CIVIL PROCEDURE — PERSONAL JURISDICTION — SECOND CIRCUIT REVERSES ANTI-TERRORISM ACT JUDGMENT FOR FOREIGN TERROR ATTACK. — *Waldman v. Palestine Liberation Organization*, 835 F.3d 317 (2d Cir. 2016).

Since 2011, the Supreme Court has been steadily limiting the breadth of general and specific personal jurisdiction.[1] One effect of this trend is to make it more difficult to sue foreign defendants for acts occurring outside the United States.[2] Recently, in *Waldman v. Palestine Liberation Organization*,[3] the Second Circuit overturned a $655.5 million judgment against the Palestinian government.[4] It concluded that the U.S. District Court for the Southern District of New York could not exercise general *or* specific jurisdiction over the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA), in a case involving overseas terrorist attacks that injured U.S. citizens.[5] It also rejected an argument that, for personal jurisdiction purposes, the Due Process Clause of the Fifth Amendment should be construed more broadly than the similar clause in the Fourteenth Amendment.[6] In the process, the *Waldman* court may have elided an important distinction relating to federal service-of-process provisions that could have altered its analysis and conclusion.

In 2004, the plaintiffs — eleven American families — filed suit in the Southern District of New York against the PLO and the PA.[7] Bringing their suit under the Anti-Terrorism Act[8] (ATA), which allows civil actions for injuries resulting from "act[s] of international terrorism,"[9] the families alleged that the defendants were responsible for injuries and deaths resulting from several terror attacks in Jerusalem between 2002 and 2004.[10] The defendants comprise separate arms of the Palestinian government: the PA is the "non-sovereign government of [the] parts of the West Bank and the Gaza Strip"[11] known by some as

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1 *See* John T. Parry, *Rethinking Personal Jurisdiction After* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607, 611–23 (2015).

2 *See* Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 271–72 (2015).

3 835 F.3d 317 (2d Cir. 2016).

4 *Id.* at 322, 344.

5 *Id.* at 344.

6 *Id.* at 330–31.

7 *Id.* at 322, 324.

8 18 U.S.C. §§ 2331–2339D (2012).

9 *Id.* § 2333(a). Process may be served in any district where the defendant "has an agent." *Id.* § 2334(a).

10 *Waldman*, 835 F.3d at 324–25. The district court found that the attacks were carried out by Palestinians affiliated with the PLO or the PA, consisted primarily of mass shootings or bombings, and were intended to "caus[e] the deaths of as many civilians as possible," *id.* at 324. *Id.* at 324–25.

11 *Id.* at 322.

Palestine, while "the PLO conducts Palestine's foreign affairs."[12] In order to carry out its diplomatic responsibilities, the PLO operates "embassies, missions, and delegations all over the world."[13] During the relevant period, two of those outposts were located in the United States — one in New York City and the other in Washington, D.C.[14]

Although the New York office engaged in United Nations activity — and thus was exempt from jurisdictional analysis[15] — the D.C. mission constituted a "substantial commercial presence," because it maintained phone lines and bank accounts in the United States and did business with U.S. companies.[16] Moreover, the defendants spent millions of dollars in a public relations campaign intended to influence U.S. policy toward Palestine.[17]

In 2007, the PLO and PA moved to dismiss the ATA claims for lack of personal jurisdiction.[18] The district court denied the motion, engaging in a traditional two-part personal jurisdiction analysis — which evaluates a defendant's "minimum contacts" with the forum and looks to "traditional notions of fair play and substantial justice" — to confirm that exercising jurisdiction over the defendants comported with due process.[19] Judge Daniels began by distinguishing between general jurisdiction, which allows a defendant to be sued for matters unrelated to their contacts with the forum, and specific jurisdiction, which requires any suit to be related to a defendant's forum contacts.[20] Without analyzing specific jurisdiction, he concluded (based largely on the activities of the D.C. mission) that the defendants had such "continuous and systematic" contacts with the United States as to satisfy minimum contacts — rendering the defendants subject to general jurisdiction.[21] He further decided that exercising general jurisdiction would not offend traditional notions of fair play or substantial justice, especially given the United States's "strong inherent interest" in litigating ATA cases.[22]

Several years later, while *Waldman* was still winding toward trial, the Supreme Court decided *Daimler AG v. Bauman*,[23] which significantly cabined the exercise of general jurisdiction. *Daimler* held that general jurisdiction is appropriate only where the defendant was "es-

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[12] *Id.* at 322–23.
[13] *Id.* at 323.
[14] *Id.*
[15] *Id.* at 325.
[16] Sokolow v. Palestine Liberation Org., No. 04 CV 00397, 2011 WL 1345086, at *4 (S.D.N.Y. Mar. 30, 2011).
[17] *Id.*
[18] *Waldman*, 835 F.3d at 325.
[19] *Sokolow*, 2011 WL 1345086, at *2–4.
[20] *See id.* at *3.
[21] *Id.* at *3; *see also id.* at *3–4.
[22] *Id.* at *6; *see also id.* at *6–7.
[23] 134 S. Ct. 746 (2014).

sentially at home,"[24] to be evaluated by comparing the defendant's activities in the forum to the entirety of its worldwide activities.[25] The Second Circuit applied the *Daimler* test for the first time in *Gucci America, Inc. v. Weixing Li*.[26] Pointing to *Daimler* and *Gucci* as controlling precedent, the PLO and PA moved for reconsideration of their motion to dismiss,[27] but Judge Daniels found both that the record was not sufficient to conclude that the defendants were at home anywhere but the United States, and that this was an "exceptional case."[28] The case proceeded to trial, and the jury found the defendants liable for six attacks, awarding the plaintiffs damages of $218.5 million — which were trebled to $655.5 million pursuant to the ATA.[29]

The Second Circuit vacated and remanded.[30] Writing for the panel, Judge Koeltl[31] ruled that the district court could not properly exercise personal jurisdiction over the defendants.[32] First, the court quickly dispatched three threshold issues: (1) the defendants "did not waive . . . their objection to personal jurisdiction;"[33] (2) despite the fact that the PLO and PA share many characteristics with sovereign governments, they were entitled to due process because they are *nonsovereign entities*;[34] (3) though the traditional two-part personal jurisdiction analysis was developed using the Fourteenth Amendment's Due Process Clause, the Fifth Amendment analysis is "the same,"[35] except that nationwide contacts can be considered.[36]

The court then held that *Daimler* foreclosed the district court's exercise of general jurisdiction. Judge Koeltl found that if the defendants were at home anywhere, it was in Palestine, where the "far larger quantum" of their worldwide activities took place.[37] And he

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[24] *Id.* at 761 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

[25] *See id.* at 762 n.20.

[26] 768 F.3d 122 (2d Cir. 2014).

[27] *See Waldman*, 835 F.3d at 326.

[28] *See* Sokolow v. Palestine Liberation Org., No. 04 CV 397, 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014) (quoting *Gucci*, 768 F.3d at 135); *see also Daimler*, 134 S. Ct. at 761 n.19 ("We do not foreclose the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952))).

[29] *See Waldman*, 835 F.3d at 326–27.

[30] *Id.* at 344.

[31] Judge Koeltl, sitting by designation from the Southern District of New York, was joined by Judges Leval and Droney.

[32] *Waldman*, 835 F.3d at 344.

[33] *Id.* at 328.

[34] *Id.* at 329.

[35] *Id.* at 331.

[36] *See id.* at 329–31.

[37] *Id.* at 333 (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014)).

rejected the idea that this was an "exceptional case," pointing out that the defendants' activities in the United States, while significant, "plainly do not approach" the level required to qualify as exceptional.[38] Therefore, Judge Koeltl concluded, the district court erred in exercising general jurisdiction over the defendants.[39]

The plaintiffs did not fare any better under Judge Koeltl's analysis of specific jurisdiction.[40] He examined the terror attacks at length,[41] finding that there was "no basis" for concluding that the defendants performed any action *in the United States* in support of the attacks.[42] Each of the plaintiffs' arguments in favor of specific jurisdiction was rejected in turn: The defendants did not expressly aim the attacks at the United States — rather, the terror attacks only "random[ly] and fortuitous[ly]" injured U.S. citizens.[43] The defendants did not purposefully avail themselves of the United States by conducting a public-relations campaign because the connection between the campaign and the attacks was too attenuated.[44] Finally, the defendants did not consent to personal jurisdiction by having a representative in Washington, D.C.[45] Thus, despite the "unquestionably horrific" nature of the terror attacks, the lack of direct attack-related conduct within the United States rendered specific jurisdiction just as improper as general jurisdiction.[46]

Although the *Waldman* plaintiffs presented a constitutional argument based in recognized case law, the court chose to rely solely on earlier perfunctory circuit precedent instead of addressing the plaintiffs' underlying claims. Their argument — that suits governed by the Due Process Clause of the Fifth Amendment should be subject to a less restrictive conception of personal jurisdiction than those governed by the Fourteenth Amendment[47] — is grounded in historical and legal differences between the amendments. Moreover, prominent legal authorities, including federal circuit courts, scholars, and the Supreme Court itself, have suggested that such an argument has some value. But by breezing over this argument without delving into its merits, and by relying on Second Circuit precedent that merely assumed all personal jurisdiction analyses under the two amendments were equiva-

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[38] *Id.* at 335 (quoting *Daimler*, 134 S. Ct. at 761 n.19); *see also id.* at 334–35.

[39] *Id.* at 335.

[40] Although the district court did not reach the issue of specific personal jurisdiction, Judge Koeltl found that the question was "sufficiently briefed and argued." *Id.*

[41] *See id.* at 335–38.

[42] *Id.* at 337.

[43] *Id.*; *see also id.* at 337–42.

[44] *See id.* at 337–43.

[45] *See id.* at 343.

[46] *See id.* at 344.

[47] *See id.* at 329.

lent, the *Waldman* court overlooked a key aspect of how process was served on the PLO and PA.

The plaintiffs based their Due Process Clause argument on the idea that because their claims under the ATA were governed by the Fifth Amendment, the traditional two-part personal jurisdiction analysis was inapposite.[48] That analysis was developed by a series of landmark cases interpreting the Due Process Clause of the Fourteenth Amendment.[49] Crucially, where a case originates in federal court and process is served under Federal Rule of Civil Procedure 4(k)(1)(A),[50] the Supreme Court has confirmed that district courts should look to the Fourteenth Amendment to "determin[e] the bounds of their jurisdiction."[51] But in *Waldman*, the ATA provided for nationwide service of process,[52] falling under a *different* federal rule, 4(k)(1)(C).[53] When 4(k)(1)(C) controls, the "constitutional outer limits are governed by the Fifth Amendment."[54] Thus, because the Fifth Amendment, not the Fourteenth, controlled here, the *Waldman* plaintiffs argued that regardless of whether the court applied a general or a specific jurisdiction theory, features unique to the Fifth Amendment's Due Process Clause militated for a more generous analysis of their ATA claims.[55]

Indeed, despite their nearly identical language,[56] the legal and historical contrast between the Fifth and Fourteenth Amendments is striking. When the Fifth Amendment was enacted, jurisdictional doctrine was entirely disconnected from the concept of "due process."[57] That understanding continued throughout the early days of the republic. In 1818, Chief Justice Marshall implied that (at least in some cir-

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48 *See id.*

49 *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945).

50 FED. R. CIV. P. 4(k)(1)(A); *see also, e.g.*, *Daimler*, 134 S. Ct. at 753.

51 Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (quoting *Daimler*, 134 S. Ct. at 753).

52 *See* 18 U.S.C. § 2334(a) (2012).

53 FED. R. CIV. P. 4(k)(1)(C) ("Serving a summons . . . establishes personal jurisdiction over a defendant . . . when authorized by a federal statute."); *see also* Sokolow v. Palestine Liberation Org., No. 04 CV 00397, 2011 WL 1345086, at *2 (S.D.N.Y. Mar. 30, 2011).

54 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069 (4th ed.), Westlaw (database updated Apr. 2016). *Waldman* assumes as much, referring to prior ATA cases as "Fifth Amendment civil terrorism cases." *Waldman*, 835 F.3d at 330.

55 Brief for Plaintiffs-Appellees-Cross-Appellants at 48–50, *Waldman*, 835 F.3d 317 (2d Cir. 2016) (No. 15-3135) ("[C]onstitutional limits on the states must not be applied blindly to the Federal Government." *Id.* at 49.).

56 *Compare* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."), *with id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

57 *See* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871–72, 876–78 (1989) ("[Due process] probably was understood to mean (at the end of the eighteenth century when the original Constitution was ratified) simply a requirement of a regular judicial proceeding with an opportunity to be heard." *Id.* at 877.).

cumstances) expansive jurisdiction over individuals lacking contacts with the United States was consistent with the Constitution, stating that Congress could enact laws punishing pirates, despite their having "committed no particular offence against the United States."[58] In contrast, the idea that personal jurisdiction might be tied to "due process" had begun to percolate in U.S. courts by 1868, when the Fourteenth Amendment was passed.[59] Importantly, that amendment applied only to the states and was enacted (in large part) to uphold the principles of federalism.[60] Modern personal jurisdiction doctrine, which places strict limits on the reach of state courts, is therefore consistent with the purpose of the Fourteenth Amendment: it ensures an appropriate divide among the states and protects against state-to-state forum shopping. Those federalism justifications do not apply to cases governed by the Fifth Amendment, where federal law applies uniformly and it is the authority of the United States government itself that matters.

Further, the plaintiffs' Due Process Clause argument is not only conceptually compelling, but it also enjoys some support from courts, the Executive, and academics. Several circuits have found that distinctions between the clauses in the two amendments may lead to different personal jurisdiction analyses, especially if a federal statute authorizes nationwide service of process,[61] as the ATA does. The Supreme Court, although it hasn't made a conclusive statement on the issue, has declined to say whether the analyses are the same.[62] The Solicitor General has argued that a restrictive, federalism-based analysis has less force when federal law obtains, given the unique authority of the federal government.[63] Scholars have also weighed in: Professor Wendy Perdue, for example, has argued that in Fifth Amendment cases, "the

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[58] *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818).

[59] *See* Trangsrud, *supra* note 57, at 876–78.

[60] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) (plurality opinion) (concluding that personal jurisdiction under the Fourteenth Amendment is about sovereign authority, not fairness); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (calling the Fourteenth Amendment's Due Process Clause an "instrument of interstate federalism").

[61] *See, e.g.*, Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc., 791 F.3d 436, 444 (4th Cir. 2015) (stating that the Fourteenth Amendment standard for personal jurisdiction is not the "correct rule of law" for cases involving a "Fifth Amendment concern"); Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 (11th Cir. 1997) ("[T]he fact that the United States is . . . asserting its power undoubtedly must affect the way the constitutional balance is struck . . . .").

[62] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 3 n.1, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965) (noting that the Supreme Court "has consistently reserved the question whether its Fourteenth Amendment personal jurisdiction precedents would apply in a case governed by the Fifth Amendment").

[63] *See id.* ("[T]he United States' special competence in matters of interstate commerce and foreign affairs, in contrast to the limited and mutually exclusive sovereignty of the several States, would permit the exercise of federal judicial power in ways that have no analogue at the state level." (citing *Nicastro*, 564 U.S. at 884 (plurality opinion))).

United States's sovereign authority should allow it to assert personal jurisdiction solely on the basis of effects in the United States."[64]

Despite the Due Process Clause argument's conceptual and legal grounding, the Second Circuit swiftly rejected it in *Waldman*, concluding that the "minimum contacts and fairness analysis is the same under the Fifth Amendment and the Fourteenth Amendment."[65] The court declined to fully engage with the argument, instead relying on circuit precedent that dealt with the issue only in a conclusory manner. The primary case cited by the court, *Chew v. Dietrich*,[66] merely asserts — in dicta and buried in a footnote — that the test is "basically the same" under both Amendments.[67] *Waldman* cited a few other cases applying the Fourteenth Amendment analysis to claims arising under federal law.[68] But these, too, assumed the test was the same under the two amendments without addressing the issue head-on.[69] Notably, the court elided a discussion of any distinction between 4(k)(1)(C), the relevant rule for service of process in *Waldman*, and 4(k)(1)(A).

This may have been a crucial distinction to make. Several circuits have, when evaluating Fifth Amendment personal jurisdiction based on a nationwide service-of-process provision under 4(k)(1)(C), placed substantial weight on the "congressionally articulated policy" evinced by such provisions.[70] Although cases that differentiate Fifth Amendment due process often involve U.S. residents being sued in a state in which they have no contacts, the cases don't articulate any fundamental reason why these legislative policy considerations would be inapplicable in cases involving entities like the PLO and PA, which do have some contacts in the United States. Indeed, the congressionally articulated policy is unusually clear in the ATA: its plain language[71] and legislative history[72] both demonstrate that it was enacted in order to expand jurisdiction and allow American victims of overseas attacks, like

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64 Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004).

65 *Waldman*, 835 F.3d at 331.

66 143 F.3d 24 (2d Cir. 1998).

67 *Id.* at 28 n.4.

68 *See Waldman*, 835 F.3d at 330.

69 *See, e.g.*, *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 659, 673–74 (2d Cir. 2013).

70 *See, e.g.*, ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 627–28 (4th Cir. 1997); *see also* Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1213 (10th Cir. 2000) ("[C]ourts should examine the federal policies advanced by the statute . . . ." (quoting Republic of Panama v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 948 (11th Cir. 1997))).

71 *See* 18 U.S.C. § 2331(1)(C) (2012) (explicitly contemplating jurisdiction over acts of "international terrorism" that occur "primarily outside the territorial jurisdiction of the United States").

72 *See* Geoffrey Sant, *So Banks Are Terrorists Now? The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 536–43 (2013) (concluding from the ATA's legislative history that it was enacted to "extend[] jurisdiction so as to allow suits against terrorists for their violent acts committed overseas," *id.* at 537).

the *Waldman* plaintiffs, to sue foreign defendants in federal court. The ATA's nationwide service-of-process provision, then, gives effect to that policy. The Second Circuit should have at least considered the implications of that provision when analyzing the plaintiffs' Due Process Clause argument, rather than dismissing the argument out of hand.

Moreover, the court was not compelled to dismiss the plaintiffs' argument due to a lack of plausible alternatives. Several options were available to the court that would have afford slightly more lenience to the plaintiffs' ATA claims, given the congressionally articulated policy manifested by the ATA's nationwide service-of-process provision. For example, the court could have applied the traditional test for specific jurisdiction, with additional weight given to the contacts that *did* exist in this case. This might have taken the form of allowing more attenuated contacts, such as the PLO and PA's attempts to influence U.S. policy, to satisfy minimum contacts. Such a test could even have been consistent with the *Chew* dicta — arguably, the test is "basically the same," though the results may differ at the margins. Of course, the "additional weight" test is a conservative approach; a wholehearted adoption of the plaintiffs' argument would likely look more like Perdue's suggestion that a federal court can exercise jurisdiction under the Fifth Amendment based purely on effects in the United States.[73]

None of that is to say that *Waldman* would have definitely been resolved in favor of the plaintiffs had their Due Process Clause argument been adopted by the court. Indeed, the court may have found that even if its personal jurisdiction analysis granted additional weight to cases involving federally authorized service, the contacts in this case were still too attenuated to warrant exerting jurisdiction over the Palestinian government. Or it could have rejected the plaintiffs' argument that the clauses should be interpreted differently altogether, if it decided that were appropriate after a closer analysis of the two clauses and the method of process in *Waldman*. But by neglecting to engage with the substance of the argument, and instead rejecting it based on an application of unconvincing precedent, the Second Circuit appears not to have taken account of the ATA's nationwide service-of-process provision — or the congressionally articulated policy of providing jurisdiction over foreign terrorists suggested by that provision. This salient omission will likely make *Waldman* less persuasive to other courts considering Fifth Amendment personal jurisdiction issues than it otherwise might have been.

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[73] *See* Perdue, *supra* note 64, at 456.