} In evaluating whether
the exercise of personal jurisdiction over a nonresident defendant is
reasonable, courts consider such factors as the burden placed on the
defendant and the interests of the forum, the plaintiff, and the interstate
judicial system.\textsuperscript{28}

When exercising jurisdiction under a federal statute that provides for
nationwide or worldwide service of process, a federal court will evaluate
a defendant’s “minimum contacts” with the entire U.S. rather than a
particular forum state.\textsuperscript{29} Because “service of process constitutes the
vehicle by which the court obtains jurisdiction,”\textsuperscript{30} a statute that
authorizes nationwide or worldwide service broadens the scope of
personal jurisdiction to the entire country.\textsuperscript{31} Actions based on federal statutes also implicate the Fifth Amendment’s Due Process Clause,
which requires that defendants have “minimum contacts” with the U.S.\textsuperscript{32}

\section*{C. Only Entities that Qualify as “Persons” Are Entitled to Due Process Protections}

Due Process Clause safeguards apply only to “persons.”\textsuperscript{33} However,
the term “persons” encompasses more than just natural persons.\textsuperscript{34} For instance, courts have treated corporations as “persons” for due process

\begin{thebibliography}{99}
King Corp. v. Radzewicz, 471 U.S. 462, 475 (1985)) (internal quotations omitted).
\item 27. \textit{Id.} at 119 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)) (internal
quotations omitted).
\item 28. \textit{See id.} at 113.
\item 29. \textit{See SEC v. Carrillo, 115 F.3d 1540, 1543 (11th Cir. 1997), dismissed on other grounds, 325
F.3d 1268 (11th Cir. 2003).}
\item 30. \textit{Id.} (quoting United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir.
1992)) (internal quotations omitted).
\item 31. \textit{Id.} (citing Go-Video, Inc. v. Akai Elec. Corp., 885 F.2d 1406, 1414 (9th Cir. 1989)).
\item 32. \textit{Id.} (quoting United Elec. Workers, 960 F.2d at 1085). In diversity cases, a federal court is
limited by the Fourteenth Amendment’s Due Process Clause and evaluates contacts with a particular
forum state. \textit{Id.}
\item 33. \textit{See U.S. CONST. amend. V; id. amend. XIV, § 1.}
\item 34. \textit{See, e.g., Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (extending Due Process
Clause protections to a corporation).}
\end{thebibliography}
purposes. In contrast, courts have declined to extend “person” status to U.S. states and foreign countries.

1. Domestic and Foreign Corporations Are “Persons”

The Supreme Court has extended due process protections to corporations. In International Shoe Co. v. Washington, the Court articulated the “minimum contacts” test and found Washington’s exercise of personal jurisdiction over an out-of-state domestic corporation constitutional. In two cases involving foreign corporations, the Court held that the exercise of personal jurisdiction violated the Due Process Clause.

In Asahi Metal Industry Co. v. Superior Court of California, the Court considered whether it was consistent with due process to assert personal jurisdiction over a foreign manufacturer based on the manufacturer’s mere awareness that the stream of commerce might bring its product into the forum. A plurality of justices concluded that, absent other contacts, mere awareness did not amount to the “minimum contacts” necessary to subject a defendant to a forum’s jurisdiction. The majority held that the exercise of personal jurisdiction at issue violated the Due Process Clause on grounds that it was unreasonable and

35. See, e.g., id.


37. See Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 116 (1987); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 418–19 (1984); Int’l Shoe, 326 U.S. at 319. Because these were cases based on diversity jurisdiction, the Court evaluated the defendants’ contacts with particular forum states, pursuant to the Fourteenth Amendment’s Due Process Clause. See Carrillo, 115 F.3d at 1543 (quoting United Elec. Workers, 960 F.2d at 1085). In diversity cases, a federal court is limited by the Fourteenth Amendment’s Due Process Clause and evaluates contacts with a particular forum state. Id.

38. 326 U.S. 310 (1945).

39. See id. at 316, 321.

40. See Asahi, 480 U.S. at 116; Helicopteros Nacionales, 466 U.S. at 418–19. In neither Asahi nor Helicopteros Nacionales did the Court evaluate whether the defendants had a “sufficient connection” with the U.S. prior to evaluating their “minimum contacts” with the forum state.


42. See id. at 105.

43. See id. at 112–13 (plurality opinion).
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unfair under the circumstances of the case.44

The Court also extended due process protections to a foreign corporation in *Helicopteros Nacionales de Colombia, S.A. v. Hall,*45 an action that arose from a helicopter crash in Peru that killed four U.S. citizens.46 The Colombian corporation’s contacts with the forum included cashing checks drawn on a Texas bank, making purchases from a Texas corporation, and sending its employees to training and a contract negotiation session in Texas.47 The Court held that the exercise of personal jurisdiction based on these contacts, which were unrelated to the cause of action and were not continuous and systematic, violated the Due Process Clause.48 In short, the Supreme Court has consistently treated foreign, as well as domestic, private corporations as “persons” within the meaning of the Due Process Clause.

2.  *U.S. States Are Not “Persons,“ but Some State Agents May Be “Persons”*

The Supreme Court stated in *South Carolina v. Katzenbach*49 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.”50 In that case, South Carolina challenged on due process grounds a federal statute that sought to eliminate discriminatory voting eligibility devices.51 Early in its analysis and without explaining its rationale, the Court concluded that states were not entitled to due process protections by virtue of not being “person[s].”52

Since *Katzenbach*, lower courts have held that states’ political subdivisions, such as cities and counties, cannot assert constitutional due process claims.53 Additionally, in a case before the U.S. Court of

44. See *id.* at 116 (majority opinion).
46. See *id.* at 409–10.
47. See *id.* at 416.
48. See *id.* at 415–16.
49. 383 U.S. 301 (1966).
50. *Id.* at 323.
51. *Id.* at 307–08.
52. *Id.* at 323–24.
53. See City of East St. Louis v. Circuit Court for the Twentieth Judicial Cir., 986 F.2d 1142, 1144 (7th Cir. 1993); Appling County v. Mun. Elec. Auth. of Ga., 621 F.2d 1301, 1307–08 (5th Cir. 1980).
 Appeals for the Sixth Circuit, the U.S. and the court agreed that the U.S. itself does not have due process rights under the Fifth Amendment. On the whole, these decisions strongly suggest that sovereigns—whether the U.S. or U.S states—are not “persons” within the meaning of the Due Process Clause.

On the other hand, the Third Circuit has held that requiring a school board to litigate in a forum in which it has no “minimum contacts” violates due process. The court reasoned that even though a school board is a state actor, it is a limited entity that concerns itself with a specific and restricted purpose. The court concluded that school boards are more akin to private corporations than to states and therefore constitute “persons” entitled to the Fifth Amendment’s due process protections. Thus, despite U.S. states not being “persons,” the exercise of personal jurisdiction over some public entities that act like private entities may have to be consistent with the Due Process Clause.

3. Foreign States Are Not “Persons”

Although the Supreme Court has not yet ruled directly on the due process status of foreign states, it has strongly suggested that they are not “persons.” In Republic of Argentina v. Weltover, the Court assumed that foreign states were “person[s]” entitled to due process protections. Immediately following this statement, however, the Court cited Katzenbach, which explicitly held that U.S. states are not

57. See id. at 765 n.3.
58. See id. This reasoning was adopted by the Ninth Circuit in a case that involved school boards challenging the constitutionality of a federal act. See Bd. of Natural Res. v. Brown, 992 F.2d 937, 943 (9th Cir. 1993). Compare id. (holding that school districts are persons under the Fifth Amendment), with Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1244 & n.2 (9th Cir. 1996) (distinguishing Brown and holding that school boards lack standing to bring a claim under the Supremacy Clause).
59. See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 & n.2 (1992) (assuming, without deciding, that foreign states are “persons” even though the constitutional status of Argentina was not before the Court).
61. Id. at 619.
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“persons” within the meaning of the Due Process Clause. According to the Court, its previous cases that assume that a particular entity is a “person” are not binding when a subsequent case requires a resolution of that precise issue. In Weltover, the Court hinted that the assumption that foreign states are “persons” would not be upheld on a direct challenge.

Relying on Katzenbach and citing Weltover, the D.C. Circuit has explicitly held that foreign states are not “persons” within the meaning of the Due Process Clause. In Price v. Socialist People’s Libyan Arab Jamahiriya, two Americans brought an action against Libya for torture and hostage-taking under the FSIA’s terrorism exception. Other than the allegation that Libya tortured two Americans within its territory, Libya did not have any contacts with the U.S. and challenged the court’s exercise of personal jurisdiction on due process grounds. The court noted that the mere fact that a plaintiff is a citizen of a particular forum and is a victim of an intentional tort elsewhere does not give that forum personal jurisdiction over the defendant.

In Price, the court recognized that whether a foreign state can rely on a personal jurisdiction defense depends on its status under the Due Process Clause. To arrive at the holding that foreign states are not “persons,” the court began by noting that the Supreme Court presumes that the term “person,” when encountered in statutes, does not ordinarily refer to sovereigns. More importantly, the court relied on Katzenbach

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62. See id. (citing South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966)).
64. See Weltover, 504 U.S. at 619 (citing Katzenbach, 383 U.S. at 323–24).
66. 294 F.3d 82 (D.C. Cir. 2002).
67. Id. at 85 (stating that plaintiffs brought the action under 28 U.S.C. § 1605(a)(7)).
68. Id. at 95.
69. See id. The outcome may differ if other contacts exist or if the defendant “expressly aimed its tortious conduct at the forum.” Id. (quoting IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998)) (internal quotations omitted) (emphasis in original).
70. See id.
71. See id. at 96 (citing Will v. Mich. Dep’t of State Police, 491 U.S. 58, 64 (1989) (holding that a state is not a “person” within the meaning of 42 U.S.C. § 1983)).
in stating that “it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system.”\footnote{72} The court reasoned that, unlike individuals, foreign states resort to the mechanisms of international law to resolve disputes.\footnote{73} It characterized foreign states as “juridical equals” of the U.S. and stated that their interactions with the U.S. are generally regulated by the principles of comity and international law and not the Constitution.\footnote{74}

The D.C. Circuit saw authority in prior Supreme Court decisions for the proposition that the interactions between the U.S. and foreign states are generally not governed by the Constitution.\footnote{75} For example, the Supreme Court has held that an individual’s right to have access to courts is derived from the Due Process Clause,\footnote{76} whereas a foreign state’s ability to sue a private party in a U.S. court is a matter of comity.\footnote{77} Similarly, the source of foreign state immunity is the principle of comity and not the Constitution.\footnote{78} About a year after the Price decision, the Court reiterated that foreign sovereign immunity grants “protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.”\footnote{79}

Other Circuits have not yet squarely confronted the issue of foreign states’ Due Process Clause status.\footnote{80} For now, the Second Circuit adheres to an approach established in Texas Trading & Milling Corp. v. Federal Republic of Nigeria,\footnote{81} a case decided prior to Weltover, which requires a

\footnotesize{\begin{itemize}
\item \footnote{72} Id. at 96.
\item \footnote{73} Id. at 98.
\item \footnote{74} Id. at 97 (quoting Lori Fisler Damrosch, Foreign States and the Constitution, 73 VA. L. REV. 483, 521 (1987)) (internal quotations omitted).
\item \footnote{75} See id.
\item \footnote{76} See id. (citing Bounds v. Smith, 430 U.S. 817, 821 (1977); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907)).
\item \footnote{77} See id. at 98 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964)).
\item \footnote{78} See id. at 99 (citing Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983)); see also Banco Nacional de Cuba, 376 U.S. at 416, 417–18 (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 303–04 (1918)) (stating that the act of state doctrine, which prevents the judicial branch from inquiring into the validity of public acts of a foreign sovereign within its territory, is a matter of comity).
\item \footnote{79} Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) (citing Verlinden, 461 U.S. at 486).
\item \footnote{81} 647 F.2d 300 (2d Cir. 1981).
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constitutional due process analysis with respect to foreign states.\(^{82}\) However, since \textit{Weltover}, the Second Circuit has expressed uncertainty about the \textit{Texas Trading} holding.\(^{83}\) Similarly, the Ninth and Eleventh circuits have not, thus far, confronted this issue and continue to evaluate foreign states’ “minimum contacts.”\(^{84}\) Nonetheless, in light of Supreme Court precedent that has denied “person” status to U.S. states,\(^{85}\) and the Court’s repeated statements that interactions between foreign states and the U.S. are governed by comity rather than the Constitution,\(^{86}\) foreign states are not “persons” entitled to a constitutional personal jurisdiction defense.\(^{87}\)

In sum, because foreign states do not qualify as “persons,” they can be haled into court without regard to the limitations of the Due Process Clause. In contrast, corporations, as well as some state agents that act like corporations, can challenge a court’s exercise of personal jurisdiction when they lack contacts with the forum. Furthermore, the relevant forum for a “minimum contacts” analysis under a federal statute that authorizes nationwide or worldwide service of process is the entire U.S.

II. CONSTITUTIONAL PROTECTIONS ARE NOT ALWAYS AVAILABLE TO FOREIGN DEFENDANTS


\(^{82}\) See id. at 313–15; see also U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 152 (2d Cir. 2001) (stating that the exercise of personal jurisdiction under the FSIA must also comport with the Due Process Clause).

\(^{83}\) See Hanil Bank v. PT. Bank Negra Indon. (Persero), 148 F.3d 127, 134 (2d Cir. 1998).

\(^{84}\) See Altman v. Republic of Austria, 317 F.3d 954, 970 (9th Cir. 2002), aff’d on different grounds, 541 U.S. 677 (2004); S & Davis Int’l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1303–04 (11th Cir. 2000).


\(^{87}\) See Price, 294 F.3d at 99.

Urquidez, the Supreme Court held that Fourth Amendment restrictions on searches and seizures did not apply to a search of a Mexican citizen in Mexico when he did not have any voluntary connection with the U.S. Courts have occasionally cited this decision to support the proposition that Fifth Amendment protections also do not apply to foreign defendants who have not established a sufficient connection with the U.S. If this principle were extended to the Due Process Clause, a court could exercise personal jurisdiction over a foreign defendant who had no connection with the U.S.

Significantly, in Verdugo-Urquidez, the Court contrasted the language of the Fifth and Fourth Amendments. The former applies to “any person” whereas the latter applies the “the people.” The Court concluded that the Fourth Amendment extends to those who have a “sufficient connection with this country [so as] to be considered part of that community.” It further noted that the historical purpose of the Fourth Amendment was to restrain the actions of the government against the people of the U.S. and not against aliens outside of its territory.

Continuing the analysis in Verdugo-Urquidez, the Supreme Court relied on prior decisions that held certain constitutional protections inapplicable in U.S. territories such as Puerto Rico and the Philippines, as well as overseas, for the proposition that the exercise of government power is not always constrained by every constitutional provision. For example, in Johnson v. Eisentrager, the Court rejected the availability of habeas corpus relief based on the violations of the Fifth Amendment

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90. See id. at 274–75.
92. However, the Court has extended due process protections to aliens residing in the U.S. See Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953). See supra Part I.A–B for a discussion of the Due Process Clause limitations and the relevant forum for a “minimum contacts” analysis.
94. U.S. Const. amend. V.
95. U.S. Const. amend. IV.
96. Verdugo-Urquidez, 494 U.S. at 265.
97. See id. at 266.
98. See id. at 268 (citations omitted).
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to enemy aliens who were captured, tried, and imprisoned abroad by the executive branch. The Court then cited numerous cases that have granted constitutional rights to aliens who have come within U.S. territory and ultimately concluded that the Fourth Amendment did not apply extraterritorially to an alien who had no voluntary connection with the U.S.

In sum, constitutional protections are not always available to foreign defendants. The Fourth Amendment’s search and seizure protections do not extend to those who have not established a sufficient and voluntary connection with the U.S. If this were also the case with respect to the Due Process Clause, the personal jurisdiction defense would not be available to foreign defendants who qualify as “persons” and who have no contacts or insufficient contacts with the U.S. Such an outcome appears to be incompatible with the limit that the personal jurisdiction requirement embodied in the “minimum contacts” test imposes on the courts’ extraterritorial power.

III. NEXUS REQUIREMENTS ASSOCIATED WITH SOME FSIA EXCEPTIONS FALL SHORT OF “MINIMUM CONTACTS”

A plaintiff who wishes to sue a foreign state in a U.S. court must do so under the FSIA. However, whether a plaintiff’s cause of action satisfies an FSIA exception to foreign state immunity is a separate issue from whether a court has constitutionally dictated personal jurisdiction over the defendant. In fact, contacts that satisfy the FSIA’s nexus requirements do not necessarily satisfy the “minimum contacts” test.

A. The FSIA Provides the Sole Jurisdictional Basis for Bringing an Action Against a Foreign State

Congress enacted the FSIA in order to provide legal redress against foreign states and their political subdivisions, agents, and

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100 See Verdugo-Urquidez, 494 U.S. at 269 (citing Eisenstrager, 339 U.S. at 781).
101 See id. at 270–71 (citations omitted).
102 Id. at 274–75.
instrumentalities. Because the statute’s text, structure, and legislative history reflect an intent on the part of Congress “to enact a comprehensive statutory scheme,” the Supreme Court has held that the FSIA provides the only authorization for exercising jurisdiction over foreign states. Thus, a plaintiff cannot invoke any statute other than the FSIA to bring an action against a foreign state.

The FSIA intertwines the concepts of sovereign immunity, subject matter jurisdiction, and personal jurisdiction. Under the statute, foreign states are presumptively immune from the jurisdiction of U.S. courts unless their conduct falls within a waiver, commercial activity, expropriation, property in the U.S., noncommercial tort, arbitration, terrorism, admiralty, or counterclaims exception to immunity. The FSIA grants district courts original jurisdiction over claims asserted against foreign states that satisfy one of these exceptions. A court has statutory personal jurisdiction whenever it has subject matter jurisdiction over a claim and the defendant has been properly served. The statute specifies procedures related to service of process, time to answer, and default. Its final three sections define which assets are subject to attachment and execution upon a court judgment.


107. Amerada Hess, 488 U.S. at 435 n.3.

108. See id. at 434–35. The Supreme Court also held that the FSIA’s grant of jurisdiction arises under federal law for the purposes of Article III of the Constitution. See Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 494 (1983).

109. See Amerada Hess, 488 U.S. at 443.


111. Id. §§ 1604–1605, 1607.

112. Id. § 1330(a).

113. Id. § 1330(b).

114. See id. § 1608.

115. See id. §§ 1609–1611.
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B. The Exercise of Jurisdiction Under the FSIA Can Raise Due Process Concerns

Most FSIA exceptions to foreign state immunity contain a U.S. nexus requirement.116 However, a case can satisfy some of these exceptions when its underlying conduct occurs outside of the U.S.117 Moreover, the statute’s nexus requirements do not necessarily equate to the personal jurisdiction requirement embodied in the “minimum contacts” test.118

1. The FSIA Applies To Conduct Occurring Outside of the U.S.

The FSIA’s scope is not limited to conduct occurring within U.S. territory.119 Two of its exceptions apply solely within the U.S.: courts have jurisdiction over claims that determine the rights of property located in the U.S.,120 and over certain noncommercial torts that occur in the U.S.121 The remaining exceptions, either explicitly or implicitly, remove the immunity bar even when the underlying conduct occurs extraterritorially.122

2. Some of the FSIA’s U.S. Nexus Requirements Do Not Equal “Minimum Contacts”

The FSIA’s personal jurisdiction requirement is satisfied whenever a court has subject matter jurisdiction and the defendant has been properly served.123 The statute’s legislative history suggests that Congress intended this provision to embody the constitutional due process “minimum contacts” requirement.124 However, the FSIA’s text does not make this intent explicit and courts have generally refused to read a

116. See id. § 1605(a)(2)–(7). The waiver and admiralty exceptions do not contain a U.S. nexus requirement. See id. § 1605(a)(1), (b).
117. See id. §§ 1605(a)(1)–(3), (6)–(7), 1605(b), 1607.
118. See infra Part III.B.2.
120. Id. § 1605(a)(4).
121. Id. § 1605(a)(5).
122. See id. § 1605(a)(1)–(3), (6)–(7), 1605(b). Though the counterclaims exception could also apply to extraterritorial conduct, the foreign state would have chosen to litigate in a U.S. forum. See id. § 1607.
123. Id. § 1330(b).
"minimum contacts" requirement into the statute’s exceptions. Instead, most courts undertake separate evaluations of the statutory and constitutional personal jurisdiction requirements. Resorting to a two-step inquiry suggests that jurisdictional contacts required by the statute will not necessarily equate to the “minimum contacts” that the Constitution requires.

The commercial activity exception to foreign state immunity is an example of an FSIA exception containing a U.S. nexus requirement that does not embody “minimum contacts.” One way to satisfy this exception is to show that a foreign state’s act carried on outside of U.S. territory had a “direct effect” in the U.S. The Supreme Court has refused to view this provision as incorporating a requirement of substantiality or foreseeability. All that is necessary for an act to have a “direct effect” is that the act’s effect be “an immediate consequence of the defendant’s ... activity.” In Weltover, the Court held that Argentina’s failure to make contractual payments to foreign corporations’ New York accounts had a “direct effect” in the U.S. In contrast, the Court based its finding that “minimum contacts” existed on two additional factors: Argentina chose to denominate financial instruments in U.S. dollars payable in New York and appointed a New York financial agent. The contact that satisfied the FSIA’s nexus requirement did not independently satisfy the “minimum contacts”


126 See Altmann v. Republic of Austria, 317 F.3d 954, 969–70 (9th Cir. 2002), aff’d on different grounds, 541 U.S. 677 (2004); U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 151–52 (2d Cir. 2001); S & Davis Int’l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1303–04 (11th Cir. 2000); Tex. Trading, 647 F.2d at 313.

127 See Tex. Trading, 647 F.2d at 308 (stating that the FSIA “cannot create personal jurisdiction where the Constitution forbids it”).


129 See id. at 618.

131 Id. (quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)) (internal quotations omitted).

132 Id. at 618–19.

133 See id. at 619–20.
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requirement. Thus, contacts that have a “direct effect” in the U.S. can be different from contacts that satisfy the Due Process Clause.

Satisfying the expropriation exception’s jurisdictional nexus requirement does not automatically satisfy the personal jurisdiction due process requirement. An FSIA action can be predicated upon an expropriation of property in violation of international law where “that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” Even when the expropriation occurs extraterritorially, a U.S. court could have FSIA jurisdiction based upon an agency’s single and unrelated act or transaction carried on within the U.S. Under these circumstances, a court would not have personal jurisdiction over the defendant as required by the Due Process Clause.

In addition, Congress amended the FSIA in 1996 to include the terrorism exception and departed from the original approach of incorporating substantial jurisdictional contacts into the statute. The terrorism exception applies to foreign states designated by the Department of State as state sponsors of terrorism that are involved in acts of “torture, extrajudicial killing, aircraft sabotage, [or] hostage taking.” This exception’s jurisdictional nexus requirement is based

134. See id. at 618–20.
135. See id.
137. Id.
138. See id. § 1603(d) (defining “commercial activity” as “regular course of commercial conduct or a particular commercial transaction or act”).
139. See id. § 1603(d).
141. See Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 90 (D.C. Cir. 2002); see also Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 490 (1983) (stating that the FSIA provisions as of 1983 require “some form of substantial contact with the United States”).
142. 28 U.S.C. § 1605(a)(7). The Department of State currently designates Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism. See 31 C.F.R. § 596.201 (2005).
solely on nationality. \textsuperscript{143} It requires that either the claimant who brings the action or the victim of terrorism be a U.S. national.\textsuperscript{144} Since states designated as sponsors of terrorism do not maintain normal relations with the U.S., and since the mere fact that a victim or claimant is an American may not provide requisite “minimum contacts,” the application of this exception could fall short of satisfying due process.\textsuperscript{145}

In sum, the FSIA grants jurisdiction over actions against foreign states that satisfy the statute’s exceptions to foreign state immunity. Under several exceptions, an action can be based on conduct occurring outside of the U.S. Even though each FSIA exception contains a U.S. nexus requirement, contacts that satisfy this requirement do not necessarily satisfy constitutional due process. This can be the case under the commercial activity, expropriation, and terrorism exceptions to foreign state immunity.

IV. THE FSIA APPLIES TO INSTRUMENTALITIES, WHICH ARE PRESUMED TO BE SEPARATE ENTITIES

The FSIA applies to foreign states as well as their instrumentalities.\textsuperscript{146} The Supreme Court has established that instrumentalities are presumed to be separate juridical entities from foreign states.\textsuperscript{147} An instrumentality is not entitled to this presumption when the foreign state extensively controls the instrumentality or when separate treatment would result in fraud or injustice.\textsuperscript{148}

A. The FSIA Definition of a “Foreign State” Includes Instrumentalities

The FSIA grants U.S. courts jurisdiction over “foreign states.”\textsuperscript{149} Under the statute, this term includes foreign states’ political subdivisions, agencies, and instrumentalities.\textsuperscript{150} The statute differentiates

\textsuperscript{144} Id.
\textsuperscript{145} See Price, 294 F.3d at 90, 95; see, e.g., 31 C.F.R. § 596.201 (prohibiting U.S. persons from engaging in financial transactions with states designated as sponsors of terrorism).
\textsuperscript{146} 28 U.S.C. § 1603(a).
\textsuperscript{148} See id. at 629–30.
\textsuperscript{149} 28 U.S.C. § 1330.
\textsuperscript{150} Id. § 1603(a).
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between foreign states and political subdivisions on one hand, and agencies and instrumentalities on the other, with respect to the expropriation exception to immunity, punitive damages, service of process, execution of judgments, and venue. Generally, an agency or instrumentality receives fewer protections than the foreign state or its political subdivisions.

In order to satisfy the definition of an agency or instrumentality, an entity must fulfill three requirements. First, an agency or instrumentality must be a “separate legal person.” Second, such an entity must be either an organ of a foreign state or its political subdivision, or an entity in which a foreign state or its political subdivision owns a majority of shares or “other ownership interest.” Third, an agency or instrumentality cannot be a citizen of the U.S. or any third country.

B. Courts Presume that Instrumentalities Are Separate Juridical Entities from Foreign States

According to the Supreme Court, “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.” In First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec), the Court addressed when the acts and liabilities of a foreign state can be attributed to a state-owned instrumentality established as a separate

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151. Id. § 1605(a)(3).
152. Id. § 1606.
153. Id. § 1608.
154. Id. § 1610.
155. Id. § 1391(f).
156. See, e.g., id. § 1606 (providing that only an agency or instrumentality can be liable for punitive damages); id. § 1610(a)-(b) (providing that the property of an agency or instrumentality is more exposed to attachment and execution of a judgment than that of a foreign state or its political subdivision).
157. Id. § 1603(b).
158. Id. § 1603(b)(1).
159. Id. § 1603(b)(2). To qualify as a foreign state instrumentality under the FSIA, the foreign state itself, rather than its subsidiary, must own a majority of shares of a corporation. See Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003).
juridical entity. The Court recognized that governments increasingly rely on separate legal entities to perform various tasks. Among other common features, the Court characterized such instrumentalities as entities that are typically created as separate juridical entities by statutes that delineate their powers and duties; are managed by boards appointed by the government; and are run as independent economic enterprises.

The Court went on to state that, in accordance with international and federal common law, the presumption that an instrumentality has separate juridical status is inapplicable first, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," and second, when adhering to the presumption "would work fraud or injustice." Lower courts have followed this approach in determining whether a court has jurisdiction over a foreign state based on the acts of its instrumentality. They have also applied the presumption to determine when the assets of an instrumentality are subject to the execution of a judgment rendered against a foreign state. Finally, one court has applied the presumption when deciding whether an agency should receive constitutional treatment independent from that of a foreign state.

Although the Supreme Court in Bancec declined to provide a "mechanical formula," several factors may be relevant to the analysis of an instrumentality’s separate juridical status. These include the

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163. See id. at 613.
164. See id. at 624.
165. See id.
166. Id. at 623.
167. Id. at 629.
169. See Transamericana Leasing, Inc. v. La Republica De Venezuela, 200 F.3d 843, 848–54 (D.C. Cir. 2000); Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1380–83 (5th Cir. 1992).
170. See Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1066, 1072–74 (9th Cir. 2002); Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984).
171. See TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 301 (D.C. Cir. 2005). Guided by Bancec, the TMR court held that a foreign state agency over which a foreign state has plenary power is not entitled to constitutional status different from that of the foreign state. Id. at 301–02. The court noted that while the State Property Fund of Ukraine portrayed itself as not being a "juridical equal" of the U.S., id. at 300, it was a "body of the State which implements national policies . . . subordinated and accountable to the Supreme Rada," the Ukrainian Parliament, id. at 302 (internal quotations omitted).
173. See Walter Fuller Aircraft, 965 F.2d at 1380 n.7.
level of economic control exerted by the government and the degree of management carried out by government officials; whether the government receives the entity’s profits or is otherwise the beneficiary of the entity’s operations; and whether acceptance of separate juridical status would allow the foreign state to obtain the benefits of the U.S. judicial system while evading its obligations. Courts have followed the *Bancec* approach when evaluating the separate juridical status of foreign state instrumentalities such as banks, telecommunication companies, an airline, a not-for-profit foundation, and a shipping line, and the separate constitutional status of a foreign state agent that implemented national privatization policies.

In sum, the FSIA applies not only to foreign states but also to their political subdivisions, agencies, and instrumentalities. With respect to instrumentalities created as separate juridical entities, the Supreme Court has created a presumption of independent status. This presumption is inapplicable when the foreign state extensively controls the instrumentality or when such status would result in fraud or injustice.

V. SOME INSTRUMENTALITIES CAN ASSERT A PERSONAL JURISDICTION DEFENSE IN A U.S. COURT

Even though foreign states are not “persons,” some foreign state instrumentalities deserve constitutional status that is separate from that

174. *Id.*
175. *See Bancec*, 462 U.S. at 632–33 (refusing to treat a nationalized Cuban bank as a separate juridical entity); *Flatow*, 308 F.3d at 1066 (treating a nationalized Iranian bank as a separate juridical entity).
177. *See* *Letelier v. Republic of Chile*, 748 F.2d 790, 793–95, 799 (2d Cir. 1984) (treating Chile’s national airline as a separate juridical entity).
179. *See* *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 846, 848–53 (D.C. Cir. 2000) (holding that Venezuela was not amenable to suit based upon the actions of a shipping line).
Instrumentalities that are “persons” may challenge a court’s exercise of personal jurisdiction regardless of whether they have a voluntary and sufficient connection with the U.S. When addressing such a challenge, a federal court must evaluate the instrumentality’s contacts with the entire U.S.

A. Some Foreign State Instrumentalities Are “Persons” for Due Process Purposes

The fact that an entity satisfies the definition of a “foreign state” for FSIA purposes does not conclusively determine its status for Due Process Clause purposes. When a foreign state or that state’s political subdivision owns a majority of a corporation’s shares, that corporation satisfies the FSIA’s definition of an “instrumentality” and is treated like a “foreign state” under the FSIA. However, the Supreme Court in Bancec, when determining whether it could attribute the acts and liabilities of a foreign state to a state-owned instrumentality, mandated that courts presume that instrumentalities established as separate juridical entities are indeed separate.

Likewise, a court should presume that an instrumentality established as a separate juridical entity is a separate entity from the foreign state for Due Process Clause purposes. Such an entity is not like a sovereign—a “juridical equal” of the U.S. that resolves its disputes with the U.S. through the mechanisms of international law and diplomacy and does not generally derive rights from the U.S. Constitution. Rather, it is like a private corporation—a limited entity that concerns itself with a specific

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182. See TMR, 411 F.3d at 301–02; infra Part V.A–B.
183. See infra Part V.A–B.
184. See infra Part V.C; see also Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981).
185. See TMR, 411 F.3d at 301–02 (following Bancec and holding that a foreign state agency over which a foreign state has plenary power is not entitled to constitutional status different from that of the foreign state).
188. See TMR, 411 F.3d at 301.
189. See Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 97 (D.C. Cir. 2002) (stating that foreign states are “juridical equals” of the U.S.); In re Real Estate Title and Settlement Serv. Antitrust Litig., 869 F.2d 760, 765 n.3 (3d Cir. 1989) (stating that a school board is more like a corporation than a state).
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and restricted purpose.190 Private corporations, including foreign ones, are entitled to due process protections.191 Consequently, courts should presume that foreign state instrumentalities, like private foreign corporations, are “persons” within the meaning of the Due Process Clause.192

Courts should employ the presumption of instrumentalities’ separate constitutional status, subject to the limitations established by the Supreme Court.193 In Bancec, the Supreme Court recognized two situations in which the presumption of separate juridical status is inapplicable.194 First, an instrumentality cannot benefit from the presumption when a foreign state extensively controls an instrumentality such that its separate juridical status is illusory.195 Second, adherence to the presumption would be inappropriate if it would lead to an unjust or fraudulent result by allowing the foreign state to obtain the benefits of the U.S. judicial system while evading its obligations.196 An instrumentality that does not implicate these exceptions, like a foreign corporation, is a “person” within the meaning of the Due Process Clause and should be able to challenge a court’s exercise of personal jurisdiction on constitutional grounds.197

B. A Personal Jurisdiction Defense Is Available to Instrumentalities that Qualify as “Persons” and that Have No Connection with the U.S.

Even though some constitutional protections would be unavailable extraterritorially to an instrumentality that does not have a sufficient connection with the U.S., such an instrumentality would be entitled to a personal jurisdiction defense once haled into a U.S. court. For example, the protections of the Fourth Amendment are not available to those who have not established a sufficient connection with the U.S.198 Applying

190. Cf. Real Estate Title, 869 F.2d at 765 n.3.
192. See TMR, 411 F.3d at 301.
193. See id.
195. See id.; TMR, 411 F.3d at 301.
196. See Bancec, 462 U.S. at 629–30, 633–34; TMR, 411 F.3d at 301.
197. See TMR, 411 F.3d at 301.
such a “sufficient connection with the U.S.” requirement to personal jurisdiction would have a peculiar result: a U.S. court would have power over an instrumentality that has no contacts with, or property in, the U.S.

As noted by the Supreme Court, unlike the Fourth Amendment, which applies to “the people,” the Fifth Amendment uses broader language and applies to “any person.” Even though the personal jurisdiction requirement has evolved from requiring actual power over the defendant’s person to requiring that a defendant have “minimum contacts” with the forum, it remains a limitation on courts’ judicial power. Moreover, the Supreme Court, in decisions that have dismissed actions against foreign corporations on the basis of due process, has not made mention of a “sufficient connection with the U.S.” requirement. In neither Asahi nor Helicopteros Nacionales did the Court evaluate whether the defendants had a sufficient connection with the U.S. prior to evaluating their “minimum contacts” with the forum.

Cases holding that the executive branch is not constrained by certain constitutional provisions abroad are not on point when considering the powers and procedures of an Article III court. As Justice Anthony Kennedy stated in his concurring opinion in Verdugo-Urquidez, “[a]ll would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant” who is haled into a U.S. court. Thus, U.S. courts do not have limitless power over an instrumentality that qualifies as a “person” and that does not have any contacts with the U.S., because they must exercise personal jurisdiction in conformance with the requirements of the Due Process Clause.

199. See id. at 265 (emphasis added).
203. See Asahi, 480 U.S. 102; Helicopteros Nacionales, 466 U.S. 408.
205. Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J., concurring).
206. See Ins. Corp. of Ir., 456 U.S. at 702.
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C. A Federal Court Exercising Jurisdiction Under the FSIA Must Consider an Instrumentality’s Contacts with the Entire U.S.

Because an FSIA action arises under a federal statute that authorizes worldwide service of process, federal courts, when faced with a constitutionally valid challenge to personal jurisdiction, must evaluate an instrumentality’s contacts with the entire U.S. Every action brought under the FSIA begins with the determination of whether it overcomes the foreign state immunity bar and therefore arises under federal law within the meaning of Article III of the Constitution. In order to satisfy the FSIA’s personal jurisdiction requirement, the defendant must be served in accordance with the statute’s service of process provision, which authorizes worldwide service. Accordingly, in Weltover, the Court’s focus for “minimum contacts” purposes was not just the forum state but the entire country. Despite discussing the defendant’s contacts with New York, the Supreme Court stated that the defendant “avail[ed] itself of the privilege of conducting activities within the United States.” Thus, when an FSIA action is brought in federal court, “the relevant area in delineating contacts is the entire United States,” and not a particular state.

As a result, any federal court will have personal jurisdiction over an instrumentality that is entitled to due process protections when that instrumentality’s contacts with the U.S. satisfy the Due Process Clause. First, any federal court will have personal jurisdiction over an instrumentality that has “minimum contacts” with the U.S. “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Second, any federal court will have personal jurisdiction over an instrumentality that is entitled to due process protections when that instrumentality’s contacts with the U.S. satisfy the Due Process Clause.
jurisdiction over an instrumentality when the action against it arises from conduct occurring within the U.S.\textsuperscript{215} Finally, any federal court will have personal jurisdiction over an instrumentality in an action where process was served in the U.S., assuming that service was made in accordance with the FSIA service provision.\textsuperscript{216} Thus, an instrumentality lacking “minimum contacts” with the U.S. may have a viable personal jurisdiction defense only if both the conduct upon which the action is based and service of process took place outside of the U.S.

VI. CONCLUSION

The exercise of jurisdiction under the FSIA with respect to instrumentalities that are separate juridical entities not extensively controlled by a foreign state, where separate constitutional treatment will not result in a fraud or injustice, must be consistent with the Due Process Clause. When facing a constitutionally valid challenge to personal jurisdiction, a U.S. court will evaluate such an instrumentality’s contacts with the entire U.S. Effectively, absent waiver or consent to personal jurisdiction, due process concerns will arise in FSIA actions that are based on extraterritorial conduct where service of process was carried out outside of the U.S. In those circumstances, a court will not have personal jurisdiction over an instrumentality that does not have any contacts with the U.S. Additionally, it will not have personal jurisdiction over an instrumentality that has some contacts with the U.S. if those contacts fall short of satisfying the “minimum contacts” test. In these limited situations, despite the court having jurisdiction under the FSIA, the court’s exercise of personal jurisdiction would violate the Due Process Clause.


\textsuperscript{216} See Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990). Of course any court will also have personal jurisdiction over an instrumentality that waives its personal jurisdiction defense. See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982).