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SUBSTANTIVE DUE PROCESS AND U.S. JURISDICTION OVER FOREIGN NATIONALS

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The due process rights of suspected terrorists have played a major role in the debate about how best to engage terrorist entities after September 11, 2001. Does citizenship or immigration status have a bearing on the treatment of terrorists? Does location within or outside the United States matter? This Article explores the connection between citizenship and alienage, enemy status, allegiance, and due process rights against a backdrop of international law. It surveys the application of due process to citizens and aliens based on the location of misconduct within or outside the territory of the United States and notes the expansion of criminal law to cover ever more extraterritorial conduct, including that of noncitizens who otherwise have no connection to the United States. It concludes by suggesting that the fairness of a particular exercise of extraterritorial criminal jurisdiction might be determined by looking at the nature of the obligation that a defendant owes to the state based on international law.

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INTRODUCTION

Debates about the optimal approach to defeating terrorist organizations after September 11, 2001, have included some elements of discord regarding the rights of suspected terrorists—aliens as well as citizens—both inside the United States and abroad. This Article explores the connection between citizenship and alienage, enemy status, allegiance, and due process rights. It surveys the application of due process to citizens and aliens based on the location of misconduct within or outside the territory of the United States and notes the expansion of criminal law to cover ever more extraterritorial conduct, including that of noncitizens who otherwise have no connection to the United States. Historically, citizenship has been thought of as the relationship of an individual to a sovereign government, encompassing the obligations of each to the other. The citizen enjoyed the protection of the government and its laws in return for his allegiance and obedience to the laws. The relationship between the state and aliens, on the other hand, was defined more in terms of obligations between the state and the alien's home state.

Citizenship (or nationality) was once seen as the essential link between individuals and the law of nations, because states—rather than individuals—were considered the subjects of international law, and it was only through the individual's relationship to a state that he could enjoy any benefits under the law of nations.[1] Statelessness was considered a substantial encumbrance; stateless individuals were essentially at the mercy of all states in whose territories they might find themselves, without the ability to call on the protection of a home state to obtain redress.

The intertwined concepts of allegiance and protection were not, however, limited to citizens; there was also a territorial element stemming from the basic international rule that a state generally has the exclusive authority to regulate conduct in its territory. Although they continued to owe allegiance to the native state, aliens in the territory of a host state owed "local allegiance" to the sovereign in return for the temporary protection of the laws of the land. If the state on whose territory the alien resided denied him equal protection of the law, technically it would be in breach of its obligations toward the alien's state of nationality rather than toward the alien himself. As a practical matter, aliens could enjoy equal protection of the host state's laws, making it potentially difficult to distinguish aliens from citizens in terms of rights they enjoyed or obligations they owed. Of course, there was never any requirement under international law that aliens enjoy all of the privileges of citizens, such as the right to participate in government, for example. International law may have been indifferent to the privileges that citizens and other categories of nationals enjoyed under domestic law, but it did operate to protect aliens from unfair treatment at the hands of local officials.[2]

1. 2 OPPENHEIM'S INTERNATIONAL LAW § 291 (Hersch Lauterpacht ed., 7th ed. 1952).
2. *Id.* § 293.

This Article traces the historical incorporation of these international law concepts into domestic law, beginning with the development of due process for aliens of various classes in U.S. territory. It then addresses the effect of war on the relationship of individuals to the United States, followed by a discussion of the development of due process rights extraterritorially. Finally, it surveys the expansion of U.S. criminal law to cover extraterritorial conduct.

I. DUE PROCESS FOR ALIENS ON U.S. TERRITORY

That aliens in U.S. territory enjoy the protection of U.S. law is well established. There was considerable discussion on the subject during the crisis and the Quasi-War involving the French Republic at the end of the eighteenth century.[3] During the summer of 1798, Congress enacted a series of national security measures known collectively as the Alien and Sedition Acts,[4] which included the Alien Act[5] and the Sedition Act,[6] as well as the Alien Enemy Act.[7]

The Alien Act empowered the president to deport any noncitizen whom he judged to be "dangerous to the peace and safety of the United States" or suspected to be engaged in any "treasonable or secret machinations" against the government.[8] Expelled aliens convicted of having returned to the United States without a license were subject to imprisonment for such time as the president deemed necessary for the public safety.[9] Outside of such a conviction, the Act did not permit summary detention, but the law was nonetheless controversial. Part of the debate surrounding the Alien Act questioned the extent to which the Bill of Rights covers "alien friends" on U.S. territory. Opponents argued that such aliens within the United States are entitled to due process of law and the same protection from the government as citizens. Therefore, aliens suspected of being disposed to engage in plots to overthrow the social order or to take part in other insurrectionist activities[10] should be tried in court rather than summarily deported.[11] Proponents argued that aliens within the United States owed

3. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 52–54 (1996).

4. Congress also amended the Naturalization Act to extend the residency requirement from five to fourteen years. Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802). For the text of the Alien and Sedition Acts and historical papers documenting the debates surrounding their passage, see *Alien and Sedition Acts*, LIBR. OF CONGRESS (Nov. 13, 2013), http://www.loc.gov/rr/program/bib/ourdocs/Alien.html.

5. Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800).

6. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

7. Alien Enemy Act, ch. 67, § 1, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2006)).

8. Alien Act § 1, 1 Stat. at 571.

9. *Id.* § 2.

10. For a description of rumored plots that were cited in support of the legislation, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 61–62 (1951).

11. The bill did not address preventive detention, except on conviction of returning without permission. Some opponents of the bill nevertheless warned that its passage would inevitably lead to similar treatment of citizens who were suspected of being dangerous to national security. *See, e.g.*, 8 ANNALS OF CONG. 1980–82 (1798).

merely temporary allegiance to the United States and were therefore not entitled to the same rights as citizens, and that all governments have the right to deport aliens who pose a danger.[12] The bill passed along regional lines,[13] but was never enforced, although some aliens left the country under their own volition.[14] The Alien Act expired in 1800.

The view that aliens on U.S. territory owe only a temporary allegiance to the United States, but nevertheless enjoy equal protection of the laws, appears to have prevailed. That "persons" under the Fifth Amendment[15] includes citizens and aliens within the United States is well settled.[16] While courts have sometimes suggested that only aliens with lawful permanent residence status are entitled to due process protection,[17] the Supreme Court has in fact found that the Due Process Clause extends to all aliens within the United States, even those whose presence is "unlawful, involuntary, or transitory."[18] The level of process that is due varies according to the

12. *See, e.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533, 534 (Jonathan Elliot ed., Washington, 2d ed. 1836) (response of the Commonwealth of Massachusetts to the Virginia Resolutions) (declaring the Alien and Sedition Acts to be constitutional and "expedient and necessary," and asserting that the Alien Act "respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States, who are entitled only to a temporary protection while they yield a temporary allegiance—a protection which ought to be withdrawn whenever they become 'dangerous to the public safety'").

13. *See* MILLER, *supra* note 10, at 53 (noting that support for the legislation came mainly from northern states). Virginia and Kentucky passed resolutions declaring the Alien Act and the Sedition Act to be unconstitutional. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 12, at 528 (response of James Madison to the Virginia Resolutions of 1798); *id.* at 540–41 (Thomas Jefferson's original draft of the Kentucky Resolutions of 1798 and 1799).

14. MILLER, *supra* note 10, at 188.

15. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

16. *See generally* 2 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 24:8 (3d ed. 2013) (describing protection as it applies to aliens).

17. *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining the view that constitutional rights extending to all "persons" or the "accused" apply universally to persons under U.S. jurisdiction, but other protections applicable to "the people" apply only to those who have developed significant ties to the United States).

18. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (holding that no executive officer may "arbitrarily . . . cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States"); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that aliens may not be incarcerated as punishment for immigration violations without regular criminal process).

substantive right for which protection is sought, however, and such rights may vary according to citizenship and immigration status.[19]

Aliens who have not acquired any domicile or residence in the United States are generally entitled to very little process to determine whether they should be permitted to enter the country.[20] Although covered by the Due Process Clause, an alien seeking entry at a port of arrival is not constitutionally entitled to a judicial hearing, even if claiming to be a U.S. citizen.[21] The distinction between due process protections accorded to "deportable," compared to "excludable" aliens, for purposes of removal hearings, has thus traditionally been stark.[22] Under the "entry fiction," excludable (now called "inadmissible") aliens are deemed to be standing at the border of U.S. territory,[23] even if they have been paroled into the country[24] or have previously been admitted to the United States and lived there many years.[25] Deportable aliens are those who have entered the country but have become ineligible to remain.[26] The U.S. Supreme Court has held that excludable aliens seeking entry into the United States are not entitled to the same due process prior to being removed that applies to aliens who have achieved entry.[27] Whatever process Congress sees fit to

19. *Diaz*, 426 U.S. at 78 ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification."); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 (1987) (finding that aliens in the United States are entitled to due process of law and equal protection under Fifth and Fourteenth Amendments, although reasonable distinctions may be made between citizens and aliens).

20. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953) (upholding long-term detention of aliens on Ellis Island seeking admission into the country); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (holding that aliens outside the country seeking admission are entitled to only that process determined by Congress to be due).

21. *See generally* United States v. Ju Toy, 198 U.S. 253 (1905).

22. Landon v. Plasencia, 459 U.S. 21, 24–25 (1982) (explaining that U.S. immigration laws created two types of proceedings in which aliens could be removed from this country: deportation hearings for aliens who had entered the country and exclusion hearings for those seeking initial admission into the United States). Aliens subject to deportation generally were granted greater substantive rights than excludable aliens. *Id.* The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) changed the rules governing removal hearings. Pub. L. No. 104-208, 110 Stat. 3009-546.

23. In *Zadvydas v. Davis*, the Supreme Court concluded that the indefinite detention of deportable aliens would raise significant due process concerns, while distinguishing the case from one in which an excludable alien is subject to detention. *Zadvydas*, 533 U.S. at 689. The Court interpreted a statute governing the removal of deportable and inadmissible aliens as only permitting the detention of aliens following an order of removal for so long as is "reasonably necessary to bring about that alien's removal from the United States." *Id.*

24. Gisbert v. U.S. Attorney Gen., 988 F.2d 1437 (5th Cir. 1993) (holding that excludable aliens may be subject to indefinite detention if their removal cannot be effectuated).

25. *See Mezei*, 345 U.S. at 213.

26. *See* 8 U.S.C. § 1229a (2012).

27. *Zadvydas*, 533 U.S. at 693.

provide to excludable aliens satisfies the Due Process Clause.[28] It bears emphasis that it is Congress's authority to admit aliens or exclude them, and the alien's lack of a substantive right to be present in the United States, that brings about this distinction. An excludable alien nevertheless has other life, liberty, or property interests with respect to which he would likely be accorded at least some due process.[29] Further, he certainly could not be punished without the full benefits of a criminal trial.[30]

II. WARTIME TREATMENT OF CITIZENS AND ALIENS

During periods of war, the obligations of individuals to their states of nationality take on greater importance. Aliens acquire further status distinctions—that of alien friend or enemy, as well as civilian versus combatant.

A. Enemy Aliens

The greatest historical distinction in terms of due process among citizens and classes of aliens in the United States arises in the context of war, in the treatment of enemy aliens—that is, citizens of a country with which the United States is at war.[31] The Alien Enemy Act, unlike the Alien Act, engendered no disagreement in Congress when it was first enacted, and it is the only one of the Alien and Sedition Acts that remains on the books, practically unchanged. The law of war permits the internment of enemy civilians and combatants and the confiscation of their property, regardless of whether the alien demonstrated any actual hostility. Allegiance to the home country is simply presumed and, therefore, such detentions or confiscations serve the wartime aim of disabling the enemy.[32] This rule has

28. *See* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States v. Ju Toy, 198 U.S. 253 (1905).

29. *Cf.* Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment."). Arriving and excludable aliens are protected at least against conduct that "shocks the conscience." *See* Rosales-Garcia v. Holland, 238 F.3d 704, 731 (6th Cir. 2001) (dictum) ("[I]t would indeed shock the conscience to permit the INS to shoot or to torture a person seeking entry into the United States . . . ."), *vacated on other grounds sub nom.* Thomas v. Rosales-Garcia, 534 U.S. 1063 (2001); Wang v. Reno, 81 F.3d 808 (9th Cir. 1996) (finding that an alien paroled into the United States was included under the Fifth Amendment and protected from government conduct that "shock[s] the conscience"); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1272 (D. Utah 2003) (holding that, even in the absence of Fourth Amendment restraints on law enforcement officers, previously removed alien felons will have protections against abusive police actions).

30. Wong Wing v. United States, 163 U.S. 228 (1896).

31. 50 U.S.C. § 21 (2006).

32. *See* Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from

been ameliorated somewhat by treaty; alien enemies are to be given adequate time to depart the country upon the outbreak of war.

International law formerly denied enemy aliens judicial standing, preventing their access to the courts.[33] Although this is no longer the case,[34] enemy aliens present in the United States may be interned[35] or deprived of property by summary administrative proceeding.[36] Interned aliens are entitled to contest their status as enemy aliens by means of habeas corpus.[37] The Supreme Court found that an enemy alien may be deported without the ordinary due process accorded to noncitizens in deportation proceedings in the United States, even after hostilities have ended.[38] In contrast, while the Supreme Court effectively permitted the wartime internment of U.S. citizens based on their Japanese descent,[39] it also held that a concededly loyal U.S. citizen could not be detained in a relocation camp, which suggests that due process must be provided in order to permit such a detainee to contest disloyalty.[40]

B. Wartime Obligations of Citizens and Inhabitants

War also affects the obligations of citizens and inhabitants, and not just by levying extra taxes or imposing conscription. Belligerents have traditionally imposed on those under their jurisdiction the obligation to refrain from trade with enemy countries and persons, no matter how benign any particular transaction may seem. Transactions intended to assist the enemy could expose those owing allegiance to the sovereign (even temporarily) to charges of aiding the enemy or even treason. Like the internment of enemy persons and confiscation of enemy property, the prohibition of commerce is aimed at depriving the enemy of resources conducive to war.

Arguably, a state of war in which hostilities take place within the United States eliminates due process rights of any enemy fighter, whether a foreign invader or a citizen who has taken up arms against the government during a

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commission of hostile acts imputed as his intention because they are a duty to his sovereign.").

33. 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 100a.

34. *Ex parte* Kawato, 317 U.S. 69 (1942) (holding that an enemy alien was permitted to bring suit against an American company to claim unpaid wages); 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 100a (explaining that this rule had virtually vanished by World War I).

35. *See Eisentrager*, 339 U.S. at 775.

36. Silesian Am. Corp. v. Clark, 332 U.S. 469, 475 (1947).

37. United States *ex rel*. De Cicco v. Longo, 46 F. Supp. 170 (D. Conn. 1942) (finding that internees have the right to habeas corpus to assert U.S. citizenship); *see Eisentrager*, 339 U.S. at 775 ("Courts will entertain [an interned enemy alien's] plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act.").

38. Ludecke v. Watkins, 335 U.S. 160 (1948).

39. Korematsu v. United States, 323 U.S. 214 (1944). The Court upheld a conviction for violating the exclusion order and did not address the citizen's right to due process in connection with relocation or detention. *Id.*

40. *Ex parte* Endo, 323 U.S. 283 (1943).

serious rebellion.[41] With the exception of those who are associated with a foreign or breakaway government at war with the United States,[42] the principle that war replaces civil law with military law has been historically limited to the actual scene of hostilities and areas that are declared hostile territory[43] (e.g., states that joined the Confederacy during the Civil War) and does not extend to regions remote from hostilities where the civil government is not deposed.[44]

The harsh consequences for wartime enemies may have been ameliorated in recent years, when the Supreme Court declined to extend the alien enemy doctrine, as described in *Johnson v. Eisentrager*,[45] to cover suspected enemy combatants (who are not technically enemy aliens) detained by the United States in an area subject to its jurisdiction overseas.[46] Some lower courts were willing to permit detention of "enemy combatants" within the United States, whether citizens[47] or aliens,[48] without requiring much due

41. WESTEL W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 513 (1912) ("[I]n war the enemy, be he a foreign one, or a rebel to whom the status of belligerent has been given, has no legal rights which those opposed to him must respect."). Occupying forces in hostile territory are likewise not subject to local civil laws. Dow v. Johnson, 100 U.S. 158, 165 (1879) (noting that when Union "armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts").

42. *Ex parte* Quirin, 317 U.S. 1 (1942) (finding that even enemy belligerents within the United States, including both enemy aliens and a U.S. citizen, had a right to contest their status via a petition for a writ of habeas corpus).

43. *See* WILLOUGHBY, *supra* note 41, at 513.

> When a civil contest becomes a public war, all persons living within limits declared to be hostile become *ipso facto* enemies, and subject to treatment as such.
>
> Different conditions prevail, however, in loyal districts. In these the existence of war does not operate to destroy or suspend the civil rights of the inhabitants.
>
> Upon the actual scene of war, there is no question that, for the time being, the military authorities are supreme, and that these may do whatever may be necessary in order that the military operations which are being pursued may succeed.

Id. (footnote omitted).

44. *See id.* at 514–15 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)); *see also Milligan*, 71 U.S. (4 Wall.) at 121, 139–42 (rejecting the government's contention that the president's determination as to the region of military operations was conclusive); CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 342 (2004) ("Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place.").

45. 339 U.S. 763, 782 (1950) (rejecting the contention that nonresident enemy aliens engaged in hostilities against the United States were "persons" within the meaning of the Fifth Amendment and had the right to access the courts to petition for a writ of habeas corpus).

46. Boumediene v. Bush, 553 U.S. 723 (2008); Rasul v. Bush, 542 U.S. 466 (2004). Similarly, an alien designated for sanctions as a "Specially Designated Global Terrorist" is able to contest such designation as a violation of due process so long as the alien has sufficient presence in the United States. *See, e.g.*, Al-Aqeel v. Paulson, 568 F. Supp. 2d 64 (D.D.C. 2008) (finding that an alien had sufficient contacts to have standing to argue a Fifth Amendment claim, but the claim was dismissed because the plaintiff had received notice and an opportunity to be heard).

47. *See* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y.) (rejecting the notion that a citizen suspected of being an "enemy combatant" was entitled to no due

process, but the Supreme Court has not validated this view. A Court plurality opinion in *Hamdi v. Rumsfeld* rejected the notion that a citizen captured on the battlefield can be detained without due process,[49] while at the same time suggesting that the process due to such a citizen might fall short of procedures accorded at a criminal trial.[50] Despite the plurality's repeated reference to the fact that the petitioner was a U.S. citizen detained on U.S. soil, lower courts have applied its due process reasoning in cases

process, but finding that due process requires only that the government present "some evidence" in support of the allegation), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004). The government in that case sought to deny the petitioner, a U.S. citizen, the ability to meet with counsel in order to present factual evidence to rebut the allegations. The judge ordered otherwise. From there, the case took a course that brought it before two circuit courts and the Supreme Court, but it was never resolved definitively on the merits. *See* Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (finding that a U.S. citizen captured abroad and held as an "enemy combatant" is entitled to due process of law, which was not satisfied by a government declaration standing alone, but suggesting that the declaration was deficient in some respects and might otherwise have sufficed), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004). The Fourth Circuit reversed, holding that no factual inquiry or evidentiary hearing was necessary to sustain the government's authority to detain the citizen under these circumstances. *Hamdi*, 316 F.3d 450.

48. *See* Al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006), *rev'd en banc sub nom*. Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated and remanded sub nom.* Al-Marri v. Spagone, 555 U.S. 1220 (2009) (mem.); Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005) (denying summary judgment and distinguishing between citizen and alien enemy combatants). In *Al-Marri ex. rel. Berman v. Wright*, the district court held that the government had satisfied its burden of proving the detainee to be an enemy combatant by submitting an affidavit based on hearsay. The appellate court, sitting en banc, was sharply divided, but the controlling opinion remanded the case for a factual determination using a higher level of due process than had been initially adopted by the district court or was urged by the government. The Supreme Court granted certiorari, but the case was made moot when the government transferred al-Marri to the criminal court system for prosecution. Al-Marri v. Pucciarelli, 555 U.S. 1066 (2008).

49. *Hamdi*, 542 U.S. at 533 (O'Connor, J.) (plurality opinion) (stating that due process requires that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); *id.* at 553–54 (Souter, J., concurring in part).

50. Justice O'Connor wrote in *Hamdi* that the exigencies of the circumstances may allow for a tailoring of enemy combatant proceedings "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," possibly allowing hearsay evidence and "a presumption in favor of the Government's evidence," as long as a fair opportunity to rebut such evidence is provided. *Id.* at 533–34 (O'Connor, J.) (plurality opinion). Justice Souter, joined by Justice Ginsburg, agreed that Hamdi was entitled to due process, including the right to counsel, but did not agree with the suggestion that "the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas." *Id.* at 553–54 (Souter, J., concurring in part) (citations omitted). Justices Scalia and Stevens would have found the full trappings of a criminal trial necessary in the absence of a suspension of the writ of habeas corpus, and in any event, did not believe the Court should engage in legislating alternative procedures. *Id.* at 554, 576 (Scalia, J., dissenting). Justice Thomas alone would have accepted the government's view that it need only show "some evidence" in order to establish that detention is warranted, arguing that the federal government's war powers cannot be "balanced away by this Court" and that only Congress should be able to "provide for additional procedural protections." *Id.* at 579 (Thomas, J., dissenting).

involving aliens alleged to be enemy belligerents, both within the United States and abroad.[51]

III. EXTRATERRITORIAL APPLICATION OF THE DUE PROCESS CLAUSE

Many once thought that the Constitution applied only on U.S. territory, at least the parts of it that set forth the rights of the governed.[52] That strictly territorial understanding has not been static, however, and may yet be evolving.

Any inquiry into the status of constitutional rights abroad must start with the *Insular Cases*,[53] in which the Supreme Court at the turn of the twentieth century examined the application of the Constitution on newly acquired territories and possessions. The crucial distinction was whether the territory in question was destined to be incorporated as a state in the Union or whether U.S. sovereignty there was meant to be temporary.[54] In the latter case, the territory was deemed "unincorporated" and only "fundamental" constitutional rights attached.[55] Although the reasoning for the incomplete attachment of constitutional rights to unincorporated territories had much to do with what were viewed as the less developed political societies formed by the native inhabitants of these territories,[56] the failure to extend constitutional rights affected U.S. citizens present in the territories as much as it did the noncitizen inhabitants.[57]

Broadly speaking, two schools of thought have emerged on the matter of the extraterritorial application of the Constitution. According to one view, the United States is considered a limited government that derives its existence and all of its powers from the Constitution.[58] It would follow that

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51. *See, e.g.*, Latif v. Obama, 677 F.3d 1175, 1179 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465 (D.D.C. 2005), *vacated by* Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009).

52. *In re* Ross, 140 U.S. 453 (1891) (holding that the constitutional right to indictment, grand jury, or jury trial do not apply to a U.S. citizen tried by a U.S. consular court abroad); *see* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 85 (2009) (describing the legal landscape at the beginning of the twentieth century as one in which some questioned why "*all* of the powers, but only *some* of the rights" under the Constitution extended to U.S. territories overseas that were not destined to join the union as a state).

53. Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dowdell v. United States, 221 U.S. 325 (1911); Rassmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 138 (1904); Kepner v. United States, 195 U.S. 100 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

54. *Downes*, 182 U.S. at 271.

55. *Dorr*, 195 U.S. at 144–148; *see* RAUSTIALA, *supra* note 52, at 83–86 (describing the doctrine of incorporation).

56. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 958–62 (1991).

57. *Id.* at 943.

58. *See* NEUMAN, *supra* note 3, at 6.

the Constitution "follows the flag"; whenever or wherever these powers are exercised, they are subject to all of the limitations contained in the Constitution.[59] A second school of thought regards the Constitution as a "social contract" between the government and the governed, in which it is emphasized that certain rights pertain to "the people" but do not extend beyond members of the exclusive community.[60]

A. Citizens Abroad

In 1891, the Supreme Court stated in *In re Ross*:

> By the constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country.[61]

Thus, up until the World War II era, American citizens could be tried overseas by a consular or extraterritorial court,[62] or, in areas subject to military occupation, by military tribunal,[63] apparently without the ordinary constitutional provisions guaranteed in criminal trials.[64]

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59. The four dissenting justices in the *Downes v. Bidwell* case, the first of the *Insular Cases*, took this view. *Downes*, 182 U.S. at 358 (Fuller, C.J., dissenting).

60. *See* Neuman, *supra* note 56, at 913.

61. *In re Ross*, 140 U.S. 453, 464 (1891) (citation omitted). The writ of habeas corpus was nevertheless available, and the case was not one in which a person was punished without any process at all. *Id.*

62. The United States created extraterritorial courts through treaties with trade partners, who were regarded as having less civilized legal systems, in order to gain access to foreign societies without subjecting American traders to the risk of what were perceived as barbaric and unfair trials. *See* RAUSTIALA, *supra* note 52, at 20–21. Although the consular courts were for the most part disbanded by the time the U.S. District Court for China was established in 1906, that court continued to consider *Ross* controlling as to the constitutional rights that defendants could assert before it. *Id.* at 68–71. The U.S. District Court for China was abolished in 1943 pursuant to a treaty with China. Treaty and an Accompanying Exchange of Notes Between the United States of America and China Respecting the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.-China, art. 1, Jan. 11, 1943, 57 Stat. 767. The United States finally relinquished all claims to consular jurisdiction in 1956, by which time the consulate in Morocco was the only one that continued to exercise consular jurisdiction over Americans. Joint Resolution Approving the Relinquishments of the Consular Jurisdiction of the United States in Morocco, U.S.-Morocco, Aug. 1, 1956, 70 Stat. 773.

63. Madsen v. Kinsella, 343 U.S. 341 (1952).

64. *Id.* at 359, 360 n.26 (describing due process protections in occupation courts, suggesting that the Fifth Amendment's inapplicability to cases arising in the land or naval forces led to a difference in protections); Neely v. Henkel, 180 U.S. 109, 122 (1901) (finding that a U.S. citizen to be tried in Cuba under U.S. military occupation was not entitled to "fundamental guaranties of life, liberty, and property embodied in [the Constitution] . . . [because] those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country," although that foreign country was under U.S. military occupation at the time).

A series of Supreme Court cases in the 1950s cast considerable doubt on that proposition, although the Court did not expressly overrule the line of cases supporting it.[65] In *Reid v. Covert*,[66] the Court reversed its own opinions from the previous term[67] and overturned the convictions of two civilian wives of military officers who were tried by military tribunals overseas for their husbands' murders. Justice Black wrote for himself and three others:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[68]

The opinion established that civilians could not be tried for capital crimes without the full panoply of due process standards guaranteed by the Bill of Rights, at least outside of areas of ongoing military operations or occupation.[69] The holding was soon expanded to cover noncapital cases and crimes involving civilian employees of the armed services.[70] Due

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65. In *Reid v. Covert*, Justice Black, writing for a plurality, considered *Ross* to be "one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today." Reid v. Covert, 354 U.S. 1, 10 (1957) (Black, J.) (plurality opinion). He distinguished *Madsen* on the basis that it "concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas, the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not." *Id.* at 35 n.63. Justice Black also suggested that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion." *Id.* at 14.

66. 354 U.S. 1.

67. *Id.* at 5 (withdrawing opinions in Kinsella v. Krueger, 351 U.S. 470 (1956), and Reid v. Covert, 351 U.S. 487 (1956)). Justices Frankfurter and Harlan concurred in the result. Justice Harlan described the reasoning in those two cases as holding that the government's choice of court-martial to try the women satisfied due process because it was "reasonable" in light of their connection with the military. *Id.* at 66 (Harlan, J., concurring).

68. *Id.* at 5–6 (Black, J.) (plurality opinion).

69. *Id.* at 35 n.63 (distinguishing *Madsen* based on the circumstances of military occupation). *Reid* invalidated Article 2(a)(11) of the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. §§ 801–946 (2012), which brought under the purview of military jurisdiction civilians accompanying the armed forces outside of the United States or its territories subject to treaty with the host country. Article 2(10) of the UCMJ covers "persons serving with or accompanying" the armed forces in the field "in time of declared war or a contingency operation." 10 U.S.C. § 802(a)(10). This provision remains good law, although the reasoning in *Reid* may call it into question, at least with respect to citizens. *See* United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012) (finding that an alien contractor working for the U.S. government was not entitled to avoid a military trial under the Fifth Amendment), *cert. denied*, 133 S. Ct. 2338 (2013).

70. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (extending *Reid* to prohibit court martial of a civilian employee of the Army for a noncapital offense); Grisham v. Hagan, 361 U.S. 278 (1960) (extending *Reid* to prohibit court martial of a civilian

process rights under the Fifth Amendment clearly now seem applicable to U.S. citizens abroad.[71]

B. Aliens Abroad

Based on Supreme Court statements suggesting that aliens gain constitutional rights upon entering the country and thereafter forming a link with the community, one might conclude that aliens abroad enjoy no constitutional protections. Yet the Supreme Court has never squarely affirmed that this is the case.[72] In at least one sense, foreign nationals with no connection to the United States are protected by due process; they cannot be subject to lawsuits in a state in which they have not formed "minimum contacts" by purposefully directing activity toward it.[73] There may be due process implications when the United States asserts jurisdiction over aliens for conduct abroad that has little or no effect on the United States.[74] It has never been held that aliens brought involuntarily to the United States for criminal trial may be denied due process of law because of their lack of positive connections with the United States. In one case involving an alien tried by a U.S. court in Berlin, the defendant was held to be entitled to a jury trial and other constitutional rights.[75] Aliens not subjected to the U.S. judicial system involuntarily, however, have had little success bringing suit against the United States for injuries suffered overseas.[76]

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employee of the Army for a capital offense); Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234 (1960) (applying *Reid* to a noncapital case involving a civilian dependent).

71. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 cmt. b (1987) ("The Constitution governs the exercise of authority by the United States government over United States citizens outside United States territory, for example on the high seas, and even on foreign soil."). U.S. citizens are not, however, protected from being transferred to a foreign government for trial, even if that government does not apply the same procedural rights guaranteed by the Constitution. *See, e.g.*, Munaf v. Geren, 553 U.S. 674 (2008); Neely v. Henkel, 180 U.S. 109 (1901).

72. *But see* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)); *Verdugo-Urquidez*, 494 U.S. at 269 ("Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

73. Asahi Metal Indus. v. Super. Court, 480 U.S. 102 (1987) (holding that the Due Process Clause of the Fourteenth Amendment, which requires due process on the part of states, is violated by a state court asserting jurisdiction over a foreign defendant lacking minimum contacts with the forum state). Arguably, the due process right at issue applies at trial in the United States and does not actually extend abroad. RAUSTIALA, *supra* note 52, at 245–46.

74. *See infra* Part IV; *see also* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 5 (2012).

75. United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

76. *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976) (citing *Eisentrager*, 339 U.S. at 776, among other cases) (stating the general rule that aliens have no standing to sue in U.S. courts and naming three exceptions). A later ruling by the D.C. Circuit called this decision into question. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 65–68 (D.C. Cir. 2011), *vacated by* 527 F. App'x 7 (D.C. Cir. 2013) (vacating in light of intervening case law on the extraterritorial reach of the Alien Tort Statute from Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)); *see also* El-Shifa Pharm. Indus. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (finding that the owners of a chemical plant

In *Johnson v. Eisentrager*,[77] the Supreme Court addressed whether alien enemies captured abroad and held in U.S.-occupied territory overseas could challenge their convictions by military commission. Reversing the appellate court below, the Court held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[78] In so holding, the Court rejected the lower court's extension of constitutional protections to nonresident alien enemies that were denied to resident alien enemies,[79] and remarked:

> If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.[80]

Still, the Supreme Court's opinion in *Reid* less than a decade later seemed to reject the strictly territorial theory of the Constitution in favor of one in which executive branch officials operate under constitutional restraints even when operating overseas. Although the justices were careful to limit their opinions to action taken against U.S. citizens abroad, none endeavored to clarify why U.S. officials should operate under fewer constitutional restraints with respect to aliens. Some lower courts have applied the *Reid* reasoning to cases involving aliens abroad,[81] construing *Eisentrager* as limited to wartime enemies.[82]

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destroyed due to a suspected connection with a terrorist organization were barred from seeking compensation by the political question doctrine); Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008) (finding that an Uzbek citizen whose cafeteria was destroyed at the behest of the U.S. government lacked significant ties to the United States and thus had no standing to bring a case under the Takings Clause of the Fifth Amendment).

77. 339 U.S. 763 (1950).

78. *Id.* at 785.

79. *Id.* at 784.

80. *Id.*

81. *See* Cadenas v. Smith, 733 F.2d 909 (D.C. Cir. 1984) (finding that an alien overseas was entitled to challenge governmental interference with her property); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (holding that an alien had standing to bring constitutional claims with respect to U.S. government conduct abroad), *abrogated by* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

82. *See, e.g.*, *Cadenas*, 733 F.2d at 915 ("It is beyond peradventure that a foreign nonresident, non-hostile alien may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States actions."). The D.C. Circuit distinguished *Eisentrager* as having to do with "rights of aliens during periods of war involv[ing] considerations not present here." *Id.* at 916.

Pointing in the opposite direction is the 1990 case *United States v. Verdugo-Urquidez*,[83] in which the Supreme Court addressed the Fourth Amendment rights of aliens abroad. In determining that such rights do not apply to aliens lacking significant ties to the United States for searches or seizures that take place abroad (even if the alien himself is present within the United States), the majority distinguished between Fourth Amendment rights, which apply to "the people," and other amendments that apply to "persons," like the Fifth Amendment.[84] Chief Justice Rehnquist applied a social contract theory to reason that the "the people" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[85] At the same time, the majority suggested that Fifth Amendment rights do not apply to aliens extraterritorially.[86] Although he joined the majority opinion, Justice Kennedy appeared to disagree with the view that aliens abroad are necessarily denied due process rights, pointing out that aliens subject to trial in the United States are entitled to due process, even if they were brought from overseas involuntarily.[87] In dissent, Justice Brennan argued that the defendant should be entitled to the Fourth Amendment protections because of involuntary ties, as the government sought to hold him accountable under U.S. law.[88]

In the 2008 case *Boumediene v. Bush*,[89] the Court ruled, in a five-to-four opinion, that the constitutional privilege of habeas corpus extends to those detained at the Guantánamo Bay detention facility.[90] In so holding, the

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83. 494 U.S. 259.

84. *Id.* at 265.

85. *Id.*

86. *Id.* at 268–71 (describing *Eisentrager* as having rejected "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States").

87. *Id.* at 278 (Kennedy, J., concurring) ("I do not mean to imply, and the Court has not decided, that [aliens brought from overseas to stand trial] have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."). The majority distinguished the Fifth Amendment privilege against self-incrimination as a trial right, while a Fourth Amendment violation occurs at the scene of an unreasonable search or seizure. *Id.* at 264 (Rehnquist, C.J.).

88. *Id.* at 284–85 (Brennan & Marshall, JJ., dissenting) (emphasizing mutuality of obligations as essential to fairness). Justice Brennan further noted that:

> The "sufficient connection" is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations," such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.

Id. at 283–84 (citations omitted); *see also id.* at 297–98 (Blackmun, J., dissenting) (agreeing with Justice Brennan's dissent, but disassociating from that opinion insofar as it applied to a broader context beyond the exercise of sovereign authority over aliens).

89. 553 U.S. 723 (2008).

90. *Id.* at 732.

Court stated that the Constitution's extraterritorial application turns on "objective factors and practical concerns."[91] These practical considerations were seen as a common thread weaving from the *Insular Cases*, through *Ross*, to *Eisentrager* and *Reid*.[92] The Court rejected the government's formalist interpretation of *Eisentrager* under which the question of habeas jurisdiction was said to turn on whether the detainees were held in a territory over which the United States was sovereign.[93] It was enough that the United States exercised exclusive jurisdiction and control over the naval base.

The Court deemed at least three factors relevant in assessing the extraterritorial scope of the constitutional writ of habeas: (1) the citizenship and status of the detainee and the adequacy of the status determination process; (2) the nature of the site where the person is seized and detained; and (3) practical obstacles inherent in resolving the prisoner's entitlement to the writ.[94] Although the Court did not clarify which constitutional rights other than the privilege of habeas corpus would extend to the detainees, the first factor suggests that at least some aliens detained abroad have due process rights.[95] Otherwise, they would have no right to a status determination process in the first place.[96]

Lower courts have interpreted the above cases as affording constitutional due process rights to aliens abroad only to the extent that they have formed sufficient positive ties with the United States.[97] The D.C. Circuit has

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91. *Id.* at 764.

92. *Id.* at 756–64. The majority was also troubled by the separation-of-powers implications that the government's approach created, which it said would mean "that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint." *Id.* at 765.

93. Guantánamo Bay is held by the United States under a lease between the United States and Cuba, which states "Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control.'" *Id.* at 753 (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, Art. III, T.S. No. 418).

94. *Id.* at 766.

95. *Cf. id.* at 781 ("The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context."); *id.* at 785 ("Although we make no judgment whether the [procedures used at Guantánamo to ascertain the status of detainees], satisfy due process standards, we agree . . . that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact.").

96. *But see* Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (finding that detainees at a U.S.-controlled prison in a war zone were not entitled to petition for a writ of habeas corpus, notwithstanding the fact that procedures for establishing belligerent status fell short of those found insufficient in *Boumediene*).

97. *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2012) (holding that an alien who voluntarily departed from the United States with the intention to return to continue her studies had developed sufficient ties to the country to assert a due process violation against the government agency that prevented her return by placing her name on a "no-fly" list); Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008) (holding that an alien with no substantial connection to the United States has no right to assert a Fifth Amendment takings claim for property destroyed overseas); Hoffmann v. United States, 17

maintained that the Fifth Amendment does not apply to aliens or foreign entities without presence or property in the United States,[98] unless the alien or entity is forced to defend itself in a U.S. court.[99] At least one appellate court has suggested that *Boumediene* may apply a functional approach to all cases in which an alien asserts an extraterritorial constitutional violation, including alleged violations of the Due Process Clause,[100] while others have limited *Boumediene*'s application to the Suspension Clause.[101]

IV. EXTRATERRITORIAL APPLICATION OF U.S. CRIMINAL LAW

Early in U.S. history, criminal laws were, for the most part, territorial.[102] Criminal laws applied to conduct taking place, at least in part, in the territory of the United States or having some territorial effect. A presumption remains against extraterritoriality for criminal laws in cases where Congress does not express its intent,[103] but a surprising number of

F. App'x 980 (Fed. Cir. 2001) (finding that a foreign national who failed to establish substantial connections to the United States could not maintain takings claim against the United States for failure to return artwork taken from Germany during the allied occupation after World War II).

98. Ali v. Rumsfeld, 649 F.3d 762, 770 (D.C. Cir. 2011) (noting that the Fifth Amendment has not been clearly established as prohibiting torture of aliens detained by the United States during hostilities overseas, resulting in qualified immunity for alleged torturers); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (determining that noncitizen detainees wrongfully held at Guantánamo lacked significant ties to the United States and were not protected by the Due Process Clause), *vacated and remanded per curiam*, 559 U.S. 131 (2010), *reinstated as modified per curiam*, 605 F.3d 1046 (D.C. Cir. 2010); Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009) (holding that Guantánamo detainees are not entitled to Fifth Amendment protections); 32 Cnty. Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (finding that a foreign entity wishing to challenge its designation as a "foreign terrorist organization" is not entitled to due process rights); Harbury v. Deutch, 233 F.3d 596, 604 (D.C. Cir. 2000) (finding that a Guatemalan citizen allegedly tortured and murdered by CIA affiliates abroad was not entitled to Fifth Amendment rights), *rev'd on other grounds sub nom.* Christopher v. Harbury, 536 U.S. 403 (2002); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

99. GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 816 (D.C. Cir. 2012) ("[S]ince [the foreign corporation] has been forced to appear in the United States, at least for that limited purpose, it is entitled to the protection of the Due Process Clause." (footnote omitted)).

100. *Ibrahim*, 669 F.3d at 997 (rejecting the government's proposed "bright-line 'formal sovereignty-based test'" under which "any alien, no matter how great her voluntary connection with the United States, immediately loses all constitutional rights as soon as she voluntarily leaves the country").

101. El Shifa Pharm. Indus. v. United States, 607 F.3d 836, 848–49 (D.C. Cir. 2010) (distinguishing the Suspension Clause from others in that it describes a role for the judiciary); *Rasul*, 563 F.3d at 531; Doe v. United States, 95 Fed. Cl. 546 (2010) (finding that *Boumediene* does not apply to the Fifth Amendment's Takings Clause).

102. United States v. Smiley, 27 F. Cas. 1132, 1134 (C.C.D. Cal. 1864) (No. 16,317) ("Except in [certain cases where Congress has provided for jurisdiction in foreign territory], the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive."); *cf.* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

103. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent

criminal statutes now expressly extend to conduct overseas.[104] The presumption may also be overcome if the nature and purpose of a statute indicate that Congress intended it to apply outside of the United States.[105]

At first, the extension of criminal jurisdiction overseas was largely limited to the conduct of citizens abroad under the "nationality" principle of jurisdiction under international law, the constitutionality of which was never in doubt.[106] Increasingly, however, jurisdiction over conduct overseas has found additional support through the principles of "passive personality" and "protection," where the victim is a national of the United States or the crime affects U.S. national interests, respectively, even though the perpetrator may be a foreign national. The "universality principle" permits extraterritorial jurisdiction over offenses that are considered to affect all nations, such as piracy. In some instances, consistent with our treaty obligations, jurisdiction may be founded solely on the fact that a suspect is later found or brought into the territorial jurisdiction of U.S. courts, without the crime necessarily having any connection to or effect in the United States.[107]

Under the United States' view of the international legal requirements, the exercise of jurisdiction over an offense that occurs in the territory of another state must be "reasonable."[108] The most commonly invoked constitutional ground for determining the validity of an exercise of extraterritorial jurisdiction in the criminal context, however, is the Due Process Clause of the Fifth Amendment. A small number of defendants have succeeded in

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appears, is meant to apply only within the territorial jurisdiction of the United States.' This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

104. *See* Doyle, *supra* note 74 (cataloging criminal statutes with extraterritorial application).

105. United States v. Bowman, 260 U.S. 94 (1922).

106. Blackmer v. United States, 284 U.S. 421, 437 (1932) ("With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power." (footnotes omitted)).

107. Some crimes related to terrorism fall into this category. *See, e.g.*, 18 U.S.C. § 32 (2012) (stating that the willful destruction of registered U.S. aircraft in foreign territory is subject to U.S. jurisdiction); *id.* § 831 (stating that a foreign transaction of nuclear materials implicating U.S. interests is subject to U.S. jurisdiction); *id.* § 1203 (stating that taking U.S. nationals hostage in a foreign country creates U.S. jurisdiction).

108. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987) ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."). Other states may take a different view. *See* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 342 (2012) (noting that the "reasonableness" test seems to be "almost exclusively a creature of U.S. antitrust jurisprudence").

having their cases dismissed on this basis,[109] or because statutes are interpreted, under the *Charming Betsy* doctrine,[110] in such a way as to comply with international law.[111] On the other hand, where Congress has explicitly provided for extraterritorial application of criminal statutes, courts do not question whether such provisions exceed any standard under international law.[112]

Some of the circuit courts have developed varying tests for determining when an exercise of extraterritorial jurisdiction violates due process. The Ninth Circuit requires a nexus between the United States and the circumstances of the offense,[113] without which a prosecution may be deemed arbitrary or unfair.[114] No such nexus requirement need be met, however, if the offenders were arrested on a stateless vessel on the high seas, apparently due to the absence of comity issues with other sovereigns and the notion that those sailing on flagless ships have forfeited protections under international law.[115] The nexus requirement is also vitiated where a

109. *See, e.g.*, United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006).

110. Under the *Charming Betsy* doctrine, Congress is presumed to intend its legislation to comply with international law unless its intent to act otherwise is clear. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .").

111. United States v. Ali, 885 F. Supp. 2d 17, 33–34 (D.D.C. 2012) (dismissing conspiracy to commit piracy charge as unfounded under international law defining universal jurisdiction), *aff'd in part*, 718 F.3d 929, 942 (D.C. Cir. 2013).

112. United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("[The defendant] seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.").

113. United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987) ("There was substantial evidence that the drugs were bound ultimately for the United States. Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction to arrest and try the offenders.").

114. United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("'In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.'" (quoting *Yousef*, 327 F.3d at 112)); *Perlaza*, 439 F.3d at 1160-61; United States v. Moreno-Morillo, 334 F.3d 819, 828 (9th Cir. 2003); United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998) ("[T]o satisfy the strictures of due process, the Government [must] demonstrate that there exists 'a sufficient nexus between the conduct condemned and the United States such that the application of the statute [to the conduct of an alien committed abroad] would not be arbitrary or fundamentally unfair to the defendant.'" (quoting United States v. Medjuck, 48 F.3d 1107, 1111 (9th Cir. 1995))); United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

115. United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) ("[W]here a defendant attempts to avoid the law of *all* nations by travelling on a stateless vessel, he has forfeited these protections of international law and can be charged with the knowledge that he has done so.").

treaty obligates the United States to prosecute certain crimes,[116] even if the alien defendant is from a nation not party to that treaty.[117]

The Second Circuit has also adopted an approach reliant on a determination of the nexus of an offense to the United States, which is found whenever the activity in question is aimed at causing harm within its territory.[118] The Fourth Circuit has followed suit.[119] The nexus test is said to perform the same function that the minimum contacts test serves in civil litigation—that is, to determine whether a defendant should "reasonably anticipate being haled into court" in the United States.[120]

Other circuits have rejected the nexus requirement and analyzed jurisdiction based on "fundamental fairness."[121] Some courts have determined fundamental fairness by inquiring whether an exercise of extraterritorial jurisdiction comports with international law principles.[122] Others apparently find dispositive the possibility that a prosecution might impinge on the interests of a foreign state.[123] In these courts, competing state interests apparently trump any analysis of individual rights when it comes to weighing fundamental fairness.

116. United States v. Shi, 525 F.3d 709, 723 (9th Cir. 2008).

117. United States v. Ali, 718 F.3d 929, 945 (D.C. Cir. 2013) (construing *Shi* as holding that an international convention provides global notice that certain generally condemned acts are subject to prosecution by any party to the treaty and that due process requires no more).

118. *Al Kassar*, 660 F.3d at 118 ("When Congress so intends, we apply a statute extraterritorially as long as doing so does not violate due process. 'In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.' For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests." (quoting *Yousef*, 327 F.3d at 86)); *Yousef*, 327 F.3d at 111–12.

119. United States v. Mohammad-Omar, 323 F. App'x 259 (4th Cir. 2009).

120. United States v. Klimavicius–Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

121. *See, e.g.*, United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) (rejecting the sufficient nexus requirement); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) (finding that where conduct occurred on the high seas and the flag nation consents to jurisdiction, "no due process violation occurs in an extraterritorial prosecution under [the criminal statute] when there is no nexus between the defendant's conduct and the United States"); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("To satisfy due process, our application of the [criminal statute] must not be arbitrary or fundamentally unfair."); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (rejecting the sufficient nexus test and noting that there was "nothing fundamentally unfair" about the defendant's prosecution).

122. *See* United States v. Ibaruen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) (finding that the exercise of jurisdiction over a stateless vessel did not offend international principles and therefore comported with due process); Stigall, *supra* note 108, at 361 (citing *Cardales*, 168 F.3d 548).

123. *See* Stigall, *supra* note 108, at 367 (describing the practice of the Third Circuit in *Martinez-Hidalgo* and *Perez-Oviedo*).

CONCLUSION

As the courts inevitably confront more foreign defendants caught in the web of antiterrorism laws, challenges to jurisdiction on due process grounds will likely swell. The Supreme Court has yet to review the doctrinal paradox that the Due Process Clause seems to provide the greatest protection to persons who are said to enjoy the fewest due process protections.[124] Perhaps the time is ripe for the Supreme Court to reassess its approach in this regard.

The Court has recently renewed its commitment to the presumption against extraterritoriality,[125] while also embracing a more pragmatic approach to determining how the Constitution applies abroad.[126] A return to historical considerations based on international law conceptions of the meaning of citizenship might serve to satisfy both the formalist and functionalist sides of the debate.

This approach would reconnect the lost link between allegiance and protection that remained perceptible until the second half of the last century. Extraterritorial jurisdiction over an alien would be presumed reasonable in the case of conduct that breaches an obligation on the part of the alien or his state of nationality. Such an obligation could arise from treaty or from the general obligation to refrain from injuring another sovereign or its nationals. Most cases in which a sufficient nexus can be established under the current approach of some circuits would likely satisfy this requirement. Crimes that are subject to universal jurisdiction would continue to apply universally. On the other hand, if the statute in question is more akin to a prohibition on trading with the enemy—in other words, where the government mobilizes the people to support its foreign policy—foreigners outside the United States would not be expected to pitch in. Under this view, sanctions laws would only apply to those persons within the United States and to those persons abroad who purposefully avail themselves of U.S. markets. This would not necessarily lessen the effectiveness of U.S. sanctions policies; it would merely sharpen the distinction between the targets of sanctions and those obliged to assist the United States in carrying them out. In the case of actual hostilities, enemy individuals would not be expected to act as if in allegiance to the United States, but would be subject to greatly reduced due process in the event of a deprivation of liberty interest, albeit in accordance with the protections of international law.

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124. A number of commentators have criticized this development. *See, e.g.*, Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997).

125. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

126. Boumediene v. Bush, 553 U.S. 723 (2008).