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The Internet, Personal Jurisdiction, and DAOs

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Abstract

Global connectivity is at an all-time high, and sovereign state law has not fully caught up with the technological innovations enabling that connectivity. TCP/IP—the communications protocol allowing computers on different networks to speak with each other—wasn't adopted by ARPANET and the Defense Data Network until January 1983. That's only forty years ago. And the World Wide Web wasn't released to the general public until August 1991, less than thirty-five years ago. The first Bitcoin block was mined on January 3, 2009, less than fifteen years ago.

Legal doctrine doesn't develop that fast, especially in legal systems heavily based around judicial precedent like the United States. The disconnect between the global, instant connectivity that internet-based technology makes possible and traditional legal and State regulatory actors has never been more apparent. In the past year, the United States, through its administrative agencies controlled by the Executive branch, has brought numerous enforcement actions against Web3 and crypto projects. Some of these projects and their members have been based in the United States, and others have, at best, limited connections to the United States's territorial borders.

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This Essay calls attention to the way the Internet, and Web3 in particular, has raised constitutional concerns about how United States agencies approach personal jurisdiction. Understanding these constitutional limits is critical for anyone considering forming or participating in a Decentralized Autonomous Organization ("DAO"). Intentional, thoughtful consideration of the issues presented here will ensure that DAOs and their members take on legal obligations in the United States knowingly and responsibly. A corollary is also true: DAOs and their members should fully consider their possible defenses and rights when confronted with the next overreaching enforcement action.

Table of Contents

INTRODUCTION

The internet permanently changed the world, but from a legal perspective, it has not been around that long. TCP/IP—the

communications protocol allowing computers on different networks to speak with each other—wasn't adopted by ARPANET and the Defense Data Network until January 1983.[1] That's only forty years ago. And the World Wide Web wasn't released to the general public until August 1991, less than thirty-five years ago.[2] The first Bitcoin block was mined on January 3, 2009, less than fifteen years ago.[3] Suffice it to say: global connectivity grew rapidly and is at an all-time high.

But sovereign state law has not caught up with the technological innovations enabling that connectivity. Legal doctrine tends to develop slowly, and many foundational legal principles, like personal jurisdiction, have not been conclusively applied to internet-based technologies. The lack of critical precedent has not stopped regulators in the United States from aggressively bringing novel enforcement actions, especially in the crypto space.[4] Although some of these projects and their members have been based in the United States, others have, at best, limited connections to the United States's territorial borders.[5] Surprisingly little attention has been paid to whether, and on what grounds, these global companies can be fairly hauled into court in the United States.

This short Essay frames the novel business structures that exist in Web3—namely Decentralized Autonomous Organizations ("DAOs")—provides an overview of the limited precedent addressing personal jurisdiction in cases involving

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1. Kevin Meynell, *Final Report on TCP/IP Migration in 1983*, INTERNET SOC'Y (Sept. 15, 2016), https://perma.cc/SC7G-6MYU.

2. *See* Josie Fishels, *A Look Back at the Very First Website Ever Launched 30 Years Later*, NPR (Aug. 6, 2021) https://perma.cc/XDY8-TJ4Z (stating the first website was launched on August 6, 1991).

3. *See* Benedict George*, The Genesis Block: The First Bitcoin Block*, COINDESK (Jan. 3, 2023, 11:03 AM), https://perma.cc/44X6-EVQ6 (last updated Jan. 4, 2023, 12:20 PM) (describing January 3 as Genesis Day because the first Bitcoin Block was mined on January 3, 2009).

4. *See infra* Part I.C.

5. *See infra* Part I.C.; COMMODITY FUTURES TRADING COMM'N, 8680-23, CFTC CHARGES BINANCE AND ITS FOUNDER, CHANGPENG ZHAO, WITH WILLFUL EVASION OF FEDERAL LAW AND OPERATING AN ILLEGAL DIGITAL ASSET DERIVATIVES EXCHANGE (2023), https://perma.cc/HG48-Y5SB ("According to the complaint, Binance has offered and executed commodity derivatives transactions to and for U.S. persons from July 2019 through the present.").

the internet and crypto, and identifies recent enforcement actions where the principle is arguably implicated.[6] With that background, the Essay then identifies several areas where personal jurisdiction needs to be evaluated as it relates to global, internet-based companies like crypto companies.[7] Lastly, it lists some key takeaways that are worth further exploration in future litigation and may be particularly relevant to DAOs.[8]

I. BACKGROUND

A. *What is a DAO?*

Arriving at a comprehensive definition of a DAO is challenging given the flavors that these entities (or non-entities) take—their flexibility is one of the key characteristics. One standard definition is that a DAO is a "member controlled organizational structure[] that operate[s] absent a centralized authority."[9] Although commentators refute that member-controlled DAOs are similar to standard LLCs,[10] the various state laws treating DAOs like LLCs demonstrate that various parallels can be drawn between the two entity formation concepts.[11] Both LLCs and DAOs can be member controlled, and depending on state law requirements, both entity types can adopt broadly flexible rules to handle entity governance in whatever way best suits the members. One key difference is that LLC members may have limited anonymity compared to the anonymity that generally exists for self-custody users operating on a public blockchain.[12]

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6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part III.

9. DAVID KERR & MILES JENNINGS, A LEGAL FRAMEWORK FOR DECENTRALIZED AUTONOMOUS ORGANIZATIONS 2 (2021), https://perma.cc/27UM-78BX (PDF).

10. *See, e.g.*, *DAO vs LLC: What's the Difference?*, COINBOUND, https://perma.cc/8NH8-BULK (last visited Apr. 23, 2023).

11. *See, e.g.*, WYO. STAT. ANN. §§ 17-31-104 to -115 (2021); H.R. 2645, 112th Gen. Assemb. (Tenn. 2022); VT. STAT. ANN. tit. 11, § 4173.

12. *Cf.* Miles Jennings & David Kerr, *DAO Entity Features & Entity Election*, ANDREESSEN HOROWITZ (May 29, 2023), https://perma.cc/7PF3-QX7X (charting various considerations for DAO entity legal structures).

Others have specifically defined a DAO as "an unincorporated business organization that operates on blockchain software and is run directly by those who have invested in it."[13] From that perspective, a DAO is not like an LLC because it is by definition "unincorporated"—indeed, in this view, a DAO "is essentially an internet community with a shared purpose and the equivalent of a shared online bank account."[14] In this purist form, "people can raise money (potentially large amounts) and organize energy aimed at a joint project, without a formalistic corporate overlay. DAOs have no physical headquarters, offices, or bank accounts; there are no directors, hired managers, other leaders, or employees."[15] Without a legal wrapper like state LLC laws,[16] DAOs run the risk of being "considered, by default, to be a general partnership, with each member potentially having unlimited legal liability if something goes wrong."[17]

At bottom, it is too soon, and the relevant examples too diverse, to specify one definition for a DAO. For my part, DAOs appear to be a reaction to a very new problem: People and businesses scattered around the globe, interacting together online, and wanting to pursue various initiatives in a seamless cross-border way without being forced to tie their community's legal existence to one specific set of nation-state laws. Understood that way, DAOs are unique in that they are internet-native corporate governance forms created to solve a rather obvious global problem that existing legal doctrine does not adequately address.

Along those lines, DAOs "are typically facilitated by a set of governance-related smart contracts that have specified control rights with respect to the smart contracts making up the underlying [blockchain] protocol."[18] In a diverse, potentially

13. Gail Weinstein et al., *A Primer on DAOs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 27, 2022), https://perma.cc/845Z-NUB7.

14. *Id.*

15. *Id.*

16. *See, e.g.*, Jennings & Kerr, *supra* note 12 ("DAOs 'wrapped' in or 'bridged' to a legally recognized entity try to adapt the framework to the extent possible to incorporate DAO-related principles.").

17. Weinstein et al., *supra* note 13.

18. KERR & JENNINGS, *supra* note 9, at 2.

anonymous community, smart contract programmed governance reduces or eliminates trust barriers among parties that may know little to nothing about each other. The matter under consideration, the action to be taken, the vote, and the outcome are all coded on an immutable, public blockchain for all to see, making the exercise far more transparent and trustworthy for all involved.[19] To understand a specific DAO, it is necessary to look at the underlying smart contracts, identify how and on what basis a person or entity can participate (e.g., by being a holder of a certain token), and locate the relevant community channels where governance proposals are discussed (e.g., Discord, Telegram).[20]

B. *Personal Jurisdiction and International Parties*

The power of United States courts to hear disputes involving international defendants, criminal or civil, is not a new problem. But there is surprisingly little case law applying personal jurisdiction precedent to civil actions arising out of activities conducted entirely online, especially as it relates to crypto and Web3. Indeed, as recently as 2007, the Government Accountability Office noted that even investigations of cybercrime were struggling with the jurisdictional issues caused by the "borderless" nature of the internet.[21] This section provides an overview of personal jurisdiction doctrines with a

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19. *See* Weinstein et al., *supra* note 13.

> A DAO's governance and rules and the parameters for its decision-making are encoded into the blockchain software on which it runs, making management essentially self-executing (through so-called "smart contracts" created by the coding); and all of the DAO's transactions are immutably recorded on the blockchain, providing transparency to its members.

20. For a deeper, more practical dive on DAO governance, Maker DAO and Uniswap are both interesting use cases worth a closer study. *See Maker Governance Voting Portal*, MAKERDAO, https://perma.cc/63ZK-ZUN9; *Governance*, UNISWAP, https://perma.cc/R2RF-BGND.

21. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-705, CYBERCRIME: PUBLIC AND PRIVATE ENTITIES FACE CHALLENGES IN ADDRESSING CYBER THREATS 42 (2007), https://perma.cc/G6RM-BUB6 (PDF) ("Federal and state law enforcement organizations are taking steps to help them work in the borderless environment within which cybercriminals operate.").

focus on existing precedent that is relevant to DAOs and crypto generally.

First, international defendants have personal jurisdiction rights guaranteed by the United States Constitution in both federal and state court.[22] In its most basic form, the test for personal jurisdiction is well known: whether the defendant had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[23] From there, it is necessary to distinguish between general jurisdiction and specific jurisdiction.

General jurisdiction allows a United States court "to hear any and all claims against" a defendant because their "affiliations with the State" or the United States "are so "continuous and systematic" as to render them essentially at home in the forum State."[24] These are "situations where a foreign corporation's 'continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings *entirely distinct* from those activities.'"[25] In practice, very few foreign entities have ever been found to be subject to general jurisdiction in the United States.[26]

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22. *See* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 233 (5th Cir. 2022) (en banc) (holding defendant foreign corporation had "due-process-based personal-jurisdiction protections under the Fourteenth Amendment").

23. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Note that there is debate about whether this test applies under the Fifth Amendment. The most recent court to address the question concluded en banc that the same test does apply, which is consistent with the six other circuits that have considered the question. *See Douglass*, 46 F.4th at 235 ("Both Due Process Clauses use the same language and serve the same purpose, protecting individual liberty by guaranteeing limits on personal jurisdiction. Every court that has considered this point agrees that the standards mirror each other.").

24. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317).

25. Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (quoting *Int'l Shoe*, 326 U.S. at 318).

26. *See id.* at 132–33 ("As this Court has increasingly trained on the relationship among the defendant, the forum, and the litigation, *i.e.*, specific

"Specific jurisdiction, on the other hand, depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."[27] In determining the sufficiency of the contacts, courts generally ask "whether there was 'some act by which the defendant *purposefully availed* itself of the privilege of conducting activities within the forum State, thus *invoking the benefits and protections* of its laws.'"[28] Purposeful availment requires that "[t]he contacts [are] the defendant's own choice and not 'random, isolated, or fortuitous.'"[29] Foreign defendants must "deliberately reach[] out beyond [their] home—by, for example, exploiting a market in the forum State or entering a contractual relationship centered there."[30] Consistent with that understanding of purposeful availment, the Supreme Court established that "[m]ere awareness" that "components" of a product that were "manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce" is not sufficient to establish personal jurisdiction.[31]

A significant gap in personal jurisdiction precedent involves online activities like crypto and Web3, and the United States Supreme Court is aware of it. First, in *Walden v. Fiore*,[32] the Court addressed a fact pattern where the injury suffered did not

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jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.").

27. *Goodyear*, 564 U.S. at 919 (internal quotation omitted).

28. *Id.* at 924 (emphasis added) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

29. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984)).

30. *Id.* (internal quotations omitted); *see also* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984) ("Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous."). Notably, *in Keeton v. Hustler Magazine, Inc.*, the market exploitation described involved mailing magazines intentionally into the forum state in the 1980s at a time where the defendant would have had to know the geographic address of those recipients in order to deliver the magazine.

31. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 105 (1987).

32. 571 U.S. 277 (2014).

connect the allegedly unlawful activity to the forum state.[33] As the Court put it, the plaintiffs "lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where [the plaintiffs] chose to be at a time when they desired to use the funds seized by" the foreign defendant.[34] Thus, they "would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had."[35]

The Court was unpersuaded by plaintiffs' argument that such a decision would hurt future plaintiffs ability to satisfy the personal jurisdiction inquiry in tort cases involving the internet. It ultimately noted that the defendant officer did "not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State."[36] And in 2021, the Court reiterated that it was not "consider[ing] internet transactions, which may raise doctrinal questions of their own."[37]

In short, international defendants have personal jurisdiction rights rooted in the United States Constitution.[38] Unless there is either general or specific jurisdiction over the international defendant, United States courts are powerless to hear the case.[39] How this fact-intensive analysis intersects with the borderless, free-flowing nature of the internet remains

33. *See id.* at 279–81 (addressing plaintiffs' allegation that an officer violated their Fourth Amendment rights when he seized cash from them in Georgia during their return trip to Nevada and kept the money after he concluded it did not come from drug-related activity).

34. *Id.* at 290.

35. *Id.*

36. *Id*. at 290 n.9.

37. *Ford Motor Co.*, 141 S. Ct. at 1039 n.4. It is worth noting that the oral argument in *Ford Motor* addresses internet-based hypotheticals at several points, and it is instructive to see how the advocates attempted to address the role of the internet in the personal jurisdiction analysis. *See* Oral Argument, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2020) (No. 19-368), https://perma.cc/D6EQ-39Q7.

38. Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 233 (5th Cir. 2022) (en banc).

39. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923–24 (2011).

unclear. But prior caselaw points to international defendants needing to have done more than simply put their product or service online in a way that a U.S. resident could access.

C. *Recent Enforcement Actions Against Crypto Companies*

Litigation related to Web3 and crypto is on the rise as these technologies become more ingrained in businesses and ordinary peoples' day-to-day lives. Although some recent cases involved private party litigation,[40] this Essay focuses on four United States government civil enforcement actions that implicate personal jurisdiction. As seen below, the level of detail in the allegations related to personal jurisdiction varies significantly.

1. Commodity Futures Trading Commission v. Ooki DAO[41]

The Commodity Futures Trading Commission ("CFTC") filed a civil complaint against Ooki Dao alleging it's "an unincorporated association comprised of holders of Ooki Tokens (or of BZRX Tokens, when . . . [it] was doing business as the bZx DAO) who have voted those tokens to govern (e.g., to modify, operate, market, and take other actions with respect to) the Ooki Protocol (formerly named the bZx Protocol)."[42] There are very few allegations tying Ooki DAO Token holders to the United States. The CFTC's one limited allegation is that "bZeroX offered any user anywhere in the world (including in the United States) the ability to trade on the bZx Protocol and, specifically, did not take any steps to exclude U.S. persons . . . from the bZx Protocol."[43]

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40. *See, e.g.*, Yuga Labs, Inc. v. Ripps, No. CV 22-4355, 2023 WL 3555645 (C.D. Cal. Apr. 21, 2023); Norris v. Brady, No. 1:23-cv-20439, 2023 WL 3065648 (S.D. Fla. Apr. 24, 2023).

41. No. 22-cv-05416, 2022 WL 17822445 (N.D. Cal. Dec. 20, 2022). The former case name was d/b/a bZx DAO.

42. Complaint para. 11, CFTC v. Ooki Dao, No. 22-cv-05416, 2022 WL 17822445 (N.D. Cal. Dec. 20, 2022) [hereinafter Ooki Dao Complaint].

43. *Id.* para. 35; *accord id.* para. 41(e).

2. SEC v. Terraform Labs PTE Ltd.[44]

The Securities and Exchange Commission ("SEC") filed a civil complaint against Terraform Labs PTE Ltd. and Do Hyeong Kwon, alleging that they "offered and sold crypto asset securities in unregistered transactions and perpetuated a fraudulent scheme that led to the loss of at least forty billion dollars of market value, including devastating losses for U.S. retail and institutional investors."[45] Terraform Labs PTE Ltd. "is a private company registered and headquartered in Singapore."[46] Do Kwon was "a resident of Korea and Singapore" at the time of the alleged activities.[47] The SEC identified several connections to the United States by Terraform Labs, including (1) having "numerous employees located in the United States, including its General Counsel, Head of Research, and Director of Special Projects"; (2) "operat[ing] a website available in the United States"; and (3) meeting "through its authorized representatives . . . with investors in the United States to offer and sell Terraform's crypto asset securities."[48] For Do Kwon, the SEC generally stated that he "traveled to the United States on behalf of Terraform to market, offer, and sell Terraform's crypto asset securities."[49] In the sole paragraph specifically directed to personal jurisdiction, the SEC asserts that "[d]efendants engaged in conduct within the United States that constituted significant steps in furtherance of the violations of the federal securities laws alleged in this Complaint, even if some of the transactions at issue may have occurred outside the United States and involved foreign investors."[50] Additionally, the SEC contends that "[d]efendants, whether within or outside of the United States, engaged in conduct that had a foreseeable substantial effect within the United States."[51]

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44. No. 23-cv-1346, 2023 WL 4858299 (S.D.N.Y. July 31, 2023).

45. Complaint para. 1, SEC v. Terraform Labs PTE Ltd., No. 23-cv-1346, 2023 WL 4858299 (S.D.N.Y. July 31, 2023) [hereinafter Terraform Complaint].

46. *Id.* para. 15.

47. *Id.* para. 16.

48. *Id.* para. 15.

49. *Id.* para. 16.

50. *Id.* para. 19.

51. *Id.*

3. Commodity Futures Trading Commission v. Zhao[52]

The CFTC filed a civil complaint against five legal entities related to one of the world's largest crypto exchanges, Binance, alleging generally that Binance "solicited and accepted orders" for CFTC regulated "futures, options, swaps, and leveraged retail commodity transactions involving digital assets that are commodities including bitcoin ("BTC"), ether ("ETH"), and litecoin ("LTC") for persons in the United States."[53]

The defendants named in the complaint are Changpeng Zhao, the CEO of Binance, who is a Canadian citizen and "currently resides in Dubai, United Arab Emirates";[54] Samuel Lim, Chief Compliance Officer of Binance through January 2022, who likely "resides in Singapore";[55] Binance Holdings Limited, which "is incorporated in the Cayman Islands and directly or indirectly owned by Zhao";[56] Binance Holdings (IE) Limited, which "is incorporated in Ireland and directly or indirectly owned by Zhao";[57] and Binance (Services) Holdings Limited, which is also "incorporated in Ireland" and "enter[s] into contracts with vendors, as well as a company called Ality Technologies DE LLC that functions as Binance's 'U.S. Tech/Ops Hub.'"[58]

An entire section of the complaint (ten paragraphs) is dedicated to "Binance's Presence in the United States" and itemizes the way Binance "solicit[ed] and interact[ed] with U.S. customers";[59] "employed at least 60 people in the United States";[60] "actively solicited customers in the United States through its marketing efforts on numerous social media applications";[61] knew "that U.S. customers trade on the platform," and "Zhao has personally interacted with Binance's

52. No. 23-cv-01887 (N.D. Ill. filed March 27, 2023).

53. Complaint para. 2, CFTC v. Zhao, No. 23-cv-01887 (N.D. Ill. filed March 27, 2023) [hereinafter Zhao Complaint].

54. *Id.* para. 14.

55. *Id.* para. 18.

56. *Id.* para. 15.

57. *Id.* para. 16.

58. *Id.* para. 17.

59. *Id.* para. 74.

60. *Id.* para. 73.

61. *Id.* para. 72.

U.S. customers";[62] generated reports related to "the effectiveness of Binance's efforts to capture the U.S. market";[63] participated in events in the United States, including conferences, and hosted "networking and social events";[64] "procured professional services from U.S.-based law firms, compliance consultants, and other vendors concerning various aspects of its business operations";[65] sought intellectual property protection in the United States;[66] and launched a spot market U.S. subsidiary that Zhao controlled.[67] Lastly, the CFTC detailed the ways Binance and its personnel worked to engage U.S. persons on the futures-related platform, including helping them evade internal controls intended to prevent their access.[68] The CFTC seeks sweeping relief to prohibit Binance's activities from continuing in the U.S. market,[69] as well as an order requiring "full restitution by making whole each and every customer or investor whose funds were received or utilized by [defendants] in violation of the provisions of the Act."[70]

4. SEC v. Bittrex Inc.[71]

On April 17, 2023, the SEC filed a civil complaint against three legal entities related to the Bittrex crypto exchange, alleging that Bittrex was operating an unregistered securities exchange "through which U.S. customers can buy, sell, and trade crypto assets."[72] The defendants named in the complaint are Bittrex Inc., a Delaware corporation "with its principal place of business in Seattle, Washington";[73] Bittrex Global GmbH,

62. *Id.* para. 75.
63. *Id.* para. 76.
64. *Id.* para. 78.
65. *Id.* para. 79.
66. *Id.* para. 80.
67. *Id.* para. 81.
68. *See id.* para. 2–3.
69. *See id.* para. B., at 71.
70. *Id.* para. F., at 73.
71. No. 23-cv-00580, 2023 WL 4866373 (W.D. Wash. July 31, 2023).
72. Complaint para. 1, SEC v. Bittrex Inc., No. 23-cv-00580, 2023 WL 4866373 (W.D. Wash. July 31, 2023) [hereinafter Bittrex Complaint].
73. *Id.* para. 16.

which "is a limited liability company organized under the laws of Liechtenstein";[74] and William Hiroaki Shihara, co-founder of Bittrex, who is a "a resident of Redmond, Washington."[75] The complaint says little specifically about personal jurisdiction over Bittrex Global, alleging generally that: (1) "Bittrex personnel provide services to Bittrex Global from" Washington state; (2) Bittrex Global is a subsidiary of a different Delaware corporation; (3) "Bittrex personnel in the United States provide a variety of services to Bittrex Global pursuant to service agreements between Bittrex and Bittrex Global"; and (4) Bittrex provided "Bittrex Global with the technology to operate its trading platform, including a single matching engine and order book that Bittrex Global shares with Bittrex, both of which are maintained by Bittrex personnel in the United States."[76] Indeed, there is no allegation that U.S. residents directly interacted with Bittrex Global. Instead, the SEC alleges that, on the backend, Bittrex and Bittrex Global combined orders received "into a single, shared order book"[77] that allows for matching of orders between customers of the two separate companies.[78] The SEC seeks broad relief in the form of disgorgement, civil penalties, and an injunction against Bittrex Global prohibiting it "from continuing to use means or instrumentalities of interstate commerce to accept orders in crypto asset securities from U.S. persons, without registering with the SEC."[79]

As these four examples show, there are widely different approaches to pleading personal jurisdiction in cases involving international crypto and Web3 entities. The most barebone example comes from the CFTC and involves the most complicated entity: Ooki DAO. By contrast, the most sophisticated pleading which also comes from the CFTC involves one of the largest crypto companies currently in existence: Binance.[80]

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74. *Id.* para. 17.

75. *Id.* para. 18.

76. *Id.* para. 17.

77. *Id.* para. 100.

78. *Id.* para. 102.

79. *Id.* para. 12.

80. The foreign defendants in Binance have moved to dismiss the complaint due to lack of personal jurisdiction. *See* Brief in Support of Biance Holdings Limited, Biance Holdings (IE) Limited, Biance (Services) Holdings

II. PERSONAL JURISDICTION JURISPRUDENCE AND U.S. AGENCIES APPLICATION OF IT HAS NOT KEPT PACE WITH THE INTERNET'S DEVELOPMENT

The high-profile civil actions filed by U.S. government agencies against crypto and Web3 companies help highlight the uncertainty that exists around personal jurisdiction, international defendants, and the internet. A few quick reminders. Federal agencies are treated just like private plaintiffs when they file civil lawsuits—there is one civil action, and the same basic rules apply to all civil cases filed in federal court.[81] And personal jurisdiction needs to be raised as part of a defendant's first responsive filing, typically a motion to dismiss.[82] At that point, "it is the plaintiffs' burden to establish the court's jurisdiction in response to a Rule 12(b)(2) personal jurisdiction challenge by a defendant."[83]

After those familiar starting points, all bets are off when it comes to how to apply substantive personal jurisdiction precedent to international Web3 and crypto companies. At one end of the spectrum, federal agencies push the idea that merely publishing an internet website *that is accessible* to U.S. persons is sufficient to establish minimum contacts for an international defendant with the United States. Indeed, in the CFTC action against the Ooki token holders, that is essentially the only concrete allegation tying Ooki Dao to the United States—there are no allegations that any of the token holders even live in the

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Limited, and Changpeng Zhao's Motion to Dismiss at 9–15, CFTC v. Zhao, No. 23-cv-1887 (N.D. Ill. July 27, 2023).

81. *See* FED. R. CIV. P. 2 ("This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure . . . ."); *id.* 12(b)(2) (providing that parties may move to dismiss for "lack of personal jurisdiction").

82. *See e.g.*, Blessing v. Chandrasekhar, 988 F.3d 889, 898 (6th Cir. 2021) (providing that "a defendant who wishes to raise a defense to the court's personal jurisdiction must do so when he makes his first defensive move" (internal quotation omitted)). It should also be noted that personal jurisdiction runs to each defendant individually, so one defendant may assert the defense even if another defendant does have minimum contacts with the United States sufficient to establish jurisdiction over them.

83. Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 287 n.8 (2022).

United States—and it is one of only a handful of allegations the SEC made against Terraform Labs PTE Ltd. [84]

Notably, the argument about whether mere publication to the internet is enough was debated by the United States Supreme Court at oral argument for *Ford Motor Co. v. Montana Eighth Judicial District*,[85] although the Court refused to decide the issue.[86] In a hypothetical about buying a used car in one state and transferring it to another state where harm occurs, counsel for the foreign defendant agreed that personal jurisdiction would not exist if someone just "saw [the car] on the Internet through, you know, a classified ad" and elected to cross state lines to get the car.[87] That response is expected from a defendant's counsel, but somewhat surprisingly, the plaintiffs' counsel agreed that publishing a website alone would not be enough. When a hypothetical was given about "a product that is produced in somewhat limited quantities" and "advertised on the [i]nternet"—"[t]hat's the only way anybody learns about it"—the plaintiffs' lawyer agreed there would be no personal jurisdiction "unless the seller has deliberately target[ed] and cultivated a market in that forum."[88] In short, both sides in a recent personal jurisdiction case appeared to agree that simply selling a product on the internet, which is available globally, is not sufficient to establish specific personal jurisdiction.

From there, the analysis predictably gets a lot more complex and case specific. In their more thorough pleadings, the U.S. agencies have noted things like (1) advertising and marketing in the United States; (2) attending conferences in the United States; (3) meeting with prospective clients in the United

84. *See* Ooki Dao Complaint, *supra* note 42, para. 35 (stating that bZeroX "offered any user anywhere in the world (including in the United States) the ability to trade on the bZx Protocol and, specifically, did not take any steps to exclude U.S. persons"); Terraform Complaint, *supra* note 45, para. 15 (suggesting that "operat[ing] a website available in the United States" is sufficient to create jurisdiction). At its most extreme, the CFTC arguably takes the view that a foreign company's affirmative failure to block U.S. users is relevant to establish personal jurisdiction. *See* Ooki DAO Complaint, *supra* note 42, para. 35, 41(e). If that is the CFTC's view, it is entirely inconsistent with the purposeful availment standard discussed in Part I.B.

85. 141 S. Ct. 1017 (2021); *see also* Oral Argument, *supra* note 37.

86. *See Ford Motor Co.*, 141 S. Ct. at 12 n.4.

87. Oral Argument, *supra* note 37, at 7:15–8:13.

88. *Id.* at 41:41–42:13.

States; (4) retaining consultants or entering into service agreements with U.S. companies; (5) hiring U.S. employees of various sorts; (6) commingling customer orders or data as part of a single backend or service for a global company;[89] (7) generating reports about the success in the U.S. markets; (8) knowing that U.S. persons used the platform; (9) seeking intellectual property protections in the U.S.; and (10) not blocking or prohibiting U.S. persons from accessing the platform.[90] In many respects, this non-exhaustive list simply identifies various ways any international company might encounter the United States in the course of doing business.

The lack of clarity around personal jurisdiction and the internet also risks parties and courts conflating subject matter jurisdiction and the presumption against extraterritoriality with the personal jurisdiction analysis. In *Terraform*, the SEC included such an allegation in the paragraph of their complaint addressing personal jurisdiction over the foreign defendants: "Defendants, whether within or outside of the United States, engaged in conduct that had a foreseeable substantial effect within the United States."[91] That allegation flows directly from 15 U.S.C. § 78aa, which provides the statutory basis for federal court jurisdiction over the relevant offenses and addresses extraterritorial jurisdiction. This Essay does not opine on the presumption against extraterritoriality,[92] but suffice it to say that the presumption is largely irrelevant to, and certainly does not override, a civil defendant's constitutionally protected right to only be subject to suit in a court that has personal jurisdiction over them.[93]

89. *See, e.g.*, Bittrex Complaint, *supra* note 72, para. 100.

90. *See, e.g.*, Zhao Complaint, *supra* note 53, para. 72–76, 78–80.

91. Terraform Complaint, *supra* note 45, para. 19.

92. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (providing the basis for the modern presumption against extraterritoriality doctrine). Whether a federal statute applies to foreign conduct and entities at all is a separate question from whether the United States Constitution permits the relevant lawsuit against the international defendant at all.

93. *See* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 234–36 (2022) (discussing the history behind the individual right to personal jurisdiction).

III. INITIAL TAKEAWAYS FOR EXISTING AND PROSPECTIVE DAOS

Non-U.S. crypto and Web3 companies may all have viable personal jurisdiction defenses in any case filed against them in the United States, whether by private litigants or a U.S. government agency. DAOs in particular, however, raise interesting issues worth considering.

First, DAOs should consider on the front end how to address litigation before it arises. In many ways, time is of the essence when served with a lawsuit, and that is especially true in terms of evaluating a personal jurisdiction defense. Regardless of whether the DAO has a legal wrapper, governance rules should be reviewed to ensure they permit a swift response and provide a process to allocate responsibilities and decision making appropriately. Personal jurisdiction defenses are fact intensive and require close coordination with attorneys in a way that can be more difficult in a decentralized environment, depending on the size and scale of the membership.

Second, the CFTC's approach in *Ooki Dao* is notable for unincorporated DAOs that do not have a legal wrapper. Depending on the facts and circumstances, each member of an unincorporated association may be personally and individually liable for the full amount of damages in a case. Additionally, for personal jurisdiction, each member stands separately.[94] Indeed, in an unincorporated DAO, each token holder may consider whether they have taken any action (e.g., voting, engaging in marketing) that would potentially subject them to jurisdiction in the United States. If they have not taken such an action individually, that token holder may have a stronger personal jurisdiction defense than other holders.

Third, recall the varied list of possibly relevant facts identified from the four recent crypto complaints filed by US agencies.[95] That list highlights another key aspect of personal jurisdiction jurisprudence—namely, a plaintiff's claims "must arise out of or relate to the defendant's contacts with the

94. *See, e.g.*, Donna Phillips Currault, *Properly Formed Unincorporated Associations Should Have Their Own Citizenship*, FED. LAW., Aug. 2018, at 5–6, https://perma.cc/2W48-JJLL (PDF) (describing the history of personal jurisdiction as applied to unincorporated associations).

95. *See supra* notes 89–90.

forum."[96] And as the United State Supreme Court recently repeated, "[i]n the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum."[97] Specific personal jurisdiction is not a death-by-a-thousand-cuts doctrine—there has to be a real connection between the international defendant's activities in the United States and the claims brought in the lawsuit.

The allegations from *Terraform* help illustrate the point. Whether the United States employees referenced in the complaint were (1) directly employed or contractors with limited scope and authority, and (2) involved in the unregistered offering and sale of securities alleged by the SEC are questions to be asked, and jurisdictional discovery may be needed to determine the answers. With respect to meetings in the United States by "authorized representatives," questions exist on the face of the complaint as to who those representatives were, who did they meet with specifically, what relationship did they have with Terraform, and what instruction Terraform provided to these individuals.[98] Answering those types of questions will quickly show whether personal jurisdiction does or does not exist over these foreign entities.

Lastly, as the *Binance* and *Terraform* complaints reflect, marketing and advertising are often the hooks for establishing personal jurisdiction in the United States over global companies.[99] To the extent the content targets U.S. consumers, this includes social media posts on platforms such as Twitter, Instagram, Telegram, and Discord. Because DAOs are flexible and often a loosely affiliated collection of individuals, governance rules may want to contemplate authorization processes to engage in these activities. More study would be needed, but DAOs that do not want to inadvertently be found to have targeted the U.S. market should evaluate ways to avoid having the actions of an individual member imputed to the

96. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (internal quotations omitted).

97. *Id.* at 1026.

98. Terraform Complaint, *supra* note 45, para. 15.

99. *See* Zhao Complaint, *supra* note 53, para. 72–81; Terraform Complaint, *supra* note 45, para. 16.

entire collective where appropriate governance processes were not followed.

* * *

This Essay is intended only to give a brief overview of personal jurisdiction in the United States; identify the current gaps in precedent that make international, internet-based projects difficult to analyze; and provide some initial thoughts for consideration by the most novel of governance approaches in crypto and Web3 DAOs. Far more research needs to be done, and personal jurisdiction is just one area of debate in the increasingly cross-border, globalized world.