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## Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law

**ABSTRACT.** From the early days of the Republic, courts have encountered the question of whether and to what extent provisions of the Constitution establishing individual rights have force beyond the borders of the United States—that is, whether the Constitution has “extraterritorial” force. Despite nearly two centuries of decisions on this issue, the law remains unsettled, and no framework for analyzing these claims is clearly defined, much less well established. This Essay draws on that body of decisions to develop an approach for evaluating whether a particular constitutional provision should have overseas application in a particular case. In so doing, it considers competing theories of the Constitution—one envisioning the document as a “compact” between the government and the governed, and the other construing it as a charter from which “organically” flow both the power of the government and the limitations of that power—and how these competing theories shape views on whether constitutional provisions should have force abroad. The question of extraterritorial applicability has arisen in numerous contexts in our history, including continental expansion, colonial administration, and conventional war. In modern times, however, we see it raised most often in the context of criminal prosecutions and antiterror operations. Because the focus of this Essay is on contemporary criminal prosecutions, it examines the basis in international law for a nation to prosecute individuals residing beyond its borders. It then discusses the body of law addressing the question of extraterritorial application and, avoiding a rigid, dogmatic theory, gleans from these decisions a set of considerations that can guide future decisionmaking in this complex area of law.

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## **FEATURE CONTENTS**

<b>INTRODUCTION</b>	1662
<b>I. COMPETING PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF CONSTITUTIONAL RULES</b>	1664
A. The Compact Theory of the Constitution	1665
B. The Organic Theory of the Constitution	1667
C. The Compact and Organic Theories Expressed by the Supreme Court	1669
<b>II. THE AUTHORITY OF NATIONS TO PROSECUTE INDIVIDUALS RESIDING BEYOND THEIR BORDERS</b>	1671
A. Jurisdiction over Conduct Abroad	1671
B. Jurisdiction over Individuals Found Abroad	1680
<b>III. DECISIONS ADDRESSING THE EXTRATERRITORIAL APPLICATION OF U.S. CRIMINAL PROCEDURE UNDER THE CONSTITUTION</b>	1682
<b>IV. A FRAMEWORK FOR IDENTIFYING THE CONSTITUTIONAL CONSTRAINTS THAT GOVERN THE INVESTIGATION, PROSECUTION, AND PUNISHMENT OF INDIVIDUALS LOCATED ABROAD</b>	1697
A. Powers Available Abroad but Not at Home	1698
B. Connection to the United States	1701
C. Risk of Irreparable Injustice	1704
D. Practical Considerations Relevant to the Particular Context	1707
E. Rejection of Categorical Rules	1709
<b>CONCLUSION</b>	1709

**INTRODUCTION**

The Constitution of the United States sets forth a framework for government, granting powers to the various branches of government, imposing restrictions on how those powers may be exercised, and providing a guarantee that certain rights of the people will not be infringed by the government.<sup>1</sup> The Constitution is largely silent, however, on the question of whether—and to what extent—constitutional provisions have force beyond the borders of the United States. Courts have been called upon to consider this question in several contexts, including those presented by the nation’s westward expansion, the administration of its territories and colonies, the conduct of its wars, the enforcement of its laws, and, more recently, its initiatives undertaken to combat international terrorism. The recent efforts of the United States in opposing terrorism, both through criminal law enforcement and through means more closely analogous to those used during wartime, have prompted much discussion and debate—in Congress, the courts, the academy, and the media—over the role of the Constitution in limiting the tools available to the government when it acts abroad and in guaranteeing rights to those affected by government action.

In this Essay, I consider a narrow aspect of this larger question: under what circumstances must the overseas actions of the U.S. government conform to procedural requirements established by the Constitution for the investigation and prosecution of crime? I take as my point of departure an unabashed recognition of the worldwide responsibilities of the United States—a country long ago described by John Marshall as the “American empire”<sup>2</sup> and even earlier by Thomas Jefferson as the “Empire of liberty”<sup>3</sup>—in securing the peace and security of free people under a system of law framed by our Constitution. The United States labors under a tension unknown to nations that either have no such global responsibilities or exercise raw power in their national self-interest without concern for the rule of law. While the United States accepts—indeed, it embraces—its international responsibilities as the world’s only superpower, we also expect that, when carrying out those obligations, our

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1. In this Essay, I expand on themes developed for the Charles Evans Hughes Memorial Lecture at the New York County Lawyers’ Association, which was delivered on November 18, 2008. These reflections rely in some measure on the jurisprudence of the court on which I am privileged to serve, including decisions which I have written or in which I have participated. I am grateful to my law clerk Justin Anderson for his editorial assistance.
  2. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).
  3. 4 THE PAPERS OF THOMAS JEFFERSON 237–38 (Julian P. Boyd ed., 1951).

government will act in conformity with standards integral to our national identity.

This tension between the necessary exercise of power and the equally vital observance of constitutional principles has become more pronounced in recent years in light of the attack on our capital and premier city on September 11, 2001, and the expanding number of domestic criminal prosecutions arising from activities, both of a violent and a commercial nature, that take place overseas. Consider the following two hypothetical scenarios:

First, a British citizen living in London is compelled under applicable laws of the United Kingdom to produce incriminating documents, without the promise of immunity, to British investigators. Members of the Antitrust Division of the U.S. Department of Justice are working with the British in what can be fairly characterized as a “joint venture” among several governments, including the United States. Ultimately, the British citizen is brought to the United States to face a criminal trial for the conduct uncovered by the multinational investigation. He moves to exclude evidence of his act of producing the documents on the ground that it amounted to a compelled, incriminatory statement.

Under U.S. law, the compelled production of incriminating documents may give rise to a violation of the Fifth Amendment if the government seeks to introduce, as evidence of guilt, that the defendant had possession of the documents and turned them over under legal compulsion.<sup>4</sup> If the act of production in this case is judged to be testimonial and incriminating, there could be a Fifth Amendment violation—depending, however, on whether the privilege extends to aliens investigated abroad by the United States.

Second, a citizen of Germany is detained abroad in connection with an investigation of a terrorist attack on a U.S. diplomatic facility in Germany. Working with local authorities and in accord with local law, U.S. agents search his home without a warrant and discover bomb-making supplies and maps of the facility. The suspect is arrested and brought back to the United States for trial. He moves to suppress the evidence on two grounds: first, the evidence was obtained without a warrant, and, second, the search was unreasonable.

The Fourth Amendment to the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”<sup>5</sup> and it is well established that “searches and seizures inside a home without a warrant are presumptively

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4. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 40 (2000).

5. U.S. CONST. amend. IV.

unreasonable.”<sup>6</sup> Can the German citizen hold the government of the United States to this requirement for its search in Germany? Looking beyond the hypothetical, would a U.S. citizen whose home in Germany was subject to such a search be able to press such a claim?<sup>7</sup>

The answers to these questions are not easy and cannot be determined by the mechanical application of a categorical rule of decision. Instead, the approach taken by courts, when confronted with requests to apply the Constitution to actions abroad (that is, “extraterritorially”), is context-specific, tailored to the needs of the case, and sensitive to the practical limitations of enforcing a particular rule. From these decisions, I believe that we can identify a series of factors—indeed a framework—for determining whether and to what extent a particular constitutional rule should have force abroad.

This Essay proceeds in four Parts. Part I examines competing conceptions of how the question of extraterritoriality should be analyzed and resolved. Part II reviews the authority in international law for a nation to undertake extraterritorial prosecutions, the types of crimes that are subject to such prosecutions, and methods of obtaining jurisdiction over the accused. Part III explores the body of case law addressing extraterritorial application of constitutional provisions to the actions of the executive undertaken beyond the borders of the United States. Part IV describes a framework for evaluating whether a constitutional provision should be applied extraterritorially in a particular case and applies that framework to the hypothetical scenarios outlined above. While “grand theories” such as those outlined in Part I are helpful in trying to understand the issues, they cannot, I submit, provide rules of decision in areas of law as complicated as those considered here.

## **I. COMPETING PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF CONSTITUTIONAL RULES**

Whether constitutional provisions have force beyond the borders of the United States—that is, whether they have “extraterritorial” application—is a difficult question that finds no easy answer in the precedents of the Supreme Court or the work of legal scholars. The question first arose when the United States began its expansion from thirteen Atlantic colonies into a transcontinental nation, and it has reemerged most recently in two different

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6. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotation marks omitted) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)).

7. See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, *United States v. Odeh*, 552 F.3d 157 (2d Cir. 2008).

contexts: the war on terror and criminal prosecutions of conduct, often of a commercial nature, that takes place abroad. Determining whether the Constitution has extraterritorial force depends in large measure on how one understands the Constitution—is it a pact between a people and its government, a charter authorizing limited action by a government in the name of the people, or a combination of both?

Broadly speaking, there are two competing views on the extraterritorial application of constitutional requirements, both of which have been articulated recently by prominent members of the legal academy.

*A. The Compact Theory of the Constitution*

Some regard the Constitution as a framework for establishing domestic order, without direct application to international conduct. Supporters of this theory—known as the “compact theory” of the Constitution—are inclined to the view expressed over one hundred years ago by Justice Stephen J. Field:

By the Constitution a government is ordained and established “for the United States of America,” and not for countries outside of their limits. . . . The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.<sup>8</sup>

From this perspective, the procedural requirements set forth in the Constitution cannot bind the government when it acts overseas because the permissibility of the government’s conduct is determined by agreements, such as treaties, between nations—not by a document that defines the relationship between the U.S. government and its people.

Shades of this outlook have found recent expression in, for example, the observation of Jack Goldsmith and Eric Posner that “[t]he U.S. Constitution . . . was designed to create a more perfect *domestic* order, and its foreign relations mechanisms were crafted to enhance U.S. welfare.”<sup>9</sup>

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8. *In re Ross*, 140 U.S. 453, 464 (1891).

9. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 211 (2005); see JACK GOLDSMITH, *THE TERROR PRESIDENCY* 64–65 (2007); see also David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *Judgment Without Borders*, L.A. TIMES, Oct. 6, 2008, at 13 (stating that domestic criminal procedure is ill-suited to accomplish foreign policy objectives).

Advocates of this view find support in the long history of American action abroad and the limited number of occasions when courts have required government action to conform to procedural requirements set forth in the Constitution. As one commentator has written, “Ever since declaring independence, the United States has operated extraterritorially, using force, conducting searches and seizures, capturing and detaining enemies and criminals, and exercising control over would-be immigrants.”<sup>10</sup> If it were the case that the same procedural requirements that apply to domestic law enforcement also govern extraterritorial operations, he argues, there has been no “lack of opportunities” for the Supreme Court to so state.<sup>11</sup> So far it has not.

Those who promote the compact theory also look to the intellectual climate of the Founding. They note the observation of Montesquieu that distinct categories of law governed the relations of states, the interaction between state and citizen, and contact among citizens. As Montesquieu explained,

[N]ations . . . have laws relating to their mutual intercourse, which is what we call the *law of nations*. Considered as Members of a society that must be properly supported, they have laws relative to the governors and the governed, and this we call *politic law*. They have also another sort of laws relating to the mutual communication of citizens among themselves; by which is understood the *civil law*.<sup>12</sup>

John Locke drew a similar distinction between a government’s “municipal laws,” which provide for the domestic order, and the external power of the state, which is used to promote “the management of the security and interest of the public” abroad.<sup>13</sup> Evidence that these views influenced the Founding generation is to be found in *The Federalist Papers*, in which Madison and Hamilton opposed restrictions, through the Constitution, on the government’s discretion when responding to overseas threats, preferring instead to afford the

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10. J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 478 (2007).

11. *Id.*

12. MONTESQUIEU, *THE SPIRIT OF LAWS* 6-7 (photo. reprint 2005) (1748).

13. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 165 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (“[T]he laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs, and interests, must be left in great part to the prudence of those who have this power committed to them . . .”).

government wide latitude when responding to threats against national security.<sup>14</sup>

Under the compact theory, the procedural safeguards set forth in the Constitution for the domestic investigation and prosecution of individuals have no force abroad. Instead, any restrictions on the government's ability to exercise power abroad must be found in international law and diplomacy. As Andrew Kent argues, "[R]ather than being based on enforcing constitutional limitations, the American global tradition protected aliens abroad through international law, diplomacy, and the policy choices of the political branches of the U.S. government."<sup>15</sup> The power of the executive to act beyond the borders of the United States is thus not unfettered even though it need not comply with the procedural rules that govern the exercise of power at home.

*B. The Organic Theory of the Constitution*

Opposing the compact theory are those who argue that compliance with constitutional procedures is the sine qua non of legitimate state action. Supporters of this view—often called the “organic theory” of constitutional application<sup>16</sup>—contend that government action is legitimate only insofar as it conforms to all legal restraints applicable domestically, including the fundamental law of our country set forth in the Constitution. Those who promote the organic theory agree with the observation of Justice Hugo L. Black that “[t]he United States is entirely a creature of the Constitution. Its power

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14. THE FEDERALIST NO. 23, at 126 (Alexander Hamilton) (E.H. Scott ed., 1894) (“The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”); THE FEDERALIST NO. 41, *supra*, at 224-25 (James Madison) (“Security against foreign danger, is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the Federal councils. . . . With what color of propriety, could the force necessary for defence be limited, by those who cannot limit the force of offence? If a Federal Constitution could chain the ambition, or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety.”).

15. Kent, *supra* note 10, at 479.

16. See, e.g., Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 916 (1991).

and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”<sup>17</sup>

Those who agree with the organic theory, such as Louis Henkin, question the very premise of the compact theory. They ask,

Was the Constitution only a compact establishing a government to secure the individual rights of the people creating it? Or, since they believed that all men, everywhere, “are endowed by their Creator with certain unalienable Rights,” did the framers intend to create a government that would secure and respect the unalienable rights of all human beings, including those in their midst not party to the contract, and human beings in other societies upon whom their new government might impinge?<sup>18</sup>

Henkin has answered the latter question in the affirmative, arguing that “a government instituted to secure rights must respect those rights,” and “[i]f, in a world of states, the United States is not in a position to secure the rights of all individuals everywhere, it is always in a position to respect them.”<sup>19</sup> From Henkin’s perspective, the “federal government must not invade the individual rights of any human being.”<sup>20</sup>

For those who embrace the organic theory of constitutional application, an attempted distinction between the rules applicable to government action at home and those that govern its actions abroad is artificial; instead, they argue, the “focus [should be] on which powers the government has been authorized by the Constitution to exercise”—regardless of whether the action is undertaken at home or abroad.<sup>21</sup> Proponents of the organic theory contend that “[i]f the government is not empowered by the Constitution to take a certain action, then the geography, citizenship status of the individual, and legal context in which his claim is brought are . . . irrelevant.”<sup>22</sup> With the war on terror in mind, Robert Knowles and Marc Falkoff have written that,

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17. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (footnote omitted).

18. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 31 (1985) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

19. *Id.* at 32.

20. *Id.*

21. Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 666 (2007).

22. *Id.*

if the Constitution does not empower the U.S. government to engage in torture, then the government may not torture an individual in its custody regardless of where the person is being detained. Whether the detainee is being kept in Kansas or Kazakhstan, the government is not empowered to torture him.<sup>23</sup>

Advocates of the organic theory, much like the supporters of the compact theory, look to our history for evidence that their conception of the Constitution was shared by the Founders and successive generations. For example, Henkin argues that “[t]he choice in the Bill of Rights of the word ‘person’ rather than ‘citizen’ was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.”<sup>24</sup> Gerald Neuman points to the reaction against the Alien Act of 1798, in which opponents argued that “[because] the federal government had only enumerated powers, [it] could not ‘at pleasure dip [its] hands into the inexhaustible treasuries of the common law and law of nations.’”<sup>25</sup> Neuman also notes James Madison’s forceful opposition to a theory of constitutional construction that would permit aliens to “be banished, [and] even capitally punished, without a jury or the other incidents to a fair trial.”<sup>26</sup> Madison analogized such power to the “practices of ‘barbarous countries, under undefined prerogatives, or amid revolutionary dangers,’” which were far from “fit precedents for the government of the United States.”<sup>27</sup>

### C. *The Compact and Organic Theories Expressed by the Supreme Court*

Both the compact and organic theories of the Constitution found adherents among the Justices of the Supreme Court in 1990 in *United States v. Verdugo-Urquidez*,<sup>28</sup> a case raising the question of whether the Fourth Amendment

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23. *Id.*

24. Henkin, *supra* note 18, at 32; see also Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 49 (2004) (“The Due Process Clause is phrased in universal terms, protecting any ‘person’ rather than ‘citizens’ or members of ‘the people.’ Nor does its wording specify limitations as to place.”).

25. Neuman, *supra* note 16, at 935.

26. *Id.* at 935-36 (internal quotation marks omitted) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES]).

27. *Id.* at 936 (internal quotation marks omitted) (quoting 4 ELLIOT’S DEBATES 557).

28. 494 U.S. 259 (1990).

should apply to evidence obtained from a search of the home of a Mexican citizen in Mexico.

In *Verdugo-Urquidez*, Chief Justice Rehnquist, writing for the Court, applied the compact theory, explaining that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”<sup>29</sup> Under Chief Justice Rehnquist’s reasoning, aliens have no grounds to complain that the actions of the American government are in violation of the Constitution until “they have come within the territory of the United States and developed substantial connections with this country.”<sup>30</sup> Only at this point do “aliens receive constitutional protections.”<sup>31</sup>

In dissent, Justice Brennan gave voice to the organic theory, urging that “[t]he Constitution is the source of Congress’ authority to criminalize conduct, whether here or abroad, and of the Executive’s authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government’s authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic.”<sup>32</sup> From Justice Brennan’s perspective, compliance with all of the procedural requirements set forth in the Constitution “is an unavoidable correlative of the Government’s power to enforce the criminal law.”<sup>33</sup>

As with many strongly held, but opposing, sets of viewpoints, there is some merit and some measure of truth on both sides of this conceptual debate. On the one hand, it is clear that certain of the procedural rules that protect the rights of the accused in the United States cannot, as a matter of either practice or theory, be simply lifted out of their domestic, peacetime context and applied to decide the lawfulness of actions abroad without modification or consideration of the relevant circumstances. For instance, the *Miranda* regime<sup>34</sup> and the rules governing police “lineups” and “showups” are not meant to

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29. *Id.* at 266.

30. *Id.* at 271. Justice Rehnquist might have stated the position of only a plurality of the Court on this issue, depending on how one interprets the concurring opinion of Justice Kennedy. See *id.* at 278 (Kennedy, J., concurring).

31. *Id.*

32. *Id.* at 281 (Brennan, J., dissenting).

33. *Id.* at 282.

34. *Miranda v. Arizona*, 384 U.S. 436 (1966).

apply, and cannot apply, on a battlefield or in the course of house-to-house combat.

On the other hand, government action that is not authorized by domestic law or that violates fundamental norms of our constitutional order diminishes the stature of our country by appearing to rely on the repulsive notion that “might makes right.” While international law may often coincide with our constitutional norms, our country has adopted further protections—regarding, in particular, arrests, confessions, and searches and seizures—that courts might wisely hold applicable insofar as the relevant circumstances permit those protections to apply.

## **II. THE AUTHORITY OF NATIONS TO PROSECUTE INDIVIDUALS RESIDING BEYOND THEIR BORDERS**

Before turning to the case law considering whether particular procedural rules accompany the extraterritorial actions of the United States, it is important first to consider a threshold question—namely, under what authority does the United States exercise jurisdiction over those not found within its borders?

### *A. Jurisdiction over Conduct Abroad*

That one nation may outlaw conduct undertaken within the borders of another sovereign nation might seem counterintuitive. Indeed, Justice Oliver Wendell Holmes wrote in 1909 that it was a “startling proposition[.]” that acts undertaken “outside the jurisdiction of the United States and within that of other states . . . [could be] governed by [an] act of Congress.”<sup>35</sup> Writing for a nearly unanimous Court,<sup>36</sup> Justice Holmes observed that “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.”<sup>37</sup> A rule that would authorize a nation to treat an actor “according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”<sup>38</sup>

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35. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909).

36. Justice Harlan concurred only in the result. *See id.* at 359.

37. *Id.* at 356.

38. *Id.*

It has been long recognized, however, that “[t]he jurisdiction to prosecute and punish for [extraterritorial] crime is . . . something with which international law invests States.”<sup>39</sup> Indeed, the jurisdiction to prosecute and punish criminal offenses is inherent in the sovereignty of nations. This principle was articulated in 1927 by the Permanent Court of International Justice (PCIJ) in the *S.S. Lotus* case, a dispute between France and Turkey over the jurisdiction of Turkey to prosecute a French citizen for a collision occurring on the high seas that resulted in the deaths of eight Turkish nationals.<sup>40</sup> In its opinion, the Court observed,

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. . . .

. . . .

. . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.<sup>41</sup>

Based on this analysis, the PCIJ concluded that jurisdiction to prosecute criminal activity beyond the borders of a state is inherent in sovereignty and can be limited only by treaty, international agreement, or rule of customary international law. Because Turkey would lack the authority to prosecute the French sailor only if France could “conclusively prove[]” the existence of such a

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39. Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 467 (1935).

40. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 10 (Sept. 7).

41. *Id.* at 18-19; *see also id.* at 20 (“Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.”).

limitation, and France had failed to make such a showing, the PCIJ entered judgment for Turkey.<sup>42</sup>

The specific holding of the PCIJ in *Lotus* with respect to jurisdiction over vessels on the high seas appears to have been superseded by the 1958 High Seas Convention,<sup>43</sup> but the *Lotus* principle—that, unless restricted by international agreement or customary international law, states have jurisdiction to prosecute criminal activity—has retained its persuasive force.<sup>44</sup> Indeed, it is the persuasive force of the *Lotus* opinion and not any binding effect or presumption of correctness of the PCIJ that makes this ruling notable. Within the last decade, the United States invoked the *Lotus* principle in a statement to the International Court of Justice that “restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations.”<sup>45</sup>

Under international law there are certain types of criminal conduct over which all states have jurisdiction regardless of where the offense occurs, the nationality of offender, and the nationality of the victim. This jurisdiction, called “universal jurisdiction,” does not turn on a connection between the state and the circumstances of the offense; rather, the “universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.”<sup>46</sup> Piracy has long constituted such an offense—one that any nation may prosecute no

42. *Id.* at 26, 31.

43. See Convention on the High Seas art. 11, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

44. See Michael P. Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, LAW & CONTEMP. PROBS., Winter 2001, at 67, 73 (“[T]he now-venerable *Lotus* principle continues to be cited with approval by the ICJ as well as the U.S. government. Most recently, the International Court of Justice confirmed the continuing vitality of the *Lotus* principle in its July 8, 1996, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.”); see also Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L L. REV. 275, 303 (2008) (“The classical approach to this situation [i.e., the lack of rules governing a certain situation] in international legal scholarship is the application of the *Lotus* principle. According to this principle, any attempt to constrain the state’s freedom of action in the absence of a legal prohibition is a violation of state sovereignty.”).

45. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368 (2001) (internal quotation marks omitted); see also Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1351 & n.114 (2007) (noting that the U.S. government had invoked the *Lotus* principle in defense of “extraordinary rendition”).

46. Scharf, *supra* note 45, at 368; see also *United States v. Yousef*, 327 F.3d 56, 103-08 (2d Cir. 2003) (describing universal jurisdiction).

matter where the perpetrator can be found.<sup>47</sup> Nations have also prosecuted participants in the slave trade pursuant to their universal jurisdiction.<sup>48</sup> The prosecution of piracy and slavetrading under universal jurisdiction has been fairly noncontroversial because, as scholars have noted, “pirates and slave traders have long been considered the enemies of all humanity.”<sup>49</sup> After the Second World War, customary international law, reflecting the practices and principles adopted by the victorious Allied Powers,<sup>50</sup> evolved to recognize universal jurisdiction over war crimes and crimes against humanity.<sup>51</sup> More recently, states have entered into conventions under which state parties recognize universal jurisdiction over (1) aircraft hijacking and sabotage,<sup>52</sup> (2) hostage taking,<sup>53</sup> (3) crimes against internationally protected persons,<sup>54</sup>

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47. See Scharf, *supra* note 45, at 369; see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (“There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy.”).
  48. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).
  49. *Id.*; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind” (internal quotation marks omitted) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980))).
  50. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (“[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”); cf. *Sosa*, 542 U.S. at 732 (“[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).
  51. See Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT’L CRIM. JUST. 215, 218 (2008) (“In cases of internal [i.e., domestic] human rights and humanitarian law violations so egregious as to inspire universal outrage, states have agreed to expose their agents to the laws and processes of foreign states, notwithstanding the risks posed by differences of values and interests among states. But less extreme internal violations, assessments of which are more likely to be coloured by ideological and political sympathies, remain exclusively matters of state responsibility—with individual criminal responsibility to be determined, if at all, by domestic laws and processes.”); Scharf, *supra* note 45, at 371.
  52. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.
  53. International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205.
  54. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

(4) apartheid,<sup>55</sup> and (5) torture.<sup>56</sup> In addition, some courts have held that acts of terrorism, in addition to those involving aircraft hijacking and hostage taking, are subject to universal jurisdiction.<sup>57</sup>

The principle of universal jurisdiction is not without its detractors, who usefully remind us of the important limitations inherent in this doctrine. One such critic, Lee Casey, argues that “territorial jurisdiction remains the primary basis of international legal authority” and that universal jurisdiction remains more theoretical than real.<sup>58</sup> According to Casey, “It is, in fact, difficult to find a single instance in which a State exercised ‘universal’ jurisdiction over offenses taking place within the territory of another State, where none of its nationals were involved.”<sup>59</sup> He contends that the breadth of universal jurisdiction “has been much exaggerated by scholars unfamiliar with the actual cases and equally unaware of the dismal record of failed attempts to codify the supposed international criminal law relating to ‘piracy’ or the international slave trade.”<sup>60</sup> Another skeptic, Alfred P. Rubin, observes that the notion of an ever-expanding universal jurisdiction over moral wrongs runs counter to the

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55. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.
56. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; *see also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”).
57. *See* *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987)). *But see* *United States v. Yousef*, 327 F.3d 56, 97 (2d Cir. 2003) (“[C]ustomary international law currently does not provide for the prosecution of ‘terrorist’ acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism.”); *id.* at 99 (holding that “reliance on this section of the Restatement (Third) in particular is error because it advocates the expansion of universal jurisdiction beyond the scope presently recognized by the community of States, as reflected in customary international law primary sources”). On the post-war expansion of universal jurisdiction, *see* Randall, *supra* note 48, at 815-39.
58. Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 855 (2002).
59. *Id.* at 856. Casey notes that the attempted Spanish prosecution of former Chilean dictator Augusto Pinochet arose from alleged offenses against Spanish nationals, that the Israeli prosecution of Adolph Eichmann rested on other principles of jurisdiction in addition to universal jurisdiction, and that the Nuremberg trials arose from the surrender of Germany at the end of World War II. *Id.* at 856-57.
60. *Id.* at 856 (internal quotation marks omitted) (quoting Alfred P. Rubin, *Dayton, Bosnia, and the Limits of Law*, 46 NAT’L INT. 41, 45 (1996/1997)).

realities of national sovereignty and international law. From the perspective of Professor Rubin,

To ignore the problems of “standing” or to assert that the rules already evident in international practice and codified in the positive law of the United Nations Charter do not apply in the case of some selected atrocities by some selected villains (but not to others), or that lawyers’ and judges’ views of “law” can overrule the political decisions of the leaders of the various communities that compose the international community today, is much more than can be accepted by anybody truly concerned with peace and justice.<sup>61</sup>

Indeed, the methodological underpinnings for the expansion of universal jurisdiction—analogy to piracy’s alleged “heinousness”—has been persuasively undercut by Eugene Kontorovich, who observes that the critical difference between a law-abiding privateer and an outlaw pirate was state authorization, not the moral repugnancy of the acts committed.<sup>62</sup> These valid critiques notwithstanding, universal jurisdiction provides one basis—although in many circumstances a controversial one—for nations to prosecute aliens for acts they commit overseas.

Another basis for such prosecutions lies in the right of all states to protect their national security and government functions, pursuant to the “protective principle” of jurisdiction, from external threats.<sup>63</sup> As stated in one eminent treatise,

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission

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61. Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 *NEW ENG. L. REV.* 265, 280 (2001); see also Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, *FOREIGN AFF.*, July/Aug. 2001, at 86, 96 (“[A]n excessive reliance on universal jurisdiction may undermine the political will to sustain the humane norms of international behavior so necessary to temper the violent times in which we live.”). For a considered response to these concerns, see Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 *GEO. L.J.* 1057 (2004).

62. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 *HARV. INT’L L.J.* 183, 222-23 (2004).

63. See CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 96-99 (2008).

which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.<sup>64</sup>

Pursuant to this power, a state may prosecute someone for an “extraterritorial act [that] threatens the state’s security or a basic governmental function.”<sup>65</sup> The basis for jurisdiction over those who present such threats is not dependent on the physical location of either the perpetrator or the harm. Instead, it is the “nature of the interest that may be injured” that provides the basis for jurisdiction.<sup>66</sup> As a result, jurisdiction may exist over acts and individuals that have no connection to a nation’s territorial boundaries. For example, the U.S. Court of Appeals for the Second Circuit has held that an alien who lied to an American consular official in Montreal so that she could obtain a visa to enter the United States committed “an affront to the very sovereignty of the United States . . . [that] must be said to have a deleterious influence on valid governmental interests.”<sup>67</sup> Under international law, the United States had jurisdiction to prosecute this conduct, the Court held, because, even though the

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64. Dickinson, *supra* note 39, at 440; *see also* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968) (“[A] state ‘has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.’” (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965))); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987) (“[A] state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”). As early as the mid-1930s, a leading treatise noted the “tendency in national legislation . . . toward an extension of the exercise of competence to punish crimes by aliens against the security and integrity of the State.” Dickinson, *supra* note 39, at 553. It observed that

[m]odern means of communication have increased the opportunities for such crimes and States have naturally reacted to the growing danger to their security in extending the application of their penal laws. . . . The overthrow of liberal regimes in many countries and the establishment of dictatorships of party or class have led to an increase in the subversive activities of dissenting groups which are frequently conducted from the shelter of foreign territory.

*Id.*

65. Randall, *supra* note 48, at 788.

66. Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1137 (1982).

67. *Pizzarusso*, 388 F.2d at 10.

misrepresentations occurred outside the country, they “threaten[ed] [U.S.] security as a state or the operation of its governmental functions.”<sup>68</sup>

In addition to its geographic breadth, the protective theory of jurisdiction extends over an equally broad range of conduct, encompassing both inchoate, as well as accomplished, offenses. One commentator has observed that “[i]t is the only accepted theory which allows extraterritorial jurisdiction over conduct which threatens *potential* danger to [state security, sovereignty, treasury, or governmental function],”<sup>69</sup> in addition to *actual* harm. Because this theory is unmoored from both geographic limitations and the requirement that an actual offense have occurred, the protective principle has a notable capacity to cause diplomatic friction. Conduct that one nation construes as jeopardizing its governmental functions might be construed differently by another country—indeed, it might be encouraged by the foreign government. In such cases, the matter takes on the flavor of a state-to-state dispute rather than a state-individual prosecution, and may be better resolved through diplomacy than through criminal prosecution.<sup>70</sup> Despite this risk of overreach, protective jurisdiction is generally invoked over offenses of a relatively prosaic nature, such as forgery, counterfeiting, making false statements to obtain a visa, and drug smuggling.<sup>71</sup>

Finally, jurisdiction may be asserted over activities that take place abroad but have domestic effects. This form of jurisdiction arises under the “objective territoriality” principle.<sup>72</sup> As Judge Learned Hand observed, “[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”<sup>73</sup> This effects-based source of authority for extraterritorial prosecution has given rise

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68. *Id.*

69. Blakesley, *supra* note 66, at 1138 (emphasis added); see also RYNGAERT, *supra* note 63, at 96 (“For the operation of the protective principle, actual harm need not have resulted from these acts.”).

70. See RYNGAERT, *supra* note 63, at 97-98.

71. *Id.* at 99.

72. Blakesley, *supra* note 66, at 1123.

73. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945); see also *Ford v. United States*, 273 U.S. 593, 620-21 (1927) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (1987) (“[A] state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403.”).

to controversy insofar as it has been used to impose one country's regulatory standards across the globe.<sup>74</sup> As one commentator has observed, in "the modern world[,] effects extend to many places,"<sup>75</sup> and a theory of jurisdiction with such a broad scope is bound to give rise to competing imperatives from different sovereigns. Another commentator has stated more bluntly that "[t]he expansion of these territorial theories . . . has [already] gone too far."<sup>76</sup>

The most significant recent expansion of effects-based (or objective territorial) jurisdiction is in the extraterritorial application of American antitrust and securities laws.<sup>77</sup> In *Hartford Fire Insurance Co. v. California*, a divided Supreme Court held in 1993 that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."<sup>78</sup> It did not matter to the Court whether the conduct at issue was lawful under local law. In the words of Justice Souter, "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct."<sup>79</sup>

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74. The overseas enforcement of American securities laws, for example, is further complicated by the interaction of American and foreign regulatory bodies. When the Securities and Exchange Commission (SEC) investigates overseas conduct, it often cooperates with its foreign counterparts. Those counterparts are generally able to obtain evidence—both documentary and testimonial—through compulsory process. See Paul R. Berger & Erin W. Sheehy, *The Globalization of SEC Enforcement Activities*, REV. SEC. & COMMODITIES REG., Oct. 15, 2008, at 243, 244 ("[T]he SEC relies heavily on the cooperation of its counterparts abroad who, unlike the SEC in most circumstances, can obtain documents and testimony from foreign entities and persons through compulsory process."). Because this process differs from that which obtains in the United States, American courts are confronted with the question of whether and when evidence so obtained can be used in a domestic criminal proceeding.
75. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 508 (2003).
76. Blakesley, *supra* note 66, at 1128-29; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.").
77. See RYNGAERT, *supra* note 63, at 76-78; see also Blakesley, *supra* note 66, at 1126-27 ("[T]he basis for the expansion of jurisdiction over actions in violation of United States antitrust laws has usually been the objective territoriality principle, in so much as the effect of such violations occurs within United States territory. The same may be said of jurisdiction over violations of the securities laws."); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146 (1957).
78. 509 U.S. 764, 796 (1993).
79. *Id.* at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 cmt. j (1987)).

Similarly, our securities laws have been applied extraterritorially (1) when a “defendant’s activities in the United States were more than ‘merely preparatory’ to a securities fraud conducted elsewhere” or (2) when a “fraud which takes place abroad [has an] impact[ ] on stock registered and listed on an American national securities exchange and [is] detrimental to the interests of American investors.”<sup>80</sup> While the worldwide enforcement of American antitrust and securities laws runs the risk of triggering resistance from other sovereigns, “[f]oreign protest against US assertions [of its economic regulations],” according to one recent commentator, “has nevertheless remained fairly mute, although it may be only a matter of time before conflicts erupt.”<sup>81</sup>

### *B. Jurisdiction over Individuals Found Abroad*

Personal jurisdiction over an accused located abroad can be obtained through extradition or abduction. Extradition is the formal mechanism by which a person is sent from the state where he is located to another state so that the latter can either prosecute him or compel him to serve an existing sentence. In the normal course, an extradition involving the United States proceeds pursuant to the terms of an extradition treaty; over one hundred foreign countries have extradition treaties with the United States.<sup>82</sup> Aside from some recent controversy over extradition to countries where the accused would face capital punishment,<sup>83</sup> the process of extradition is normally routine. All that is generally required from a requesting state is proof (1) of probable cause or valid conviction, (2) that double jeopardy does not bar the intended prosecution, (3) that the offense is punishable as serious crime in both countries, (4) that the prosecution is not time-barred, and (5) that the intended prosecution is not for a “political offense.”<sup>84</sup> Of course, a state may decline to extradite an individual whom it intends to prosecute or punish for a serious crime itself.<sup>85</sup>

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80. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122, 124 (2d Cir. 1995) (citations omitted).

81. RYNGAERT, *supra* note 63, at 78.

82. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 820, 848 & n.3 (2004).

83. See, e.g., Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion To Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 910 (2005).

84. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 (1987).

85. See *id.* § 476(3).

Abduction provides another mechanism for obtaining personal jurisdiction over an alien for the purpose of prosecution for extraterritorial conduct. If an alien is abducted from his home country and that country either authorizes the abduction or does not object, there is no violation of international law and the abducting country's personal jurisdiction over the alien is secure.<sup>86</sup> In the United States, a related principle, known as the *Ker-Frisbie* doctrine, was developed in a line of cases stretching back to the 1886 decision in *Ker v. Illinois*.<sup>87</sup> As explained by the U.S. Court of Appeals for the District of Columbia Circuit, this doctrine recognizes that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction."<sup>88</sup>

In two decisions arising from the United States' prosecution of Humberto Alvarez-Machain, a citizen and resident of Mexico, for the murder of an agent of the U.S. Drug Enforcement Administration in Guadalajara, Mexico, the Supreme Court considered whether the forced abduction of a foreign national from a sovereign nation deprived the United States of the power to prosecute him and whether the abduction violated international law.<sup>89</sup> First, the Supreme

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86. *Id.* § 432(2) cmt. c ("If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.").
87. 119 U.S. 436 (1886); *see also* *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Pettibone v. Nichols*, 203 U.S. 192, 208 (1906) (Harlan, J.) ("[W]hen a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, so far as the Constitution and laws of the United States are concerned, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State."); *cf.* *The Ship Richmond v. United States*, 13 U.S. (9 Cranch) 102, 104 (1815) (Marshall, C.J.) ("The seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This Court can take no cognizance of it; and the majority of the Court is of opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the District Court, so as to annul the proceedings of that Court against the vessel.").
88. *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998) (internal quotation marks omitted) (quoting *Frisbie*, 342 U.S. at 522); *see also id.* ("This general rule does admit of some exceptions; for instance, an extradition treaty may provide that it is the only way by which one country may gain custody of a national of the other country for the purposes of prosecution, and we have also suggested that there may be a very limited exception for certain cases of torture, brutality, and similar outrageous conduct." (citations omitted)).
89. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Alvarez-Machain*, 504 U.S. 653 (1992).

Court held that, despite the official protest of the government of Mexico, the abduction of Alvarez-Machain did not violate the extradition treaty between the United States and Mexico and therefore, pursuant to *Ker*, there was no bar to “his trial in a court in the United States for violations of the criminal laws of the United States.”<sup>90</sup> Insofar as the Mexican government had a complaint against the United States for its actions, that was a matter to be resolved through diplomatic channels.<sup>91</sup> Second, in a later civil action for damages arising from the abduction,<sup>92</sup> the Court held that the abduction did not violate a “norm of customary international law so well defined as to support the creation of a federal remedy” under the Alien Tort Statute and dismissed the action.<sup>93</sup>

Through these mechanisms, the United States is able to exercise authority over individuals residing outside of the borders of the United States. Conduct might give rise to U.S. jurisdiction when it (1) falls under universal jurisdiction, (2) presents a threat to national security, or (3) produces domestic effects. Extradition or, in many circumstances, abduction will then provide U.S. courts with jurisdiction over the individuals who engage in proscribed conduct.

### III. DECISIONS ADDRESSING THE EXTRATERRITORIAL APPLICATION OF U.S. CRIMINAL PROCEDURE UNDER THE CONSTITUTION

Having concluded that the government of the United States has power to proscribe criminal conduct that takes place beyond its territorial borders, we now address the issue at the core of the present inquiry: what procedural rules set forth in the Constitution govern any subsequent investigation and prosecution arising from this overseas conduct?

The Supreme Court first encountered the question of whether constitutional provisions restrict government action beyond the borders defined by the several states in the early days of the Republic. In 1828, the Court considered in *American Insurance Co. v. Canter* whether the constitutional

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90. *Alvarez-Machain*, 504 U.S. at 670.

91. *See id.* at 669; *see also Ker*, 119 U.S. at 444 (“It must be remembered that this view of the subject does not leave the prisoner or the government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and on demand from Peru, Julian [the abductor], the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws.”).

92. *Sosa*, 542 U.S. at 698.

93. *Id.* at 738.

requirement of life tenure for judges applied to courts established by Congress in Florida, which was then a territory of the United States.<sup>94</sup> In an opinion by Chief Justice Marshall that essentially adopted the compact theory, the Court held that the judicial power could be vested in non-Article III courts within a territory of the United States because Congress was specifically empowered by the Constitution to exercise its *sovereign* power to govern territories,<sup>95</sup> without reference to any limitation on such power.

Sixty years later, the Court reiterated *Canter's* holding in a decision rejecting the challenge of residents of the territory of Utah to a federal law disenfranchising bigamists and polygamists. In 1885, in *Murphy v. Ramsey*,<sup>96</sup> the Court observed that “[t]he right of local self-government . . . belongs, under the Constitution, to the *States* and to the people thereof, by whom that Constitution was ordained.”<sup>97</sup> Territories, by contrast, were not similarly guaranteed the right of self-government. The Court explained,

[I]n ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.<sup>98</sup>

The Court was careful to distinguish, however, between the “political right” of the franchise, which did not extend to the territories under the Constitution, and the “personal and civil rights of the inhabitants of the Territories,” which the Court reasoned were “secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of

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94. 26 U.S. (1 Pet.) 511 (1828); *see also* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”).

95. *Canter*, 26 U.S. (1 Pet.) at 546.

96. 114 U.S. 15 (1885).

97. *Id.* at 44 (emphasis added).

98. *Id.*

government.”<sup>99</sup> The Court did not elaborate further on the content of these personal and civil rights, and it cannot be determined from the Court’s passing remarks whether these rights were derived from citizenship or from presence in a territory subject to U.S. control.

In 1891, the Supreme Court again appeared to adopt the compact theory of the Constitution when it categorically rejected the extraterritorial application of constitutional trial rights, not only in U.S. territories but in other countries as well. In *In re Ross*, the Court considered a habeas petition from a sailor<sup>100</sup> convicted by an American consular tribunal in Japan of a murder committed on board a vessel docked in the harbor of Yokohama, Japan.<sup>101</sup> The sailor challenged his conviction on the ground that he had been denied his constitutional rights to indictment by a grand jury and trial by a petit jury, arguing that “the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad.”<sup>102</sup> The Supreme Court disagreed, stating,

By the Constitution a government is ordained and established “for the United States of America,” and not for countries outside of their limits. The guarantees 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 offences committed elsewhere, and not to residents or temporary sojourners abroad. *The Constitution can have no operation in another country*[.] When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two

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99. *Id.* at 44-45; *see also id.* at 44 (“In the exercise of this sovereign dominion, [the citizens of Utah] are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, *as to every power of society over its members, that it is not absolute and unlimited.*” (emphasis added)).

100. 140 U.S. 453, 479 (1891). The sailor claimed to be a British subject, but the Court treated him as a United States citizen because “[w]hile he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born.” *Id.*

101. *Id.*

102. *Id.* at 463.

countries may agree, the laws of neither one being obligatory upon the other.<sup>103</sup>

The Court determined that the sailor was not entitled to these procedural protections, and therefore his conviction did not run afoul of the Constitution.<sup>104</sup>

Seven years after *In re Ross*, the United States emerged from the Spanish-American War as a world power with new colonial possessions—namely, Puerto Rico, the Philippines, and Guam. The emergence of the United States as a colonial power prompted an examination of whether and to what extent the Constitution applied to these new possessions. This inquiry—in politics styled, “Does the Constitution follow the flag?”—was undertaken in a series of early twentieth-century decisions known as the *Insular Cases*.<sup>105</sup>

In the most important of these decisions, *Downes v. Bidwell*,<sup>106</sup> a divided Court held that the provision of the Constitution establishing that “all duties, imposts, and excises shall be uniform throughout the United States”<sup>107</sup> does not apply to Puerto Rico, which the Court determined was not part of the United States for the purposes of that provision. After reviewing the history of American expansion and the administration of the territories acquired in that process, the Court concluded that “the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct” and “the power to acquire territory by treaty implies not only the power

103. *Id.* at 464 (emphasis added) (citations omitted).

104. *Id.* at 464-65, 480.

105. The *Insular Cases*, also known as the *Insular Tariff Cases*, comprise approximately twenty-five decisions of the Supreme Court issued between 1901 and 1922. *Downes v. Bidwell*, 182 U.S. 244 (1901), is recognized as the most important case in the series, and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), provides “the last significant development in the doctrine.” Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389, 389 (Christina Duffy Burnett & Burke Marshall eds., 2001). Early in the development of this doctrine, which sought to answer the question of whether the Constitution “follows the flag,” Finley Peter Dunne’s satiric Irish-American political sage, Mr. Dooley, famously quipped, in an observation that would live in history detached from its origins, “[N]o matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.” FINLEY PETER DUNNE, *DOOLEY ON THE CHOICE OF LAW* 52 (Edward J. Bander ed., 1963). A more refined observer of public affairs, then-Secretary of War Elihu Root, remarked, “[A]s near as I can make out the Constitution follows the flag—but doesn’t quite catch up with it.” STUART CREIGHTON MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903*, at 157 (1982).

106. 182 U.S. 244 (1901).

107. U.S. CONST. art. I, § 8.

to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.'"<sup>108</sup>

The *Downes* Court went on to "suggest, without intending to decide," that a distinction existed between two categories of rights, echoing a similar distinction identified in *Murphy*.<sup>109</sup> On the one hand were "natural rights, enforced in the Constitution by prohibitions against interference with them," such as freedom of religion, free speech and due process of law; significantly, the Court said these rights might extend to America's colonial possessions.<sup>110</sup> On the other were "artificial or remedial rights, which are peculiar to our own system of jurisprudence,"<sup>111</sup> such as citizenship, suffrage, and "the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."<sup>112</sup>

In a concurring opinion, Justice Edward Douglas White reasoned that "Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico."<sup>113</sup> Whether a "particular provision of the Constitution is applicable" in a territory of the United States turned on "an inquiry into the situation of the territory and its relations to the United States."<sup>114</sup> With respect to the requirement of uniform tariffs, Justice White concluded that the requirement did not apply to Puerto Rico because Puerto Rico had not been "incorporated" into the United States.<sup>115</sup>

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108. *Downes*, 182 U.S. at 279 (emphasis omitted).

109. *Id.* at 282; see *supra* text accompanying note 99.

110. *Downes*, 182 U.S. at 282.

111. *Id.*

112. *Id.* at 283.

113. *Id.* at 293 (White, J., concurring). On the misspelling of Puerto Rico's name, see JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 1 n.1 (1979).

114. *Id.* In this concurring opinion, Justice White described the nature of the relation between Puerto Rico and the United States in memorable language:

[W]hilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

*Id.* at 341-42.

115. *Id.* at 342.

In dissent, Chief Justice Fuller rejected the holding of the majority as contrary to an organic conception of the reach of the Constitution. He viewed the majority as endorsing the proposition that “if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period . . . irrespective of constitutional provisions.”<sup>116</sup> Chief Justice Fuller argued that when Puerto Rico came under the control of the United States, the restrictions set forth in the Constitution on the domestic power of the national government governed the administration of that territory. Under his reasoning, the tariff on Puerto Rican trade violated the constitutional guarantee of uniform tariffs within the United States and therefore should be struck down.<sup>117</sup>

In subsequent cases, the Court adopted the context-driven doctrine of territorial incorporation set forth in Justice White’s concurring opinion.<sup>118</sup> This doctrine reached its maturity in *Balzac v. Porto Rico*, a case presenting the question of whether the Sixth Amendment right to trial by jury extended to the territory of Puerto Rico.<sup>119</sup> In a unanimous opinion by Chief Justice Taft, the Supreme Court held that the right did not extend to “unincorporated” territories, such as Puerto Rico. Relying on precedents of the Court that the jury trial right and other provisions of Anglo-American procedure were ill-suited to the “history and condition” of the new insular territories,<sup>120</sup> the Court reasoned that the right “[did] not apply to territory belonging to the United States which has not been incorporated into the Union.”<sup>121</sup> The Court then considered whether the United States had “incorporated” Puerto Rico. In that regard, the Court expected a clear statement from Congress, positing that “when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference

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116. *Id.* at 372 (Fuller, J., dissenting).

117. *Id.* at 374-75.

118. See Christina Duffy Burnett, “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659 (2008).

119. 258 U.S. 298 (1922).

120. See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197, 211, 217-18 (1903); see also *Balzac*, 258 U.S. at 310 (“The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.”).

121. *Balzac*, 258 U.S. at 304-05.

or construction.”<sup>122</sup> And, the Court concluded, Congress had not yet done so. Without a clear statement of incorporation, and in light of the history and traditions of Puerto Rico that were considered inhospitable to the right, the Court held that the constitutional guarantee of a right to trial by jury did not apply to Puerto Rico.<sup>123</sup>

In the aftermath of the Second World War, the question of whether, and to what extent, constitutional guarantees applied in lands under the control of the United States again reached the Supreme Court. In *Johnson v. Eisentrager*,<sup>124</sup> the Court considered habeas petitions filed by German prisoners convicted by a U.S. military commission in China and imprisoned in U.S.-occupied Germany. The prisoners challenged their convictions on the basis that, *inter alia*, they were obtained in violation of the Constitution.

The Supreme Court denied the petition, noting at the outset that it was aware of “no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.”<sup>125</sup> Insofar as noncitizens acquire any rights under the Constitution, the Court observed, they do so commensurate with their ties to the United States.<sup>126</sup> Justice Jackson, writing for the six-Justice majority, observed that

[t]he 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. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. . . . But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.<sup>127</sup>

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122. *Id.* at 311.

123. *Id.* at 312-14.

124. 339 U.S. 763 (1950).

125. *Id.* at 768; *see also id.* (“Nothing in the text of the Constitution extends [the right of habeas corpus beyond American borders], nor does anything in our statutes.”).

126. *Id.* at 770-71.

127. *Id.*

During wartime, moreover, nationals of an enemy state had no basis to claim aid from the United States. The Court explained, “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.”<sup>128</sup>

Turning to the question of whether the prisoners had a right to petition an American court, the Court answered in the negative, noting that “the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even th[e] qualified access to our courts [of resident enemy aliens], for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.”<sup>129</sup> In light of the prisoners’ detention outside the territory of the United States, their status as “alien enemies,” the logistical impediments to their presentation before a U.S. court, and the distraction that interference by the courts would impose on military efforts, the Court concluded that the right of habeas corpus did not extend to these prisoners despite their detention by the United States.<sup>130</sup>

Justice Black, in dissent, relied on aspects of the *Insular Cases*, writing that when the United States “decides to occupy conquered territory either temporarily or permanently, it assumes the problem of deciding how the subjugated people will be ruled, what laws will govern, [and] who will promulgate them.”<sup>131</sup> One facet of this problem is deciding “the extent to which our domestic laws, constitutional and statutory, are transplanted abroad.”<sup>132</sup> Justice Black did not suggest that the United States “either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries.”<sup>133</sup> He argued, nevertheless, that it was inconsistent with the doctrine of territorial incorporation for the majority to conclude that “the Constitution is wholly inapplicable in foreign territories that we occupy and govern.”<sup>134</sup>

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128. *Id.* at 772-73; *see also id.* at 775 (“The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists. Courts will entertain his 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. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.”).

129. *Id.* at 776.

130. *Id.* at 778-79, 781.

131. *Id.* at 796.

132. *Id.*

133. *Id.* at 796-97.

134. *Id.* at 797.

Seven years later, Justice Black reiterated these views, at least as applied to U.S. citizens abroad, in an opinion for a plurality of the Court. In *Reid v. Covert*,<sup>135</sup> the Court considered whether the overseas convictions of the civilian spouses of American servicemen by a military tribunal should be overturned for failure to comply with the Fifth and Sixth Amendments. The Court held that, notwithstanding *In re Ross*, the convictions of these American citizens could not stand. Joined by three members of the Court, Justice Black wrote,

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.<sup>136</sup>

Rejecting the argument that only “fundamental” constitutional rights protected American citizens when overseas, Justice Black could “find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”<sup>137</sup> He distinguished *In re Ross* as “a relic from a different era”<sup>138</sup> and the *Insular Cases* because “they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions.”<sup>139</sup> He concluded that the overseas convictions of American civilians by military courts in violation of rights secured by the Constitution ran counter to the history and traditions of the nation and could not stand.

In a concurring opinion, Justice Harlan opposed Justice Black’s opinion insofar as it “discard[ed] *Ross* and the *Insular Cases* as historical anomalies.”<sup>140</sup> Justice Harlan argued that these cases “stand for an important

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135. 354 U.S. 1 (1957).

136. *Id.* at 5-6 (footnotes omitted).

137. *Id.* at 9.

138. *Id.* at 12.

139. *Id.* at 14; *see also id.* (“None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians.”).

140. *Id.* at 67.

proposition . . . *not* that the Constitution ‘does not apply’ overseas, but that there are provisions in the Constitution which *do not necessarily apply* in all circumstances in every foreign place.”<sup>141</sup> Under his reading,

the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, *no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous*.<sup>142</sup>

Rejecting a “rigid and abstract rule,” Justice Harlan described the Court’s task as determining “*which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not of compulsion.”<sup>143</sup> Because the trials at issue in *Reid v. Covert* were for capital offenses and the defendants were the civilian spouses of U.S. servicemen, Justice Harlan considered the procedural safeguards warranted *under the circumstances presented* and voted in favor of the grant of habeas corpus relief.<sup>144</sup>

The Supreme Court has revisited these issues in recent decades.<sup>145</sup> In the 1990 decision *United States v. Verdugo-Urquidez*,<sup>146</sup> the Court considered whether the Fourth Amendment applied to the arrest of a Mexican citizen in Mexico. As noted above, Chief Justice Rehnquist appeared to adopt the compact theory of the Constitution in his opinion for the Court.<sup>147</sup> He wrote that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal

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141. *Id.* at 74 (emphasis added).

142. *Id.* (emphasis added).

143. *Id.* at 75.

144. *Id.* at 77-78.

145. In *Jean v. Nelson*, the Supreme Court granted certiorari to consider whether unadmitted aliens seeking asylum could challenge the denial of temporary parole under the equal protection guarantee of the Fifth Amendment’s Due Process Clause, but the Court decided the case on other grounds. 472 U.S. 846, 854-55 (1985).

146. 494 U.S. 259 (1990).

147. See *supra* Part I.

Government against aliens outside of the United States territory.”<sup>148</sup> For the majority, the two most important facts of the case were that the alien defendant had “no voluntary attachment to the United States” and that the search took place in Mexico.<sup>149</sup> Relying principally on the text of the Fourth Amendment, the *Insular Cases*, and *Eisentrager*, the Chief Justice rejected a “global view” of the Constitution, concluding instead, as suggested in *Eisentrager*, that aliens have no grounds to complain that the actions of the American government are in violation of the Constitution until “they have come within the territory of the United States and developed substantial connections with this country.”<sup>150</sup> Only at this point do “aliens receive constitutional protections.”<sup>151</sup> Because the alien in this case had no prior connection to the United States, he could not avail himself of the protections of the Fourth Amendment.

The Chief Justice concluded by noting that, if aliens subjected to overseas searches by American agents were able to press Fourth Amendment claims against the United States, American foreign policy would be impaired. He wrote,

For better or for worse, we live in a world of nation-states in which our Government must be able to function effectively in the company of sovereign nations. Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.<sup>152</sup>

Justice Kennedy, who was in the majority that joined the opinion of the Chief Justice, also wrote separately. In his concurring opinion, he recognized that when considering the extraterritorial application of constitutional

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148. *Verdugo-Urquidez*, 494 U.S. at 266.

149. *Id.* at 274-75.

150. *Id.* at 271. Chief Justice Rehnquist was arguably stating the position of only a plurality on this issue, in light of Justice Kennedy’s concurring opinion. See *infra* text accompanying note 153.

151. *Id.*

152. *Id.* at 275 (citation omitted).

provisions, the Court had drawn a distinction between citizens and aliens, but the drawing of that distinction did not mean that aliens were without constitutional protections.<sup>153</sup> Justice Kennedy construed the Court's precedents—including *In re Ross*, the *Insular Cases*, and *United States v. Curtiss-Wright Export Corp.*<sup>154</sup>—to mean that courts must consider the extraterritorial application of “constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”<sup>155</sup> Quoting from Justice Harlan's concurrence in *Reid v. Covert*, Justice Kennedy suggested that the standard for determining whether a constitutional provision has extraterritorial force is whether its application was “impracticable and anomalous” *under the circumstances*.<sup>156</sup> Requiring U.S. agents to obtain search warrants prior to conducting a search in Mexico did not pass that test because

[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.<sup>157</sup>

Both Justice Stevens, in a concurring opinion, and Justice Blackmun, in dissent, also expressed skepticism that the Warrant Clause could govern searches conducted abroad, noting that U.S. judicial officers have no power to issue such warrants.<sup>158</sup>

In a dissenting opinion for himself and Justice Marshall, Justice Brennan appeared to embrace the organic theory. Following Justice Black's plurality opinion in *Reid v. Covert*, he argued that the extraterritorial application of

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153. *Id.* at 277-78 (Kennedy, J., concurring).

154. 299 U.S. 304, 320 (1936) (recognizing the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

155. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

156. *Id.* at 278 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

157. *Id.*

158. *See id.* at 279 (Stevens, J., concurring in the judgment) (“I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.”); *id.* at 297 (Blackmun, J., dissenting) (“[A]n American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country.”). Justice Blackmun, however, thought that the “reasonableness” requirement of the Fourth Amendment applied and had been violated. *Id.* at 297-98.

constitutional protections is part and parcel of extraterritorial prosecutions.<sup>159</sup> Invoking “basic notions of mutuality,” Justice Brennan maintained that “[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”<sup>160</sup> In this way, the United States, by its conduct, promotes respect for the law. If not, Justice Brennan warned, U.S. legitimacy is diminished, as is the rule of law, because “[l]awlessness breeds lawlessness.”<sup>161</sup> Justice Brennan also rejected the proposition that the Warrant Clause served no function overseas, asserting that “a warrant serves the same primary function overseas as it does domestically: it assures that a neutral magistrate has authorized the search and limited its scope.”<sup>162</sup> Because, in Justice Brennan’s view, “[t]he need to protect those suspected of criminal activity from the unbridled discretion of investigating officers is no less important abroad than at home,” he would hold U.S. agents to all the requirements of the Fourth Amendment when they engage in extraterritorial searches and seizures.<sup>163</sup>

Over the last seven years, American courts have confronted the question of the extraterritorial application of constitutional provisions in the context of the efforts of our government to combat al Qaeda and other transnational terror networks. Detainees held at the U.S. military base at Guantanamo Bay, Cuba challenged their detentions in habeas petitions, which were twice dismissed by federal courts for lack of jurisdiction. The Supreme Court reinstated the petitions in 2004 in *Rasul v. Bush*<sup>164</sup> and in 2006 in *Hamdan v. Rumsfeld*,<sup>165</sup> but in both cases its decisions were based on U.S. statutory law and on international law, not on U.S. constitutional law. Two years later, however, in

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159. See *id.* at 281 (Brennan, J., dissenting) (“The Constitution is the source of Congress’ authority to criminalize conduct, whether here or abroad, and of the Executive’s authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government’s authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic.”).

160. *Id.* at 284.

161. *Id.* at 285.

162. *Id.* at 296.

163. *Id.*

164. 542 U.S. 466 (2004).

165. 548 U.S. 557 (2006).

the 2008 case of *Boumediene v. Bush*,<sup>166</sup> the Court considered the extraterritorial application of the constitutional guarantee of habeas review.<sup>167</sup>

Writing for the majority in *Boumediene*, Justice Kennedy explained that the detainees were entitled to the constitutional right of habeas review, and that the suspension of the writ set forth in the Military Commissions Act of 2006 was in violation of the Constitution. As a preliminary matter, Justice Kennedy reiterated the *Rasul* Court's determination that "that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over [the U.S. naval station at Guantanamo Bay]."<sup>168</sup>

In keeping with the views expressed in his concurring opinion in *Verdugo-Urquidez* and those of Justice Harlan in *Reid v. Covert*, Justice Kennedy turned to the *Insular Cases* and to the doctrine of territorial incorporation to determine not *whether* the Constitution extended to American possessions, but *which* provisions applied to those possessions.<sup>169</sup> Justice Kennedy found the *Insular Cases* instructive, noting that, in these landmark cases, the Supreme Court recognized "the inherent practical difficulties of enforcing all constitutional provisions always and everywhere," and established "a doctrine that allowed it to use its power sparingly and where it would be most needed."<sup>170</sup> In Justice Kennedy's view, the holdings in *Reid* and *Eisentrager* appeared equally motivated by pragmatism—that is, by the particular or novel circumstances presented by those cases—because "practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority."<sup>171</sup> Practical considerations also "weighed heavily" in *Eisentrager*, according to Justice Kennedy, as "difficulties of ordering the Government to produce the prisoners in a habeas corpus proceeding" constituted a substantial barrier to issuance of the writ.<sup>172</sup>

166. 128 S. Ct. 2229 (2008).

167. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

168. *Boumediene*, 128 S. Ct. at 2253 (emphasis omitted).

169. *Id.* at 2254–55.

170. *Id.* at 2255 (internal quotation marks omitted).

171. *Id.* at 2256.

172. *Id.* at 2257. The effect of *Boumediene* on the continued validity of *Eisentrager* has been questioned by some commentators. See Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 28–32. The view that *Boumediene* has undermined *Eisentrager* is not consistent with the stated position of the *Boumediene* majority. The majority opinion in *Boumediene* did not purport to reverse or limit

Based on this authority, Justice Kennedy identified a nonexhaustive list of factors relevant to a determination of the extraterritorial application of habeas review, including the following: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”<sup>173</sup> On balance, these factors weighed in favor of extending the right of habeas review to the Guantanamo detainees, and on that basis, the Court held that the Suspension Clause has “full effect at Guantanamo Bay.”<sup>174</sup>

In dissent, Justice Scalia reasoned that, because the majority “admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States,” it was bound to affirm the dismissal of the petitions.<sup>175</sup> Unlike the majority, Justice Scalia adopted a categorical approach, advancing “the primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien.”<sup>176</sup> Finding no support in the text and history of the Suspension Clause, or in the relevant precedents of the Court, for the extraterritorial extension of the writ of habeas corpus to aliens located in lands where the United States is not sovereign, Justice Scalia, along with three other Justices, would have affirmed the dismissal of the petitions.

In these decisions, we see that the questions of whether and to what extent provisions of the Constitution have extraterritorial force do not lend themselves to simple answers. From the early days of the Republic, the United States has exerted authority over individuals beyond its borders—and periodically, those actions have been challenged in American courts. These challenges often arise from the exigencies of the day, such as continental expansion, colonial administration, and war, and they reflect the particular context in which they arise. In the Court’s decisions, we see at times an *attempt* to impose categorical rules on government action overseas—either by freeing these actions from or limiting these actions to constitutional constraints, echoing the compact and organic theories of the Constitution. But no categorical rule—nor even a categorical or theoretical mode of analysis—has

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*Eisentrager*; rather, it relied on *Eisentrager* to construct the framework that it announced. In the absence of an indication from a Supreme Court majority that *Eisentrager* no longer carries precedential force, it remains an important guidepost in this area of law.

173. *Boumediene*, 128 S. Ct. at 2259.

174. *Id.* at 2262.

175. *Id.* at 2297 (Scalia, J., dissenting).

176. *Id.* at 2298; see also *id.* at 2300-01.

emerged from this body of law to provide a framework for evaluating whether the claimed extraterritorial application of a constitutional provision should be recognized. Although some Justices have written in favor of a categorical approach, the trend in cases decided in the last half century strongly suggests an aversion to a categorical rule in favor of a judicially administered, multifaceted analysis of the right invoked and the specific circumstances of the case.

#### **IV. A FRAMEWORK FOR IDENTIFYING THE CONSTITUTIONAL CONSTRAINTS THAT GOVERN THE INVESTIGATION, PROSECUTION, AND PUNISHMENT OF INDIVIDUALS LOCATED ABROAD**

Courts will continue to face the extraterritorial application of constitutional procedures in the years to come. Nowhere will this inquiry prove more important than in the investigation and prosecution of overseas criminal activity. As noted, the prosecution of the war on terror and the cross-border criminal enforcement of antitrust and securities regulation<sup>177</sup> will inevitably raise questions about whether and to what extent American procedural rules govern overseas operations.<sup>178</sup> This inquiry will prove particularly delicate in situations in which U.S. agencies cooperate with their foreign counterparts in investigations and interrogations. Commentators have noted the differences between the criminal procedures applicable in the United States and those overseas.<sup>179</sup> Insofar as American courts require compliance with American procedures, investigative agencies must act accordingly from the outset of their efforts. The need for regularity and predictability in this area of the law is readily apparent.

To that end, can we identify common ground between the compact theory and the organic theory of extraterritoriality that have been expressed, sometimes in the majority and sometimes in dissent, in the precedents reviewed above? I think so. Each theory presents valid considerations that must be taken into account when considering whether a constitutional rule constrains American action overseas.

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177. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 280 (1990) (Brennan, J., dissenting) (“Foreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes.” (footnotes omitted)).

178. See *supra* note 74 and accompanying text.

179. See Andrew Ashworth, *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 *CARDOZO L. REV.* 751 (2008); Mike Redmayne, *English Warnings*, 30 *CARDOZO L. REV.* 1047 (2008).

The compact theory recognizes the undeniable truth that the Constitution was written to provide sound government to a particular nation—and not to bestow rights to all people across the globe. This commonsensical insight tells us that the procedures set forth in the Constitution will not necessarily apply with equal force both within and beyond the borders of the United States. In some cases, the rule cannot be implemented overseas because it is impossible or impracticable to do so. Other rules pertain to rights that exist only between subject and sovereign, such as the right to participate in democratic processes.

The organic theory, on the other hand, appreciates that a government of limited, enumerated powers domestically cannot be utterly unrestrained when it acts abroad. This theory reminds us that a nation built on the rule of law must hold itself to the rule of law if its actions are to be perceived as legitimate both at home and abroad. A government formed by a Constitution cannot act in ways that are repugnant to that foundational document simply because those affected are aliens in a foreign land.

When faced with these competing claims over whether a constitutional rule should have extraterritorial effect, courts have looked to the nature and purpose of the relevant rule and the facts and circumstances of the particular case. From these precedents, we can discern several critical considerations. Chief among these are the following: (1) whether the power exercised by the government is one that can only be exercised abroad; (2) the extent of the connection to the United States of those acted upon overseas; (3) whether the challenged government action presents a risk of irreparable injustice; (4) the practical limitations on enforcing the constitutional provision in question; and (5) the absence of any categorical rule to determine whether a particular provision of the Constitution should have extraterritorial force. I describe each of these considerations in greater detail below.

#### *A. Powers Available Abroad but Not at Home*

Where the Constitution has specifically empowered the government to exercise powers abroad that it lacks at home, some constitutional limitations that obtain in the domestic sphere may have limited relevance. Domestic constraints are tailored to domestic powers, and certain of these may be incompatible with the scope of authority vested in the government when it operates in the international sphere.

In *Canter*, *Murphy*, and the *Insular Cases*, for example, the Supreme Court recognized the power vested exclusively in Congress to acquire and govern U.S. territories, and it refused to apply fully domestic constraints to the exercise of that power. The *Canter* Court observed that “[t]he Constitution confers absolutely on the government of the Union, the powers of making war,

and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”<sup>180</sup> Pursuant to this power, the government obtains “[t]he right to govern” newly acquired territory as “the inevitable consequence of the right to acquire territory.”<sup>181</sup> In its capacity as governor of these territories, the federal government was empowered to do in a territory what it was prohibited by the Constitution from doing in a state of the Union—in this case, appointing non-Article III judges to hear admiralty cases.<sup>182</sup> Similarly, in *Murphy*, the Court reasoned that “in ordaining government for the Territories, and the people who inhabit them,” the Constitution entrusts Congress “beyond all controversy, to determine[] by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it.”<sup>183</sup> Whatever limits the Constitution imposed on the government’s power to restrict suffrage domestically did not bear on its power to determine voting qualifications in the territories. The Court explained that Congress “may . . . take from [the residents of a territory] any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.”<sup>184</sup> Equally deferential to the power of the government to administer the territories was the Court’s statement in *Downes*, one of the *Insular Cases*, that “the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.”<sup>185</sup> Because of its constitutionally conferred authority over the territories, Congress was not bound, in its administration of those territories, by the requirement of the Constitution that “all Duties, Imposts, and Excises shall be uniform throughout the United States.”<sup>186</sup>

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180. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

181. *Id.* at 543.

182. *Id.* at 546 (“The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.”).

183. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

184. *Id.*

185. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (Brown, J., announcing the judgment of the Court).

186. U.S. CONST. art. I, § 8; see *Downes*, 182 U.S. at 283 (“Large powers must necessarily be entrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised.”).

*In re Ross* also involved powers granted the government by the Constitution to conduct foreign affairs—namely, the treaty power to establish consular courts. The Court observed that “[t]he treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. . . . [including] the exercise of judicial authority in other countries by [government] officers appointed to reside therein.”<sup>187</sup> The establishment of consular courts was a necessary component of that power, the Court reasoned, because it facilitated commercial intercourse between nations. While these courts lacked “the guarantees of the Constitution against unjust accusation and a partial trial,” the Constitution did not require that “all the guarantees in the administration of the law upon criminals at home . . . be transferred to such consular establishments.”<sup>188</sup> This was so, according to the Court, because the purpose of the treaty power was to facilitate the ability of the government to establish relations with other nations. In this instance, that power allowed Americans to be “withdrawn from the procedure of [foreign] tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.”<sup>189</sup> This benefit could only be obtained through the exercise of the treaty power to establish the courts and the Court saw no basis to encumber that power by imposing restrictions applicable to domestic circumstances.

The war power loomed large in the analysis of the *Eisentrager* Court. The Court explained that the backdrop of war altered drastically an alien’s claim to constitutional protections against the exercise of government power. “It is war that exposes the relative vulnerability of the alien’s status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us.”<sup>190</sup> In wartime, “the nonresident enemy alien . . . neither has . . . claims upon our institutions nor could his use of them fail to be helpful to the enemy.”<sup>191</sup> Indeed, the Court’s concern that enemy aliens could use constitutional constraints on the exercise of government power as a tool to undermine the efficacy of the government’s war powers cannot be overstated. If the *Eisentrager* petitioners were granted habeas review, the Court observed,

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187. *In re Ross*, 140 U.S. 453, 463 (1891).

188. *Id.* at 465.

189. *Id.*

190. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

191. *Id.* at 776.

“[s]uch trials would hamper the war effort and bring aid and comfort to the enemy.”<sup>192</sup> The Court explained,

They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.<sup>193</sup>

Because habeas review, which was fully available domestically, undermined the ability of the government to exercise its war power abroad, the Court held that it was inapplicable and denied habeas review to the German detainees.

Accordingly, where the government is authorized by the Constitution to act abroad in ways not authorized at home, constitutional rules that apply at home might not apply—or might not apply in the same way—to action by the government abroad.

*B. Connection to the United States*

The degree and nature of a person’s connection to the United States is often an important factor in determining whether and how a constitutional provision is recognized and enforced. The stronger the connection, the more likely it is that a constitutional claim will be recognized. Conversely, a weak connection to the United States tends to weigh against the extension of the constitutional provision in question.

We saw this factor at work in *Canter* when the Court emphasized that the residents of the territory of Florida, as former subjects of Spain, had only recently come under the sovereignty of the United States and therefore had not yet acquired a claim to all American constitutional protections. The Court explained, “[A]ll the laws which were in force in Florida while a province of Spain . . . which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United

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192. *Id.* at 779.

193. *Id.*

States.”<sup>194</sup> Similarly, the *Downes* Court emphasized the “differences of race, habits, laws and customs of the people” and the “differences of soil, climate and production” that arose from “the annexation of outlying and distant possessions.”<sup>195</sup> Based on this lack of connection to the culture and practices of the United States, the Court declined to extend “the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence” to the residents of America’s newly acquired overseas possessions.<sup>196</sup>

Lack of connection to the United States was also essential to the *Eisentrager* Court’s denial of habeas review to the detainees held in Germany—detainees who had never come within the sovereign territory of the United States and who had only a few years earlier taken up arms against the United States. The Court rejected the proposition that

a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.<sup>197</sup>

The Court was also careful to distinguish earlier cases “deal[ing] with persons both residing and detained within the United States and whose capacity and standing to invoke the process of federal courts somewhere was unquestioned,” further emphasizing the importance of connection to the United States when considering constitutional claims.<sup>198</sup> The importance of an individual’s relationship with the United States was most recently articulated in the Court’s determination in *Verdugo-Urquidez* that a citizen of Mexico with no connections to the United States could not press a Fourth Amendment claim against the United States. In that case, the Court made clear that, as “a citizen and resident of Mexico with no voluntary attachment to the United States,” the

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194. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 544 (1828).

195. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

196. *Id.* at 283.

197. *Eisentrager*, 339 U.S. at 777.

198. *Id.* at 790.

defendant had no rights under the Fourth Amendment with respect to the search conducted in Mexico.<sup>199</sup>

When a connection to the United States is established, however, the argument for extending constitutional protections has greater force. We saw the importance of a strong connection to the United States in *Reid v. Covert*, in which the Court refused to allow the civilian spouses of U.S. military personnel to be tried in military courts without the benefit of certain constitutional protections.<sup>200</sup> The plurality opinion emphasized the need to protect *U.S. citizens* from unchecked government power, noting that

[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Moreover we cannot consider this encroachment a slight one. Throughout history many transgressions by the military have been called “slight” and have been justified as “reasonable” in light of the “uniqueness” of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.<sup>201</sup>

The concurrences of both Justice Frankfurter and Justice Harlan emphasized the fact that this case involved the prosecution of civilians who were U.S. citizens.<sup>202</sup>

In *Boumediene*, sovereignty, not citizenship, was the relevant “connection” to the United States. There, the Court extended the writ of habeas corpus to detainees at Guantanamo Bay—an area that, as the majority emphasized, is under *de facto* U.S. sovereignty. The Court accepted “the Government’s position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay,” but further observed “the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.”<sup>203</sup> This *de facto* sovereignty was sufficient for the majority to conclude that “Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”<sup>204</sup>

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199. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

200. 354 U.S. 1, 23, 40-41 (1957); *id.* at 64 (Frankfurter, J., concurring); *id.* at 65 (Harlan, J., concurring).

201. *Id.* at 40 (citation omitted).

202. *Id.* at 49 (Frankfurter, J., concurring in the result); *id.* at 74-77 (Harlan, J., concurring in the result).

203. *Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008).

204. *Id.* at 2262.

While connection to the United States is a factor that often weighs in favor of the application of the constitutional provision in question, it bears noting that it is not a decisive or dispositive factor. The *In re Ross* Court, for example, determined that the petitioner, who was treated as a U.S. citizen for analytical purposes,<sup>205</sup> was nevertheless unable to avail himself of the constitutional protections sought in that case.<sup>206</sup> Thus, “connectedness,” while not dispositive, is a recurring factor worthy of consideration when determining whether and to what extent a constitutional provision should have extraterritorial force.

### C. Risk of Irreparable Injustice

Constraints set forth by the Constitution on the power of the government are more likely to be enforced when the risk of irreparable injustice is high. This can be inferred from the distinction drawn in *Murphy* and the *Insular Cases* between “political rights,” which the government did not necessarily have to respect in the territories, and “personal and civil rights,” which might bind the government.<sup>207</sup> In declining to extend the full range of constitutional provisions to the territories, the *Downes* Court observed that the inhabitants of those territories “are [not] in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of

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205. See *supra* note 100.

206. 140 U.S. 453, 464 (1891).

207. In *Downes v. Bidwell*, for example, Justice Brown observed that “there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.” 182 U.S. 244, 282 (1901). Among the “natural rights” were

the rights to one’s own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one’s own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government.

*Id.* at 282-83. Similarly, the Court observed in *Murphy v. Ramsey* that “[t]he personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National.” 114 U.S. 15, 44-45 (1885).

the Constitution to be protected in life, liberty and property.”<sup>208</sup> The nature of the constitutional provision invoked—and the consequences of failing to recognize the applicability of that provision—is an important factor in Supreme Court decisions in this area.

The centrality of this “measuring of the stakes” is most clear in the concurring opinion of Justice Harlan in *Reid v. Covert*.<sup>209</sup> In that opinion, Justice Harlan emphasized the fact that the proceedings at issue were *capital* proceedings and that determining which procedures apply to a criminal trial takes on greater urgency when the outcome of the trial could be a sentence of death. “So far as capital cases are concerned, I think they stand on quite a different footing than other offenses,” Justice Harlan wrote.<sup>210</sup> “In such cases the law is especially sensitive to demands for that procedural fairness . . . . I do not concede that whatever process is ‘due’ an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case.”<sup>211</sup>

Likewise, in *Boumediene*, the risk of indefinite erroneous detention at the military base at Guantanamo Bay—a serious deprivation of liberty that, if unwarranted, could work a great injustice—weighed in favor of the majority’s decision to call for habeas review of the detentions. The majority expressed concern over what it perceived to be the injustice of further delay in determining whether the detainees were properly held in U.S. custody, observing that “[i]n some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.”<sup>212</sup> In light of the time that had already elapsed, the Court ruled that “the costs of [further] delay can no longer be borne by those who are held in custody” and required that “[t]he detainees in these cases [receive] a prompt habeas corpus hearing.”<sup>213</sup> The situation appeared sufficiently dire to the Court that action—in the form of extending the writ to the detainees—was necessary.

Conversely, in the decisions that deny the application of constitutional provisions, the risk of irreparable injustice appears to be low. In *Canter*, the provision at issue was whether admiralty suits in the territories could be heard only by Article III courts,<sup>214</sup> and in *Downes*, it was the uniformity of duties.<sup>215</sup>

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208. *Downes*, 182 U.S. at 283.

209. 354 U.S. 1, 77 (1957) (Harlan, J., concurring in the result).

210. *Id.*

211. *Id.*

212. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

213. *Id.*

214. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 543 (1828).

While *Murphy* involved suffrage, a vital right in a democracy, the Court observed that the restriction imposed by Congress was “clearly within . . . justification,” noting that the restrictions in question were “wholesome and necessary in the founding of a free, self-governing commonwealth.”<sup>216</sup> Similarly, in *In re Ross*, the Court noted that, even though the consular tribunals did not provide full constitutional protections, they nevertheless worked to the benefit of Americans abroad:

While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.<sup>217</sup>

In addition, the petitioner’s death sentence had been commuted to a life sentence of imprisonment within the United States by the time *In re Ross* reached the Court.<sup>218</sup> Likewise, neither the suppression issue in *Verdugo-Urquidez*<sup>219</sup> nor the detention of the German prisoners in *Eisentrager*<sup>220</sup> presented circumstances risking irreparable injustice.

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215. *Downes v. Bidwell*, 182 U.S. 244, 249 (1901).

216. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

217. 140 U.S. 453, 465 (1891).

218. *Id.* at 480.

219. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). As the Ninth Circuit has recognized, “[a] criminal defendant acquires no personal right of redress in suppressed evidence” because the rationale for suppressing unlawfully obtained evidence is to deter official misconduct, not to compensate criminal defendants for the violation. *United States v. Rabb*, 752 F.2d 1320, 1323 (9th Cir. 1984).

220. *Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950) (“It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the *Yamashita* case, ‘If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.’” (quoting *In re Yamashita*, 327 U.S. 1, 8 (1946))).

From this review, we see that an assessment of the stakes in a particular case contributes to the determination of whether a particular constitutional provision has extraterritorial force.

*D. Practical Considerations Relevant to the Particular Context*

Practical considerations loom large across these decisions. The *In re Ross* Court noted “the impossibility of obtaining a competent grand or petit jury” abroad and the likelihood that “[t]he requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution.”<sup>221</sup> In the *Insular Cases*, the different practices and history of the new territories often provided the basis for concluding that a right or procedure recognized in the common law system of justice did not necessarily apply in lands with other traditions.<sup>222</sup> The logistical difficulty presented in *Eisentrager* of transporting thousands of German detainees to the United States for habeas hearings factored into the Court’s decision to deny them habeas review. There, the Court noted that “[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing,” requiring “[the] allocation of shipping space, guarding personnel, billeting and rations” and “transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.”<sup>223</sup> The imposition of such a heavy burden during wartime was met with skepticism by the Court. In *Verdugo-Urquidez*, Justice Kennedy’s concurring opinion noted, as factors weighing against the overseas application of the Fourth Amendment’s warrant requirement, the “absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials.”<sup>224</sup> When faced with significant impediments to the effectuation of a constitutional provision, the Court has been wary of imposing it on the actions of the government.

Where logistical obstacles are not so great, the Court has been more receptive to the recognition of the provision. In *Boumediene*, for example, Justice Kennedy distinguished *Eisentrager*, noting that

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221. 140 U.S. at 464.

222. See *supra* text accompanying note 120.

223. *Eisentrager*, 339 U.S. at 778-79.

224. *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

[w]hen hostilities in the European Theater came to an end, the United States became responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million. In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. In retrospect the post-War occupation may seem uneventful. But at the time *Eisenstrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain enemy elements, guerilla fighters, and "were-wolves."<sup>225</sup>

The U.S. Naval Station at Guantanamo Bay, on the other hand, "consists of 45 square miles of land and water" and the detainees housed there "are contained in a secure prison facility located on an isolated and heavily fortified military base."<sup>226</sup> Justice Kennedy noted further that "adjudicating a habeas corpus petition would [not] cause friction with [any] host government" and the facility "[was not] located in an active theater of war."<sup>227</sup> Accordingly, he concluded that "there are few practical barriers to the running of the writ."<sup>228</sup>

Similar considerations animated the concurring opinion of Justice Harlan in *Reid v. Covert*, which recognized that "requir[ing] the transportation home for trial of every petty black marketeer or violator of security regulations would be a ridiculous burden on the Government."<sup>229</sup> Even so, Justice Harlan saw no undue burden in carving out an exception for a narrow class of crimes, such as capital offenses.<sup>230</sup>

From these decisions, we see that practical considerations influence both the decision of whether the extraterritorial application of a constitutional provision should be recognized and the extent to which that provision will have force.

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225. *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008) (citations omitted). "Werewolves" is a term used to refer to Nazi guerillas who resisted the Allied occupation of Germany. *THE OXFORD COMPANION TO WORLD WAR II*, at 1268 (I.C.B. Dear & M.R.D. Foot eds., 1995).

226. *Boumediene*, 128 S. Ct. at 2261.

227. *Id.* at 2261-62.

228. *Id.* at 2262.

229. 354 U.S. 1, 76 & n.12 (1957).

230. *Id.* at 77.

*E. Rejection of Categorical Rules*

A categorical approach to the question of extraterritorial application of constitutional rights—the categorical assertion that rights must always be observed or the categorical denial of any such obligation—rarely attracts a full majority of the Court.<sup>231</sup> The wisest words from the Supreme Court suggest, in my view, that we cannot answer with a simple yes or no the question of whether a particular right extends beyond the borders of the United States. The nature and purpose of each procedural rule is different, and whether a particular rule applies must turn on factors associated with that rule *and* on the facts and circumstances of the particular case where the right is invoked. Any serious student of the long and tangled history of the extraterritorial application of the Constitution will be careful to avoid seeking a single theory that admits of no nuance; he will focus instead on facts of the particular case presented, and on the precedents and practices that have actually guided us in the past.

**CONCLUSION**

I now briefly apply these considerations to the hypothetical scenarios described at the outset of this Essay.

With respect to the British citizen investigated for antitrust violations, nothing in the hypothetical indicates that the government acted pursuant to special authority conferred upon it by the Constitution for the conduct of foreign affairs, such as the treaty or war powers. With respect to the suspect's ties to the United States, the hypothetical provides no information of what those might be, so his claims to this protection might be affected by whether he has resided in the United States or developed closer ties through dual citizenship, for example. The hypothetical does not suggest that a severe or irreparable injury would result from the admission into evidence of the act of production, but insofar as an American trial cannot be considered fair if it involves compelled, but nonimmunized, testimony of the defendant, there might be an argument excluding the evidence on the ground that it would constitute a grave and irreparable deprivation of one of the hallmarks of a fair trial. As for the practical considerations, a court would consider how American agents could prevent the British authorities from demanding such information from suspects and how American resistance to this coercion might impair joint American-British efforts to enforce antitrust violations.

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231. A notable exception to this observation is *In re Ross*, 140 U.S. 453, 464 (1891).

Turning to the hypothetical in Germany, the first question a court would have to consider is whether the search of the German citizen's home was conducted pursuant to the authority of our government to provide for national security. Insofar as the Constitution entrusts the federal government with powers to engage in actions abroad in order to protect national security and those powers exceed what is available when the federal government undertakes to enforce domestic law, domestic rules might have no application to this overseas action. The connections of the German citizen are not specified by the hypothetical and so call for an inquiry similar to the one described above. The injury at issue here—an invasion of privacy without a warrant—does not, without more elaboration, appear to be so serious or irreparable so as to require special consideration. To be sure, if one takes the view that a fair trial always requires the suppression of even reliable evidence that is obtained without a warrant, one might see an irreparable injury here, but there is no basis for this strict rule in our precedents.<sup>232</sup> Practical considerations appear to weigh against strict adherence to the warrant requirement in light of the absence of a means of obtaining an American warrant for the search of a residence in Germany, the lack of legal force of any such warrant, and the inadvisability of conditioning overseas actions to combat threats to national security on obtaining a warrant from a U.S. court.

While the factors identified above do not lead to a clear “yes” or “no” in these hypotheticals, they do provide a framework for evaluating the claim and weighing the competing considerations. Weighing these factors in light of the specific context at issue will facilitate informed decisionmaking in this complex area of law.<sup>233</sup>

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There is no simple answer to the question of whether, and to what extent, the overseas actions of the United States government must conform to

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232. See, e.g., *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (“The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion has always been our last resort, not our first impulse, and our precedents establish important principles that constrain application of the exclusionary rule.” (internal citations and quotation marks omitted)).

233. One of the specific contexts where this body of law may continue to be applied is the detention of combatants at Bagram Air Base in Afghanistan. See, e.g., *Al Maqaleh v. Gates*, No. 06-1669, 2009 WL 863657, at \*2 (D.D.C. Apr. 2, 2009) (holding that habeas corpus review is available to three of four alien petitioners detained at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan).

procedural requirements established by the Constitution for the investigation and prosecution of crime. Courts have struggled with this question since the Founding, invoking competing theories of the scope of the Constitution's reach, but no single theory has come to provide the rule of decision in this area of law. Indeed, categorical approaches infrequently provide the basis for a particular ruling because they rarely attract the votes of a majority of Justices. In the Court's decisions on particular applications for the extraterritorial application of the Constitution, we discern instead a pragmatic, context-specific approach to determining whether the protection or limitation in question applies beyond the borders of the United States. These decisions are often tailored closely to the needs of the case and sensitive to the practical limitations of enforcing adherence abroad to a particular rule that is normally applied at home. A close examination of these cases suggests there are several factors relevant to determining whether a particular rule should have extraterritorial force. Evaluating a claim for the extraterritorial extension of a constitutional rule in light of those factors provides a framework rooted in our past practices and experiences for resolving these claims. By relying on this framework, the practical wisdom of our precedents can guide our response to challenges that appear novel, but that share much in common with challenges that we have faced – and overcome – in the past.

In sum, when considering questions involving the extraterritorial application of American constitutional law, as perhaps in other realms, we do well to avoid the common temptation of modern legal scholarship to devise a unified field theory, and to recall always the great insight of Oliver Wendell Holmes on Anglo-American law, that “[t]he life of the law has not been logic: it has been experience.”<sup>234</sup>

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234. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).