3 Personal Jurisdiction Questions Mallory Leaves Unanswered

By **Andrew Rhys Davies** (October 18, 2023)

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The due process framework that has cabined personal jurisdiction over nationwide and global businesses for the last eight decades — since the U.S. Supreme Court's 1945 ruling in International Shoe Co. v. Washington — looks increasingly precarious, in the wake of this summer's fractured high court decision in Mallory v. Norfolk Southern Railway Co.[1]

And the Supreme Court will likely be asked to address personal jurisdiction again in short order, in the context of a petition for review of the U.S. Court of Appeals for the Second Circuit's decision last month in Fuld v. Palestinian Liberation Organization that addressed several of the questions that Mallory left unanswered.

Mallory holds that the due process allows a state to exercise personal jurisdiction over an out-of-state corporation that has registered to do business there in circumstances where registration signifies consent to be sued in the state's courts on any and all claims.

The majority — actually a plurality composed of Justices Neil Gorsuch, Clarence Thomas, Sonia Sotomayor and Ketanji Brown Jackson, with a partial concurrence by Justice Samuel Alito — treats Mallory as an easy case with an obvious outcome.

By registering to do business under Pennsylvania's registration-to-do-business statute, the out-of-state corporate defendant consented to be sued there on any claim, regardless of where the claim arose. Therefore, the due process clause of the Fourteenth Amendment permitted Pennsylvania's courts to adjudicate an out-of-state plaintiff's claims that arose from events that took place in Virginia and Ohio.[2]

But the dissent — written by Justice Amy Coney Barrett and joined by Chief Justice John Roberts and Justices Elena Kagan and Brett Kavanaugh — views Mallory as a "sea change" in the restrained, contacts-based approach to personal jurisdiction over corporations that has applied since the landmark International Shoe decision.[3]

Under the International Shoe framework, which the Supreme Court reaffirmed as recently as 2017, doing business in a state is not a sufficient basis for personal jurisdiction over a corporation unless: (1) it is incorporated or has its principal place of business in the state — i.e., general or all-purpose jurisdiction; or (2) the claim arises from business conducted in or directed at the state — i.e., specific or case-linked jurisdiction.[4]

The majority insists that Mallory is consistent with International Shoe, which, they say, merely staked out "an additional road to jurisdiction over out-of-state corporations" — that is, contacts-based jurisdiction — without supplanting other roads, such as consent.[5]

The dissent sees things quite differently. Mallory does not formally overrule International Shoe, they say, "but it might as well." Post-Mallory, the International Shoe contacts-based approach is "halfway out the door," and it will be entirely obsolete if states accept the invitation to amend their statutes to provide that registration to do business signifies consent to all-purpose jurisdiction.[6]

Whether or not other state legislatures choose to copy the Pennsylvania statute, Mallory raises — and leaves unanswered — a variety of tricky questions concerning what limitations due process imposes on personal jurisdiction.

1. What conduct signals consent?

First, what kinds of conduct might signal consent to jurisdiction for claims arising out of state, besides registering to do business? Mallory offers no clarity.

The dissent notes that neither the Pennsylvania statute nor the registration paperwork the Mallory defendant filed said in so many words that the registrant was consenting to jurisdiction.[7] No matter, responded the plurality — consent may be implied, there is no "'magic words' requirement," and "consent may be manifested in various ways by word or deed."[8]

The Mallory dissent highlights the reason for circumspection here. Under the International Shoe regime, a defendant's non-suit-related in-state business does not authorize jurisdiction over claims arising elsewhere. So it would make no sense to uphold a statute that instead provides that a company that does business in the state will be deemed to consent to be sued there on out-of-state claims.[9]

In the course of ruling that the Palestinian Liberation Organization and Palestinian Authority had not consented to U.S. jurisdiction for purposes of a civil action under the federal Antiterrorism Act, the Second Circuit's September decision in Fuld v. Palestinian Liberation Organization squarely confronted the question of what conduct can signify consent to jurisdiction.[10] No doubt the disappointed plaintiffs and the government, which intervened to defend the ATA's jurisdictional provisions, are considering Supreme Court review.

To explain Fuld, in 2019, in response to rulings that the PLO and PA were not subject to general or specific jurisdiction for ATA claims by U.S. nationals who were injured in terrorist attacks in Israel, Congress amended the ATA to provide that the PLO and PA are "deemed" to consent to U.S. jurisdiction if they continue to (1) maintain a physical presence in the U.S., or (2) make certain terrorism-related payments anywhere in the world.[11]

The Second Circuit rejected the deemed consent provision, holding that "Congress cannot, by legislative fiat, simply 'deem' activities to be 'consent' when the activities themselves cannot plausibly be construed as such," and that consent-signifying conduct must be "a much closer proxy for actual consent than the predicate conduct" in this deemed consent provision.[12]

True, as in Mallory, the case law establishes that consent may be inferred when a person accepts a government benefit — in Mallory, the right to do business — that is conditioned on submitting to jurisdiction. But that case law was inapplicable here. Although the PLO and PA had established U.S. presences, the government had not authorized such, and could require them to leave at any time.[13]

That Mallory will play a major role in any Supreme Court review of Fuld is already obvious. After Mallory was decided, the government filed a supplemental brief in Fuld, broadly defending the ATA's deemed consent provision based on Mallory's "flexible approach to determining if a defendant consented to suit."[14]

Before Mallory, the government had been much more cautious, conceding that it would not be constitutional to deem consent "based on conduct entirely unrelated to the forum or the

lawsuit," and emphasizing the provision's limitations — it applies only to the PLO and PA, and its predicates are closely tied to the kinds of terroristic conduct that the ATA seeks to combat.[15]

2. Are there constitutional limits on legislatively deemed consent?

Second, are there any constitutional limitations on a legislature's ability to demand consent in exchange for authorization to do business in the state?

Justice Alito wrote separately in Mallory to opine that the dormant commerce clause doctrine, which generally prohibits a state from imposing undue restraints on interstate trade, precludes a state from conditioning consent to do business on a submission to jurisdiction for claims that are wholly unrelated to the state.[16]

In Justice Alito's view, there is a "good prospect" that, by doing just that, the Pennsylvania statute impermissibly discriminates against out-of-state businesses and imposes a significant burden on interstate commerce without any legitimate local public interest.[17]

But what constitutional limitations, if any, are there on Congress' authority to demand or deem consent? Certainly not the dormant commerce clause doctrine, which applies only to the states.

This issue, too, arose in Fuld, where the government's defense of the ATA deemed-consent provision included an appeal for deference because the due process clause of the Fifth Amendment allows Congress to authorize "a greater scope of personal jurisdiction" than the states can authorize under the Fourteenth Amendment.[18]

The Second Circuit declined to revisit its prior ruling that the Fifth Amendment imposes the same limitations on Congress' ability to authorize federal jurisdiction as the Fourteenth Amendment imposes on the states.[19] Just last year, in Douglass v. Nippon Yusen Kabushiki Kaisha, a private civil case, the en banc U.S. Court of Appeals for the Fifth Circuit adopted the Second Circuit's rule.[20]

The Supreme Court declined to review the Fifth Circuit's decision, even though five dissenting Fifth Circuit judges would have held that the Fifth Amendment imposes no limitation on Congress' ability to authorize "expansive personal jurisdiction in federal courts."[21] Conceivably, a certiorari petition from the government presenting this question will receive a more favorable reception.

3. What does this mean for personal jurisdiction?

Third, where does all of this leave International Shoe and personal jurisdiction as we have understood it for decades?

It has been just over two years since members of the Mallory majority, concurring in Ford Motor Co. v. Montana Eighth Judicial District Court, questioned whether the International Shoe framework is fit for the modern business environment, and called for a case that would allow the court to reconsider "what the Constitution as originally understood requires" in the corporate personal jurisdiction space.[22]

The Ford majority, too, reserved on internet-based claims "which may raise doctrinal questions of their own."[23] And the so-called "stream of commerce" doctrine of personal jurisdiction, often invoked in product liability cases, defies predicable application, largely

because it rests on a pair of unclear, unsatisfying plurality decisions.[24]

Mallory turned out not to be the case in which the Supreme Court went back to the drawing board. But Mallory amplifies these lurking, fundamental questions about what limitations the Constitution imposes on personal jurisdiction — even questioning which provisions of the Constitution bear on personal jurisdiction.

The Mallory plurality also evokes an expansive attitude to jurisdiction "at the time of the founding and the Fourteenth Amendment's adoption," noting that even now a state can exercise "tag" jurisdiction over a nonresident individual defendant who is served with process in the state, even if the claim arose elsewhere — and pointedly asking why a corporate defendant should benefit from "a more favorable rule, one shielding it from suits even its employees must answer."[25]

Much more to come, it seems.

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[1] Mallory v. Norfolk Southern Railway Co., 143 S. Ct. 2028 (2023).

[2] See Mallory, 143 S. Ct. at 2038-45 (plurality opinion); see also id. at 2047 (Alito, J., concurring in part and concurring in the judgment).

[3] See id. at 2065.

[4] BNSF Railway Co. v. Tyrrell, 581 U.S. 402, 413–14 (2017).

[5] Mallory, 143 S. Ct. at 2038-41 (plurality opinion); see also id. at 2048 (Alito, J., concurring in part and concurring in the judgment) ("Consent is a separate basis for personal jurisdiction").

[6] Id. at 2055, 2064-65.

[7] Id. at 2057-58.

[8] Id. at 2038-39 & n.5.

[9] Id. at 2057-58.

[10] Fuld v. Palestinian Liberation Organization, --- F.4th ----, Nos. 22-76(L)-cv, 22-496-cv(Con), 2023 WL 5808926 (2d Cir. Sept. 8, 2023).

[11] 18 U.S.C. § 2334(e).

[12] Fuld, 2023 WL 580926 at *1, 14.

[13] Id. at *9-10 & n.10; see also id at *13-14.

[14] See Supplemental Br. for the U.S. at 2-6, Fuld v. Palestinian Liberation Organization, No. 22-76(L) (2d Cir. July 26, 2023) ("Fuld"), ECF No. 220.

[15] See, e.g., Br. for Intervenor-Appellant at 22–28, 30, Fuld, ECF No. 73.

[16] See 143 S. Ct. at 2051.

[17] See id. at 2051–54.

[18] See Br. for Intervenor-Appellant, Fuld, ECF No. 73, at 39.

[19] Fuld, 2023 WL 580926 at *6, 19.

[20] Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 235 (5th Cir. 2022) (en banc), cert. denied sub nom. Douglass v. Kaisha, 143 S. Ct. 1021 (2023).

[21] Id. at 270 (Elrod, J., dissenting, joined by Graves, Higginson, Willett and Oldham, JJ.).

[22] Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017, 1034-39 & n.2 (2021) (Gorsuch, J., joined by Thomas, J., concurring in the judgment); see also id. at 1033 (Alito, J., concurring in the judgment) ("[T]here are grounds for questioning the standard that the Court adopted in [International Shoe]").

[23] Id. at 1028 & n.4.

[24] J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011); Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty., 480 U.S. 102 (1987).

[25] Mallory, 143 S. Ct. at 2047–55 (plurality opinion).