

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury
Investigation of Possible
Violations of 18 U.S.C. § 1956
and 50 U.S.C. § 1705

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Case No. 18-mc-00175-BAH
GJ No. 18-2
UNDER SEAL

Supplemental Brief Regarding Consent to Jurisdiction

In its supplemental brief, the Government argues that a [REDACTED] consent to federal jurisdiction ("Consent"), executed as part of [REDACTED] application to open a [REDACTED] branch,¹ confers jurisdiction on this Court to enforce a subpoena for documents in China concerning transactions alleged to have transited through [REDACTED] New York correspondent bank.

The argument raises two legal issues: (1) can the Consent be construed as broadly as the Government suggests? and (2) if so, does the Federal Reserve's requirement that banks provide such consents violate the "unconstitutional conditions" doctrine? [REDACTED] submits that—to avoid the constitutional problems created by an overly broad construction of the Consent—this Court should construe the Consent *not* to confer jurisdiction over [REDACTED] in the present matter.

¹ As the Court is aware, [REDACTED] opened a branch in [REDACTED]. Despite a diligent search, [REDACTED] has not located any documents indicating it consented to federal jurisdiction as part of that application. Similarly, the Government has advised that, to date, it has not located any document demonstrating that [REDACTED] consented to federal jurisdiction as part of that application.

I. The Government cannot demand that parties give up Due Process rights in exchange for obtaining a benefit or service.

A. Principles of Due Process protect parties from being haled into a court in a jurisdiction having no connection with the underlying dispute.

Federal courts follow state law in determining the bounds of their jurisdiction over persons. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). “[T]he District’s long-arm statute permits the exercise of personal jurisdiction over nonresident defendants to the fullest extent permissible under the due process clause of the United States Constitution.” *Companhia Brasileira Carburato De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1130–31 (D.C. 2012). *See also Vantage Commodities Fin. Services I, LLC v. Assured Risk Transfer PCC, LLC*, 321 F. Supp. 3d 49, 57 (D.D.C. 2018) (“The ‘transacting any business’ prong of the District’s long-arm statute has the full reach permitted by the Due Process Clause.”). Thus, in the present case, the question boils down to whether asserting jurisdiction over [REDACTED] comports with due process.

“[T]he personal jurisdiction requirement is not a structural limitation on the power of courts but a function of the individual liberty interest preserved by the Due Process Clause.” *GSS Group Ltd v. Nat’l Port Auth.*, 680 F.3d 805, 816 (D.C. Cir. 2012) (internal quotations and citations omitted). Foreign corporations like [REDACTED] have a right under the Due Process Clause not to be haled into court in a jurisdiction lacking constitutionally sufficient contacts with it or the cause of action. *GSS Group*, 680 F.3d at 816. “[T]he exercise of personal jurisdiction over a defendant is informed and limited by the U.S. Constitution’s guarantee of due process, which requires that any jurisdictional exercise be consistent with ‘traditional notions of fair play and substantial justice.’” *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625 (2d Cir. 2016). Whether or not the assertion of jurisdiction comports with due process depends on “‘the

relationship among the defendant, the forum, and the litigation.” *Daimler*, 571 U.S. at 126 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

B. Under the unconstitutional conditions doctrine, the Government cannot condition a service or benefit on the applicant’s ceding a constitutional right.

In its brief, the Government notes that personal jurisdiction is a personal right that can be waived or forfeited. (Supp. Br. at 1.) Thus, it observes, parties to a freely negotiated agreement can consent to have their disputes resolved by a particular jurisdiction. (*Id.*) (citing *Water & Sand Int’l Capital, Ltd. v. Capacitive Deionization Tech. Sys., Inc.*, 563 F. Supp. 2d 278, 283 (D.D.C. 2008)). From this, it concludes that ████████ consent to jurisdiction—executed as part of a Federal Reserve application to open a branch—is a valid waiver of its personal-jurisdiction objections.

This does not follow. Under the unconstitutional conditions doctrine, the Government cannot condition a benefit on a person’s relinquishing a valuable constitutional right. *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 604 (2013). Thus, for example, a public college cannot condition the renewal of a professor’s contract on the professor’s giving up his right to criticize the institution. See *Perry v. Sindermann*, 408 U.S. 593 (1972). Nor can the government, as a condition of approving a land-use permit, take property from the applicant without providing just compensation. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). “[T]he unconstitutional conditions doctrine provides that ‘even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.’” *Autor v. Pritzker*, 740 F.3d 176, 181 (D.C. Cir. 2014).

Applying that principle here, the Federal Reserve cannot condition its approval of a bank branch on the applicant's forfeiting its right under the Due Process Clause. The personal-jurisdiction requirement is a valuable constitutional right grounded in the Due Process Clause. It protects litigants from being haled, willy nilly, into a forum having nothing to do with the underlying dispute. It follows that the Federal Reserve cannot require a foreign bank applying to open a US branch to forfeit all personal-jurisdiction objections in any matter brought against it by the United States Government.

II. The Consent should not be read to forfeit all personal-jurisdiction objections in any matter brought by the United States Government.

This Court should not construe the Consent to have waived [REDACTED] personal-jurisdiction arguments. To begin with, the wording of the Consent leaves its scope unclear. The document states that "the Bank consents to the jurisdiction of the federal courts of the United States and of all United States governmental agencies, departments and divisions for the purposes of any and all claims made by, proceedings initiated by, or obligations to, the United States . . . in any matter arising under U.S. Banking Law." Yet it is unclear whether, by consenting to "the jurisdiction of the federal courts," [REDACTED] agreed to the jurisdiction of *all* federal courts, regardless of the jurisdiction's connection to [REDACTED] branch or to the underlying events-in-suit.

The language plausibly could be construed to consent only to the jurisdiction of *some* federal court (e.g., a federal court having a connection to the matter at issue) though not necessarily *any and every* federal court.² A limited construction such as this would ease the

² Significantly, the Consent refers to "*the* federal courts" but to "*all* United States government agencies, departments, and divisions." Had the Consent been intended to concede personal
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constitutional difficulties posed by the consent requirement—the Federal Reserve plainly has a legitimate interest in being able to take legal action against foreign banks that establish branches in this country. Construing the consent in this limited way would not, however, help the Government in the present case, which has no connection to the operations of the [REDACTED] branch or to this District.

To the extent the Consent could be construed as a blanket waiver of any personal-jurisdiction defenses against the United States, it is unenforceable. As the Government notes in its supplemental brief, foreign banks applying to open branches in the United States *must* provide the Federal Reserve with a consent to jurisdiction. (Supp. Br. at 2.) There are 94 district courts in the federal system. If the Government’s construction of the Consent were correct, the Government could pick and choose from among these 94 district courts in bringing an action against [REDACTED]—regardless of that jurisdiction’s connection to [REDACTED] branch, [REDACTED] other branches, or to the underlying facts. Under this reasoning, the Government could just as well have brought the present subpoena-enforcement action in the District of Guam as the District of Columbia.

Such a broad construction falls afoul of the unconstitutional conditions doctrine. A defendant’s right not to be haled into a court having no connection with the dispute is a valuable constitutional protection secured by the Due Process Clause. The unconstitutional conditions doctrine forbids the Government from coercing parties to give up valuable constitutional rights as a precondition for obtaining a benefit. Thus, to the extent the Consent could be construed as a

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jurisdiction in “all federal courts” for any matter whatsoever it would have, and should have, said so.

blanket waiver of personal-jurisdiction objections, it is an unconstitutional, and therefore unenforceable, condition.

The cases that the Government cites in its brief are inapposite because they involve forum-selection clauses in private, voluntary transactions. *Nymbus, Inc. v. Sharp*, 2018 WL 705003, at *3 (D. Conn. Feb. 5, 2018) (private employment agreement choosing the “federal courts of the United States of America” as forum); *SLSJ, LLC v. Kleban*, 2015 WL 1973307, at *8 (D. Conn. Apr. 30, 2015) (purchase agreement selecting Connecticut as forum); *Turner v. Sedgwick Claims Mgmt. Services, Inc.*, N.D. Ala. No. 7:14-CV-1244-LSC, 2015 WL 225495, at *2 (N.D. Ala. Jan. 16, 2015) (ERISA plan selecting the “U.S. District Court for the Eastern District of Missouri” as the exclusive forum); *Nw. Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990) (indemnification agreements had forum-selection clauses choosing Milwaukee County, Wisconsin, as permissible forum); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588 (1991) (cruise ticket choosing Florida as forum).

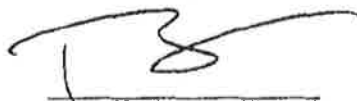
The unconstitutional conditions doctrine does not apply to private citizens and so these forum-selection cases raise no similar constitutional issues. By contrast, when it is the Government—not a private party—that requires the waiver of valuable constitutional rights as a condition for obtaining a benefit, the unconstitutional conditions doctrine applies. Notably, the Government does not cite a single case in which a court has upheld a blanket waiver of personal-jurisdiction objections imposed by a governmental entity as a condition for obtaining a government benefit. The reason is simple: unlike private parties, the Government may not use its power to coerce parties to bargain away their constitutional rights.

CONCLUSION

For all the foregoing reasons, [REDACTED] submits that, by executing the Consent in connection with its application to open a [REDACTED] branch, [REDACTED] did not waive its right to object to personal jurisdiction in this matter.

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Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2019, copies of the foregoing were served via electronic mail and via first class mail to Zia M. Faruqui, Assistant United States Attorney, c/o United States Attorney's Office, 555 4th Street NW, Room #4806, Washington, DC 20530, Zia.Faruqui@usdoj.gov.



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