

THE CONSTITUTIONAL POWER OF CONGRESS TO PROVIDE FOR EXTRATERRITORIAL JURISDICTION IN CIVIL ANTI-TERRORISM MATTERS

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International terrorism threatens American interests from beyond the nation's territorial borders. The United States has at its disposal a wide variety of tools to project American power beyond those borders to protect national security and achieve anti-terror objectives. Among the tools are civil legal powers exercised by the Executive branch—both administratively and in court—and, where Congress provides, by private attorneys general authorized by the Anti-Terrorism Act of 1992 to prosecute civil actions on behalf of U.S. victims of international terrorism. However, recent decisions by federal courts brought by U.S. citizens injured in international terror attacks have drawn into question the extent of that power. In 2018, Congress enacted the Anti-Terrorism Clarification Act, disapproving of those cases and permitting the exercise jurisdiction on the basis of consent. Now, that statute too is being challenged.

The article will discuss the constitutional foundation of congressional power to provide for the exercise of adjudicative jurisdiction over persons and conduct beyond U.S. territorial borders, trace the recent debate over the limits of that power, and evaluate the constitutionality of the recent legislation.

I. THE *SOKOLOW* CASE

Between 2001 and 2004, the Palestinian Authority (“PA”) and the Palestine Liberation Organization (“PLO”), under the leadership of Yasser Arafat, orchestrated a terror campaign in Israel known as the “al-Aqsa Intifada.” Terror attacks by PA “security officers” resulted in deaths and severe injuries to American citizens.

Numerous American families brought suit against the PLO and PA under the Anti-Terrorism Act of 1992.¹ That statute provides an expressly extraterritorial right of action for U.S. nationals killed or injured by reason of an act of international terrorism. One such case was *Sokolow v. PLO*. The *Sokolow* plaintiffs (eleven American families) sued in the United States District Court for the Southern District of New York in 2004. The case was tried to verdict in 2015. The unanimous twelve-member jury found, after a seven-week contested trial, that officers of the PA acting within the scope of their employment planned and perpetrated the terror attacks and that the PLO and PA knowingly provided material support to U.S.-designated foreign terror organizations that committed the attacks.² The verdict rested on evidence that included confessions and convictions of PA officers who planned and executed the attacks at issue;

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1. 18 U.S.C. § 2333.

2. *Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 336 (2d Cir. 2016).

documentation of PA and PLO payments to the perpetrators; written policies requiring pay and promotion of convicted terrorists; incitement to terror by the PA directed specifically at its security forces; and internal documents approving of the terrorist activity at issue in the case. The jury awarded the forty-plus plaintiffs a total of \$218.5 million in compensatory damages, which was automatically trebled under the ATA.³

After the verdict and just before entry of judgment, the United States Department of State filed a Statement of Interest in the District Court. The State Department refrained from expressing a view “on the merits,” but explained that “the United States strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries.”⁴ The Statement of Interest added that “[t]he ATA promotes the public interest in providing just compensation to terrorism victims,” and that the “ability of victims to recover under the ATA also advances U.S. national security interests,” reflecting “our nation’s compelling interest in combatting and deterring terrorism at every level, including by eliminating sources of terrorist funding and holding sponsors of terrorism accountable for their actions” which is “an important means of deterring and defeating terrorist activity.”⁵

In 2016, the Second Circuit vacated the District Court’s judgment for lack of personal jurisdiction.⁶ The Court first held that the PLO and PA enjoy full due process protection, and that in civil cases the Due Process Clause of the Fifth Amendment subjects the United States to the same territorial limitations that the Fourteenth Amendment imposes on individual States.⁷ The Court then concluded that it could not permit the exercise of general jurisdiction in light of *Daimler*.⁸ The Court also held that it could not permit the exercise of specific jurisdiction because there was “no basis to conclude 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.”⁹ Finally, the Court held that the PLO and PA had not consented to suit in the United States.¹⁰

Plaintiffs petitioned for certiorari.¹¹ The House of Representatives, 23 Senators, and 11 former federal officials including two former Attorneys General filed bi-partisan *amicus* briefs urging the Court to take the case and reverse.¹² For

3. *Id.* at 327.

4. Declaration of Anthony J. Blinken ¶ 2, *Sokolow v. Palestine Liberation Org.*, No. 04-cv-397-GBD-RLE (S.D.N.Y. 2015), ECF No. 953-1 (“Blinken Declaration”).

5. *Id.* ¶¶ 4, 5.

6. *Waldman*, 835 F.3d. at 322.

7. *Id.* at 329-30.

8. *Id.* at 332-35 (discussing *Daimler AG v. Bauman*, 571 U.S. 117 (2014)).

9. *Id.* at 337.

10. *Id.* at 343.

11. Petition for Writ of Certiorari, *Sokolow v. PLO*, No. 16-1071 (Mar. 3, 2017).

12. Br. of United States Sen. Charles E. Grassley et al., *Sokolow*, No. 16-1071 (Apr. 6, 2017); Br. for the U.S. House of Representatives, *Sokolow*, No. 16-1071 (Apr. 6, 2017); Br. of Former Federal Officials, *Sokolow*, No. 16-1071 (Apr. 6, 2017).

example, the House of Representatives explained, the Second Circuit’s holding “not only vitiates the ATA and frustrates Congress’s intended exercise of legislative power to combat terrorism, it also . . . improperly cabins the broad constitutional authority of Congress to legislate extraterritorially for the protection of U.S. interests in the areas of foreign affairs and national security.”¹³

The Supreme Court sought the views of the United States, but the U.S. Government’s brief offered no evaluation of the merits of the Second Circuit’s decision. Instead, the brief argued that review “would be premature,” because “further development in the lower courts is likely to be useful” before the Supreme Court addresses arguments that “the federal courts may, in particular circumstances, exercise personal jurisdiction over civil cases without regard to the principles of specific and general jurisdiction developed under the Fourteenth Amendment.”¹⁴ The Supreme Court denied the petition on April 2, 2018.¹⁵

II. THE ANTI-TERRORISM CLARIFICATION ACT

On May 24, 2018, a bi-partisan group introduced the Anti-Terrorism Clarification Act in the Senate and House.¹⁶

The House Judiciary Committee reported the bill by voice vote on June 13, 2018.¹⁷ The Committee Report states that the bill’s “purpose” is “to better ensure that victims of international terrorism can obtain justice in United States courts against those who commit, or conspire to commit, an act of international terrorism or who aid and abet international terrorist activity.”¹⁸ Specifically, the bill “addresses lower court decisions that have allowed entities that sponsor terrorist activity against U.S. nationals overseas to avoid the jurisdiction of U.S. courts” in civil ATA cases, including the “flawed Second Circuit decision” in *Sokolow*.¹⁹

The Senate Judiciary Committee reported the bill by voice vote on July 12, 2018.²⁰ Judiciary Committee Chairman Grassley (the lead sponsor in the Senate) confirmed on the Senate Floor that the Act was intended to respond to “recent Federal court decisions that severely undermined the ability of American victims to bring terrorists to justice,” including *Sokolow* (by name).²¹

Chairman Grassley remarked that he was “stunned” when the Department of

13. Br. for the U.S. House of Representatives, *supra* note 12, at 1-2.

14. Br. for United States at 17, *Sokolow*, No. 16-1071 (Feb. 22, 2018).

15. *Sokolow*, No. 16-1071, *cert. denied*, 138 S. Ct. 1438 (2018). “[T]he denial of a writ of certiorari,” it should be noted, “imports no expression of opinion upon the merits of the case.” *E.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal quotation marks omitted).

16. S.2946, 115th Cong. (2018); H.R.5954, 115th Cong. (2018); *see* 164 Cong. Rec. S2926-2927, H4728 (daily ed. May 24, 2018).

17. 164 Cong. Rec. D672 (daily ed. June 13, 2018).

18. H.R. Rep. No. 115-858, at 2-3 (2018).

19. *Id.* at 3, 6.

20. 164 Cong. Rec. S4950 (daily ed. July 12, 2018).

21. 164 Cong. Rec. S5103 (daily ed. July 19, 2018) (statement of Sen. Grassley).

Justice failed to support American victims of terrorism in *Sokolow*.²² He added that the proposed legislation “makes crystal clear that defendants who take advantage of certain benefits from the U.S. Government following 120 days after the bill’s enactment . . . will be deemed to have consented to personal jurisdiction in ATA cases.”²³

Both chambers of Congress passed the bill by unanimous consent.²⁴ President Trump signed it into law on October 3, 2018.²⁵ As enacted, the Act added a new paragraph (e) to section 2334 of Title 18:

(e) Consent Of Certain Parties To Personal Jurisdiction.—

(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of any civil action under section 2333 of this title, a defendant shall be deemed to have consented to personal jurisdiction in such civil action if, regardless of the date of the occurrence of the act of international terrorism upon which such civil action was filed, the defendant—

(A) after the date that is 120 days after the date of enactment of this subsection, accepts—

(i) any form of assistance, however provided, under chapter 4 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2346 et seq.);

(ii) any form of assistance, however provided, under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291) for international narcotics control and law enforcement; or

(iii) any form of assistance, however provided, under chapter 9 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2349bb et seq.); or

(B) in the case of a defendant benefiting from a waiver or suspension of section 1003 of the Anti-Terrorism Act of 1987 (22 U.S.C. 5202) after the date that is 120 days after the date of enactment of this subsection—

(i) continues to maintain any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the

22. *Id.*

23. *Id.*

24. 164 Cong. Rec. S5864-65 (daily ed. Aug. 22, 2018); 164 Cong. Rec. H8245 (daily ed. Sept. 13, 2018).

25. Pub. L. No. 115-253.

United States; or

(ii) establishes or procures any office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States.

(2) APPLICABILITY.—Paragraph (1) shall not apply to any defendant who ceases to engage in the conduct described in paragraphs (1)(A) and (1)(B) for 5 consecutive calendar years.

III. CONSTITUTIONALITY

A. How Does Due-Process Review Apply to a Federal Statute Invoking the Judicial Power of the United States?

Review of jurisdiction-granting State statutes “focuses on the relationship among the defendant, the forum, and the litigation.”²⁶ The standard of review in those cases is “reasonableness,” assessed “in the context of our federal system of government.”²⁷

The ATA is a federal statute, not a state statute, and one which creates an express private right of action and provides for nationwide service of process.²⁸ Such statutes invoke the judicial power of the United States and are therefore subject to review under the Fifth Amendment.²⁹ The Supreme Court has expressly left “open the question whether the Fifth Amendment imposes the same restrictions [as the Fourteenth Amendment] on the exercise of personal jurisdiction by a federal court.”³⁰ This article offers some considerations for answering that question.

In some contexts, the Fifth Amendment and Fourteenth Amendment do the same work. For example, both require procedural due process, and cases evaluating procedural due process rights apply the same test to the Federal government and State governments.³¹ But in other contexts, the Fourteenth Amendment obviously

26. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014) (internal quotation marks omitted).

27. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)); *Burger King Corp.*, 471 U.S. at 478 (courts assess the “reasonableness of jurisdiction”); *Shaffer v. Heitner*, 433 US 186, 203 (1977) (same).

28. 18 U.S.C. § 2334(a).

29. *See Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 (3d Cir. 1985); *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979); *see generally* Charles A. Wright & Arthur R. Miller et al., *Personal Jurisdiction in Federal Question Cases*, FED. PRACTICE & PROCEDURE, CIV. § 1068.1 (4th ed.).

30. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1784 (2017); *see also* *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 n.* (1987).

31. *Matthews v. Eldridge*, 424 U.S. 319 (1976) (Fifth Amendment); *Goldberg v. Kelly*, 397

performs work that the Fifth Amendment does not perform. For example, the Supreme Court has long held that the Fourteenth Amendment incorporates the Bill of Rights.³²

Two circuits have held that in the context of personal jurisdiction, the Fifth Amendment standard and the Fourteenth Amendment standard is “the same.”³³ Other circuits have held that “a Fifth Amendment analysis of due process is different from one undertaken under the Fourteenth Amendment.”³⁴

This writer is of the view that, like the Fourteenth Amendment, the Fifth Amendment requires application of a “reasonableness” test to statutes invoking the judicial power of the United States. But because such reasonableness must be assessed “in the context of our federal system of government,” the reasonableness analysis must account for the legitimate interests of the Federal Government, which cannot be equated to those of the individual states in enforcing their domestic laws. In other words, the differing interests of the individual States and the United States must guide the jurisdictional analysis, if one is to fairly assess the “reasonableness” of a statute “in the context of our federal system of government” and with a focus on “the relationship among the defendant, the forum, and the litigation.”³⁵

In our federal system of government the Fourteenth Amendment “acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”³⁶ As the Supreme Court explained in *Bristol-Myers*, “[t]he sovereignty of each State” to adjudicate claims “imply[s] a limitation on the sovereignty of all its sister States.”³⁷ The Fourteenth Amendment’s “restrictions on personal jurisdiction . . . are a consequence of territorial limitations on the power of the respective States.”³⁸ “Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the

U.S. 254 (1970) (Fourteenth Amendment).

32. See *Chicago, Burlington & Quincy RR. Co. v. Chicago*, 166 U.S. 226 (1897), and its progeny.

33. *Livnat v. Palestinian Authority*, 851 F.3d 45, 54 (D.C. Cir. 2017); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016).

34. *Handley v. Indiana & Michigan Electric Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 (3d Cir. 1985) (“Those strictures of fourteenth amendment due process analysis which attempt to prevent encroachment by one state upon the sovereignty of another do not apply with equal force to the adjudication of a federal claim in a federal court.”).

35. See *supra* at notes 26-27.

36. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

37. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (internal quotation marks omitted).

38. *Id.* (quoting *Hanson v. Denckla*, 357 U. S. 235, 251 (1958)).

State of its power to render a valid judgment.”³⁹

Do these same territorial limitations restrict the Federal Government? It is axiomatic, as Justice Kennedy wrote for a plurality in *J. McIntyre Machinery v. Nicastro*, that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct”⁴⁰ Justice Kennedy said, in effect, that the Federal Government may have different interests at stake: “Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”⁴¹ The Solicitor General takes the same position on behalf of the United States, explaining that a due process inquiry under the Fifth Amendment “must be judged by reference to the fairness of subjecting the defendant to the sovereign powers of the United States, rather than the sovereign power of a particular State.”⁴² The Solicitor General has also explained, “Congress’s express constitutional power over and special competence in matters of interstate and foreign commerce, in contrast to the limited and mutually exclusive sovereignty of the several States, enables Congress, consistent with the Fifth Amendment, to provide for the exercise of federal judicial power in ways that have no analogue at the state level.”⁴³ Congressional authority under Article III to “ordain and establish” inferior courts which exercise “the judicial power of the United States” must also be considered.⁴⁴ It would be odd to conclude that the judicial power of the United States is territorially restricted in ways that the legislative power is not, as “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”⁴⁵

In other due-process contexts, the Supreme Court has observed that there are important differences between the sovereign interests of the Federal Government and of the State governments, and that those differences matter. In *United States v. Bennett*, the Supreme Court reversed a decision that imposed territorial limitations on federal sovereign power to tax by analogizing the Due Process Clause of the Fifth Amendment to that of the Fourteenth. The Court admonished that “the limitations of the [Fourteenth Amendment] * * * preventing [States] from transcending the limits of their authority” afford “no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purposes of shutting the government off from the exertion of

39. *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

40. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

41. *Id.*

42. U.S. Br. *Walden v. Fiore*, No. 12-574 (June 2013) at 11 n.6.

43. Br. of United States as Amicus Curiae, *BNSF Railway Co. v. Tyrrell*, No. 16-405 at 32 (U.S. 2017); see U.S. Br. *Daimler Chrysler AG v. Bauman*, No. 11-965 (July 2013) at 3 n.1.

44. U.S. CONST. art. III, § 1.

45. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

powers which inherently belong to it by virtue of its sovereignty.”⁴⁶ And in *Cook v. Tait*, the Supreme Court taught that, while the power of States of the Union is “limited by” the powers of “other States,” “there is no such limitation . . . upon the national power.”⁴⁷ To the contrary, the national government, “by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete.”⁴⁸

These differences are sharp in the field of foreign affairs and national security. The Constitution allocates power over these matters exclusively to the Federal Government and denies those powers to the states, both expressly,⁴⁹ and implicitly.⁵⁰ A jurisdictional analysis that did not take account of these differences would be turning a blind eye to the “reasonableness” of the statute “in the context of our federal system of government.”⁵¹

B. Consent-to-Jurisdiction Statutes

Consent to jurisdiction under conditions specified by statute has been an accepted part of the legal landscape for generations.⁵² Shortly after ratification of the Fourteenth Amendment, the Supreme Court held that a juridical entity “may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there.”⁵³ As the Supreme Court explained more recently, “because the personal jurisdiction requirement is a waivable right, there are a ‘variety of legal arrangements’ by which a litigant may give ‘express or implied consent to the personal jurisdiction of the court.’”⁵⁴ Consent to the jurisdiction

46. *United States v. Bennett*, 232 U.S. 299, 306 (1914); *accord Burnet v. Brooks*, 288 U.S. 378, 403-05 (1933); *Cook v. Tait*, 265 U.S. 47, 55-56 (1924).

47. *Cook v. Tait*, 265 U.S. 47, 55 (1924).

48. *Id.* at 56.

49. Compare U.S. CONST. art. I, § 8, cls. 1, 3, art. II, § 2, and art. IV, § 4, with art. I, § 8, cl. 3, and art. I, § 10, cls. 2, 3.

50. See *Arizona v. United States*, 567 U.S. 387, 394-95 (2012) (United States has “inherent power as sovereign to control and conduct relations with foreign nations”); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (inherent federal power over foreign affairs forbids a State to “disturb foreign relations” or “establish its own foreign policy”); *United States v. Texas*, 339 U.S., 707, 717-18 (1950) (“In external affairs, the United States [is] the sole and exclusive spokesman for the Nation.”).

51. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 293-94 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. at 317).

52. *E.g.*, *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 892-93 (1988); *Olberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340-41 (1953); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939); *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927); *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95-96 (1917); *Simon v. Southern Ry. Co.*, 236 U.S. 115, 130 (1915); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855).

53. *Baltimore & Ohio RR. Co. v. Harris*, 79 U.S. (12 Wall.) 65, 81 (1870).

54. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of*

of a court has been implied in circumstances where the litigant is aware of the right to refuse to consent and still proceeds voluntarily.⁵⁵

In its recent decision in *Daimler AG v. Bauman*, the Supreme Court acknowledged that consent may still serve as a basis for the exercise of personal jurisdiction in appropriate circumstances.⁵⁶ However, the Court also cautioned that general-jurisdiction cases from an earlier era dominated by “territorial thinking” “should not attract heavy reliance today.”⁵⁷ Guided by this cautionary note, several courts have construed state general-jurisdiction “deemed consent” statutes narrowly to avoid potential conflict with *Daimler*’s limitations on general jurisdiction, most prominently, the Second Circuit in *Brown v. Lockheed Martin Corp.*⁵⁸ In these cases, the courts have consistently declined to read state business-registration statutes as conferring jurisdiction by consent where the statutes have been silent as to their jurisdictional effect, in order to avoid a difficult constitutional question.⁵⁹ Scholars have also questioned whether such state statutes would discriminate unconstitutionally against interstate commerce where the plaintiff has no connections to the state in question, although this issue has received less judicial attention to date.⁶⁰

An argument for due-process review of consent-to-jurisdiction statutes is that any statute that is entirely unrelated to legitimate state interests would be irrational and thus in conflict with the Due Process Clause’s protection against arbitrary government action.⁶¹ It is safe to assume that a statute imposing legislatively created consent would be subject to this sort of due-process review.⁶²

Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982).

55. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015); *Roell v. Withrow*, 538 U.S. 580, 590 (2003).

56. *Daimler AG v. Bauman*, 134 S. Ct. 746, 756 (2014).

57. *Id.* at 761 n.18.

58. *Brown v. Lockheed Martin Corp.* 814 F.3d 619, 638-41 (2d Cir. 2016); see also *DeLeon v. BNSF Ry. Co.*, 2018 MT 219, ¶ 23 & n.2, 392 Mont. 446, 455, 426 P.3d 1, 9; *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 447 (Ill. 2017); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 376 Wis. 2d 528, 552 (2017).

59. E.g. *Brown*, 814 F.3d at 640.

60. See John F. Pries, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121 (2016); Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477 (2016).

61. See *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (Due Process Clause “bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them’”) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)); *Lea Brilmayer, Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989).

62. See Simon E. Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L. Q. 196, 198 (1957) (“Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”) (quoting *Buchanan v. Rucker*, 9 East 192 (K.B. 1808) (Lord Ellenborough)).

C. Applicability of The Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine has attracted a great deal of scholarly attention.⁶³ With regard to personal jurisdiction, scholars have argued that “the state cannot attach a condition to the extension of a benefit that arbitrarily limits the recipient’s constitutional protections.”⁶⁴ On the other hand, this argument has not received judicial endorsement to date in the context of personal jurisdiction, and one judge has rejected it on the assertion that “the Supreme Court has upheld the validity of consent-by-registration statutes numerous times since the development of the unconstitutional conditions doctrine.”⁶⁵

If the unconstitutional conditions doctrine applies, one must also consider the appropriate standard of review. In property-rights cases, a statute imposing conditions on the receipt of a government benefit will be sustained if it has a “legitimate purpose” and it was “reasonable” to conclude that the condition “would promote that purpose.”⁶⁶ The unconstitutional-conditions doctrine restrains government action in such cases only where the condition “has little or no relationship” to the government’s interest.⁶⁷ This standard of review mirrors the “reasonableness” test required under *International Shoe*.

In the free-speech context, the Supreme Court has applied a more searching standard, forbidding “conditions that seek to leverage funding to regulate speech

63. *E.g.*, Richard A. Epstein, *The Supreme Court, 1987 Term Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26-28 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 604-09 (1991).

64. D. Craig Lewis, *Jurisdiction over Foreign Corporations based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 11 (1990); Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler Ag v. Bauman*, 90 N.Y.U. L. REV. 1609, 1640 (2015).

65. *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 770 (Fed. Cir. 2016) (O’Malley, J., concurring).

66. *W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668 (1981).

67. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-06 (2013) (allowing a condition “so long as there is a ‘nexus’ and ‘rough proportionality’” between the condition and the “social costs” imposed by private conduct); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (condition must provide the private citizen a “‘reasonable and unambiguous’” choice) (quoting *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984)); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (“[A] statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose.”); *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 497 (1927) (“[C]lassification must rest on differences pertinent to the subject in respect of which the classification is made”).

outside the contours of the program itself.”⁶⁸ But to this writer, the heightened standard does not appear germane in personal jurisdiction analysis. Jurisdiction over private parties in civil actions generally leads to the deprivation of property, and almost never to judicially imposed prior restraints of protected speech.⁶⁹ Where the Courts recognize special protections for freedom of speech rooted in the First Amendment, they build those protections into substantive law.⁷⁰

If the unconstitutional conditions doctrine applies in this context, the reasonable-relationship standard applicable in the property-rights cases governed by the Fifth Amendment would dovetail with existing jurisprudence reflecting due-process “reasonableness” review of state statutes authorizing the exercise of personal jurisdiction by individual States over foreign citizens. In contrast, a heightened standard of review for jurisdiction-creating statutes would appear untethered to applicable constitutional provisions.

D. “Reasonableness” Review

As noted, several courts have considered due process review of consent-to-jurisdiction statutes. The leading case is *Brown v. Lockheed Martin*, in which the Second Circuit construed Connecticut’s business-registration statute narrowly to avoid a “difficult constitutional question”—“whether consent to general jurisdiction via a [run-of-the-mill] registration statute would be . . . effective notwithstanding *Daimler*’s strong admonition against the expansive exercise of general jurisdiction.”⁷¹

Applying the due process analysis described above suggests reasons to question a broadly framed consent statute, particularly one permitting any claim by any plaintiff arising anywhere in the world. To the extent that a state statute permits claims with no nexus to the forum or its citizens, a state might be hard pressed to identify a legitimate interest advanced by the statute.⁷² And such a statute would also raise federalism concerns, even if it meaningfully advanced a legitimate state interest.

A federal claim asserting federal judicial power is different. In the context of the national interests at stake, there can be no serious doubt that the exercise of jurisdiction over an entity whose employees murdered American citizens in the scope of their employment advances the legitimate interests of the United States,

68. *A.I.D. v. Alliance for Open Soc’y Int’l.*, 570 U.S. 205, 214-15 (2013).

69. *See, e.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1970); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (prior restraints permitted “only in exceptional cases”).

70. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

71. *Brown*, 814 F.3d at 640; *see also* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142 (Del. 2016); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc.*, 90 N.E.3d 440, 447-48 (Ill. 2017); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 376 Wis. 2d 528, 552 (Wis. 2017).

72. *Brown*, 914 F.3d at 641.

even if no liability-creating conduct occurred on U.S. soil. “Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs.”⁷³ Moreover, “the Government’s interest in combating terrorism is an urgent objective of the highest order.”⁷⁴

Approximately 9 million U.S. citizens live abroad,⁷⁵ and more than 80 million U.S. citizens travel abroad every year,⁷⁶ making this interest ever more urgent.⁷⁷ Are all those U.S. citizens unprotected by the United States when they cross the border? The Supreme Court has said that the Federal Government has a long-recognized “responsibility” to protect “the just rights of [its own] own nationals when those nationals are in another country.”⁷⁸

The ATCA itself appears rationally related to these federal interests. The House Judiciary Committee Report explained that it is “eminently reasonable to condition acceptance of U.S. foreign assistance and continued presence in the United States on consent to jurisdiction in cases in which a person’s terrorist acts injure or kill U.S. nationals” and “particularly so with regard to the PLO and the PA, as Congress has repeatedly tied their continued receipt of these privileges to their adherence to their commitment to renounce terrorism.”⁷⁹

The list of statutes directed to deterring and disrupting terrorism by the PLO and the PA by conditioning the expenditure of funds and their admission to the United States on anti-terror commitments is long indeed, reflecting decades of congressional commitment to anti-terror policies:

1. In 1987, Congress determined that “the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States.”⁸⁰

73. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

74. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010).

75. *Consular Affairs by the Numbers*, DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS (2018), <https://travel.state.gov/content/dam/travel/CA-By-the-Numbers%202018-Q4.pdf> [<https://perma.cc/PNU5-7K7J>].

76. *U.S. Resident Travel Abroad Historical Visitation—Outbound, 2008-2016 (One or More Nights)*, DEP’T OF COMMERCE, NAT’L TRAVEL & TOURISM OFFICE (2017), https://travel.trade.gov/outreachpages/download_data_table/US-Outbound-Travel-Country-Region-Historical-2008-2016.pdf [<https://perma.cc/46CB-6B5H>].

77. This sovereign authority has an ancient pedigree:

Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.

Emer de Vattel, *The Law of Nations*, § 71 at *162 (1797 ed); *id.* § 17 at *5-6 (first translated into English in 1760, see *United States v. Arjona*, 120 U.S. 479, 484 (1887)).

78. *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

79. H.R. Rep. No. 115-858 at 7 (2018).

80. Anti-Terrorism Act of 1987, Pub. L. No. 100-204, § 1002, 101 Stat. 1406, 1406-07 (codified at 22 U.S.C. § 5201). Earlier, Congress had prohibited U.S. government employees from

Congress forbade the PLO and its agents to spend money in the United States or operate an office on U.S. soil.⁸¹

2. In 1990, Congress enacted the PLO Commitments Compliance Act.⁸² That law reiterated “long-standing United States policy” that “any dialogue with the PLO be contingent upon the PLO’s . . . renunciation of all acts of terrorism.”⁸³ Congress required the President to report periodically on, *inter alia*, the PLO’s actions and statements “regarding cessation of terrorism” and whether the PLO would provide “compensation to the American victims or the families of American victims of PLO terrorism.”⁸⁴

3. Also in 1990, Congress amended the Immigration and Nationality Act to exclude any “officer, official, representative, or spokesman of the Palestine Liberation Organization” because such persons are “considered . . . to be engaged in a terrorist activity” as a matter of law.⁸⁵

4. In 1992, Congress enacted the ATA, which established federal court jurisdiction for civil claims by U.S. nationals arising out of terrorist attacks that occur “outside the territorial jurisdiction of the United States.”⁸⁶ The ATA was precipitated by jurisdictional defenses raised by the PLO in attempt to avoid paying compensation to the family of U.S. citizen Leon Klinghoffer, who was murdered by PLO terrorists who hijacked an Italian cruise ship.⁸⁷

5. Starting in 1993, after the PLO stated that it would renounce the use of terrorism, Congress allowed the PLO and PA to establish a U.S. office and receive foreign assistance. However, Congress conditioned these benefits on certification by the President that the PLO was complying with its commitment

negotiating with or recognizing the PLO unless and until the PLO, *inter alia*, “renounce[d] . . . terrorism.” Foreign Assistance and Related Programs Appropriations, 1985, Pub. L. No. 98-473 § 535, 98 Stat. 1884, 1902 (1984). Congress had also provided that U.S. funds contributed to the U.N. could not be used to support the PLO. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83 § 403, 99 Stat. 190, 219 (codified at 22 U.S.C. § 2227); *see also* Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act, 1983, Pub. L. No. 97-377 § 154, 96 Stat. 1878, 1919 (1982).

81. Anti-Terrorism Act of 1987, Pub. L. No. 100-204 § 1003 (codified at 22 U.S.C. § 5202).

82. PLO Commitments Compliance Act of 1989, Pub. L. No. 101-246, tit. VIII, 104 Stat. 76 (1990).

83. *Id.* § 803(a).

84. *Id.* § 804(b)(1), (10).

85. Pub. L. 101-649, § 601, 104 Stat. 5069 (adding language to 8 U.S.C. § 1182(a)(3)(B)).

86. 18 U.S.C. § 2331(1)(C).

87. *See* H.R. Rep. No. 102-1040, at 5 (1992); *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1010 (7th Cir. 2002) (“repeated favorable references to Klinghoffer indicate a desire on the part of Congress to extend this liability to land-based terrorism that occurred in a foreign country”).

to renounce the use of terrorism.⁸⁸ Congress repeatedly imposed this condition on the maintenance of a U.S. office,⁸⁹ and on the provision of foreign assistance to the PLO and PA.⁹⁰ In addition, Congress began imposing additional anti-terror

88. Middle East Peace Facilitation Act of 1993, Pub. L. No. 103-125, §§ 2, 3(d)(3), 107 Stat. 1309, 1309-10, (incorporating letter from PLO Chairman Arafat to Israel Prime Minister Rabin (Sept. 9, 1993), <https://www.un.org/unispal/document/israel-plo-recognition-exchange-of-letters-between-pm-rabin-and-chairman-arafat-arafat-letter-to-norwegian-fm-non-un-documents/> [<https://perma.cc/FSU6-GDF5>]); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, Pub. L. No. 103-87, §§ 516(c), 578, 107 Stat. 931, 950, 973-74 (1993).

89. Middle East Peace Facilitation Act of 1994, Pub. L. No. 103-236 § 583, 108 Stat. 488, 488-89 (1994); Foreign Operations, Export Financing, and Related Appropriations Act, 1995, Pub. L. No. 103-306, §§ 547(d), 565, 569, 108 Stat. 1608, 1642, 1650, 1652 (1994); Middle East Peace Facilitation Act of 1995, Pub. L. 104-107, tit. VI, § 604, (b)(2)(B), (b)(4)(A)(iii), 110 Stat. 755, 756-57 (1996) (wavier premised on maintenance of commitment to “renounce the use of terrorism and other acts of violence”); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 553, 110 Stat. 3009, 3009-160 (1996); *see also* Foreign Operations, Export Financing, And Related Programs Appropriations Act, 2002, Pub. L. No. 107-115, § 566, 115 Stat. 2118, 2164 (2002).

90. The conditions at present appear in §§ 7036-40 and 7041(*l*) of the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, as well as the Taylor Force Act, Pub. L. No. 115-141, tit. X, 132 Stat. at 1143-47 (2018). *See also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §§ 7036-40, 7041(m), 132 Stat. 348, 899-904, 911-12; Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §§ 7036-40, 7041(*l*)(3), 131 Stat. 135, 655-59, 668; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §§ 7036-40, 7041(*j*)(3), 129 Stat. 2242, 2769-73, 2280-81 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §§ 7036-40, 7041(*j*)(3), 128 Stat. 2130, 2628-32, 2639-40 (2014); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, §§ 7036-40, 128 Stat. 5, 518-22; Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, §§ 7036-40, 125 Stat. 786, 1218-22 (2011); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, §§ 7036-40, 123 Stat. 3034, 3364-68 (2009); Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 1107, 123 Stat. 1859, 1900; Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, §§ 7036-40, 123 Stat. 524, 879-83; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 644, 121 Stat. 1844, 2335-36 (2007); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, § 1304, 120 Stat. 418, 435-36; Foreign Operations, Export Financing, And Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 544, 119 Stat. 2172, 2215 (2005); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 544, 118 Stat. 2809, 3012-3013 (2004); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 545, 118 Stat. 3, 186-87; Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 545, 117 Stat. 11, 198; Foreign Operations, Export Financing, And Related Programs Appropriations, 2001, Pub. L. No. 106-429, § 551, 114 Stat. 1900, 1900A-41 (2000); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 551, 113 Stat. 1501, 1501A-99 (1999); Omnibus Consolidated And Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 553, 112 Stat. 2681, 2681-187-88 (1998); Foreign Operations, Export Financing, And Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 552, 111 Stat. 2386, 2422 (1997).

conditions on such assistance.⁹¹ Today, those requirements including the following:

- the PA “is acting to counter incitement of violence against Israelis and is supporting activities aimed at promoting peace, coexistence, and security cooperation with Israel” and the President reports to Congress providing details of “the steps the Palestinian Authority has taken to arrest terrorists, confiscate weapons and dismantle the terrorist infrastructure.”⁹²
- no “individual, private or government entity, or educational institution” receiving United States assistance “advocates, plans, sponsors, engages in, or has engaged in, terrorist activity.”⁹³
- no assistance is used “for [. . .] the purpose of recognizing or otherwise honoring individuals who commit, or have committed acts of terrorism,”⁹⁴ or to “provide equipment, technical support, consulting services, or any other form of assistance to the Palestinian Broadcasting Corporation.”⁹⁵
- any future governing entity of any new Palestinian state must take “appropriate measures to counter terrorism and terrorist financing.”⁹⁶

6. In 2002, Congress made permanent its requirement that the President report to it on the PLO’s and PA’s compliance with their anti-terror commitments, provide detailed information about their connections to terror attacks and the effects of such attacks on American citizens, and sanction them for failure to comply.⁹⁷ These requirements remain in place.

7. In 2006, Congress enacted the Palestinian Anti-Terrorism Act, imposing additional terrorism-related conditions on the PA during certain periods. *First*, the PA must “declare an unequivocal end to violence and terrorism and undertake visible efforts on the ground to arrest, disrupt, and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere.”⁹⁸ *Second*, the PA

91. *See id.*

92. Pub. L. No. 115-141, § 7040, (d), (e), 132 Stat. at 902.

93. *Id.* § 7039(b), 132 Stat. at 901.

94. *Id.* § 7039(c)(1), 132 Stat. at 901.

95. *Id.* § 7038, 132 Stat. at 901.

96. *Id.* § 7036(a)(1)(B), 132 Stat. at 899-900.

97. Middle East Peace Commitments Act of 2002, Pub. L. No. 107-228, tit. VI, § 601-04, 116 Stat. 1394, 1394-96 (2002); *see also* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13 § 2106, 119 Stat 231, 267 (2005).

98. Palestinian Anti-Terrorism Act of 2006, Pub. L. No. 109-446, 120 Stat. 3318 (2006)

must have made “demonstrable progress” toward “dismantling all terrorist infrastructure within its jurisdiction, confiscating unauthorized weapons, arresting and bringing terrorists to justice, destroying unauthorized arms factories, thwarting and preempting terrorist attacks, and fully cooperating with Israel’s security services.”⁹⁹

8. In March 2018, Congress enacted the Taylor Force Act, imposing additional anti-terror conditions on the provision of U.S. assistance to the PA and PLO.¹⁰⁰ Certain bilateral economic assistance may not be provided unless the PA and its affiliates:

- (A) are taking credible steps to end acts of violence against Israeli citizens and United States citizens that are perpetrated or materially assisted by individuals under their jurisdictional control, such as the March 2016 attack that killed former United States Army officer Taylor Force, a veteran of the wars in Iraq and Afghanistan;
- (B) have terminated payments for acts of terrorism against Israeli citizens and United States citizens to any individual, after being fairly tried, who has been imprisoned for such acts of terrorism and to any individual who died committing such acts of terrorism, including to a family member of such individuals;
- (C) have revoked any law, decree, regulation, or document authorizing or implementing a system of compensation for imprisoned individuals that uses the sentence or period of incarceration of an individual imprisoned for an act of terrorism to determine the level of compensation paid, or have taken comparable action that has the effect of invalidating any such law, decree, regulation, or document; and
- (D) are publicly condemning such acts of violence and are taking steps to investigate or are cooperating in investigations of such acts to bring the perpetrators to justice.

Although most of these statutes have concerned exercise of the spending power, the 1987 and 1990 acts also focused on congressional determinations to exclude the PLO and its successors and agents from the United States, which surely “has the power, as inherent in sovereignty, and essential to self

(adding § 620K(b)(1)(B) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2378b), incorporating the Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Phase I (https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_030430_PerformanceBasedRoadmapTwo-StateSolution.pdf [<https://perma.cc/YV9Y-4L8H>])).

99. *Id.* § 620K(b)(2)(B).

100. Taylor Force Act, Pub. L. No. 115-141, tit. X, § 1004(a)(1), 132 Stat. at 797-98 (2018).

preservation, to forbid the entrance of foreigners within its domain, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”¹⁰¹ Conditions on an excludable alien’s continued presence are permitted even if they would be “unacceptable” if applied to U.S. citizens.¹⁰²

Moreover, legislation concerning foreign affairs and national security “warrants respectful review by courts,”¹⁰³ and such review is particularly deferential where (as reflected in the House Judiciary Committee Report) “Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns.”¹⁰⁴

IV. CONCLUSION

Congress passed the ATCA to keep the ATA from becoming a dead letter. The ATA had been passed to allow civil actions against international terrorists acting outside the territory of the United States, because such lawsuits further important national interests. For many years, the PLO and PA were subject to jurisdiction under the ATA, but following *Daimler* such jurisdiction was withdrawn. The ATCA restored it, and there can be little doubt that Congress acted within its constitutional authority in doing so.

101. *Ekiu v. United States*, 142 U.S. 651, 659 (1892).

102. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 79-81 (1976).

103. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016); *see Holder v. Humanitarian Law Project*, 561 U.S. at 33-34 (giving “deference” to policy and factual judgments of the political branches because anti-terror statute “implicates sensitive and weighty interests of national security and foreign affairs.”); *Regan v. Wald*, 468 U.S. 222, 243 (1984); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321-22 (1936) (“We should hesitate long before limiting or embarrassing such powers.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (matters such as the conduct of foreign relations “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”).

104. *Holder v. Humanitarian Law Project*, 561 U.S. at 35; *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (“The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the . . . constitutionality” of its national security measures).