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Panel: Challenging the Assumption of Equality: The Due Process Rights of Foreign Litigants in U.S. Courts

*Paul R. Dubinsky, Moderator**

This panel will discuss the due process rights of aliens in U.S. courts. One aspect of this question is very much in the news, especially in connection with the so-called war on terror and the U.S. government's detention of foreign nationals at detention facilities located abroad, like the one at Guantánamo Bay, Cuba. A central issue arising out of these detention cases is the extent to which aliens located outside the territory of the United States enjoy rights under the U.S. Constitution that can be raised in habeas proceedings or criminal proceedings in U.S. courts so as to challenge the conditions of their capture or confinement. That timely and important topic is not our focus today. Rather, Professors Boyd, Keitner, Parish, and I will concentrate on one main question: When foreign nationals and business entities are called upon to defend civil suits in U.S. courts, should the court's ability to exercise power over them be measured by the Due Process Clause – a U.S. constitutional standard – or should the check on overly aggressive assertions of power be seen as grounded in some other source of law, perhaps international law?

In most civil procedure courses, discussion of the relationship between the Due Process Clause of the Fourteenth Amendment and personal jurisdiction over the civil defendant begins with *Pennoyer v. Neff*,¹ a wholly domestic case. In the first year of law school, that case typically launches the class on a discussion of territoriality, interstate federalism, and the debatable proposition that the framers of the Fourteenth Amendment intended for 19th century notions of territoriality and state sovereignty to be written into the federal constitution. As you know, much of

* Paul Dubinsky is an associate professor of law at Wayne State University.

1. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

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Pennoyer —most notably its territorial standard of due process — has been overruled. But a central aspect of the case, the constitutionalization of personal jurisdiction in civil litigation, remains very much alive. It also remains uniquely American, or nearly so. Overwhelmingly, for legal systems around the world, the judicial assertion of jurisdiction is a matter of statute and treaty.

Pennoyer was an interstate case. None of the parties was a non-citizen or a business entity formed or based outside the United States. In the many decades that have passed since *Pennoyer*, the United States Supreme Court has on only a few occasions dealt with the international variation of *Pennoyer*, an attempt by a state or federal court in the United States to exercise civil jurisdiction over a non-citizen domiciled abroad, where that non-citizen maintains that the exercise of judicial power is contrary to the Due Process Clause of the Fourteenth Amendment. In those few instances in which the Court has been presented with such a scenario, it has never squarely considered the threshold question, whether the Due Process Clause applies. Nor have lower federal courts or state courts, which now frequently adjudicate civil suits against foreign defendants, squarely and thoughtfully addressed whether and why the rights of aliens outside the U.S. should be defined by the U.S. Constitution rather than by treaty or statute or customary international law. Somewhat inexplicably, courts in the United States simply have assumed that personal jurisdiction over domestic defendants and foreign defendants alike is governed by the U.S. Constitution.

*Asahi Metal Industry Co. v. Superior Court*² is the exception (or at least partially an exception) that demonstrates the rule. Part IIB of Justice O'Connor's opinion — the part addressing reasonableness and “traditional notions of fair play and substantial justice” — was a rare acknowledgement that the position of the foreign defendant may differ dramatically from that of the domestic defendant. In its dismissal of an indemnification claim between the two co-defendants, a Taiwanese tire manufacturer and a Japanese component-part manufacturer, where the only claims involving U.S. litigants had already been settled, Justice O'Connor's opinion is often regarded as a model of judicial internationalism. Part IIB speaks about the potentially greater burdens imposed on foreign defendants than domestic ones.³ And Part IIA, which rejected the pure stream-of-commerce theory, was of particular comfort to foreign manufacturers.⁴ But most significantly for our purposes, Justice O'Connor, like the other members of the Court, simply

2. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

3. *Id.* at 114. That part of the opinion attracted the support of seven other justices.

4. Only three other justices joined in this portion of Justice O'Connor's opinion.

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assumed that *International Shoe*⁵ and *World-Wide Volkswagen*⁶ were the starting points for the analysis. In fact, no one on the Court stopped to question whether foreign defendants, like domestic ones, enjoy constitutional protections against overly assertive exercises of jurisdiction by U.S. courts or, rather must find their ultimate protection in non-Constitutional sources. In other words, the basic framework applied in *Asahi* with respect to foreign defendants fits only if one largely equates the position of such litigants with that of domestic, sister-state defendants in interstate litigation.

Our panel discussion today first focuses on this assumption of equality between the domestic and foreign defendant for jurisdictional purposes and subjects that assumption of equality to scrutiny. We begin by asking whether the extrapolation from interstate cases to transnational ones is justified. Professor Austen Parrish of Southwestern Law School will lead us off in this. Professor Lee Boyd of Pepperdine will then follow. She will address the next logical question: If the jurisdictional rights of foreign defendants should not be regarded as being defined by the Court's Due Process Clause jurisprudence, then where do we turn? What other sources of law protect aliens from overly aggressive assertions of personal jurisdiction in civil actions in U.S. courts? Finally, Chimene Keitner, soon to be a member of the U.C. Hastings faculty, will respond to these first two presentations.

A final thought before I turn the microphone over to the panelists: Some years ago I served as a member of the U.S. delegation to the Hague Conference on Private International Law. One of the projects pursued by our delegation was an effort to negotiate a multilateral treaty regulating the exercise of personal jurisdiction by national courts in the context of a wide-ranging treaty-based duty to recognize and enforce civil judgments originating from other treaty countries. At several points in those negotiations,⁷ members of our delegation worried aloud whether a proposal supported by a large majority of other countries nevertheless posed a formidable constitutional problem for the United States. This happened repeatedly, so much so that I privately wondered whether other delegations in the room would start referring to us as the "angst delegation" or the "too-coy-for-their-own-good delegation." Although a few other countries raised constitutional concerns of their own, the domestic constitutional objection in these negotiations

5. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

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

7. For example, in the discussions over whether the U.S. should agree to abandon tag jurisdiction. See generally Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 258-65 (2005).

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was disproportionately a U.S.-voiced concern, and it occurred in a context — a proposed private international law treaty — where it was less expected to arise than, say, in negotiations over a human rights treaty, where Constitution-based reservations are common. Could it really be that if Australia were prepared to negotiate treaty-based rights for its nationals that were less expansive than those unilaterally extended to such litigants by U.S. courts interpreting the Fourteenth Amendment that the U.S. Constitution would stand in the way? If the French Republic has no objection to French nationals being required to defend themselves in multi-party litigation in U.S. courts in the absence of minimum contacts and in the interests of efficiency, could it really be that those who wrote and ratified the Fourteenth Amendment, in their beneficence, had said no, this cannot be?

*Austen Parrish, Panelist**

Thank you Paul. In the time I have, I intend to discuss an article I wrote that the Wake Forest Law Review published last year.⁸ In that article, I argue that sovereignty — or, more precisely, concepts of sovereignty as understood in international law — and not the Due Process Clause, is the appropriate jurisdictional constraint on U.S. courts when those courts adjudicate civil claims against non-resident, alien defendants.

First, an introduction. The Due Process Clause has become the key, if not only, jurisdictional limitation on a court's ability to enter a civil judgment against a defendant, be the defendant foreign or not. The U.S. Supreme Court and the lower courts have assumed, and have always assumed, that the personal jurisdiction analysis that should apply to foreign defendants is the same analysis that applies to domestic defendants. The test is well-known: does the defendant have minimum contacts with the foreign state such that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.⁹

But is that assumption correct? Do the limits on a court's power to assert extraterritorial personal jurisdiction over alien defendants derive only from the Due Process Clause? I am not convinced. Treating nonresident alien defendants in the same way as courts treat domestic defendants for purposes of personal jurisdiction is inconsistent with broader notions of American constitutionalism. I therefore reject the uncritical assumption that foreign defendants should be treated

* Austen Parrish is an associate professor at Southwestern Law School, and the Director of Southwestern's Summer Law Program in Vancouver, B.C., Canada. The Journal has added citations to Professor Parrish's remarks for ease of reference.

8. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006).

9. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

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identically as domestic defendants in the personal jurisdiction context. My thesis is that the jurisdictional limits on the court's power to adjudicate claims against non-resident, alien defendants should be drawn from concepts of sovereignty under international law, and not the Due Process Clause. The U.S. Supreme Court should untether, or decouple, its personal jurisdiction analysis from the Due Process Clause of the Constitution, when the defendant is foreign and not in U.S. territory.

To explore this thesis I will cover three things in the next twenty minutes. First, I will explain why the issue of what personal jurisdiction standard applies to foreign defendants is an important one. What is at stake is not academic. Second, I will explain how the Supreme Court took a misstep in its personal jurisdiction jurisprudence. It took that misstep many years ago – in most notably the famous *Asahi* case¹⁰ – by not questioning critically *why* the Due Process Clause applies to foreign, nonresident alien defendants in civil cases. And then, finally, I will explain what I believe to be a better framework for analysis: how personal jurisdiction law could be changed positively.

So first, the stakes involved. In at least the last ten years, the United States has seen a dramatic proliferation of cases involving foreign defendants. In part, this proliferation is a result of globalization. In part, the proliferation is a result of technological advances (such as the Internet's growth), which makes it more likely that foreign, non-resident alien defendants, will be caught up in U.S. litigation. There has also been a dramatic increase in international class actions brought in U.S. courts, and in parallel proceedings abroad. In short, the rise of transnational litigation is here to stay. More and more cases will be litigated in U.S. courts where at least one of the parties is from outside of the United States. So as a preliminary matter, the question of personal jurisdiction over nonresident, alien defendants is more likely to arise and be litigated than it has in the past.

But the impact is not just in the number of cases involving foreign defendants. As a result of increased litigation involving transnational actors or foreign defendants, broad assertions of jurisdiction or, at least the appearance of broad assertions of jurisdiction, have the potential to increase tensions with other countries and undermine diplomatic relations. Retaliation can take the form of diplomatic protests, or trade and commercial retaliation. Of course, other more subtle forms of retaliation exist. For example, countries have reacted to perceived exorbitant exercises of jurisdiction in a number of recent cases. One case that I

10. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

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mention in my article is a landmark case currently winding its way up to the United States Supreme Court.¹¹ That case involves a U.S. plaintiff who sued a Canadian company operating solely in Canada for conduct occurring solely in Canada under the U.S. Superfund laws. The case implicates the extraterritorial application of domestic environmental laws, but it also involves a personal jurisdiction issue. The Canadians are upset about the litigation and Canadian Foreign Affairs has debated whether Canadian law should be changed in response to what Canada perceives to be overbroad and exorbitant applications of U.S. law.

Personal jurisdictional standards are important in other ways too. Broad extraterritorial assertions of jurisdiction can impact U.S. trade and discourage foreign companies from buying American products. Certainly at the time of the *Asahi* case, the U.S. Solicitor General painted a negative picture of what would happen if the U.S. Supreme Court did not take into account that the defendant was foreign, and if it did not recognize that transnational litigation creates significant, unique burdens not faced in purely domestic litigation.

Lastly, lower courts — without clear guidance from the U.S. Supreme Court — have revealed deep confusion over how to apply jurisdictional standards to nonresident, alien defendants. How burdensome is it for a foreign defendant to litigate in a U.S. court? How is a court to determine whether the exercise of jurisdiction is reasonable or not? Some judges essentially say that courts should treat foreign and domestic defendants the same. A line of cases hold that improvements in transportation, along with easy access to FAX machines and the Internet, means that foreigners face few burdens when defending in U.S. Courts.¹² Other cases disagree. In fact, the holdings in lower courts are not only confusing but contradictory. In cases involving near identical facts, courts reach completely

11. *Pakootas v. Teck Cominco Metals*, 452 F.3d 1066 (9th Cir. 2005). See also Austen L. Parrish, *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363 (2005) (describing the *Pakootas* case in detail); Shi-Ling Hsu & Austen Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 41 VIRGINIA INT'L L.J. 1 (2007) (describing recent Canadian cases and deterioration of U.S.-Canada relations).

12. See generally Austen Parrish, *supra* note 8, at 20-25. See, e.g., *Anderson v. Dassault Aviation*, 361 F.3d 449, 455 (8th Cir. 2004) (finding the exercise of jurisdiction over a French jet manufacturer reasonable when an Arkansas forum would not be especially inconvenient and the French company had “ready access to air transportation for conveniently making the trip”); *Mutual Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1320 (11th Cir. 2004) (finding the exercise of jurisdiction over a foreign insurer reasonable because, among other things, “modern methods of transportation and communication’ have lessened the burden of defending a suit in a foreign jurisdiction” (internal citation omitted)).

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different conclusions.¹³ One group of cases say that foreign defendants face significant burdens when defending in U.S. courts and therefore the exercise of jurisdiction would be unreasonable. Another group of cases hold that given technological advances, the exercise of jurisdiction is “no big deal.” Absent from consideration in international cases are comity concerns, or whether the exercise of jurisdiction would offend another nation’s sovereignty.

Perhaps most importantly, our current jurisdictional rules place U.S. residents at a comparative disadvantage when attempting to enforce U.S. judgments. Because U.S. personal jurisdiction laws are constitutionally derived, it becomes near impossible for the U.S. to enter into a judgments enforcement treaty where it can obtain reciprocity from other nations to recognize valid U.S. judgments. Other countries believe that U.S. courts have the potential under the Constitution to assert jurisdiction exorbitantly and unfairly, and so under the equivalent of a full faith and credit analysis, those countries will not sign treaties that recognize U.S. judgments. Many scholars explain that U.S. judgment-enforcement laws are sometimes more generous than their foreign equivalents, which can hurt U.S. trade. It would be nice to enter into negotiations on a judgments enforcement treaty without constitutional doctrine handcuffing negotiators, unless that constitutional doctrine is necessary. In short, how courts apply jurisdictional rules to foreigners is important.

Let me explain next why the United States Supreme Court took a misstep: why the Court has the personal jurisdiction analysis wrong when the defendant is a nonresident alien. The Supreme Court has never explained its reasoning, but it has uncritically assumed that the Due Process Clause of the Constitution should apply to foreign defendants in the exact same way as it applies to domestic defendants. But is that assumption sound? Several reasons suggest the assumption is misguided.

First, if you look at the history of the Fourteenth Amendment and the Due Process Clause, very little suggests that the Framers ever intended the Fourteenth Amendment to impose any territorial limitations on jurisdiction in the first place. A large amount of scholarship questions the wisdom of tying personal jurisdiction precepts to the Constitution. *Pennoyer v. Neff* is the landmark case where in the 1870s the Court took international law — which provided the original territorial constraints on personal jurisdiction — and constitutionalized the jurisdictional question. But this was probably a mistake. Certainly there is no evidence in the

13. For a general discussion, see Parrish, *supra* note 8, at 22-23, n.107.

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Fourteenth Amendment's history that it was intended to apply to personal jurisdiction. Even if it did, the rationale behind having the Due Process Clause connected to personal jurisdiction lacks force when the Full Faith and Credit Clause is not implicated (such as when the defendants are foreign). Without the Full Faith and Credit Clause, the rationale of the *Pennoyer* case — which connects the Constitution to personal jurisdiction — is missing.

Second, permitting nonresident alien defendants to assert Due Process rights conflicts with long-established constitutional doctrine. In the 1960s and 1970s it may have been undecided whether the Constitution applies to aliens who are outside U.S. territory. The authority was mixed. Beginning in the 1980s though, and continuing throughout the Rehnquist court, the Supreme Court has been quite clear that non-citizens outside U.S. territory are not entitled to constitutional protections. Nonresident aliens obtain constitutional protections only when they have some substantial connection to the United States, or are physically present in U.S. territory. Now I am not taking a position on whether this is a good thing or not. In fact, I am sympathetic to arguments — most notably those Professor Neuman, now out of Harvard, champions — that the Constitution should provide protections to aliens outside of U.S. territory in certain circumstances.¹⁴ But under current U.S. Supreme Court constitutional doctrine aliens, not in U.S. territory, do not have Constitutional rights. You see that most clearly with the recent Guantánamo Bay cases and the question of whether aliens in Guantánamo Bay are entitled to raise constitutional challenges. Courts first ask whether Guantánamo Bay is considered part of U.S. territory. The decisions that have found that Guantánamo Bay is part of U.S. territory or under U.S. control also have found that aliens may assert certain constitutional rights.¹⁵ Those courts that have found Guantánamo Bay not to be part of U.S. territory have, in contrast, held that aliens there have no constitutional rights.¹⁶ This trend, connecting territoriality and

14. See generally Gerald L. Neuman, *Strangers To The Constitution: Immigrants, Borders, and Fundamental Law* (1996).

15. *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005); see also *Almurbati v. Bush*, 366 F. Supp. 2d 72, 80 n.6 (D.D.C. 2005) (citing *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 464). See generally Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2073 (2005) (noting that the U.S. Supreme Court's *Rasul* opinion "strongly suggests in a footnote that foreign nationals in U.S. custody at Guantánamo Bay Naval Base . . . possess constitutional rights" but explaining that the decision is unclear whether this is because the detainees "are human beings in long-term U.S. custody or because of the special character of U.S. authority at Guantánamo").

16. See, e.g., *Khalid v. Bush*, 355 F. Supp. 2d 311, 321-23 (D.D.C. 2005). Prior to the Supreme Court's decision last June in *Rasul v. Bush*, lower courts denied Guantánamo Bay detainees

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citizenship with constitutional rights, for the last twenty years has been fairly consistent.

Paul Dubinsky, our moderator, had mentioned the *Verdugo-Urquidez* case,¹⁷ which is the case where U.S. drug enforcement authorities entered Mexico and conducted an unreasonable search and seizure, and then attempted to use the evidence found in that search in a U.S. court. The defendant's argument was that the Fifth Amendment and Fourth Amendment prevented a U.S. court from admitting evidence that was unconstitutionally seized. The court rejected that argument saying that the search occurred outside of U.S. territory and control, and therefore the defendant could not assert constitutional rights: the Fourth Amendment prohibition against unreasonable searches and seizures did not apply.

It seems almost inconceivable that our courts will not afford constitutional protections in a Guantánamo Bay-type situation, or to aliens facing criminal charges, and yet international corporations may assert Fourteenth Amendment Due Process rights in a civil case. The Court has never explained the reason for the different treatment. In the four U.S. Supreme Court cases involving international defendants and personal jurisdiction — the *Asahi* case, the *Ireland* case,¹⁸ the *Helicopteros* case,¹⁹ and the *Perkins* case²⁰ — the Court never addressed the threshold question whether the Due Process Clause applies to the foreign defendants. In these cases, the Court assumed the personal jurisdiction analysis would be the same, the litigants assumed that the Due Process Clause would apply, and the scholarship relied upon in those cases assumed that the doctrine and analysis would be the same. So the issue of whether the same due process considerations apply to alien defendants as to domestic defendants never squarely came before the Supreme Court to critically analyze; it was overlooked.

Principles of sovereignty are the appropriate limits of jurisdiction in transnational cases. If constitutional doctrine does not constrain courts — if courts could address jurisdictional issues on a non-constitutional level — then the courts

the right to file habeas petitions because they were “detained *outside* the geographic boundaries of the United States” and therefore lacked legal protection. Khalid, 355 F. Supp. 2d at 320-23); *Coal. of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Ability of Detainees in Cuba to Obtain Habeas Corpus Review*, 96 AM. J. INT'L L. 481 (2002); *see also* *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1417, 1428-29 (11th Cir. 1995) (finding that Haitian and Cuban aliens outside U.S. territory could not assert various statutory and constitutional rights).

17. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

18. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

19. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

20. *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952).

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could approach personal jurisdiction issues pragmatically. Personal jurisdiction could be developed with an appreciation of comity and the concept of reciprocity between sovereigns in a way that would serve U.S. interests best.

Three responses can be anticipated to this thesis. The first response is found in law review articles published in the 1980s just before the *Asahi* decision. In those articles, scholars argue that alien defendants should be entitled to greater constitutional protections as a matter of policy. The problem with that literature is that it never addressed the threshold constitutional question of whether the Due Process Clause even applies. All these scholars say is that for policy reasons courts should be more careful when asserting jurisdiction over a foreign defendant. I agree with that conclusion; courts should be wary of asserting jurisdiction over foreign defendants – and should be reluctant to broadly assert jurisdiction. But why demand that the jurisdictional inquiry be constitutionally mandated? Why permit foreigners constitutional protections in the civil litigation context, but not in any other context? The literature is silent.

The second response is that personal jurisdiction is different from other constitutional contexts and therefore the Due Process Clause should apply differently in civil litigation. Personal jurisdiction should be viewed as a limit on a court's power to act, and therefore when a court is operating within the United States the Due Process Clause serves to constrain the Court regardless of who the defendant is. Permitting nonresident alien defendants to assert Due Process protections is not an extra-territorial application of the Constitution, the argument goes, but rather an application within the United States. That sounds good, but it does not withstand a close scrutiny. First, this position is entirely inconsistent with personal jurisdiction doctrine in all other contexts. The Court has been very clear that personal jurisdiction is an individual right.²¹ Second, if personal jurisdiction existed only as a constraint on the court's sovereign power to act then surely individual litigants would be unable to waive a personal jurisdiction defense. An individual can not waive sovereign prerogative. But waiver has also been a cornerstone of the personal jurisdiction doctrine. So this second approach would be inconsistent with the history of personal jurisdiction if courts were suddenly to view the Due Process Clause as a limit on the court's sovereign power to act rather than an individual right.

Lastly, the biggest challenge to my thesis is the idea that we should treat foreign defendants who are acting passively differently from those seeking entry into the

21. *Ins. Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982).

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United States (like aliens who obtain constitutional rights once they arrive on U.S. territory). The argument is that nonresident foreign civil defendants have done nothing and it is Americans who are attempting to bring them into United States courts. In such circumstances, the courts should accord nonresident aliens constitutional rights — or at least Due Process rights.²² I like this idea. It is the position most associated with Professor Neuman's writings. Known as the "mutuality of obligation" approach, it applies when the United States seeks to impose and enforce its own laws on foreigners.²³ But again, the U.S. Supreme Court has rejected that approach. Every commentator who supports the mutuality of obligation approach acknowledges that it is not currently accepted. So there is no reason, in my opinion, to only embrace this approach in the civil litigation context, when it has never been embraced elsewhere before.

So what is the remedy? How should courts correct the doctrinal confusion that presently exists? I really see two different solutions. One is perhaps more realistic, but only a patchwork solution. The other is bolder and more aspirational, but would be doctrinally and pragmatically preferable.

The first is a partial fix. This would assume that the United States Supreme Court will be hesitant and reluctant to significantly re-tailor the minimum contacts test as it relates to foreign defendants for a variety of reasons. So the question is, if we are stuck with the same doctrine, could courts tweak that doctrine so that it makes more sense when dealing with foreign defendants?

First, courts would stop the broad rhetoric that we see used in cases like *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*,²⁴ which holds that due process is the sole limitation on personal jurisdiction. Even if the court is inclined to believe that personal jurisdiction doctrine is derived solely from the Due Process Clause, the court should recognize that the Due Process Clause also contains a territorial limitation. This, in part, mirrors a debate that has occurred for many years in the domestic context, most famously between Martin Redish and scholars like Russell J. Weintraub who have argued whether the Due Process Clause conveys some sort of federalist concept. Regardless of who is correct in that debate, courts at least would recognize that personal jurisdiction implicates sovereignty concerns (the prerogatives of States) in the international context. Courts would not use the rhetoric of individual liberty and rather would recognize

22. See generally Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARV. L. REV. 1217 (1992).

23. See NEUMAN, *supra* note 15.

24. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

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that the Due Process Clause is also concerned with comity and nation-state sovereignty – concepts that existed at the time of *Pennoyer v. Neff*.

Second, the U.S. Supreme court would give much more meaningful consideration on a practical level – and direct lower courts to give more meaningful consideration on a practical level – to interstate interests in the personal jurisdiction calculation. This would occur under the fair play and substantial justice prong of the minimum contacts analysis. Currently, under the fair play and substantial justice prong, the only factor that really has any significance is the burden on the defendant. And I am fine with that when the defendant is domestic. But in the international context, courts should be much less concerned with the defendant's burden and much more concerned with other factors – such as the interests of foreign states and the shared interest of foreign states. The U.S. Supreme Court should therefore repudiate those overly simplistic decisions that hold that because of FAX machines, the Internet, and relatively inexpensive plane flights, foreign defendants face few burdens when defending in U.S. courts. That is not a sophisticated analysis and it does not represent the true burdens and concerns of foreign defendants.

Third, courts should embrace differences. Judges should recognize that there may be different outcomes when adjudicating cases against foreign defendants not within U.S. territory, as compared to adjudicating cases with domestic defendants in similar circumstances. Americans have no difficulty treating nonresident aliens differently in all other contexts (rightly or wrongly), and so again, it seems unjustified to carve out an exception for the personal jurisdiction context.

That is my partial fix: Keep the minimum context test as currently structured but change it slightly on the theoretical underpinnings and slightly in practical terms as to what is weighed under the fair play and substantial justice analysis.

For the bolder approach, the U.S. Supreme Court would be honest and recognize that the Due Process Clause and the Fourteenth Amendment have very little to do with personal jurisdiction, and ultimately very little, if anything, to do with whether a U.S. Court can adjudicate a claim against a foreign defendant. The personal jurisdiction analysis would be decoupled from the Constitution altogether. Instead, the personal jurisdiction doctrine would be concerned with under what circumstances a court can impinge on another nation-state's sovereignty. Personal jurisdiction law would thus reflect international law concepts of jurisdiction and comity that existed at the time the Court decided *Pennoyer v. Neff*, and concepts that existed for hundreds of years before *Pennoyer*.

If the U.S. Supreme Court was to untether personal jurisdiction from the

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Constitution, the United States would need to enter into a judgments and jurisdiction treaty. Congress would have to create a personal jurisdiction doctrine relating to foreign defendants that makes pragmatic sense: serving good policy, rather than constitutional, dictates. In a deconstitutionalized personal jurisdiction world, legislative choices would balance the interests of foreign defendants against the United States' interest in foreign trade and diplomatic relations. Hopefully this would free the U.S. up to make better progress on a judgments enforcement treaty, which is what Paul Dubinsky mentioned right at the start of this panel.

To sum up, there exist serious doctrinal inconsistencies in constitutional doctrine when the defendant is a nonresident, alien. Providing foreign civil litigants due process rights is inconsistent with broader notions of American constitutionalism. It would be wise for the United States Supreme Court to think about this issue critically, which it has not done before, and for litigants to think about this issue critically, which they have not done before, to create a personal jurisdiction doctrine that applies to alien defendants not residing in the United States. Concepts of sovereignty under international law, not the Due Process Clause, should limit a U.S. court's extraterritorial assertion of personal jurisdiction. Thank you.

*Kathryn Lee Boyd, Panelist**

I think Professor Parrish has made some compelling arguments that in the transnational litigation context, the current due process analysis for determining personal jurisdiction over foreign defendants is at odds with the Supreme Court's broader approach to constitutionalism. I agree that it could in theory be decoupled, although in practice it may be difficult, and that the jurisdictional question in transnational litigation could become a matter of international law with its emphasis on sovereignty. I question whether this would be necessary or is as serious a problem as Professor Parrish thinks it is given all of the structural and doctrinal limits to jurisdiction already in place for international litigation. And these doctrines or checks on the exertion of jurisdiction in transnational cases are taught in the international litigation classes in almost every law school. I teach them myself.

The doctrine of international comity, which takes many of the sovereignty interests that would be of concern to Professor Parrish, and how courts apply those to the assertion of jurisdiction of the abstention doctrines, the foreign sovereignty immunity and head of state immunities of course take into consideration

* Kathryn Lee Boyd is an associate professor of law at Pepperdine University School of Law specializing in international human rights law and civil procedure.

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sovereignty interests and concerns. Now the case-specific deference to statements of interest filed by governments, foreign governments as well as the United States, and foreign policy concerns, and, of course, the doctrine of *forum non conveniens*, which I have explored in depth in my own scholarship, takes into consideration many of the concerns that would be incorporated into the due process analysis.

However, assuming that personal jurisdiction for non-resident aliens was not a matter of constitutional due process, as Professor Parrish has argued, but rather a matter of international law, I would advocate the use of federal common law instead of treaties, which would not be my first choice as the source of international law to be incorporated for reasons previously alluded to such as that treaty-making is fairly cumbersome and hardly ever happen without significant understandings, reservations, and declarations on the part of the United States and others,.

Although there are arguments that consent treaties on sovereignty would be the preferable means to incorporate international laws under the purest sense of the sources of international law, I would argue that there is substantial precedent for incorporating these concerns through federal common law particularly in the era of post *Sosa v. Alvarez-Machain*,²⁵ drawing on early cases like *Sabatino*.²⁶ *Sabatino* incorporates international law principles into the exertion of extra-territorial jurisdiction in U.S. courts in the context of statutory interpretation as well as various other extra-territorial federal common law incorporation statutes such as the alien torts statute. There is substantial precedent for fashioning federal common law rules that take into consideration international law sovereignty interests when exerting personal jurisdiction over non-resident aliens.

As a litigator in a number of international cases in U.S. courts involving international human rights, in which before and after the *Sosa* case in 2004, courts have adjudicated substantive content of universal rights of alien plaintiffs by applying customary international law. It seems appropriate that they could do the same where individual liberty interests of alien defendants were at stake, as well as incorporating sovereignty interests and interests of the international community in the form of a federal common law rule.

A federal common law rule on the procedural side for determining personal jurisdiction could take into account international legal principles that have been applied by U.S. courts before while not undermining or even substantially departing from the U.S. constitutional principles in place, given the substantive

25. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

26. *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398 (1964).

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overlap in the current due process analysis, the principles of international comity in the exertion of extra-territorial jurisdiction under international law.

A quote that got me thinking about this subject is from Justice Breyer in the *Sosa v. Alvarez-Machain* case. When he was deciding, in his concurrence, that the alien torts statute would allow for some limited private rights of action under a customary traditional law to be part of federal common law, he noted, for the purpose of my argument, that substantive continuity of customary international norms must necessarily invoke procedural agreement on jurisdictional principles. Breyer wrote, international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of behavior. While he was discussing this in the context of universal jurisdiction — I think in universal civil jurisdiction there are even lesser bases of jurisdiction, territorial, objective, subjective, territorial, or protective, or nationality principles and the quote would be equally applicable.

For example, what substantive due process rights would non-resident alien defendants, brought under the court's subject matter of jurisdiction, possess under universal jurisdiction? In international human rights law they would possess a gauntlet of rights to liberty and security, rights to life, the right to be treated as a person equal before the law, right to freedom from discrimination, and rights and protections found in custom as well as general principles under international law. The problem of focusing solely on individual-liberty interests in the fashioning of federal common law rule for non-resident aliens would be that opinions of juries would yield norms that are far less protective of individual rights than U.S. constitutional rights. This would leave us with the dichotomy that non-resident aliens would have far less protections than U.S. citizens, bringing us back to the problems that were addressed early on with our foreign sovereign neighbors. Here is where Professor Parrish's suggestion that international law notions of territorial sovereignty would also factor into a federal common law rule.

In the *Sosa* case Justice Breyer was referring to the international law principle of universal jurisdiction existing together with universally accepted substantive norms. In fact, U.S. courts have drawn upon international norms of extra-territorial jurisdiction for statutory interpretation and as a rule of decision under principles of comity and abstention in another of other contexts, such as the extension of anti-trust laws, securities, and criminal prosecution of non-resident alien defendants. Although traditionally, under international law jurisdiction principles, territoriality governs the scope of prescriptive as well as adjudicatory

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jurisdiction under international law. Since the *Lotus* decision in 1927, international law has recognized extra-territorial jurisdiction expands beyond strict territoriality.²⁷ In the modern international order, states have recognized other sovereign interests, non-territorial connections such as the nationality of the actor, nationality of the victim, the protective principle, and mutations of the territoriality principle such as the effects doctrine, and even universality in certain contexts like we see in the *Sosa* case

Against the backdrop of the presumption against extra-territorial application of the U.S. laws, courts have applied federal common law doctrines that incorporate international law to determine the jurisdiction to extend any number of contexts. We teach these in international litigation, the *Alcoa*²⁸ case, an anti-trust litigation. In criminal prosecutions courts apply a two-part analysis to determine if U.S. criminal statutes apply extra-territorially. One of the prongs is whether exercising the extra-territorial jurisdiction will offend international law principles. United States courts have resorted to international law principles in deciding to exercise jurisdiction, for example, before issuing anti-suit injunctions in the airways litigation.

For the fashioning of federal common law rule, there is substantial precedent, particularly through the application of Charming Betsy principle,²⁹ that courts have interpreted the reach of several statutes through the lens of international law and sovereignty principles. Moreover, the doctrine of international comity, as a separate consideration after subject matter jurisdiction, has incorporated through federal common law many of the interests that are set forth in Section 403 of the Restatement as stated by Professor Dubinsky.³⁰ This sets forth a reasonableness inquiry that courts should undertake before extending jurisdiction extra-territorially.

Perhaps unlike Professor Parrish I see a lot of doctrinal connection between the courts and the Supreme Court's more recent supplanting of the minimum contacts analysis with a more reasonableness inquiry. I saw that in *Asahi* where the majority really could only agree on the exercise of jurisdiction being unreasonable, based on a series of reasonableness factors. The reasonableness factors applied to extra-territorial assertions of personal jurisdiction in international law are set forth

27. The Case of the S.S. "Lotus" (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7, 1927).

28. *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37 (D.D.C. 2001).

29. *Murray v. The Charming Betsy*, 6 U.S. 64 (1804) (the principle that a statute should be interpreted consistent with American treaty obligations).

30. Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987).

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in Section 403 of the Restatement, but they look and sound a lot like the reasonableness factors set forth in *World-Wide Volkswagen*.³¹ The difference being scope rather than difference in kind. For example, the reasonableness factors in the due process clause analysis under *World-Wide Volkswagen* include looking at the plaintiff's interests in obtaining convenient and effective relief, a forum's interest in adjudicating a dispute, looking at sovereign interests from the U.S. perspective, the burden on the defendant, the interstate judicial system's interest in obtaining the most efficient resolution, and the shared interests of several states in furthering fundamental substantive social policies.

If we look at the Section 403 reasonableness factors and the assertion of extra-territorial jurisdiction under international law, we see factors such as the importance of the regulation to the international, political, legal, or economic system, looking at the substantive policies on the international level rather than the federal level. The extent to which the regulation is consistent with the traditions of the international system, looking again broadly not to the interstate system within the borders of the United States but the international community, the extent to which another state may have an interest in regulating that activity, and the extent to which there would be a conflict between states if the exercise of jurisdiction were to extend to a non-resident alien.

How this federal common law fashioning works in some of the recent cases brought for example under the anti-terrorism act, where unlike what Austin alluded to, courts have found in a number of cases that they could not exercise personal jurisdiction over non-resident alien defendants applying the traditional due process analysis. For example, in the *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*,³² a suit arising out of a terrorist attack in Israel, the trial court dismissed the suit brought by a surviving nine-month-old son for the death of his parents by Hamas on the basis that there was no personal jurisdiction over individual Hamas operatives alleged to have perpetrated the attack as well as individual members of the Palestinian Authority.

Also, in the terrorist attacks litigation of September 11, courts have refused to exert personal jurisdiction over several Saudi princes alleged to have supported Al-Qaeda.³³ In those cases, for example, if our courts were to draw upon its precedent, in federal common law exertions of extra-territorial jurisdiction

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

32. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004).

33. For a brief discussion of case, see *\$116 Trillion Lawsuit Filed by 9/11 Families*, CNN, Aug. 16, 2002, available at <http://archives.cnn.com/2002/LAW/08/15/attacks.suit>.

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international law bases for exerting personal jurisdiction would be available to the courts. The “passive personality test,” for example in the *Hamas* case, where the nationality of the victims in cases where U.S. citizens were harmed, the territoriality, where acts of terrorism occurred on U.S. soil in the 9/11 cases, the objective territoriality, where acts outside of the U.S., terrorist acts, would have a substantial effect territory and would be foreseeable to have substantial effects such as terror in the United States. Additionally, protective principles of international jurisdiction in which the U.S. would have the right to assert and apply their laws against conduct that is directed against the security of their essential government functions. Even universality as Section 403 defines it would extend, although I think there is less agreement that universal jurisdiction would extend in the case of terrorism, but there is a move toward that as the states become more and more consensual on their understanding of the definition.

After the assertion that international law principles would apply after the United States declared its right to apply its own laws, the reasonableness factors could be balanced by the courts as they have done in other cases. U.S. sovereignty interests, evidenced by executive orders or recent congressional statutes, as well as consideration of statements of interest are, as a rule, being brought to this type of litigation by the State Department, the ministers of defense, ministers of state, and ministers of foreign affairs from other countries. There will be skeptics that would argue that courts are not equipped to determine sovereignty interests and I do think that, as you said, this is a ship that has sailed because courts in transnational litigations today do undertake this. Now I come full circle back to the other doctrines that appear in transnational litigation, that courts do determine the availability of causes of action abroad, the availability of a true claim that would be available for plaintiffs, or whether it would be convenient for them to litigate in foreign countries. They assess the judicial systems of other countries to determine if they are corrupt and will provide a remedy in the *forum non conveniens* context. Again, they look at and determine the interests of foreign policy as set forth in statements by our State Department as well as foreign governments. For example, in South Africa apartheid litigation, the *Rio Tinto* case,³⁴ there were statements of interest as well as in the *Talisman* case³⁵. So courts have been doing this, and I would argue, can continue to do this with the help of the executive branches and the legislative branches.

34. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 (9th Cir. 2006).

35. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

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By applying international law principles that are customarily followed by the international community, it would allay the angst that Professor Parrish alluded to, that the Court has revealed in *Asahi* and its reluctance to extend notions of personal jurisdiction out into the international field. In developing their own federal common law that incorporates international law principles, U.S. courts become, in type, an international tribunal that will participate in the dialog and the development of customary international law in the broader sense of international tribunals and our international system.

*Chimène Keitner, Panelist**

I think that Austen Parrish is absolutely right, that these issues are of more than academic interest. Generally speaking, defendants hate being haled into U.S. courts. The traditional wisdom is that the extensive discovery tools available to foreign plaintiffs—although perhaps a decreased availability in recent years of punitive damages—make defendants want to avoid the exercise of jurisdiction by the U.S. courts at any cost. And here I am thinking particularly but not only of corporate defendants.

There are a range of doctrines that defendants can invoke in attempting to put an end to litigation that is brought against them in U.S. courts. The first thing particularly alien non-resident defendants will think of is personal jurisdiction. Even if they are not successful in arguing against the exercise of personal jurisdiction, they are surely going to bring motions to dismiss for *forum non conveniens*. Additionally, they might invoke some of the other doctrines previously mentioned such as the political question doctrine, for example, since even if they are not a sovereign entity they may feel that there is a political issue at stake.

There are three points that I want to raise — I'll call these points community, constraints, and consistency. First, community. One very interesting question raised is what really is the nature of the community we are thinking about when discussing personal jurisdiction? Are we thinking about groups of individuals interacting either within the U.S. or across U.S. borders or in other countries? Or are we taking a more statist view of nation-states interacting in the international

* Ms. Keitner graciously stepped in at the last minute as a substitute panelist. She is an Associate Professor of Law at the University of California, Hastings College of the Law, and her work has appeared in many journals. Prior to joining the Hastings faculty, Professor Keitner clerked for the Chief Justice of the Supreme Court of Canada and spent three years representing plaintiffs in complex civil litigation in U.S. state and federal courts. She is the author of *THE PARADOXES OF NATIONALISM: THE FRENCH REVOLUTION AND ITS MEANING FOR CONTEMPORARY NATION BUILDING* (2007).

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arena, and it just so happens that this interaction is through the proxies of their private citizens or private corporations fighting things out in civil litigation? It seems to me that Austen's concern for reasserting the importance of sovereignty considerations in this context stems from a more nation-statist view of what this interaction is all about, which rubs against the sort of more traditional or accepted notion that what is really at stake here are individual liberties, even if that individual is a fictitious individual such as a corporation. Also, perhaps pushing the sovereignty argument does not account enough for the multiple ways in which even traditional public international law notions and doctrines increasingly recognize that individuals actually are subject to international law, and that we are not just in a nation-state system where traditional sovereignty concerns dictate the boundaries of states and how they interact with each other.

Pushing or privileging sovereignty concerns over individual liberty, just analytically, really underestimates the ways in which the international system today is not just nation-state based. Certainly we have not moved past that entirely, but one of the reasons the Supreme Court in *Asahi* did not seem to comment at great length about the fact that this was a foreign defendant at issue, foreign in the sense of not from the United States, and particularly when we are talking about corporations, there is a sense that there is not something so qualitatively different about foreign defendants in this context. With *Asahi*, there seems to be an attempt to put some consistency into district courts' and appellate courts' analyses of the stream of commerce theory of personal jurisdiction, irrespective of the nationalities of the defendants. So that is really where the analysis was focused.

If you are going to privilege sovereignty concerns, it strikes me as ironic that you want to do this by suggesting that the U.S. enter into a treaty to regulate its exercise of personal jurisdiction. It seems that the capacity to exercise jurisdiction is itself a hallmark of sovereignty, and so in fact you would curtail U.S. sovereignty in the name of sovereignty. Some might argue this is legitimate, but my sense is that the irritant driving your analysis is that U.S. judgments are not being recognized abroad. There is maybe a reaction against U.S. assertions of jurisdiction, and so it seems that maybe you are too willing to subordinate the U.S. in a treaty context in the name of sovereignty. So this is a paradox that you might want to elaborate on.

I am also a little bit less optimistic that, even if we set aside constitutional doctrines of due process, it will be somehow easier to come up with a treaty that the U.S. would sign on to, but perhaps that is just my pessimism about the U.S.'s

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role in international treaty negotiations generally and not an issue specific to jurisdiction. So those are just some comments about the nature of the community. Are we looking at individuals, or nation-states, or some combination of the two?

My second point is the type of constraint that we are talking about. This is really what I alluded to at the beginning, that jurisdictional barriers are one barrier to courts asserting some sort of authority over foreign defendants. But the analysis does not stop there. The cases I brought as a plaintiff's lawyer were generally against U.S. defendants. We tried to avoid the jurisdictional hurdle by finding U.S. component manufacturers and so forth (for example, in plane crashes that happened abroad) so you did not have a personal jurisdiction problem, but of course the action all happened at the *forum non conveniens* stage, which makes me think of the broader question of reasonableness. Whether the debate happens under a motion to dismiss for lack of personal jurisdiction or whether it happens in your motion to dismiss for *forum non conveniens*, the court is trying to tease out what is a reasonable exercise of its authority. In a way, what you're advocating, Austen, is a greater taking into account of what we traditionally think of as public interest factors in the *forum non conveniens* analysis, but at the jurisdictional stage.

What are the implications of hashing this out at the jurisdictional stage versus the *forum non conveniens* stage? To what extent does the jurisdictional analysis overlap with the public interest factor analysis in the *forum non conveniens* motions that plaintiff's lawyers who are interested in international work and in recovering U.S. damages on behalf of foreign plaintiffs struggle with and analyze in much greater detail looking at *forum non conveniens*?

My last point is consistency. I thought that the previous observation that whether or not you like the sort of territorial definition of constitutional rights or entitlement to constitutional rights we are now stuck with this, was very interesting. The Supreme Court has done some interesting modifications. I am certainly not an expert in this area but I submitted an amicus brief in the *Benitez v. Mata*³⁶ case, which was heard a couple of years ago. There, aliens who were not considered admitted to the U.S. because they had come in illegally were nonetheless deemed a part of the political community, for lack of a better word, for certain purposes. The very strict interpretation prohibiting the extension of constitutional rights to individuals who are not, maybe, part of the core of the U.S.'s territorially bounded citizenry, is softening at the edges, although not as much as some would like.

36. *Benitez v. Mata*, 540 U.S. 1147 (2004).
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But I am wondering if the real consistency problem is not a doctrinal problem, and not really a problem of the scope of due process rights either. We tend to consider these rights as a bundle—they either apply to foreigners or they do not. It is a consistency problem really more of the sort that the *Asahi* court was facing at the time in terms of the stream of commerce theory, which is just confusion among lower courts about what to consider a reasonableness factor and what not to consider a reasonableness factor. We would have a lot more success, if we want to talk pragmatically, in trying to press our Supreme Court to better elaborate the particular reasonableness concerns that arise in the context of a lawsuit against a foreign defendant, rather than directing them to a body of international law reasonableness factors, either federal common law or treaty-based, that is in my pessimistic view certainly the cause of more, rather than less, confusion.