Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction

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PROSECUTING TERRORISTS AS CRIMINALS AND THE LIMITS OF EXTRATERRITORIAL JURISDICTION

SARA A. SOLOW

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INTRODUCTION

Since 9/11, the United States has deployed many strategies to combat global terrorism. It has pursued wars in Afghanistan and in Iraq; launched drone strike campaigns over regions of Pakistan; and frozen the assets of thousands of individuals and organizations purportedly linked to terrorism. Additionally, one very powerful tool that the United States has deployed has been the prosecution and punishment of persons for overseas acts of terrorism, a strategy that makes use of both the country's Article III courts and its newly created military commissions. This Article focuses on the government's use of the federal court system for prosecuting extraterritorial acts of terrorism in the so-called "War on Terror." 1 It explores what Due Process Clause constraints have been imposed by courts, and whether those constraints have been sufficient.

While the focus in the media and in Congress over the last several years has been on the propriety of convening military commissions to try persons who are detained by the government as enemy combatants, it is the Article III courts, in fact, that have served as the country's central instrument for subjecting

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1 The Obama Administration has decidedly parted with the term “War on Terror.” See Oliver Burkeman, Obama Administration Says Goodbye to ‘War on Terror,’ THE GUARDIAN (Mar. 25, 2009 5:40 PM), http://www.guardian.co.uk/world/2009/mar/25/obama-war-terror-overseas-contingency-operations (“A message sent recently to senior Pentagon staff explains that ‘this administration prefers to avoid using the term Long War or Global War On Terror (Gwot) . . . please pass this on to your speechwriters’.”) (alteration in original). But rhetoric aside, the Administration's May 2010 National Security Strategy commits in no shy terms to a "global campaign" against terrorist networks. NAT'L SECURITY COUNCIL, NATIONAL SECURITY STRATEGY 19 (2010) (“The United States is waging a global campaign against al-Qa'ida and its terrorist affiliates. To disrupt, dismantle and defeat al-Qa'ida and its affiliates, we are pursuing a strategy that protects our homeland, secures the world's most dangerous weapons and material, denies al-Qa'ida safe haven, and builds positive partnerships with Muslim communities around the world.”). This Article will use the phrase “War on Terror” because of its descriptive convenience, but does not intend to express any political position on its appropriateness.
terrorists to legal process. Since 9/11, the United States has obtained nearly 600 convictions in Article III courts against persons for crimes associated with terrorism; in military commissions, meanwhile, it has obtained a mere six convictions.\(^2\) Moreover, while many of the individuals that the United States has prosecuted for terrorism crimes since 9/11 have been Americans or foreigners conducting their activities from within the United States—persons falling under conventional concepts of “jurisdiction”—a significant number have been non-nationals, conducting their activities from abroad. For this latter group, the application of United States penal law has been on a wholly extraterritorial basis.

The problem is that due process has gone largely unmentioned throughout all of this. Today, when the United States indicts a foreign citizen for violating American terrorism statutes from some place overseas, it is rare that the defendant challenges the district court’s jurisdiction under the Due Process

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\(^2\) See infra notes 24–25, 27 and accompanying text.

\(^3\) “National” and “territorial” jurisdiction are the two most common bases of jurisdiction recognized by United States and international law. “National jurisdiction” refers to jurisdiction over persons who are citizens or legal permanent residents of a political community. “Territorial jurisdiction” refers to jurisdiction over all persons who are physically located within a territory when they carry out their conduct. For sources recognizing the national jurisdiction principle, see *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) (holding that the United States can prescribe the conduct of its own citizens upon the high seas); *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (holding that a United States citizen living in France was subject to punishment for violating United States law); and *Restatement (Third) of Foreign Relations Law of the United States* § 402(2) (1987) (“[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . .”). For sources recognizing the territorial jurisdictional principle, see *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356–57 (1909), overruled in part as stated in *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2887 n.11 (2010) (noting the “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”); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”); *Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 623 (“Crimes are in their nature local, and the jurisdiction of crimes is local.”); and *Restatement (Third) of Foreign Relations Law of the United States* § 402(1) (“[A] state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory . . .”). In this Article, the term “domestic jurisdiction” will be used to refer to jurisdiction arising under either a national or territorial principle. The term “extraterritorial jurisdiction” will be used to refer to jurisdiction where neither factor is present—in other words, where the individual is neither a national nor is territorially present in the state in which he is being tried.
Clause. It is even more rare for a court to address the issue *sua sponte*. The prosecution proceeds, with all parties assuming that the application of United States criminal law to the defendant is substantively fair, raising no problems from a jurisdictional perspective. But this might not always be true. Several federal terrorism statutes outlaw conduct that not only is sanctioned in foreign territories, but that involves activities far removed from the actual infliction of harm or violence vis-à-vis the United States. A deeper look at the case law shows that there have been a number of terrorism prosecutions since 9/11 in which it is arguable that the defendant was denied fair warning that his activities abroad might make him a criminal in the United States. In these cases, the individual rights that we typically expect the Due Process Clause to protect are put at risk.

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4 Defendants do routinely challenge terrorism statutes under the Due Process Clause for other reasons, such as arguing that they are unconstitutionally vague, see for example *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010), or that they infringe on protected activities, see for example *United States v. Shah*, 474 F. Supp. 2d 492, 496 (S.D.N.Y. 2007). But those types of challenges are not the focus of this Article.

5 See infra notes 38–56 and accompanying text.

6 See, for example, 18 U.S.C.A § 2339B(a)(1) (West 2011), which makes it a federal crime to "knowingly provide[] material support or resources to a foreign terrorist organization." Title 18 U.S.C.A. § 2339A(b)(1) defines "material support" to mean "any property, tangible or intangible, service, including currency or money instrument, or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities ...." This statute sweeps far broader than many foreign countries' laws. E.g., Case C-340/08, The Queen ex rel M v. Her Majesty's Treasury ¶¶ 56–74 (Apr. 29, 2010), available at http://curia.europa.eu/jcms/jcms/1_6 (holding that European laws banning terrorist financing still authorize social security payments to be made to terrorists' wives); see also Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 124 (2011) ("Several of the offenses codified in the [Military Commissions Act] notoriously have no grounding in the standard menu of sources for identifying the substantive content of customary international law.... Perhaps most conspicuously, Congress incorporated the federal crime of 'providing material support for terrorism' into the MCA, despite the fact that this is a novel statutory offense that was not even conceived until the mid-1990s, and has never been considered a law-of-war offense by any other nation."); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 177 (2007) (explaining that "providing material assistance" to terrorists does not qualify as a universally condemned offense).

7 See infra Part I.B.
This Article probes the reasons for the impoverished nature of the due process doctrine in contemporary extraterritorial terrorism cases. First, it shows that it is not just terrorism cases in which courts have failed to develop a due process test—it is the large majority of cases involving extraterritorial crimes altogether. Next, this Article offers an explanation: It suggests that the reason the Due Process Clause has been largely absent when it comes to the extraterritorial application of the criminal law, both in terrorism cases and others, is that the type of extraterritorial prosecution that would necessitate such a test is a relatively recent feature of the American republic. Until roughly 1980, the United States only sought to apply its penal laws beyond the country's borders in two situations: when foreigners committed "universal crimes," and when they perpetrated crimes against the United States. Both categories of offenses failed to raise due process problems, however, because they each involved conduct that foreign defendants should have expected would trigger criminal liability in the United States. It was only in 1980 that Congress passed a statute that both applied overseas and that wrapped foreigners into a distinctly American criminal code of conduct. Similar statutes have since been passed; the problem is that constitutional doctrine has lagged behind.

If the lack of a due process test for regulating the extraterritorial application of United States criminal law is a product primarily of historical fact, should we be satisfied with the current state of the law? Certainly not. In fact, the absence of a due process test for monitoring the extraterritorial reach of criminal statutes is inconsistent with two other foundational bodies of American law. First, under the law that applies in "domestic" criminal trials, where the defendant is either an American citizen or is located in the United States when he commits his crime, the Fifth and Fourteenth Amendments unquestionably limit when a court can impose punishment. Three doctrines—the Bouie test; the void-for-vagueness test; and the rule of lenity—all apply as extensions of the Due Process Clause to ensure that the criminal defendant is given fair warning before a court can hear the case. Second, under the law that applies when U.S. civil statutes are enforced

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8 See supra note 3.
9 See infra Part III.A.
extraterritorially, courts have also limited jurisdiction according to a notice requirement since the time those statutes have had purchase overseas. The federal government has sought to enforce U.S. antitrust and securities fraud statutes abroad since the 1950s and '60s. In turn, U.S. courts have required that the foreign defendant be given ample warning of his potential for incurring liability domestically, before allowing such prosecutions to proceed.\(^{10}\)

Both the domestic criminal jurisprudence and the extraterritorial civil jurisprudence point to one conclusion: The Due Process Clause should be made to regulate over extraterritorial applications of American criminal law. Before we subject a foreigner to criminal jurisdiction in a United States court, we must be assured that he was on notice. Fortunately, the Ninth Circuit of the United States Court of Appeals has made this realization in recent drug-trafficking cases and has developed a "nexus test" for ensuring that extraterritorial enforcement complies with the Due Process Clause.\(^{11}\) These Ninth Circuit cases should point the way forwards for U.S. courts in extraterritorial terrorism prosecutions and beyond.\(^{12}\)

The remainder of this Article is structured as follows. Part I discusses the United States government's current use of the Article III courts to combat global terrorism. First, it reviews data to show that there has been a whopping number of extraterritorial prosecutions for terrorism crimes brought since 9/11. Second, it surveys the case law to demonstrate that U.S. courts have failed to develop a due process test for assessing extra-jurisdictionality in those terrorism cases, and that this has

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\(^{10}\) See infra Part III.B.

\(^{11}\) See infra Part III.C.

\(^{12}\) This is not the first article to make this normative assertion. In their path-breaking *Harvard Law Review* article in 1992, Lea Brilmayer and Charles Norchi advocated for a Fifth Amendment Due Process Clause test that would regulate over all extraterritorial applications of United States law, criminal and civil. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1233-34 (1992). But since Brilmayer and Norchi's piece almost twenty years ago, there has been no serious scholarly piece that revisits their argument. This Article fills that void. Moreover, it builds on Brilmayer and Norchi's work in several ways: it situates the analysis in the recent terrorism cases; it offers a historical explanation for why extraterritorial criminal jurisdiction suffers from its current deficiencies; and it uses other bodies of law, such as anti-trust and securities fraud law, to frame its recommendation for the extraterritorial criminal law.
been problematic because several cases have raised due process questions. Part II puts the discussion in Part I in context by exploring the larger body of United States law on extraterritorial criminal jurisdiction. First, Part II.A shows that the lack of a due process doctrine for limiting terrorism prosecutions is actually par for the course; as a whole, federal court opinions allowing for the extraterritorial application of the criminal law have been largely silent on the Due Process Clause. Next, Part II.B claims that the reason for this state of the doctrine is historical. Extraterritorial crimes necessitating a due process analysis only date back to 1980. In Part III, this Article shifts to a normative argument. Drawing on domestic criminal law in Part III.A and on the law concerning the extraterritorial enforcement of federal civil statutes in Part III.B, this Article argues that the absence of a Due Process Clause test for prosecuting overseas crimes is inconsistent with core tenants in American law. Part III.C examines drug-trafficing cases in the Ninth Circuit since the 1990s, the one body of cases in which judges have begun to fill the holes. In the Conclusion, this Article seeks to apply the lessons from Part III to contemporary extraterritorial terrorism cases. It sketches the outlines of a Due Process Clause test that U.S. courts should apply in terrorism prosecutions going forward.

I. SUBJECTING FOREIGN TERRORISTS TO UNITED STATES CRIMINAL LAW

A. The Centrality of Criminal Trials in the "War on Terror"

Over the past two years, there has been significant political debate and media attention devoted to the use of military commissions for trying terrorists. President Bush convened military commissions by executive order in November 2001, authorizing them to preside over persons alleged to be members of al Qaida or to have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism." The Supreme Court enjoined the Bush commissions in 2006, finding that they "lack[ed] the power to proceed because [their] structure[s] and procedures violate both the UCMJ [the (Uniform Code of Military

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Justice]] and the four Geneva Conventions signed in 1949.\textsuperscript{14} Congress responded in 2006\textsuperscript{15} and 2009,\textsuperscript{16} but whether the commissions should actually be used has remained a politically charged and divisive issue throughout.

When he took office in January 2009, President Obama barred executive officials from bringing new prosecutions in military commissions while he formulated his terrorism prosecution and detention policies.\textsuperscript{17} The Obama Administration then flip-flopped its position on whether to use military commissions several times—it vacillated over whether to prosecute the 9/11 defendants in an Article III court or in a commission,\textsuperscript{18} and throughout 2010, stalled in five other cases that it earlier deemed ripe for military commissions.\textsuperscript{19} In March 2011, President Obama signed an executive order directing that military commissions for accused terrorists at Guantanamo Bay resume,\textsuperscript{20} and in April 2011, Attorney General Holder withdrew the criminal indictment pending against five 9/11 defendants in New York and authorized their cases to be tried before

\textsuperscript{19} In late 2009, the Obama Administration announced that prosecutions in an additional five cases, not related to 9/11 but also involving Guantanamo detainees, would proceed in military commissions. Press Release, supra note 18. However, it failed to advance these prosecutions in 2009 and 2010.
commissions in Guantanamo. Every single one of these announcements by the Administration provoked a cacophony of responses in Congress, the media, and the academy. Most recently, in the summer of 2011, the fixation on Capitol Hill was with the prosecution of a Somali terror suspect, Ahmed Warsame. The Administration announced that it would bring suit against Warsame in federal court, and dozens of lawmakers immediately lambasted the decision.

Meanwhile, despite all of the attention that has been paid toward military commissions, the real adjudicative action vis-à-vis foreign terrorists since 9/11 has been in Article III courts. According to the Center on Law and Security at New York University, from September 11th 2001 through September 11th 2010, the United States government brought 998 criminal indictments against persons for terrorism-associated crimes, resolved 688 of them, and obtained a conviction rate of nearly eighty-seven percent. The National Security Division of the Justice Department releases data on a more narrow set of terrorism cases—namely, those that involve the most serious terrorism offenses under federal law such as hostage-taking and sabotage of nuclear facilities—and it reports that between 2001 and March 2010, the government obtained 150 convictions under

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22 See Eileen Sullivan, Administration Defends Terror Prosecution Decision, ASSOCIATED PRESS, July 26, 2011.

23 See, e.g., id. (describing a letter sent by forty-three senators to Attorney General Eric Holder, on July 6, 2011, rejecting the "government's decision to try Warsame in civilian court" as opposed to in a military commission); Joseph I. Lieberman & Kelly Ayotte, Editorial, Why We Still Need Guantanamo, WASH. POST, July 22, 2011, at A17 (arguing against Warsame's trial in civilian court).

24 N.Y.U. SCH. OF LAW CENTER ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010, at 4 (2010) [hereinafter TERRORIST TRIAL REPORT CARD 2010]. Of the 998 criminal indictments, 315 were for direct violations of about ten “core” terrorism statutes. Id. at 3, 4 & n.2, 5. The remainder were for criminal conspiracies and other national security violations associated with terrorism. N.Y.U. SCH. OF LAW CENTER ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at i, 1, 124 (2010) [hereinafter TERRORIST TRIAL REPORT CARD 2009] (demonstrating the non-“core” terrorism prosecutions were for these types of crimes).

25 TERRORIST TRIAL REPORT CARD 2010, supra note 24, at 4. Accordingly, 598 individuals were convicted of a terrorism-related charge either by trial or by guilty plea. Id.
the statutes it surveyed. Meanwhile, military commissions have been far less fruitful tribunals. They have reached convictions in only six cases since September 11th—one of which is still on appeal. The remaining cases that the Bush Administration initiated in the commissions were either stalled by procedural issues or were removed to the criminal system. Moreover, major questions surrounding the military commissions are still unresolved, and they will likely need to be addressed by the Supreme Court in order for the commissions to become a reliable and authoritative source of decision making altogether. For instance, must the tribunals respect defendants’ rights under the Fifth and Sixth Amendments? Is it constitutional for the commissions to take jurisdiction over offenses like material support and conspiracy, given that they are not widely recognized under the law of war? Criminal proceedings against


28 Frakt, supra note 27 (explaining why so few cases have been successfully tried in military commissions). While the Obama Administration announced in March 2011 it was reinitiating its use of military commissions, see supra notes 20–21, and while three additional guilty pleas have been secured since then, see supra note 27, it remains to be seen how the other cases progress.

29 Both Mr. Hamdan and Mr. al-Bahlul argued in their appellate briefs to the Court of Military Commissions Review that it was not constitutional for commissions to adjudicate over such offenses. See, e.g., Brief for Appellant at 21–25, United States v. al-Bahlul, CMCR Case No. 09-001 (U.S. Court of Military Commission Review, Sept. 1, 2009) (arguing that neither material support nor conspiracy constitute “terrorism” under the international law of war and that the military commission thus lacked jurisdiction over such crimes). However, the court rejected these arguments in the case of Mr. Hamdan and affirmed his conviction. See Hamdan, CMCR 09-002 at 86. Mr. Hamdan is now pressing the same arguments
terrorists in federal courts certainly also pose questions—hence, the subject of this Article—but their fundamental legitimacy is not in question.

The Article III system has served as the country’s primary engine for submitting terrorists to legal process. Moreover, it is important to point out that federal courts are not just being used to prosecute domestic terrorists, but also to prosecute foreigners for their conduct overseas. New York University (“NYU”) reports that only 273 of the 804 defendants (thirty-four percent) charged of terrorism-associated crimes between 2001 and 2009 were United States citizens; the rest were either citizens of foreign countries or persons for whom no indication of citizenship was found. NYU also finds that a large number of terrorism defendants have been indicted for acts they committed overseas. Of the 243 individuals whose indictments involved descriptions of a specific target between 2001 and 2009, sixty-seven percent were allegedly planning to attack a target overseas.

Finally, the government is also using the Article III courts to punish a wide array of terroristic conduct overseas. At one end of the spectrum, it has brought a criminal indictment against a foreigner for committing an overt act of war. In United States v. al-Delaema, the United States indicted a Dutch citizen for attempting to bomb U.S. troops in Iraq, marking the first time the government turned to the Article III system to punish an attack on American troops in Iraq. At the other end of the spectrum, the government has sought criminal penalties against

before the D.C. Circuit, see Brief of Petitioner Salim Ahmed Hamdan, Hamdan v. United States, No. 11-1257, 2011 WL 5569434, (D.C. Cir. Nov. 15, 2011), and, if the Justices allow it, will likely do so before the Supreme Court as well. For sources agreeing with Hamdan’s position, at least with respect to material support, see Morrison, supra note 6, and Colangelo, supra note 6.

30 TERRORIST TRIAL REPORT CARD 2009, supra note 24, at 20.
31 Id. at 16.
33 Id. The defendant was a Dutch citizen who, in 2003, drove his car from the Netherlands to Iraq and helped a group of combatants plant improvised explosive devices (“IEDs”) in the roadway outside Fallujah. See Gov’t’s Sentencing Memorandum to al-Delaema, Docket No. 99 (D.D.C. Apr. 3, 2009). The United States indicted al-Delaema in 2005 and obtained his extradition in 2007. He subsequently pled guilty to the charge of conspiracy to kill a U.S. national and agreed to serve twenty-five years in federal prison. See TERRORIST TRIAL REPORT CARD 2009, supra note 24, at 56.
foreign actors for conspiratorial activities that resemble organized crime. In fact, NYU reports that the majority of persons indicted for terrorism crimes since 9/11 have fallen into this latter category, as they were charged not with conduct linked to a specific target but with inchoate offenses such as lending financial support or recruiting members to terrorist organizations. The Justice Department commissioned a report in 2008 which similarly found that "(n)early 85% of the terrorism cases in the pre-9/11 era were event-linked . . . . After 9/11, the proportion of event-linked cases dropped to just 30% . . . ." The shift away from event-linked prosecutions towards inchoate-offense prosecutions has been driven by the government's increased use of the material support statute, codified at 18 U.S.C. §§ 2339A and 2339B. Human Rights First found that as of 2009, "(t)he most commonly charged substantive offenses in [its terrorism prosecution] data set continue to be the material support statutes."

B. Difficult Terrorism Cases that Raise Questions of Notice

The government's decision to use the Article III court system in its efforts to contain global terrorism is to be celebrated. The resort to legal process rather than to the use of force vis-à-vis terrorists ensures that alleged perpetrators are truly guilty of terrorism before they are retaliated against or subjected to punishment. The resort to process also prevents the infliction of collateral damage on innocent bystanders that might otherwise occur when the United States responds to terrorism with counterattacks.

34 See TERRORIST TRIAL REPORT CARD 2009, supra note 24, at 21–22 (explaining that the same preventative strategies used by the government to combat organized crime are being deployed against terrorism to prevent future attacks).
35 Id. at 15–16; see also id. at 9 ("Criminal conspiracy alone would constitute the most commonly charged statute, having been used in 293 indictments.").
37 RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS: 2009 UPDATES AND RECENT DEVELOPMENTS 11 (2009); see also TERRORIST TRIAL REPORT CARD 2009, supra note 24, at 48–51 (finding that the United States charged persons with the crime of material support in 170 indictments between 2001 and 2009).
Nonetheless, the work of the Article III system during the so-called “War on Terror” has not been flawless. A central problem has been that U.S. courts have failed to develop and routinely apply a due process test that would ensure that jurisdiction over foreign terrorists is normatively legitimate, as well as constitutional. This oversight by the federal courts dates back to pre-9/11 terrorism cases, such as United States v. Yunis, in which they also failed to ground their analyses in the Due Process Clause.

In Yunis, a Lebanese citizen was tried and convicted in federal court in Washington, D.C. for violating American terrorism laws, such as the law against aircraft piracy and hostage taking. Yunis and a group of associates boarded a Jordanian commercial plane in Beirut and attempted to fly it to Tunis, where they hoped to get a meeting with delegates to a conference of the Arab League. Two Americans had been on board. The plane was ultimately blocked from landing and flew back to Beirut, where the hijackers released the passengers. Yunis was arrested by United States authorities and charged in federal court in Washington, D.C. He contested the court’s jurisdiction by raising statutory, constitutional, and international law claims, but the D.C. Circuit was unconvinced.

The D.C. Circuit’s holding might have been correct, but what was missing from the court’s opinion was any discussion of the Due Process Clause and why it permitted a domestic tribunal to take jurisdiction over Yunis and allow for the application of American criminal law to his case. Yunis was not a citizen or

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38 924 F.2d 1086 (D.C. Cir. 1991).
39 Id. at 1088–89.
40 Id. at 1089.
41 Id.
42 Id.
43 Id.
45 Yunis, 924 F.2d at 1090–92.
46 See Brilmayer & Norchi, supra note 12, at 1251 (“Although the Yunis court seemed to acknowledge a role for the Constitution in assessing the means by which Yunis was apprehended, it did not inquire into Fifth Amendment due process limits on the application of federal law. Further, it is questionable whether Yunis would meet the usual constitutional tests for the extraterritorial application of law in the state choice of law context.”).
resident of the United States, all of his activities occurred abroad, and he had not sought to violently harm any United States person, place, or thing during his operations.\textsuperscript{47} Rather, two American citizens happened to be aboard the plane he hijacked.\textsuperscript{48} The D.C. Circuit did not discuss these issues. It summarily held that the two federal statutes under which Yunis was charged were designed to extend criminal liability to his situation and that its "inquiry [could] go no farther."\textsuperscript{49}

The D.C. Circuit's failure to evaluate the legitimacy of extraterritorial jurisdiction in Yunis under the Due Process Clause is representative of the general approach that courts have taken in terrorism cases from Yunis, decided in 1991, through the present day. Even though the United States has prosecuted dozens, if not hundreds, of foreigners for overseas acts of terrorism since September 11th,\textsuperscript{50} there is only one precedential opinion by a circuit court to date—United States v. Yousef—\textsuperscript{51} that contains a Due Process Clause analysis about the legitimacy of applying a terrorism statute extraterritorially.\textsuperscript{52} In Yousef, the Second Circuit held that a foreigner who attacked a Philippine plane as a "test-run" for an attack he sought to deploy in the United States could be prosecuted domestically because the nature of his conduct gave him sufficient notice of his likely culpability in the United States.\textsuperscript{53} The Yousef court dealt with due process, at least, but still only in one paragraph of its analysis.\textsuperscript{54} Moreover, while this paragraph has been cited in

\textsuperscript{47} Yunis, 681 F. Supp. at 898–99.

\textsuperscript{48} Yunis, 924 F.2d at 1089.

\textsuperscript{49} Id. at 1090–91; see also id. at 1092 ("[W]e are satisfied that the Antihi-jacking Act authorizes assertion of federal jurisdiction to try Yunis regardless of hijacking's status vel non as a universal crime [or any other consideration].").

\textsuperscript{50} See supra notes 24–25, 30–37, and accompanying text.

\textsuperscript{51} 327 F.3d 56 (2d Cir. 2003).

\textsuperscript{52} See id. at 111–12. This conclusion is based on the author's extensive search of the extraterritorial criminal terrorism cases in Westlaw that have been decided since 9/11. See also United States v. Reumayr, 530 F. Supp. 2d 1210, 1222–23 (D.N.M. 2008) (citing Yousef as the only published federal appellate case on the topic of due process and the extraterritorial reach of terrorism crimes); United States v. Bin Laden, 92 F. Supp. 2d 189, 219 (S.D.N.Y. 2000) (stating that "few cases" have addressed due process issues about the extraterritorial application of terrorism statutes).

\textsuperscript{53} 327 F.3d at 112.

\textsuperscript{54} See id. ("Applying this standard, it seems clear that assertion of jurisdiction over the defendants was entirely consistent with due process. The defendants conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy, and their attack
terrorism cases decided after Yousef, those cases consist of only a handful, are concentrated in New York, and lack deep analysis.\textsuperscript{55} Since 2003, no appellate court has seriously engaged with Yousef’s rationales about extraterritorial jurisdiction, and no district court has rendered any substantial doctrinal development of its holding.\textsuperscript{56}

Not only have United States courts failed to develop a due process test for evaluating jurisdiction in extraterritorial terrorism prosecutions, but they have allowed jurisdiction to lie in questionable cases. In several criminal trials brought against foreign terrorists since 9/11, a colorable argument can be made that the defendant was channeled through the American criminal system without having been on notice that his activities abroad could subject him to punishment in this country. This Article does not offer a conclusive judgment on any such cases examined below, but it maintains that, at the least, they pose difficult questions about the legitimacy of extra-territorial jurisdiction.

The first case worth reviewing is United States v. Al Kassar, which was filed in the Southern District of New York in 2008.\textsuperscript{57} In Al Kassar, the federal government charged three foreign nationals with conspiracy to murder, money laundering, and

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\textsuperscript{55} See United States v. Bout, No. 08 Cr. 365(SAS), 2011 WL 2693720, at *2–3 (S.D.N.Y. July 11, 2011) (holding the prosecution was neither “arbitrary [nor fundamentally unfair” under Yousef because the indictment alleged the defendant “offered to sell millions of dollars of weapons to the FARC after acknowledging—at least three times at the March 6th meeting—his understanding that the FARC intended to use those weapons to kill U.S. forces in Colombia” and so “‘should [have] reasonably anticipate[d] being haled into court in this country’”) (second and third alterations in original) (quoting other sources); United States v. Yousef, No. S3 08 Cr. 1213(JFK), 2010 WL 3377499, at *5 (S.D.N.Y. Aug. 23, 2010) (holding the extraterritorial application of a narco terrorism statute to a defendant who agreed to sell the FARC military-grade weapons stolen from American forces in Iraq comported with Yousef); United States v. Al Kassar, 582 F. Supp. 2d 488, 494 (S.D.N.Y. 2008), abrogated in part as stated in, Goldberg v. UBS AG, 690 F. Supp. 2d 92 (E.D.N.Y. 2010); Reumayr, 530 F. Supp. 2d at 1222–23.

\textsuperscript{56} This conclusion is based on the author’s extensive searching of all federal court cases that have cited Yousef since 2003.

\textsuperscript{57} 582 F. Supp. 2d 488 (S.D.N.Y. 2008).
material support for terrorism. According to the United States, the defendants helped broker an arms deal with undercover agents who were pretending to represent the Fuerzas Armadas Revolucionarias de Colombia ("FARC"), a paramilitary group in Colombia that has been classified as a foreign terrorist organization ("FTO") by the United States since 1997. The lead defendant, Monzer Al Kassar, was a notorious weapons dealer based out of Spain. The other two defendants were Mr. al-Ghazi, a middle man to Al Kassar who had not worked for him for the fifteen years leading up to the case, and Mr. Moreno Godoy, Al Kassar's personal assistant. The indictment described a complicated web of activities among the three defendants, all of which occurred in Lebanon, Spain, and Colombia. The government argued that jurisdiction was proper because the defendants had each been aware that the weapons being brokered by Al Kassar ultimately could be used to injure U.S. nationals in Colombia. All three defendants filed motions to dismiss, which the district court denied. In his opinion sending the case to trial, Judge Jed Rakoff summarily resolved several due process issues that this Article argues merited greater consideration. First, Judge Rakoff sustained the charges against Misters al-Ghazi and Moreno Godoy even though, according to the indictment, those defendants’ only conduct had been to help their boss, Al Kassar, communicate and meet with persons who wanted to buy

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58 Id. at 491.  
59 See id.  
61 See Memorandum of Law of Defendant Tareq Mousa al-Ghazi in Support of Motion to Dismiss the Indictment and Other Relief at 5, United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008) (No. S3 07 Cr. 354 (JSR)), 2008 WL 5515135 [hereinafter Memorandum of Tareq Mousa al-Ghazi] (explaining that when al-Ghazi was approached by undercover agents in Lebanon, he had not worked for Al Kassar for fifteen years and that he informed the agents “that his relationship with Al Kassar was not strong, [and] that they were not friends anymore”); Pre-Sentence Memorandum on Behalf of Defendant Moreno Godoy at 1, United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008) (No. S3 07 Cr. 354 (JSR)), 2009 WL 700853 [hereinafter Pre-Sentence Memorandum of Moreno Godoy] (explaining that Mr. Moreno Godoy was “[t]reated like a member of the Al Kassar family, he lived with them in Marbella, Spain and, indeed, was largely responsible for the maintenance and operation of the residence, its grounds, and its large staff”).  
62 See Indictment, supra note 60, ¶¶ 2, 10, 11(a).  
63 See id. ¶¶ 9–10, 13–14.  
64 See Al Kassar, 582 F. Supp. 2d at 498.
weapons. As per the United States' description of the facts, al-Ghazi and Moreno Godoy were far removed from the commission of violence: they worked for a weapons seller, not for any terrorist group; they were functionaries and aides to Al Kassar, not persons with authority to broker a deal; and they were not shown to harbor personal animosity towards the United States. Judge Rakoff sent both cases to trial, but he never discussed why, from a due process perspective, it was fundamentally fair to hold these two foreigners responsible under American criminal law when, according to the government's own indictments, they were so many steps removed from the commission of violence against Americans. A second due process issue in the case that Judge Rakoff did not discuss concerned al-Ghazi in particular, who asserted in his motion to dismiss that he never knew that the buyers would target U.S. persons or interests. Al-Ghazi claimed that the undercover agents originally told him that the buyers were from the Ivory Coast, and the agents only revealed months later, in a conversation al-Ghazi did not understand because it was in a foreign language, that they represented the FARC. The United States did not allege facts in its pre-trial

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65 See Indictment, supra note 60, ¶ 11(a)-(b), (d), (j), (o)-(p), (r)-(s), (v), (x), (z)-(aa), (cc), (ddd)-(eee) (describing the "Overt Acts" that made al-Ghazi criminally liable, which were primarily his being "present[ ]" at two meetings between the U.S. agents and Al Kassar at Al Kassar's residence and his "advis[ing] the CSs on how to negotiate with Monzer Al Kassar ... for the purchase of weapons"); id. ¶ 11 (k), (p), (r)-(s), (w)-(w), (z)-(aa), (cc), (ee), (hh)-(ii), (kk), (nn), (pp), (tt), (ww)-(xx), (bbb)-(ddd), (fff) (describing the "Overt Acts" that made Moreno Godoy liable).

66 The Indictment alleged no facts about al-Ghazi's or Moreno Godoy's animosity towards the United States. See id. ¶ 11. Both defendants claimed they harbored none. See, e.g., Pre-Sentence Memorandum of Moreno Godoy, supra note 61, at 4 ("With respect to the defendant's motives for committing the instant offense, the Probation Office believes that he was primarily motivated by the prospect of substantial financial gain. The defendant's niece and defense counsel both contend that the defendant bears no animosity toward the United States or the American people.") (internal quotation marks omitted).

67 See Memorandum of Tareq Mousa al-Ghazi, supra note 61, at 6–7.

68 See id. at 7 ("As made clear in the tape transcripts[,] ... al-Ghazi played almost no role whatsoever in the negotiations during the series of meetings in Spain during Spring 2007. In part, this is due to the fact that CS-1 and CS-2, the DEA operatives posing as the weapons buyers, spoke Spanish, a language neither spoken nor understood by al-Ghazi, who speaks only Arabic. The majority of the conversation concerning the details of the proposed weapons transaction was in Spanish. Therefore, there is no evidence that al-Ghazi actually understood what was being discussed. As indicated above, he was present at these meetings as the guest, and at the expense, of a DEA operative, SNH.").
filings to rebut al-Ghazi's claims on this point. But Judge Rakoff failed to take up the issue in his decision to sustain the indictment, suggesting that jurisdiction would be proper regardless of whether al-Ghazi knew that the buyers represented the FARC, a group with a known history of targeting Americans.

The Al Kassar case presents the fundamental question: What are the appropriate boundaries on criminal responsibility under United States law, from a jurisdictional perspective, when a terroristic plot to cause harm overseas is hatched overseas? That question in turn contains two parts: a question about activity level and a question about mens rea. First, with respect to activity level, assuming that Al Kassar's assistants actually intended for or knew that the arms Al Kassar was selling would be used to harm U.S. nationals in Colombia, was their participation sufficient to subject them to criminal penalty in the United States? Second, with respect to mens rea, if al-Ghazi and

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69 In its response to al-Ghazi's motion to dismiss, the United States only argued: In his motion, al Ghazi contends that "there is no evidence that al Ghazi actually understood what was being discussed" during the February and March 2007 meetings. ... In any event, whether or not and at what point al Ghazi knew the full extent of the criminal conspiracies in which he participated ... are all issues for a jury trial and not for a pretrial motion to dismiss.

Government's Memorandum in Opposition to Defendants' Motions to Dismiss and for Other Relief at 4 n.2, United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008) (No. S3 07 Cr. 354 (JSR)), 2008 WL 5515136 (quoting Brief for Defendant at 7, United States v. Al Kassar, 582 F. Supp. 2d 488 (S.D.N.Y. 2008)).

70 See Al Kassar, 582 F. Supp. 2d at 494 n.4.

71 One might argue that al-Ghazi's claim of ignorance as to the identity of the buyers was a merits issue to be dealt with at trial. In other words, whether the government could actually prove with sufficient evidence that al-Ghazi knew that the buyers represented the FARC was a "trial" issue concerning whether the government could win on the merits, not a jurisdictional issue. However, this argument loses sight of the fact that to bring the case in federal court in the first place, there must be a jurisdictional hook for the charge. The fact that the government failed to even allege in its pre-trial filings that al-Ghazi knew that the buyers represented the FARC triggers not just a merits concern about al-Ghazi's guilt, but a jurisdictional concern as well, about whether it is even proper to try him in a United States tribunal. Cf. United States v. Bout, No. 08 Cr. 365(SAS), 2011 WL 2693720, at *5 n.73 (S.D.N.Y. July 11, 2011) ("To the extent Bout's challenges are to the sufficiency of the Government's evidence to satisfy—as opposed to the sufficiency of the Indictment to allege—the 'federal elements' of the crimes charged, those arguments are 'not appropriately decided on a motion to dismiss.' Whether that evidence will legally satisfy the jurisdictional and other elements of the crimes charged—the suggestion lurking in all of Bout's 'due process' arguments—is not a question for this Court today.") (citation omitted).
Moreno Godoy had not known that the weapons would be used to target Americans, because, for instance, they had not known that a group with anti-U.S. leanings was the buyer, would jurisdiction have been proper? In short, both al-Ghazi and Moreno Godoy lived in foreign countries and did not look to the United States legal system as the source of rules to govern their primary conduct. Thus, what level of activity and what level of mens rea, with respect to harming Americans, is needed to make jurisdiction fair?

The 2008 case of United States v. Warsame\(^7\) also highlights fairness problems that can arise when U.S. terrorism laws are given extraterritorial effect. In Warsame, the United States charged a Canadian citizen in the District Court of Minnesota with providing material support for terrorism.\(^7\) Two of the activities that rendered him guilty, the government asserted, were that he “provided English lessons in an Al Qaeda clinic in Kandahar, Afghanistan, in part to assist nurses in reading English-language medicine labels,”\(^7\) and that he “sent money overseas to an Al Qaeda member to repay a loan.”\(^7\) Warsame filed a motion to dismiss.\(^7\) He claimed that under the First Amendment, providing medical training and loaning currency to members of an organization were constitutionally protected activities, and in the alternative, should the statute be construed to apply to his conduct, it was unconstitutionally vague.\(^7\) The district court disagreed and sent Warsame’s case to trial.\(^7\)

In his pre-trial motions, Warsame did not challenge his prosecution from a jurisdictional perspective. He did not argue that it violated the Due Process Clause for the United States to assume jurisdiction over the conduct he performed in Canada and Afghanistan.\(^7\) Yet, one is left to wonder how such an

\(^7\) 537 F. Supp. 2d 1005 (D. Minn. 2008).
\(^7\) \textit{See id.} at 1009.
\(^7\) \textit{Id.} at 1019 (“According to the prosecution, the nurses in the clinic attended to Al Qaeda members who were participating in nearby terrorist training camps. The alleged English-language training in this case has direct application to a FTO’s terrorist activities, as it would likely speed the healing and eventual return of terrorist militants to Al Qaeda training camps.”).
\(^7\) \textit{Id.} at 1017 (“The prosecution alleges that Warsame sent money overseas to an Al Qaeda member to repay a loan.”).
\(^7\) \textit{Id.} at 1009.
\(^7\) \textit{Id.} at 1013, 1016–17.
\(^7\) \textit{Id.} at 1023.
\(^7\) \textit{Id.} at 1020.
argument would have fared. Should a Canadian citizen like Warsame be expected to comply with United States law over and above Canadian law assuming that the former bans English training to nurses at Al Qaeda camps but the latter does not? Given that Warsame's direct activities did not involve any likelihood of causing imminent harm to Americans, why should a person in his situation expect that he might be punished in an American court and limit his conduct accordingly?

Besides these examples, there are dozens of recent terrorism cases involving defendants subject to conventional, domestic jurisdiction that would become problematic from a fairness standpoint when one imagines extending their holdings extraterritorially. Federal courts have construed the material support statute codified in 18 U.S.C. § 2339B to outlaw a very broad range of conduct. The provision of medical services to "jihadists" in Afghanistan, the provision of food and shelter to members of organizations designated as FTOs, the broadcasting of Hezbollah programs via U.S. satellite, and the disseminating of information about terrorist groups' activities on the internet, all qualify as material support. Likewise, the federal conspiracy-

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80 Note, in addition to the training of nurses and loaning of money, the prosecution also alleged that Warsame "voluntarily participated in an Al Qaeda training camp in Afghanistan." Id. at 1018. The extraterritorial application of the law for that type of activity—training with terrorists—is clearly less problematic from a notice perspective. But the district court did not limit its holding to that charge.

81 See supra note 3.

82 United States v. Shah, 474 F. Supp. 2d 492, 498–99 (S.D.N.Y. 2007) (holding that the statute criminalized "volunteer[ing] as a medic for the al Qaeda military" by making oneself "available specifically to attend to the wounds of injured fighters" and that such an application was not unconstitutionally vague).


84 United States v. Iqbal, No. 1:06-Cr.-01054 (RMB) (S.D.N.Y. 2009). In their motion to dismiss the indictment, the defendants argued: "Here, Mr. Iqbal and Dr. Elahwal's conduct as alleged in this case—broadcasting the signal of Al Manar's television programming—falls squarely within First Amendment parameters." Joint Memorandum of Law in Support of Defendants' Pre-Trial Motions at 11, United States v. Iqbal, No. 06 Cr. 1054 (RMB) (S.D.N.Y., July 13, 2007). Their motion was denied, and both defendants ultimately plead guilty.

85 United States v. Al-Hussayen, No. CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793, at *6–9 (D. Idaho Apr. 6, 2004) (order denying defendant's motion to dismiss on the basis of his argument that these internet activities were protected under the First Amendment). The jury ultimately acquitted the defendant on all charges, not finding sufficient proof of criminal liability. See al-Kidd v. Ashcroft, 580 F.3d 949, 953–54 (9th Cir. 2009), overruled on other grounds 130 S. Ct. 415 (2010) (describing the resolution of the Al-Hussayen case).
to-commit-terrorism statute has been construed to have extremely broad reach, outlawing activities such as serving as a communications intermediary between an individual in prison and a foreign group in Egypt, and providing fundraising and logistical support from the United States to a Palestinian resistance group. The defendants in the afore-referenced cases had all been either American citizens or persons physically present in the United States when they broke the law. But given that both § 2339B and the conspiracy statute apply extraterritorially, the statutory constructions in those cases technically should extend to foreigners based abroad. And therein lies the rub.

Consider, for instance, applying the outcome in United States v. Shah to an extraterritorial defendant. In Shah, a doctor living in New York City was indicted for materially supporting terrorism when he purposefully, over the course of two years, conspired with members of Al Qaeda from his residence in New York to volunteer as a medic for "wounded jihadists" in Afghanistan. The court found the criminal charge against Shah consistent with the Due Process Clause, despite his claim that allowing the statute to condemn his activities would infringe on his livelihood. Applying § 2339B to Mr. Shah's activities would not deprive him of any broad "right to practice medicine," the court held, because it would only prevent him from practicing medicine "under the control or direction of a terrorist organization." Whatever one thinks of the court's holding in Shah, the case becomes unquestionably more difficult when one contemplates extending it to foreigners located abroad. What if the defendant in Shah had been not a doctor living in New York,

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88 See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (2004) (rendering § 2339B extraterritorial in reach by stating it covers offenses committed by any persons "found" in the United States); 18 U.S.C. § 956(a)(1) (2006) (stating that an individual will be liable under the conspiracy provision regardless of where he is located, as long as one of his co-conspirators is "within the jurisdiction of the United States").
90 Id. at 493–94.
91 Id. at 498.
but a medic living with his family in Afghanistan in an area that Al Qaeda took over as a stronghold? If that person were to agree to provide medical services for Al Qaeda, perhaps because no other position was available to him in his community, should he be considered a criminal under United States law? Would he really stand on equal footing with a defendant like Shah? Similar difficulties arise when one contemplates extending the holding in *Al-Hussayen*, in which a domestic defendant was prosecuted for disseminating information on the internet, to foreigners acting overseas.  

Clearly, not all extraterritorial prosecutions entail a potential deprivation of notice for the defendant. When a person abroad intentionally participates in a plot to violently harm American individuals or places, such as a plot to bomb a U.S. embassy or to hijack an American aircraft, his case will raise less gestalt or constitutional concerns about fair warning. That defendant purposefully attempted to injure American people or to destroy government property, and so being forced to take responsibility in an American court should come as no surprise. But given the capacious breadth of the federal terrorism statutes today, such as the material support statute or the laws banning conspiracy to commit terrorism, all of which apply overseas, there is the potential for extraterritorial prosecutions to be more controversial. The cases profiled in this Part highlight some of the questions that arise regarding a defendant's fair warning when the terrorism law is applied to an extraterritorial defendant. This Article does not suggest that the actual and hypothetical cases it reviewed should necessarily be resolved in favor of the defendant, but only that federal courts going forward should take seriously the questions these cases raise.

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93 This has occurred in a case currently pending in the federal system. See, e.g., United States v. Ahmad, No. 3:04-CR-301 (MRK) (D. Conn. 2004) (involving a British citizen taken from his home in London and extradited to the United States where he was then tried for conspiracy to provide material support for terrorism; among the charges in the indictment that the court sustained were the defendant's creation of websites from which he conducted fundraising for the "global jihad movement").

94 See the Conclusion below, in which this Article more clearly articulates why jurisdiction in such cases is consistent with the Due Process Clause.
II. THE LAW OF EXTRATERRITORIAL CRIMINAL JURISDICTION: PRINCIPLES AND HISTORY

This Part seeks to put into context the contemporary prosecutions of foreign terrorists under United States criminal law and the due process questions in those cases that courts have left unanswered. As Part I illustrated, extraterritorial prosecutions are becoming a key tool in the United States' arsenal for combating global terrorism, but the jurisdictional limitations that should attach under the Due Process Clause have yet to be fleshed out by the courts. This Part shows that terrorism jurisprudence is a microcosm of a much bigger body of law that shares the same deficiencies.

Part II.A below reviews the key principles that animate the larger body of United States law on extraterritorial criminal jurisdiction. It shows that the absence of a due process doctrine to condition the law's reach in the terrorism cases is reflected in the law as a whole. It is not just terrorism cases but immigration cases, bank fraud cases, and drug trafficking cases where courts regularly fail to examine whether the imposition of criminal jurisdiction overseas runs afoul of the Due Process Clause. The impoverished nature of the doctrine is particularly striking because in private civil lawsuits there is a well developed test that courts have applied for decades to ensure that jurisdiction over foreign defendants is legitimate. This is the "personal jurisdiction" test, which attaches under the Due Process Clause.

Part II.B probes the reasons for the disconnect between the civil and criminal jurisprudences. By embarking on a historical survey of extraterritorial criminal statutes in the United States, Part II.B demonstrates that the type of criminal statute that raises due process concerns, such as the material support statute, is a relatively recent phenomenon.

A. Principles

1. Civil Law and the Personal Jurisdiction Test

   In the civil law context, the Due Process Clause plays a prominent and familiar role in regulating the reach of the law vis-à-vis outsiders. Tort, contract, and other civil liabilities created by federal and state law do not just attach to anyone, especially if those persons do not live within the relevant community that created the law. The key requirement under the
Fifth and Fourteenth Amendments is notice. Through the Due Process Clause's "personal jurisdiction" test, all courts in the United States will insist that before a nonresident is held legally accountable by a jurisdiction, he be afforded some type of notice that his behavior will trigger legal consequences there. As the Supreme Court put it in International Shoe v. Washington, civil jurisdiction is proper over a defendant when "the quality and nature of [his] activity" in relation to the forum renders such jurisdiction consistent with "traditional notions of fair play and substantial justice." 

In general, federal and state courts have developed three proxies for measuring whether a foreign defendant has been provided sufficient notice in private civil cases. These tests apply in matters that involve both intra-national foreigners—for example, defendants who reside within the United States but outside the state in which the litigation is pending—and international foreigners—for example, defendants who live outside the country entirely.

First, courts will look to whether the defendant was physically present in the jurisdiction when he violated its law. If so, courts will assume that fair warning was provided and that personal jurisdiction is reasonable. For instance, if a defendant set up a store in state X from which he sold defective products to local customers, his physical presence in X would suffice as a proxy for his notice that legal sanctions—should he violate the law—would likely follow. In these cases, courts fall back on a centuries-old, territorial concept of jurisdiction: the notion that "full and absolute territorial jurisdiction" is an "attribute of every sovereign." As Chief Justice John Marshall put it in 1812,

When private individuals of one nation spread themselves through another...mingling indiscriminately with the inhabitants of that other,...[it] would subject the laws to

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96 Id. at 316, 319 (citation omitted).
97 Burnham v. Superior Court of Cal., 495 U.S. 604, 610, 619 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.... The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'").
continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.99

Second, courts will invoke the “minimum contacts” test as a proxy for notice. If the defendant was not physically present in the jurisdiction when he violated its law, but made a sufficient number of contacts with the jurisdiction before the conduct in the litigation arose, courts will also assume that notice was afforded.100 The defendant’s minimum contacts in these cases come to signify a quasi-membership status that he has assumed in the community. Accordingly, courts will deem it reasonable to hold the defendant accountable for failing to follow the community’s laws.101 When courts apply the minimum contacts test to cases involving foreigners, they look to whether the foreigner had a sufficient number of contacts with the United States as a whole.102

Third, courts will use a “purposeful availment” test as a proxy for notice. In these cases, where a defendant “purposefully availed himself” of a jurisdiction’s benefits in order to derive some personal benefit—for instance, through carrying on business activities that depended on the existence of the jurisdiction’s laws—courts will again infer that fair warning was provided.103

These three doctrines for regulating courts’ personal jurisdiction over out-of-jurisdiction defendants, especially foreigners who were outside of the United States altogether when they purportedly broke a state or federal law, have become staples of private litigation.

99 Id. at 144; see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES 21 (8th ed. 1883).
100 Int’l Shoe Co., 326 U.S. at 319.
101 See id.
103 See Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that the Due Process Clause test for personal jurisdiction is satisfied whenever there is “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”).
2. Criminal Law Unbounded

The "personal jurisdiction" test that attaches in civil law contexts does not carry over to the criminal context. When it comes to the application of criminal law vis-à-vis outsiders—either those from outside the state, or those from outside the United States altogether—the conventional account among scholars, practitioners, and even judges is that the Due Process Clause simply has less to say.104 Granted, the Due Process Clause protects a defendant's procedural rights during a criminal trial, regardless of where he comes from.105 And criminal defendants can move for changes of venue once they have been indicted in state or federal court if the balance of equities or their Sixth Amendment jury rights militate in favor of such.106 But there is no "personal jurisdiction" test that is routinely invoked to judge, a priori, the fairness of convening a trial over an extraterritorial defendant.107 Rather, in cases involving both extra-state criminal jurisdiction and extraterritorial jurisdiction, the conventional practice among judges has been to allow the criminal trial to proceed, without subjecting it to a rigorous due process test as a jurisdictional gatekeeper.108 There is a jarring disconnect between civil and criminal case law.

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104 See infra note 108 and accompanying text.
105 See Brilmayer & Norchi, supra note 12, at 1219.
106 See Mortensen v. State, 217 S.W.2d 325, 328–29 (Ark. 1949) (involving venue claims by the defendant).
107 Part of this is due to the fact that until recently, criminal defendants rarely invoked the Due Process Clause to challenge the court's jurisdiction. Brilmayer & Norchi, supra note 12, at 1219 (“Although defendants faced with federal legislative overreaching do raise arguments based upon international law, they rarely rely on the Due Process Clause of the Fifth Amendment, the federal analog of the Fourteenth Amendment's Due Process Clause.”).
108 In cases involving extra-state criminal jurisdiction, the only question courts will ask is whether the defendant intended to cause effects in the state that is now seeking to impose punishment. E.g., Strassheim v. Daily, 221 U.S. 280, 285 (1911); U.S. ex rel. Pascarella v. Radakovich, 548 F. Supp. 125, 126–27 (N.D. Ill. 1982); West v. State, 797 A.2d 1278, 1284 (Md. 2002); People v. Blume, 505 N.W.2d 843, 844 (Mich. 1993); Innis v. State, 69 P.3d 413, 417 (Wyo. 2003). However, courts apply this test not under the mandate of the Due Process Clause but out of concerns for states' sovereignty. See Strassheim, 221 U.S. at 285; MODEL PENAL CODE § 1.03(1)(f) (2010) (providing that a state may take jurisdiction over conduct occurring outside that state if it "bears a reasonable relation to a legitimate interest of that State"). In cases involving extraterritorial defendants, courts typically do not consult the Due Process Clause to ensure that jurisdiction is legitimate, see infra notes 129–35 and accompanying text, and where they do, it is in a pro-forma manner rather than in a rigorous manner that approximates the civil jurisdiction test, see infra notes 143–48.
Focusing on prosecutions involving the extraterritorial application of the American criminal law beyond our country's borders, the subject of this Article, one sees that it is the "Bowman doctrine" as opposed to the Due Process Clause that has dominated the field for nearly a century. Let us pause to review the facts of Bowman.

In 1922, the federal government charged three U.S. citizens on board a ship with "hatching a plot" to defraud a corporation in which the United States government held stock. According to the indictment, the defendants crafted their plan when the ship was on the high seas, en route from the United States to Brazil. The government charged the defendants with conspiring to defraud the United States and the defendants claimed that the statute, as a matter of interpretation, did not reach their conduct. The sole question before the Supreme Court was as follows: Did the federal statute apply, given that the defendants were outside of the United States when they broke the law?

The Court held for the government, concluding that the statute reached the defendants' conduct aboard the ship. On the one hand, a common canon of construction at the time instructed that courts refrain from giving laws extraterritorial effect without a clear statement by Congress. The criminal statute in Bowman "contain[ed] no reference to the high seas as a part of the locus of the offense defined by it," and so a straight application of the presumption against extraterritoriality suggested that the prosecution be dismissed. On the other hand, the Supreme Court observed that crimes against the government pose a distinct type of harm because they involve an

and accompanying text. The one outlier body of case law is the recent drug trafficking cases in the Ninth Circuit, in which federal courts have grounded extraterritorial jurisdiction in the Due Process Clause. See infra Part III.C.

110 Id. at 96–97.
111 Id. at 97–98.
112 Id. at 102.
113 See, e.g., Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909), overruled in part as stated in Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2887 n.11 (2010) (holding that "in case of doubt," a statute should be construed "to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").
114 Bowman, 260 U.S. at 97.
assault on the country's sovereign interests.\textsuperscript{116} Statutes criminalizing such activity deserve a more liberal presumption about their territorial reach. The \textit{Bowman} Court stated,

Crimes against private individuals or their property, like assaults, murder, burglary ... which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it.

....

But the same rule of interpretation should not be applied to criminal statutes which are, as a class ... enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.\textsuperscript{117}

The \textit{Bowman} Court concluded that the criminal conspiracy law at issue should be read to apply to the high seas, and that the prosecution should proceed.\textsuperscript{118}

\textit{Bowman} has been cited over 800 times.\textsuperscript{119} But for many courts and scholars, it has come to stand for a much broader principle than was actually articulated in the opinion. The technical holding of \textit{Bowman} was rather narrow. The Court announced a rule of statutory interpretation that would apply to limited category of laws; namely, federal laws banning crimes against the United States government would be spared the presumption against extraterritorial effect.\textsuperscript{120} The opinion contained no constitutional analysis,\textsuperscript{121} and the only defendants in the case were American citizens.\textsuperscript{122} Over time, however,

\begin{footnotes}
\item[116] Id. at 98–99.
\item[117] Id. at 98.
\item[118] Id. at 102–03.
\item[119] Citing References, WESTLAW, www.westlaw.com (search “260 U.S. 94” in citation search; then follow “citing references” hyperlink on the left under “full history”) (last visited Mar. 5, 2012).
\item[121] \textit{Bowman}, 260 U.S. at 96–97 (stating that the defendants’ “sole objection was that the crime was committed without the jurisdiction of the United States or of any state thereof” and accordingly, “[w]e have in this case a question of statutory construction”).
\item[122] There was a fourth defendant in \textit{Bowman}—a British national—but he was never apprehended. The Supreme Court was careful to note, at the end of its opinion, that its holding should not be read to necessarily authorize jurisdiction over
\end{footnotes}
jurists and scholars have read Bowman as articulating a de facto rule of constitutional law. They have read the case as establishing that there is no constitutional bar on Congress from passing criminal statutes that bear extraterritorial effect.123

A recent decision in the Southern District of New York exemplifies the broad reading of Bowman that many courts and academics have rendered. In United States v. Manuel, the United States charged a foreign citizen for conspiring to import to and distribute illegal drugs in the United States, in contravention of American criminal law.124 The defendant allegedly transported ecstasy pills from Holland to Germany.125 The government presented “no evidence whatsoever” in its pre-trial filings showing that the defendant ever knew or intended for the eventual destination of the pills to be the United States.126 However, when the defense raised a constitutional challenge to Congress’s ability to subject him to legal sanction, the judge rejected it, citing Bowman.127 “Any challenge to the legislative jurisdiction of Congress must fail, since there is no constitutional bar to the extraterritorial application of penal laws. Whether a statute has such extraterritorial application is solely a question of legislative intent.”128

The Manuel opinion is illustrative of how courts have applied Bowman in the years since it was decided. Just as the court in that case read Bowman as implicitly endorsing, from a constitutional standpoint, any extraterritorial crime that Congress chooses to codify, federal courts have made similar analytic moves in cases involving immigration offenses,129 sexual

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123 See infra notes 127–35 and accompanying text.
125 Id. at 406.
126 Id.
127 Id. at 409.
128 Id. (citing United States v. Bowman, 260 U.S. 94, 97–98 (1922)).
129 See United States v. Delgado-Garcia, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (acknowledging that whether a statute applies extraterritorially depends on Congress's judgment and that the character of the criminal offense at issue, namely, an immigration offense, suggested Congress meant to reach extraterritorial conduct).
crimes, fraud laws, terrorism crimes, and more. The Supreme Court also began its opinion in a relatively recent extraterritoriality case with the assumption that applying the law abroad triggered no constitutional implications. It stated, "Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction." The Congressional Research Service sums up the case law as follows: "[T]he courts fairly uniformly have held that questions of extraterritoriality are almost exclusively within the discretion of Congress... [T]he question of the extent to which a particular statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction.

130 See United States v. Frank, 599 F.3d 1221, 1230 (11th Cir. 2010) ("Congress has the power to apply its laws extraterritorially, but whether it has done so is a matter of statutory construction that is subject to plenary review... We have interpreted Bowman to hold that extraterritorial application 'may be inferred from the nature of the offense[ ] and Congress's other legislative efforts to eliminate the type of crime involved.'" (alteration in original)); United States v. Martinez, 599 F. Supp. 2d 784, 796–98 (W.D. Tex. 2009) (holding that the Constitution does not bar Congress from the "extraterritorial application of the United States penal laws" and citing Bowman for the proposition that to determine whether a law applies extraterritorially, a court need look only to congressional intent). To date, cases involving the extraterritorial application of federal sex crime laws have all involved defendants who were U.S. citizens acting abroad. Nonetheless, these cases are instructive because they illustrate courts' expansive readings of Bowman.

131 See United States v. Birch, 470 F.2d 806, 811 (4th Cir. 1972) (holding that "United States v. Bowman... states the rule for determining whether a criminal law should be given extraterritorial effect" and under Bowman, the statute criminalizing the counterfeit use of military passes applied abroad).

132 See United States v. Yunis, 681 F. Supp. 896, 903 (D.D.C. 1988) ("The reliance that Yunis' counsel places on United States v. Bowman to argue that Congress has no power to extend jurisdiction outside its territorial boundaries, is misplaced. Bowman stands for the contrary proposition. Indeed, it is routinely quoted for the holding that 'there is no constitutional bar to the extraterritorial application of penal laws.'" (citation omitted) (quoting United States v. King, 552 F.2d 833, 850 (9th Cir. 1977))).

133 E.g., United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) (invoking the kidnapping and murder of a DEA agent in Mexico, and holding that "[g]enerally, there is no constitutional bar to the extraterritorial application of United States penal laws. Courts look to congressional intent, express or implied, to determine whether a given statute should have extraterritorial application." (citations omitted)).


Moreover, it is not just federal courts that treat *Bowman* and its progeny as implicitly ratifying jurisdiction over extraterritorial crimes from a constitutional standpoint. Law treatises have reasoned this way as well. Some decline to even list the Constitution as a relevant concern when discussing whether criminal statutes should be construed as reaching foreigners' conduct abroad. One treatise writes: "The threshold question in cases in which federal authorities seek extraterritorial criminal jurisdiction is whether Congress intended the extraterritorial application of the statute that proscribes the conduct alleged. The second phase of the analysis considers whether the exercise of extraterritorial jurisdiction is consistent with international law." In the legal scholarship, there is also little mention of any constitutional barrier to Congress's extension of the criminal law overseas. The weight of opinion is that Congress has relatively free rein. According to Curtis Bradley, Congress enjoys "broad authority to regulate extraterritorial conduct, and any due process limitations on such regulation are likely to be weak at best." Arthur Mark Weisburd argues that to impose due process limitations on extraterritorial laws would be doubly flawed: It would "necessarily amount to limiting the discretion of Congress" in contravention of Article I, and it would give "aliens outside the United States" Fifth Amendment rights they do not enjoy. William Dodge advocates for "judicial unilateralism" when courts determine whether a criminal statute applies overseas, and fails to list the due process implications for


136 See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 403 cmt. f (1987) (explaining that extraterritorial application of criminal laws depends on legislative intent).

137 E.g., 8A Fed. Proc., L. Ed. § 22:47 (2011) (describing congressional intent as the touchstone to identifying whether a statute may be applied extraterritorially and declining to address constitutional considerations).


foreigners as a relevant factor.\textsuperscript{141} Scholars with less opinionated views than Bradley, Weisburd, or Dodge still agree that at least as a matter of the governing case law, "Congress could extend its laws as far as it likes" because the Supreme Court has set no clear limits on such activity under the Due Process Clause or otherwise.\textsuperscript{142}

Granted, the assumption that the Constitution implicitly endorses all extraterritorial criminal lawmaking is not universally shared. Especially in the past five to ten years, courts have begun to reason that despite the Supreme Court's failure to say so in \textit{Bowman} or in subsequent cases, the Due Process Clause does put a backstop to Congress's extension of United States criminal law overseas. The Ninth Circuit of the United States Court of Appeals has led the way in its adjudication of drug trafficking. In the 1991 case of \textit{United States v. Larsen}, the Ninth Circuit began its analysis by stating that "Congress is empowered to attach extraterritorial effect to its penal statutes so long as the statute does not violate the [D]ue [P]rocess [C]lause of the Fifth Amendment."\textsuperscript{143} Since that case, courts in the Ninth Circuit regularly cite the Due Process Clause at the outset of their opinions when confronted with

\textsuperscript{141} William S. Dodge, \textit{Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism}, 39 HARV. INT'L L.J. 101, 104–05 (1998) ("Thus, I argue that a court should apply a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations.").

\textsuperscript{142} John H. Knox, \textit{A Presumption Against Extrajurisdictionality}, 104 AM. J. INT'L L. 351, 351 (2010); see also Brilmayer & Norchi, supra note 12, at 1219 n.12 (observing that none of the "leading federal extraterritoriality cases ... treat due process as a serious issue"); Ellen S. Podgor, \textit{"Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes}, 31 GA. J. INT'L & COMP. L. 1, 11–12 (2002) ("When Congress does not mention extraterritoriality in the statute, as is the case in the majority of criminal statutes, courts are left to resolve the issue of whether the extraterritorial application should be allowed. Courts approach this issue by trying to discern the intent of Congress, looking to whether jurisdiction is authorized under the international bases of jurisdiction, or by using an approach that combines an examination of congressional intent and international law.").

\textsuperscript{143} 952 F.2d 1099, 1100 (9th Cir. 1991). The reasoning in \textit{Larsen} was based on that in \textit{United States v. Davis}, decided the year before. 905 F.2d 245, 248–49 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair.") (citation omitted).
extraterritorial prosecutions for drug trafficking. Moreover, in recent years, district and appellate courts in other circuits have begun to make reference to the Fifth Amendment in extraterritoriality cases. But the fact is, the lion's share of the courts that acknowledge the Due Process Clause in their opinions "do little more than note that due process restrictions mark the frontier of the authority to enact and enforce American law abroad." They treat due process more as a formality to be mentioned at the beginning of an opinion than as a real constraint on Congress's powers. United States v. Al Kassar, for instance, discussed in Part I.B above, was a case which technically cited the Due Process Clause with respect to jurisdiction, but lacked any true discussion about the case's complicated notice issues. After an extensive search, the author of this Article could find only one case to date in which a federal court at either the district or appellate level has struck down an extraterritorial application of a federal criminal law under the Due Process Clause.

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144 E.g., United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008); United States v. Moreno-Morillo, 334 F.3d 819, 827 (9th Cir. 2003); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).


148 DOYLE, supra note 135, at 5; see also infra notes 299–305 (explaining how the due process tests in all circuits except for the Ninth, in extraterritorial drug trafficking cases, lack teeth).

147 See Brilmayer & Norchi, supra note 12, at 1219 n.12.

149 That case was United States v. Perlaza, 439 F.3d 1149, 1161-62 (9th Cir. 2006). See also Yousef, 2010 WL 3377499, at *3 n.1 ("The Court is not aware of any case in which a federal court has dismissed an action on the ground that the
Thus, while courts are beginning to give lip service to Due Process Clause doctrine in some cases involving extraterritorial criminal jurisdiction, the doctrine, on the whole, is still missing in action.

B. History

This section seeks to use a historical analysis to account for the underdevelopment of a due process test and the dominance of the Bowman doctrine in extraterritorial criminal cases. Have courts, and legal scholars, for that matter, simply been blind to the potential fairness problems that inhere when foreigners acting abroad are prosecuted under American criminal law? Has everyone been asleep at the wheel? This Section argues otherwise. It shows that, instead, the reason courts have not developed a robust due process test to assess the extraterritorial application of the criminal law in the terrorism cases and beyond is that, for most of United States history, courts have not needed such a test.

The key point made below is that extraterritorial criminal statutes of the type seen today, under which conduct abroad can make a person guilty in the United States whenever Congress prescribes, are latecomers to the American legal system. This type of statute is, in fact, only about thirty years old. At the founding of the United States, crime and punishment had been a highly local affair. The Framers thought it only natural that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”\(^{150}\) Criminal law applied within set territorial areas, and only persons within those boundaries were obliged to comply. For the next two hundred years, this description continued to capture the lion’s share of criminal cases. The Supreme Court declared in 1909, “[T]he 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.”\(^{151}\)

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extraterritorial application of a federal statute violates the Due Process Clause.”); Reumayr, 530 F. Supp. 2d at 1223 (“It appears that no federal court has invalidated the extraterritorial application of U.S. law on due process grounds.”).

\(^{150}\) U.S. CONST. art. III, § 2, cl. 3.

Parts II.B.1 and II.B.2 below show that from the Founding through 1980, there were only two types of situations in which the federal government sought to impose criminal punishment on foreign citizens for their conduct abroad. The first was when the offender committed a “universal crime” that Congress codified in a statute. The second was when an offender perpetrated a conventional crime, such as murder or embezzlement, but directly against the United States government. Both categories of extraterritorial jurisdiction were relatively uncontroversial because both were based on activities that the defendant should have known could trigger punishment in the United States. It is not surprising that courts failed to develop due process tests for taking extraterritorial criminal jurisdiction during these years; the cases themselves did not present due process difficulties.

The landscape changed in 1980. As Part II.B.3 below shows, 1980 marked the first time in which Congress passed a criminal law—the Marijuana on the High Seas Act—that not only bore extraterritorial effect but also outlawed a form of conduct which foreigners might not have expected to carry punitive consequences. This Act marked the birth of the modern extraterritorial criminal statute. Since 1980, Congress has passed additional laws of this variety, primarily in the terrorism area. The problem is that courts have yet to develop a doctrinal framework to measure the legitimacy of these laws under Fifth Amendment principles.

1. Universal Crimes

The first category of crimes over which the United States has long sought to impose extraterritorial jurisdiction consists of “universal crimes.” According to international law, some offenses are considered so heinous and offensive to all of mankind that any state would be justified in imposing punishment, no matter who the perpetrator or where the site of conduct.

152 These are “universal crimes.” Offenses come to be regarded as “universal” through the development of customary international law and practice, or through the passage of multilateral treaties and

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152 Restatement (Third) of Foreign Relations Law of the United States § 404 (1987) (“A [sovereign] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern... even where none of the bases of jurisdiction indicated in § 402 is present.”).
international agreements. There is widespread consensus among jurists and scholars today that piracy, slave trading, genocide, and war crimes are all examples of universal crimes.

Since the early days of the American republic, federal courts have adjudicated extraterritorial piracy cases. The practice appears to date back to the Articles of Confederation, and it was explicitly written into the Constitution. Under Article I, the framers authorized Congress to "define and punish Piracies and Felonies committed on the high Seas," an area categorically outside of United States borders, and under Article III they endowed the federal judiciary with appropriate jurisdiction over such cases. As early as 1819, Congress invoked its authority under the Define and Punish Clause and made it a federal crime to commit piracy, "as defined by the law of nations," anywhere on the high seas. As early as 1820, the Supreme Court upheld the application of the 1819 statute to a British citizen who committed robbery aboard a Spanish ship. Although the defendant claimed that his prosecution was unfair and denied him fair

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153 See id. § 404 cmt. a (explaining that universal crimes can develop via customary international law, or as "a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations").

154 Id. § 404; see also id. § 404 reporter's n.1 (suggesting that torture, apartheid, aircraft hijacking, and hostage-taking qualify as universal crimes as well, given that those acts are now banned by widely-signed treaties).


156 Under Article 9 of the Articles of Confederation, officially ratified in 1781, Congress was given "the sole and exclusive right... of appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures." ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

157 U.S. CONST. art. I, § 8, cl. 10 (emphasis added).

158 U.S. CONST. art. III, § 2, cl. 1 (authorizing the federal judiciary to hear all cases "arising under" federal law or treaties).

159 The Act provided

[t]hat if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender... shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14. This Act is today codified in modified form at 18 U.S.C. § 1651 (2006) ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations... shall be imprisoned for life.").

warning, the Supreme Court disagreed.\textsuperscript{161} It consulted the writings of Hugo Grotius, Domenico Alberto Azuni, and other international law scholars to conclude that piracy under the law of nations had an amply “certain” definition.\textsuperscript{162} Any man in Smith’s position should have known what was prohibited and should have expected punishment somewhere. The United States’ prosecution was constitutional and consistent with international law.\textsuperscript{163}

In addition to piracy, a second universal crime over which the United States has long exerted extraterritorial jurisdiction is slave trading. In the early nineteenth century, Congress took a more restricted approach to slave traders, declaring their conduct criminal only in the case of United States citizens or persons aboard American-owned ships.\textsuperscript{164} In a notable 1825 case, the Supreme Court refused to treat Spanish and Portuguese slave traders as guilty of a criminal violation because those foreigners did not fall under United States law at the time.\textsuperscript{165} But in the 1840s, the United States shifted gears. It signed bilateral treaties with European countries in which it declared slave

\textsuperscript{161} See id. at 156–62.

\textsuperscript{162} Id. at 154, 160–62, 163 n.h (holding that “the crime of piracy is defined by the law of nations with reasonable certainty” and “[t]here is scarcely a writer on the law of nations[ ] who does not allude to piracy as a crime of a settled and determinate nature”).

\textsuperscript{163} Id. at 162. The Supreme Court reiterated this position in another case decided the same year. See United States v. Furlong, 18 U.S. 184, 197 (1820) (“Robbery on the sea is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all . . . ”). Judge Moore from the Permanent Court of International Justice issued an often-cited dissenting opinion in \textit{S.S. Lotus} that supports the Supreme Court’s holdings in \textit{Smith} and \textit{Furlong} that piracy was a universally cognizable crime in the early 1800s. \textit{S.S. Lotus} (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 70 (Sept. 7) (J. Moore, dissenting) (“Piracy by law of nations . . . is an offence against the law of nations; and as the scene of the pirate’s operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—hostis humani generis—whom any nation may in the interest of all capture and punish.”).

\textsuperscript{164} Act of May 15, 1820, ch. 113, §§ 4–5, 3 Stat. 600, 600–01 (declaring that “any citizen of the United States” or “any person whatever” who served on a slave ship owned by a United States citizen would be “adjudged a pirate” and “suffer death”).

\textsuperscript{165} The Antelope, 23 U.S. 66, 114–15, 121–23, 131–32 (1825) (holding that slaves that had been seized by the United States from Spanish and Portuguese ships off the African Coast had to be returned to those countries because, although the United States sought freedom for the slaves and claimed that slave-trading violated law of nations, many nations still sanctioned the practice).
trading to be equivalent to piracy. These treaties announced that both parties would collaborate in prosecuting slave traders, regardless of their citizenship or the site of their conduct. In 1919 and 1926, the United States signed multilateral agreements that also pledged collective action in ending slave trading throughout the globe.

Finally, in the 1970s, the United States broadened its extraterritorial jurisdiction over universal crimes by bringing certain acts of terrorism within its reach. As the Cold War deepened in the 1960s and militant groups began to gain access to increasingly violent technologies, the international community passed a slew of conventions aimed at suppressing terroristic conduct. These treaties denounced aircraft hijacking, hostage taking, crimes against diplomatic agents, and extortion as globally condemned offenses. They obliged signatory parties to not only outlaw the activities domestically but to collaborate in bringing perpetrators from other jurisdictions to justice. After ratifying these anti-terrorism treaties, the United States passed the Antihijacking Act of 1974 and the Comprehensive Crime

173 Colangelo, supra note 6, at 179.
Control Act of 1984,\textsuperscript{175} to ensure the treaties had domestic effect. The 1974 statute applied to aircraft hijackers, the 1984 statute applied to hostage-takers, and both announced that offenders would be subject to criminal punishment in the United States, no matter where they perpetrated their conduct or who had been the victims.\textsuperscript{176} In 1994, the United States also assumed universal jurisdiction over torture,\textsuperscript{177} and it has prosecuted one case of torture under that statute to date.\textsuperscript{178}

Nonetheless, despite its posture towards piracy, slave trading, and certain acts of terrorism and torture, the United States has not assumed extraterritorial jurisdiction over all universal crimes. Most notably, it has refrained from doing so for war crimes or for genocide. Under the Geneva Conventions of 1949, the international community made the willful imposition of "grave suffering," "inhumane treatment," and other wartime acts universally punishable offenses.\textsuperscript{179} However, the United States, to date, has still only assumed criminal jurisdiction over war crimes when the perpetrator or the victim is a United States national; it does not seek to hold foreign offenders overseas responsible in U.S. courts unless their target was an American.\textsuperscript{180}

\textsuperscript{177} Foreign Relations Authorization Act of 1994, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified at 18 U.S.C. § 2340A (2006)) ("Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. . . . There is jurisdiction over the activity . . . if . . . the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.") (emphasis added).
\textsuperscript{178} See United States v. Belfast, 611 F.3d 783, 793 (11th Cir. 2010) (upholding the jury's verdict and the court's imposition of a ninety-seven-year sentence against Charles Taylor II under the 1994 Torture Statute for various atrocities he committed in Liberia between 1999 and 2003). The case was only quasi-extraterritorial because Taylor was actually an American citizen, born in Massachusetts in 1977, so the application of the Torture Statute to his case was not on a wholly extraterritorial basis. \textit{Id}.
\textsuperscript{179} Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–47, Aug. 12, 1949, 6 U.S.T. 3516 (outlawing the act of willfully causing grave suffering); Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316 (outlawing inhumane treatment).
\textsuperscript{180} 18 U.S.C. § 2441(b) (2006) (requiring that, for a criminal penalty to be imposed, "the person committing such war crime or the victim of such war crime
Similarly, although genocide has been globally outlawed since 1948,\textsuperscript{181} the United States also has limited its genocide law—jurisdiction only lies where the offense is “committed within the United States” or the offender is a “national of the United States.”\textsuperscript{182} Thus, while the United States has a long history of assuming extraterritorial jurisdiction over certain universal crimes, and while the Supreme Court has endorsed the practice since 1820, universal jurisdiction is still only selectively established by Congress for particular types of conduct.

2. Crimes Against the Sovereign

In addition to universal crimes, there is a second class of criminal conduct over which United States courts have for decades taken extraterritorial jurisdiction: crimes against the sovereign. In such cases, the defendant commits an act that is not only illegal under United States law, such as the crime of murder or forgery, but that involves—either as an element of the offense or as a key part of the charge—the intentional infliction of harm against the United States and its sovereign concerns. For instance, the murder of a Drug Enforcement Administration (“DEA”) agent,\textsuperscript{183} the assault of a United States Congressman,\textsuperscript{184} or the embezzlement of governmental monies,\textsuperscript{185} would qualify. These cases involve the intentional infliction of harm by a foreigner on the United States, its officials, or its core governmental functions.

Foreigners have regularly been prosecuted for committing crimes against the sovereign since the 1960s. \textit{Bowman,} decided in 1922, was a case of this variety, but because the defendants in


\textsuperscript{183} United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984).


\textsuperscript{185} E.g., United States v. Hijazi, No. 05-40024-02, 2011 U.S. Dist. LEXIS 77347, at *22 (C.D. Ill. July 18, 2011) (describing a prosecution for theft from the U.S. treasury as follows: “This is not a case in which the United States is attempting to prosecute a foreign national for an act taken against a U.S. citizen, or even a U.S. corporation, it is attempting to prosecute Hijazi for actions that were taken against the United States itself.”).
the case were actually United States citizens, it is not an example of extraterritorial jurisdiction being applied in its fullest sense. In the decades following Bowman, there are numerous examples of courts taking pure extraterritorial jurisdiction—allowing prosecutions against foreigners for conduct perpetrated abroad—when the offenses were of the Bowman variety. To name a few examples, courts sustained extraterritorial jurisdiction in cases involving the submission of false documents to a consular official overseas; the forging of U.S. treasury checks at a bank abroad; activities undertaken in Jamaica to smuggle illegal aliens into the United States; lying to the federal government; and the attempted murder of a U.S. law enforcement official in Colombia.

In all of these cases, the courts found that assuming extraterritorial jurisdiction was appropriate because the defendant had purposefully targeted a sovereign interest of the United States. The judges did not invoke the Due Process Clause to ground their analyses, but instead looked to Bowman for its rules of statutory interpretation and to international law for its principles of sovereign jurisdiction. Both doctrines, courts

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186 See United States v. Ayesh, 762 F. Supp. 2d 832, 839–40 (E.D. Va. 2011) (“Cases following Bowman have consistently found the exercise of extraterritorial jurisdiction appropriate for statutes targeting crimes primarily involving government personnel or assets because, consistent with Bowman, the nature of the offenses targeted makes the presumption against extraterritorial jurisdiction inappropriate.”).

187 United States v. Pizzarusso, 388 F.2d 8, 8–9 (2d Cir. 1968) (involving a violation of 18 U.S.C. § 1546, under which it is crime to give false statements of “material fact” on a visa application, at a consulate in Canada); Rocha v. United States, 288 F.2d 545, 546, 548 (9th Cir. 1961) (also involving a violation of § 1546, but in Mexico).

188 United States v. Fernandez, 496 F.2d 1294, 1295 (5th Cir. 1974).

189 United States v. Williams, 464 F.2d 599, 600 (2d Cir. 1972). The law that the defendants were convicted of violating creates criminal penalties for anyone who “knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry.” 8 U.S.C. § 1324(a)(1)(A)(i) (2006).

190 United States v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358, 1366 (S.D. Fla. 1998) (giving extraterritorial effect to 18 U.S.C. § 1001 and noting that “contending a due process violation by a statute...which criminalizes the inherently bad conduct of lying to the government about something important, is unconvincing”).


192 See id. at 1371 n.1; Pizzarusso, 388 F.2d at 8 n.2; Rocha, 288 F.2d at 548–49; United States v. Hijazi, No. 05-40024-02, 2011 U.S. Dist. LEXIS 77347, at *28–29
found, supported the taking of jurisdiction. In *Rocha v. United States*, for example, the United States indicted a group of foreigners for entering into sham marriages in Mexico and thereby violating the American immigration code. The Ninth Circuit held that subjecting the defendants to a criminal trial in the United States would be legitimate both under *Bowman* and under international law. The court reasoned,

This brings us to the point—can United States law have extra territorial jurisdiction? Or, more specifically as put to us by the appellants—does the district court have jurisdiction to indict and try an alien found within the court's jurisdiction for a crime committed abroad?

[Analogizing the case to *Bowman*, we] see no reason why an alien... should be placed in a more favorable position with respect to his actions taken against the sovereignty of the United States while he was abroad, than a United States citizen would be.

The acts done to violate 1546 of Title 18 were all done outside the state, but they were intended (at least at the point of time when the fraudulent document was used to gain entry) to produce, and they did so produce, a detrimental effect on the sovereignty of the United States. Thus under "the protective principle," less well known than "the territorial principle," yet "claimed by most states," there is, and should be, jurisdiction. A sovereign state must be able to protect itself from those who attack its sovereignty.

Similarly, in cases involving the smuggling of aliens or the forging of U.S. treasury checks overseas, courts concluded that extraterritorial jurisdiction was justified because the defendants' acts "were designed to have and were proved to have had in fact, an adverse effect upon a governmental function of the United States."

On several occasions, courts denied assuming extraterritorial jurisdiction precisely because the criminal indictment did not involve allegations of the defendant's intent to harm a United

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193 *Rocha*, 288 F.2d at 546.

194 *Id.* at 548–49.

The case of *United States v. Columba-Colella* is illustrative. There, the Fifth Circuit held that a statute making it a crime to receive a stolen car could not be construed to apply extraterritorially to Mexico. Unlike cases where “the alien intended to and did directly interfere with one of the functions of the United States government[,] . . . here there was no interference with a governmental function.” The court recognized that a person who receives a stolen car in Mexico will “somehow affect[]” a United States citizen by preventing him from using his property. “But that an act affects the citizen of a state is not a sufficient basis for that state to assert jurisdiction over the act.”

In both the universal crimes and crimes-against-the-sovereign cases, courts for the most part did not refer to the Due Process Clause during their analyses about the legitimacy of imposing extraterritorial accountability. However, the lack of such analysis was not fatal because due process was not an issue to begin with. Universal crimes are by definition egregious acts that are condemned everywhere. Crimes against the sovereign are by definition acts that involve the intent to harm the United States and its governmental persons or functions. Accordingly, perpetrators of either type of conduct should expect that they could be haled into a United States court to account for their activity. The universality of the crime in the first case, and the intentional direction of the crime towards the United States in the second, operates as an implicit proxy for notice.

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196 See, e.g., *United States v. Mann*, 615 F.2d 668, 671 (5th Cir. 1980) (holding that unlawfully carrying a firearm in the course of a felony, prohibited under 18 U.S.C. § 924(c)(2), did not apply extraterritorially to foreigners on the high seas); *United States v. Columba-Colella*, 604 F.2d 356, 358–59 (5th Cir. 1979) (holding that the federal crime of receiving stolen property was not applicable to a British citizen’s acts in Mexico); *United States v. James-Robinson*, 515 F. Supp. 1340, 1341, 1345 (S.D. Fla. 1981) (holding that the federal crime of possession of marijuana with intent to deliver was not applicable to Colombian citizens’ possession of narcotics on a ship 400 miles from the United States border, lest the government could demonstrate they harbored intent to import the drugs into the United States).

197 604 F.2d 356 (5th Cir. 1979).

198 Id. at 360.

199 Id. at 359.

200 Id. at 360.

201 Id.
3. The Birth of the Modern Extraterritorial Criminal Statute

Up through the late 1970s, universal crimes and crimes against the sovereign remained the only two categories of criminal activity over which the United States sought to assume extraterritorial jurisdiction. For its other penal statutes, the United States did not seek enforcement overseas. As late as 1958, a law review article summarized the state of the federal criminal law as follows: “[A]s to acts taking place abroad, the . . . law is only available against those owing allegiance to the United States on grounds of nationality or citizenship.”

This all changed in 1980 when Congress passed the Marijuana on the High Seas Act. Under subsection (a) of the statute, which applied to any person “on the high seas,” it was unlawful “to possess with intent to manufacture or distribute, a controlled substance.” Under subsection (d), which applied to “any person,” it was unlawful “to possess, manufacture, or distribute a controlled substance—(1) intending that it be unlawfully imported into the United States; or (2) knowing that it will be unlawfully imported into the United States.” Although subsection (d) did not include a specific location to which it extended, it certainly applied at least as far as the high seas. The high seas are categorically beyond United States territorial waters.

The legislative history of the Marijuana on the High Seas Act shows that it had one key purpose: ensuring that foreigners, captured on boats beyond United States territory and in possession of a substantial amount of drugs, could be made to

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204 Id. § (a).
205 Id. § (d).
206 A catch-all provision stated that the entire Act was intended to have extraterritorial effect. Id. § (h) (“This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.”). Accordingly, section (d) certainly applied beyond United States borders; the question is whether it applied as far as the “high seas,” as section (a) had done, or perhaps even further. The most likely construction is that (d) reached the high seas, an area beyond the control of any nation. There is no indication in the statute’s text or legislative history that it was intended to apply within other sovereign nations’ territories.
stand trial in United States courts. Under the relevant federal statute at the time, drug trafficking was not an extraterritorial crime. Prosecutors could only charge foreigners acting beyond United States borders with the crime of conspiracy to traffic in illicit drugs, and proving such a charge required evidence of two things: first, overt acts taken by co-conspirators within the United States—meaning at least part of the crime had to have occurred within the United States—and second, the specific intent of the defendant to import into the United States. Officials from the Florida United States Attorney’s office complained to Congress in 1979 about the high evidentiary bars they faced under that law. They related that the office had begun “just declining on those cases where experience taught us we were not going to be able to proceed with a successful prosecution.” An official from the DEA similarly testified about the “loophole[s] by which traffickers are circumventing prosecution in the United States.” Proving overt acts by co-conspirators within the United States, and proving specific intent of the defendant to target U.S. markets, were steep evidentiary

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208 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 401(a)(1), 84 Stat. 1236, 1260 (stating that it shall be “unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance,” but not specifying that the Act applied abroad).

209 E.g., United States v. Cadena, 585 F.2d 1252, 1256–58 (5th Cir. 1978); United States v. Winter, 509 F.2d 975, 977–80 (5th Cir. 1975); Rivard v. United States, 375 F.2d 882, 883–86 (5th Cir. 1967). Some courts had begun to loosen the overt act requirement at the end of the decade, allowing jurisdiction over foreign defendants under § 841(a) as long as the defendant showed a clear intent to penetrate the United States. E.g., United States v. Baker, 609 F.2d 134, 138 (5th Cir. 1980); United States v. Williams, 589 F.2d 210, 213 (5th Cir. 1979), aff’d on reh’g 617 F.2d 1063 (5th Cir. 1980); United States v. Egan, 501 F. Supp. 1252, 1257 (S.D.N.Y 1980). But this was a new trend in the circuits, and it was judicially, as opposed to congressionally, constructed. See M. Lawrence Noyer, Note, High Seas Narcotics Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction, 50 FORDHAM L. REV. 688, 708 (1982).


211 Id.

212 Id. at 48 (statement of Peter B. Bensinger, Administrator, Drug Enforcement Administration).
bars. The DEA official urged that the United States code be changed, so that it would become a crime for anyone "to possess large quantities of drugs on-board [a ship]," ipso facto.

Congress heeded the calls. As a Senate report accompanying the Marijuana on the High Seas Act explained, the law was designed to fix "th[e] statutory void which does not proscribe possession of controlled substances on the high seas, while such conduct is a crime in U.S. territory." Accordingly, subsection (a) criminalized the possession with intent to distribute, subsection (d) criminalized possession with intent to import into the United States, and both provisions applied at least as far as the high seas. A report prepared by the House clarified that intent under the statute—including under subsection (d)—may be "inferred by proof of a presence of a large quantity of the narcotic" within the defendant's possession. In other words, no overt acts within the United States were necessary, nor did the prosecutor need to prove that the defendant specifically intended to make sales in the United States. As one of the sponsors of the bill in the House explained on the floor, "[T]his bill essentially requires only knowledge or intent to distribute [in general] with no need to establish a U.S. destination."

The Marijuana on the High Seas Act of 1980 was path-breaking. It was the first criminal statute to explicitly apply extraterritorially, while punishing a form of conduct that was neither cognizable under international law, nor that involved the direct infliction of harm on a United States sovereign interest, such as a government official or operation. Many key players

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213 Id.
214 S. REP. NO. 96-855, at 1 (1980).
215 See supra notes 204–06 and accompanying text.
217 125 CONG. REC. 20,082–83 (July 23, 1979) (statement of Rep. Biaggi); see also United States v. Howard-Arias, 679 F.2d 363, 372 (4th Cir. 1982) ("Prosecutions for possession of controlled substances prior to the enactment of the Marijuana on the High Seas Act required proof of intent to distribute the illegal drugs within the United States. The very intent of the Marijuana on the High Seas Act was to eliminate that requirement and to facilitate prosecution of smugglers both native and foreign who were apprehended on the high seas.").
218 Id. at 20,083 (statement of Rep. McCloskey).
219 That the Act reached further than international law at the time was widely appreciated. H.R. REP. NO. 96-323, at 20 (1979) (noting that drug trafficking "is not generally accepted as an international crime"); Memorandum from Mark G. Aron, Acting Gen. Counsel, to Hon. John M. Murphy, Chairman of the Comm. on Merch. Marine & Fishers in the House of Reps. (April 20, 1979), reprinted in H.R. REP. NO.
in the statute's passage commented on its dramatic expansion of United States law enforcement powers.\textsuperscript{220} What is remarkable is that no one appears to have questioned whether the Marijuana on the High Seas Act complied with the Due Process Clause. The one note of caution about the statute that appears in its legislative history is found in a letter written from the Assistant Attorney General to the House of Representatives, but even that referred only to the bill's potential conflicts with international law.\textsuperscript{221} Whether the statute afforded due process went undiscussed. In prosecutions brought under the Marijuana on the High Seas Act shortly after it was passed, federal courts sustained the new type of extraterritorial jurisdiction that the law authorized, also without mentioning potential constitutional problems.\textsuperscript{222}

\textsuperscript{220} E.g., 126 CONG. REC. 28690 (Oct. 1, 1980) (statement of Rep. Biaggi) ("[F]or the first time, the U.S. Attorney need not indict suspected smugglers for conspiracy to import illegal drugs but may charge them with possession with intent to distribute, a much simpler crime to prove. . . . Now possession of large quantities of illegal drugs would give rise to an inference of illegal drug trafficking."); see also Illegal Drug Traffic on the High Seas: Presidential Statement on Signing H.R. 2538 into Law, 2 PUB. PAPERS 1722 (Sept. 15, 1980) (stating that in making it a "crime to illegally possess or distribute drugs on the high seas" the legislation will "close[s] a loophole in our maritime enforcement laws"); S. REP. NO. 96-855, at 2 (1980) (explaining that the statute departs from current law in stretching United States extraterritorial jurisdiction to the maximum extent allowed by international law); H.R. REP. NO. 96-323, at 24 (1979) (same).

\textsuperscript{221} Memorandum from Patricia M. Wald, Assistant Attorney Gen., to Hon. John M. Murphy, Chairman of the Comm. on Merch. Marine and Fishers in the House of Reps. (April 20, 1979), reprinted in H.R. REP. NO. 96-323, at 16–17 (1979). The Justice Department told Congress that "[u]nder international law, a state does not have jurisdiction to proscribe . . . conduct" unless it can show "an actual or potential adverse effect within its territory." Id. at 16. Accordingly, the Justice Department argued that the law should be framed so that the intent to import drugs into the United States was a necessary element of the offense for a foreign offender.

\textsuperscript{222} E.g., United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982). In Howard-Aris, the Fourth Circuit did confront the issue of whether the state's expansive extraterritorial reach violated international law, as Assistant Attorney General Wald had warned in her letter to Congress. But the court concluded that even if the statute breached international law, "the United States may violate international law principles in order to effectively carry out this nation's policies." Id. at 371–72 (citation omitted).
In 1986, Congress passed a second extraterritorial statute of the new breed: the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 ("Anti-Terrorism Act"). Under the Anti-Terrorism Act, murder, conspiracy to murder, or "physical violence" perpetrated abroad would be considered a federal crime if two conditions were present: (1) a United States national was the actual or intended victim, and (2) the defendant had intended to intimidate a government or civilian population. Congress passed the Anti-Terrorism Act in response to a widely publicized incident in 1985, during which a group of rogue terrorists captured an Italian cruise ship and ended up murdering a disabled American aboard. Such conduct would now be punishable in the United States. In its Conference Report, Congress clarified that the Act was not aimed at "[s]imple barroom brawls or normal street crime" in foreign countries. Its goal was to reach terroristic activity that targeted or ended up harming Americans, as long as the defendant had intended to intimidate some civilian population.

Like the Marijuana on the High Seas Act, the Anti-Terrorism Act did not fall into either of the two buckets of extraterritorial criminal jurisdiction that had long been practiced in United States courts through 1980. It was not a "universal jurisdiction" statute, because it criminalized a form of conduct not yet covered by international law. The multilateral terrorism conventions in the mid-1980s had deemed certain acts like hijacking and hostage taking to be universally outlawed, but the 1986 statute reached broader. It outlawed any physical violence undertaken to intimidate civilians. The Anti-

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227 See id.
228 See supra notes 169–72 and accompanying text.
229 According to Andreas Lowenfeld, the Omnibus Act exceeded Congress's powers under the Define and Punish Clause of the Constitution because it authorized United States jurisdiction over extraterritorial conduct that was not forbidden by the law of nations. Lowenfeld, supra note 225, at 891–92 ("[T]he constitutionality of the assertion of jurisdiction is, one may safely say, in doubt, because it . . . does not, as written, come within the power to define and punish offenses against the law of nations. Unable to define terrorism, or at least to make the legislative finding that terrorism is an offense against the law of nations,
The Terrorism Act also deviated from the *Bowman*-type statute, because it did not require the offender to have targeted the United States government or its sovereign interests. In fact, the offender did not even need to have targeted a private American civilian. Rather, the intent to frighten any population, whether American or not, was sufficient to confer jurisdiction, as long as one of the actual victims wound up being an American.\(^2\)

Over the next two decades, Congress continued to pass extraterritorial criminal statutes of the new mold, particularly in the terrorism sphere. For instance, under the Anti Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress made it illegal to "knowingly provide[] material support or resources to a foreign terrorist organization,"\(^2\) whether done domestically or extraterritorially.\(^2\) AEDPA, like the Anti-Terrorism Act of 1986, departed from international law, given that material support is not outlawed by any multilateral convention.\(^2\) It also departed from the *Bowman*-type statute because it did not require the defendant to intend to harm United

Congress seeks to narrow the effect of the law by authorizing the Attorney General to make the determination that the crime charged fits within the title and purpose of the statute. At a minimum, should not the prosecution have to prove the jurisdiction of the court—that is, jurisdiction to prescribe and to enforce?\(^2\)

230 See 18 U.S.C. § 2332(d) (2006) ("Limitation on prosecution.—No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General . . . [that] such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.") (emphasis added). The Conference Report explained that the targeted population did not need to be American, however. H.R. REP. No. 99-783, at 88.


233 See supra note 6. See generally Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Setence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 855 (2007) (arguing that the material support provision of AEDPA takes a preventative, as opposed to a strictly punitive, approach to terrorism, punishing conduct that is likely to give rise to harm even if it is not harmful per se; the "statute does not require any showing of personal dangerousness on the part of the defendant" and its primary effect is to "contribute[] to [terrorism] prevention on an untargeted basis by degrading the ability of unknown members of designated groups to cause harm on unknown occasions").
States officials, property, or governmental functions to be liable; it was enough that the defendant know that the organization to which he was contributing assistance was designated as an FTO by the United States government.\(^{234}\) Another example is Congress’s amendments to the International Emergency Economic Powers Act of 1977\(^{235}\) ("IEEPA"), made in 2007. Under the original IEEPA statute, Congress authorized the Treasury Department to prohibit domestic banks that fell under its regulatory authority from providing financing to terrorist organizations.\(^{236}\) The 2007 amendments built on IEEPA by creating a new extraterritorial crime: that of "caus[ing] a violation of any...[the Office of Foreign Assets Control ("OFAC")] regulation."\(^{237}\) Parties not even subject to OFAC’s regulatory authority in the first place—such as foreign banks located abroad—could now face criminal sanctions under the new law.\(^{238}\) Again, like the Marijuana on the High Seas Act, the Anti-Terrorism Act, and AEDPA, the 2007 IEEPA Amendment did not fall into either of the two historical buckets of extraterritorial jurisdiction, for it reached further than international law and it did not require the perpetration of a crime-against-the-sovereign.\(^{239}\)

\(^{234}\) Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2717 (2010) ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.").


\(^{236}\) Id. §§ 203, 205; see also Robert M. Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARV. J. ON LEGIS. 1, 19–20 (2005).


\(^{238}\) Alex Lakatos & Jan Blöchliger, The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws: Criminal Prosecution and Civil Litigation Risk for Non-U.S. Financial Institutions Arising from Operations Outside the United States, Electronic BANKING L. & COM. REP., June 2010, at 1, 7, available at http://www.mayerbrown.com/fsr/article.asp?id=9439&nid=706 ("The phrase ‘cause a violation,’ added to IEEPA in 2007, applies to conduct in which a party not directly covered by OFAC regulations causes a party that is covered by OFAC regulations (e.g., non-U.S. banks or banks outside of the United States) unwittingly to violate those regulations . . . .").

\(^{239}\) A multilateral treaty passed in 1999 did ban terrorist financing. See International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 197 (prohibiting any person from “unlawfully and willfully[ ] provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used . . . to carry out . . . [an] act [that] constitutes an offence” of terrorism). However, the 2007 IEEPA amendment reached
Today, the modern day extraterritorial criminal statute is a staple of the United States' legal system. It is considered an unexceptional phenomenon. But taking a step back and considering the 230 year history of the American Republic, one realizes that this type of statute is a newcomer to the scene. Up until thirty years ago, the only criminal laws that applied extraterritorially were those outlawing universal crimes and crimes against the sovereign, so by nature, they did not raise problems of notice for the courts to wrestle with. The landscape changed dramatically in 1980 and has continued to shift ever since. The federal government now views itself as having the authority and legitimacy to enforce its penal laws throughout the world, and it is doing so with increasing vigor. However, the due process doctrines developed by courts in the civil law context to ensure that jurisdiction is substantively fair, not to mention constitutional, has not caught up with the facts on the ground. It is often the case that law lags behind new developments in society, especially when the source of the law is the judiciary. Consider how long it took for federal courts to outlaw segregation or to create the Miranda regime. The federal courts have yet to catch up to the reality of the modern day extraterritorial criminal statute. But that does not mean that the present state of the doctrine is sensible, normatively correct, or constitutional.

III. ANCHORING EXTRATERRITORIAL PROSECUTIONS IN DUE PROCESS

This Part argues that the lack of a robust due process doctrine for the law of extraterritorial criminal jurisdiction in the United States is unacceptable because it conflicts fundamentally with the tenants of two separate bodies of American law. Clearly, the lack of a due process doctrine to regulate extraterritorial prosecutions is inconsistent with the law on extraterritorial jurisdiction in private civil cases, in which

broader for two reasons: (1) it criminalized “caus[ing] a violation” of an OFAC order as opposed to causing “an offense” of terrorism in the first place, and (2) unlike the Convention, it did not specify an intent or knowledge requirement. Lakatos & Blöchliger, supra note 238.


241 See supra Part II.
courts have developed a multi-part “personal jurisdiction” test. But, one might argue, private law cases are different from criminal prosecutions. In the former, the plaintiffs are ordinary persons, and we cannot trust such persons to use the courts with the same degree of solicitude that we can expect of our public officials. In other words, one might argue, the fact that we need to set clear boundaries for limiting jurisdiction in transnational private suits does not mean that we need them in extraterritorial criminal cases. We can trust our public officials to do the work of the “personal jurisdiction” test through their use of prosecutorial discretion.

However, this Part draws on two other bodies of law in which the party initiating the lawsuit is also the government, rather than a private party, in order to show that the lack of due process parameters for extraterritorial prosecutions is inconsistent with basic legal principles in the United States system. The two areas of law to be surveyed are: the criminal law for domestic defendants, and the application of federal civil statutes, such as U.S. anti-trust or securities fraud laws, to extraterritorial defendants. The reason for looking to these two areas for guidance is that each shares something fundamentally in common with extraterritorial criminal prosecutions; the former involves adjudication under American criminal law, and the latter involves situations of extraterritorial enforcement. As will be shown below, U.S. courts in both domestic criminal cases and in civil extraterritorial enforcement cases have developed robust tests for ensuring that jurisdiction complies with the Due Process Clause. These two bodies of law are instructive because they highlight the degree to which the present state of the law on extraterritorial crimes—and the prevalence of the Bowman doctrine—is out of sync.

A. Learning from Domestic Criminal Law

When it comes to domestic criminal prosecutions, the Due Process Clause does important work in ensuring that prosecutions against the defendant are anchored in his having been given fair warning of the law. On the one hand, it is a staple of the criminal law that ignorantia juris non excusat; the defendant's ignorance of the law, or of the factors that constitute
the elements of his offense, is no defense. Except in extremely rare cases, federal courts will not allow defendants to invoke the Due Process Clause to block their indictments on the basis of ignorance of the law, even if they actually did not know their conduct was criminally banned. Nonetheless, through at least three separate doctrines, the Due Process Clause ensures that criminal jurisdiction vis-à-vis domestic defendants proceed only when there was a reasonable opportunity for the defendant to have taken notice.

First, under the Bouie test, the Due Process Clause requires that judicial interpretations of criminal statutes not be applied retroactively if those interpretations would be “unexpected and indefensible” compared to the law already in force. The Bouie test does not demand proof that the defendant was actually on notice at the time when he acted, but only evidence that the average, reasonable person would have been on notice, had they been in the defendant’s shoes. When judges expand the meaning of criminal statutes for the first time in the process of writing their opinions, the possibility for any defendant to be on notice will only be afforded if the interpretations are given prospective effect. The Bouie test protects several of the same interests that lie behind the Ex Post Facto Clause, but it is doctrinally anchored in the Due Process Clause of the Fifth and Fourteenth Amendments.

Second, under the void-for-vagueness test, the Due Process Clause requires that criminal statutes be sufficiently clear in what they outlaw before they can be enforced. “[A] statute

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242 E.g., United States v. Meade, 175 F.3d 215, 225 (1st Cir. 1999) (rejecting a defendant’s Due Process Clause challenge to § 922(g)(8), which makes the existence of a state court order an element of the federal misdemeanor of illicit possession of a handgun, because of “the well-established tenet [that] actual knowledge of the law’s requirements is a precondition to criminal liability”).

243 One such outlier case is Lambert v. California, 355 U.S. 225, 229 (1957), in which the Court struck down a municipal law in Los Angeles making it a crime for an ex-offender to fail to register. However, the Court has declined to extend Lambert in subsequent cases and has instead described it as “‘an isolated deviation from the strong current of precedents—a derelict on the waters of the law.’” Texaco, Inc. v. Short, 454 U.S. 516, 537 n.33 (1982) (quoting Lambert, 355 U.S. 225 at 232).

244 Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) (“If a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.”); see also Rogers v. Tennessee, 532 U.S. 451, 458–69 (2001) (applying the Bouie doctrine).

245 Bouie, 378 U.S. at 353–54.
which . . . forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” will fail. The void-for-vagueness test furthers a separate goal of ensuring that laws are enforced in a non-arbitrary manner, because when officials are given too much discretion to enforce capacious legal mandates, they can use their authority to selectively punish disfavored groups. But that aside, the central purpose of the void-for-vagueness test is to guarantee that defendants be given the opportunity to understand what the law forbids before they are held accountable under it.

Third, under the rule of lenity, the Due Process Clause directs judges to avoid constitutional problems by making narrow constructions of ambiguous criminal statutes, interpreting those statutes to reach only the “conduct clearly covered” so that “fair warning” is ensured.

All three Due Process Clause doctrines serve a similar purpose: ensuring that the application of the criminal law to the defendant is substantively fair by demanding that he has been given a reasonable opportunity to learn that his behavior could subject him to punishment in the now-prosecuting jurisdiction. The doctrines are close cousins of the personal jurisdiction test in civil cases, but what distinguishes them is that they apply when it is the federal government—as opposed to a private litigant—requesting the court to take cognizance of the suit. To date, these doctrines have been developed and applied primarily with respect to “domestic” criminal defendants—persons who acted from within United States territory when they broke the law or who are United States nationals and thus subject to its penal regulations in any corner of the globe. However, they demonstrate that the Due Process Clause is fundamentally concerned with whether criminal defendants are afforded notice

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246 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); see also City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (holding that under the Due Process Clause, Chicago’s anti-loitering ordinance was unconstitutionally vague “not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all” ) (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)).
248 See Hill, 530 U.S. at 732.
before they are penalized, and they instruct that the Clause should, in some fashion, promote the same objectives when it comes to cases of extraterritorial enforcement.

B. Learning from Extraterritorial Civil Prosecutions

Beyond the domestic criminal law, a second body of law showing that the Due Process Clause should regulate extraterritorial criminal prosecutions is that dealing with the overseas application of federal civil statutes. Since the 1940s, the United States government has sought to enforce its anti-trust and securities fraud statutes abroad. Namely, it has brought civil proceedings against foreign firms on the basis of their conduct overseas, and it has successfully obtained judgments against these firms under the federal antitrust and securities fraud laws. But U.S. courts have not just sustained jurisdiction without reflection. Instead, they have developed frameworks for ensuring that the overseas application of the federal antitrust and securities fraud laws accords with the Due Process Clause and with common law due process doctrines by demanding that foreign defendants be given fair warning of the potential for legal liability. These two bodies of civil law are further illustrations of why it is only principled that there be a Due Process Clause test for the extraterritorial reach of United States criminal laws.

1. Anti-trust

The Sherman Act is the United States' central anti-trust statute. It outlaws any "conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."\(^{250}\) When it was originally passed in 1890, nobody appears to have considered whether the Sherman Act's prohibition on monopolistic conduct applied to activities undertaken by firms in foreign countries. In the early case of *American Banana Co. v. United Fruit Co.*, the Supreme Court resolved that question in

\(^{250}\) Sherman Antitrust Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (codified at 15 U.S.C. § 1 (2006)) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").
the negative.\textsuperscript{251} The Court held that when a New Jersey firm had arranged with the Costa Rican government to set prices for goods that would be produced in Costa Rica, that agreement was beyond the reach of the law.\textsuperscript{252} The Sherman Act should be construed as regulating domestic conduct only, the Court held, because "the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious."\textsuperscript{253} The \textit{American Banana} holding prevailed as the governing interpretation of the Sherman Act for the next several decades.\textsuperscript{254}

In the Alcoa litigation in 1945, however, Judge Learned Hand chartered a new path. The federal government brought a civil proceeding under the Sherman Act against both Aluminum Company of America ("Alcoa"), a United States corporation, and Aluminum Limited ("Limited"), a Canadian firm that was forty-nine percent owned by American shareholders, for price-fixing activities in both the United States and overseas.\textsuperscript{255} In what turned out to be a path-breaking opinion, Judge Hand held that Section 1 of the Sherman Act could apply in complete extraterritorial fashion to Limited—meaning it could apply to that foreign firm's activities, undertaken beyond U.S. borders—as long as at least two conditions were met. First, the firm had to have intended for its activities to have monopolistic effects within the United States. Second, these effects needed to have materialized.\textsuperscript{256} Judge Hand reasoned:

Did [Limited's price-fixing agreements overseas] violate § 1 of the Act? The answer . . . [depends on] whether Congress chose to attach liability to the conduct outside the United States of

\textsuperscript{251} 213 U.S. 347 (1909), \textit{overruled in part as stated in} \textit{Morrison v. Nat'l Austl. Bank Ltd.}, 130 S. Ct. 2869, 2887 n.11 (2010) (holding that an Alabama-based company could not bring a damages claim under the Sherman Act against a New Jersey-based company for activities the defendant company conducted in Costa Rica, in conjunction with the Costa Rican government).

\textsuperscript{252} \textit{Id.} at 359.

\textsuperscript{253} \textit{Id.} at 357.

\textsuperscript{254} \textit{See, e.g., United States v. Sisal Sales Corp.}, 274 U.S. 268, 275–76 (1927) (applying the \textit{American Banana} reading of Sherman Act, but holding that \textit{American Banana} was not applicable in the present case because the defendants had conducted both foreign \textit{and} domestic activities that were illegal under the statute).

\textsuperscript{255} \textit{United States v. Aluminum Co. of Am.}, 148 F.2d 416 (2d Cir. 1945). The cause of action that the federal government invoked was the Clayton Act, which establishes civil remedies for violations of the Sherman Act and creates a cause of action for both the Justice Department and private litigants. \textit{Id.} at 428; 15 U.S.C. § 15a (2006).

\textsuperscript{256} \textit{Aluminum Co. of Am.}, 148 F.2d at 443–45.
persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so.... Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports.... [A]greements may on the other hand intend to include imports into the United States, and yet it may appear that they had no effect upon them.... We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied, the situation certainly falls within [the Sherman Act's coverage].

Although Judge Hand never mentioned the Due Process Clause in his analysis about whether the Sherman Act could be construed to apply extraterritorially, he crafted his holding in light of "our own Constitution." Moreover, his requirement that Limited intend to have caused harmful effects in the United States before it could be held civilly liable functioned to achieve what the Due Process Clause was understood at the time to do more generally: ensure that jurisdiction accorded with "traditional notions of fair play and substantial justice." By 1945, it was well established in American jurisprudence that the Due Process Clause required that an out-of-state resident be given warning of his potential to stand in judgment before his life, liberty, or property could be taken from him. Judge Hand did not cite any Due Process Clause precedents in his Alcoa decision, but his logic was parallel. Just as the Due Process Clause required that a defendant be on notice of his capability to incur legal liability before jurisdiction was proper, so too did the Sherman Act require that foreign firms be given fair warning. Those firms' intent to cause harmful effects in the United States was what satisfied the notice requirement—because it was "settled law" that any person who intends harm within a given

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257 Id. at 443-44.
258 Id. at 443.
260 E.g., McDonald v. Mabee, 243 U.S. 90 (1917) (holding that under the Fourteenth Amendment, the exertion of sovereign jurisdiction demanded reasonable notice to the person that the jurisdiction intended to "bind" him). This doctrine was developed further in International Shoe, 326 U.S. at 310, 316, which came down several months after Judge Hand's Aluminum Co. decision.
jurisdiction should expect to be held accountable. Over time, Judge Hand's decision in Alcoa became the benchmark for when courts can impose civil remedies under the Sherman Act for extraterritorial conduct. In 1987, the Restatement adopted the Alcoa framework wholesale, and in 1993, the Supreme Court endorsed it by declaring, "[I]t is well established by now 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." In cases involving foreign commerce other than imports, some courts have interpreted a 1982 amendment as lessening the standard so that causing any "direct, substantial, and reasonably foreseeable" (as opposed to intended) effect in a United States market authorized jurisdiction. Since 1995, the Justice Department and Federal Trade Commission have also adopted this bifurcated approach; they use Alcoa as the standard for extraterritorial jurisdiction in foreign import cases, and a "reasonably foreseeable effects" test in non-import cases.

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261 Aluminum Co., 148 F.2d at 443 ("[I]t is settled law—as 'Limited' itself agrees—that any 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.").

262 Restatement (Third) of Foreign Relations Law of the United States § 415(2) (1987) ("Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.").


264 E.g., Kruman v. Christie's Int'l PLC, 284 F.3d 384, 402 (2d Cir. 2002) ("One of the concerns raised by the defendants is that because of the global nature of today's markets, any anticompetitive conduct that affects markets abroad could conceivably have an impact on our economy. But... [there is a] significant limit on the reach of the antitrust laws that may address this concern. The 'effect' of the conduct must be 'direct, substantial, and reasonably foreseeable'... [W]e observe that this limit will likely prevent conduct that merely has an ancillary effect on our markets from being actionable under our antitrust laws.") (quoting 15 U.S.C. § 6a(1)(2006)).

265 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.1 (1995), available at http://www.justice.gov/atr/public/guidelines/internat.htm ("With respect to foreign import commerce... the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States... [W]ith respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act of 1982 ('FTAIA') applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce.") (emphasis added).
But even the reasonably foreseeable effects test affords the foreign defendant notice because it requires that he undertook action he should have known was likely to harm U.S. markets.

Finally, one court to date has adopted Judge Hand's test in Alcoa as the guiding framework for whether the Sherman Act can be construed to trigger criminal penalties for extraterritorial conduct. In 1997, the Justice Department filed its first-ever criminal indictment under the Sherman Act on the basis of a foreign firm's overseas activities. That case, Nippon Paper, involved a Japanese firm that had conspired with Japanese trading houses to fix the price of paper eventually imported into the United States. The First Circuit had to decide whether to allow an indictment to go forward, given that there was no case on record in which a defendant had been held criminally liable under the Sherman Act solely for overseas activity. The First Circuit ultimately allowed the prosecution to advance because it found that the government's indictment met both prongs of the Alcoa test. The prosecution was substantively fair, the court held, given that the defendant undertook acts whose harmful impacts on U.S. markets were foreseeable, and thus he should have expected that an American tribunal would hold him accountable.

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267 Id. at 2-3.
268 Id. at 4 ("[H]ere the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.").
269 Id. at 12-13. "The effects on United States markets were foreseeable and direct. The Government of Japan acknowledges that antitrust regulation is part of the international legal system, and NPI does not really assert that it has justified expectations that were hurt by the regulation." Id. While criminal prosecution may have come as a surprise, NPI should have known that civil antitrust liability could include treble damages. "The only factor counseling against finding that the United States' antitrust laws apply to this conduct is the fact that the situs of the conduct was Japan and that the principals were Japanese corporations. This consideration is inherent in the nature of jurisdiction based on effects of conduct, where the situs of the conduct is, by definition, always a foreign country. This alone does not tip the balance against jurisdiction." Id.
270 Id. at 12. In its petition for certiorari to the Supreme Court, the firm argued that the prosecution ran afoul of the Due Process Clause because it had no reason to assume that its actions abroad could trigger criminal penalties in the United States. Petition for a Writ of Certiorari at 19-20, Nippon Paper Indus. Co. v. United States, 552 U.S. 1044 (1998) (No. 96-1987), 1997 WL 33556961 ("The First Circuit's enlargement of the territorial scope of the Sherman Act's criminal provisions—without any legitimate antecedent for that expansion—jeopardizes the due process
Since *Nippon Paper*, the Justice Department has initiated a slew of criminal prosecutions against foreigners under the Sherman Act. In 1999, for instance, it obtained a historic plea agreement with a Swiss CEO, marking "the first time a foreign executive agreed to serve time in U.S. prison for his participation in an international cartel." As of November 2010, the Justice Department reports that it has obtained seventy-six corporate fines worth over $10 million under the Sherman Act to date, and sixty-six have been against non-United-States-based companies. Another source reports that "[a]t present, approximately fifty sitting U.S. grand juries are conducting [Sherman Act] investigations, and close to one-half of those investigations involve international cartel activity." A substantial number of these cases involved global cartels and international conspiracies in which some of the illegal conduct occurred within the United States. Thus, they did not involve exclusive "extraterritorial" activity to the same degree as *Nippon Paper* did. But foreigners undertaking activities abroad were certainly involved. It is premature to guess whether *Nippon Paper* will become the widely accepted standard among U.S. courts in extraterritorial criminal prosecutions under the rights of Petitioner and future defendants. Petitioner had no reason to believe that Congress intended such criminal penalties to apply to wholly foreign conduct. While *Alcoa* applied the civil provisions of the Sherman Act to overseas conduct, it did not consider whether the statute exposed foreign actors to criminal sanctions for conduct undertaken wholly abroad. Since, at common law, penal statutes were interpreted strictly and were held to have no extraterritorial effect, Petitioner had no reason to believe that entirely foreign conduct would be subject to criminal penalties in the United States.

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274 *E.g.*, United States v. Anderson, 326 F.3d 1319 (11th Cir. 2003); see also Paul, *supra* note 273, at 127–30 (describing extraterritorial criminal prosecutions under the Sherman Act since *Nippon Paper* and describing how many of them involved global cartels with U.S. counterparts).
Sherman Act going forwards, but it has garnered a wide amount of positive attention, and given that it follows Alcoa’s formulation, it is likely to be strongly endorsed.

In sum, the civil cases since 1945 involving extraterritorial enforcement of the Sherman Act—and at least one criminal case—have conditioned United States jurisdiction over foreign defendants abroad on a de facto notice requirement. In demanding that the defendant cause market disruptions that were either intended to arise in the United States, or that were at least reasonably foreseeable to arise here, courts have limited extraterritorial culpability to situations in which foreigners should have expected to face judgment domestically, given the effects of their actions. Throughout the past several decades, due process concerns about the fairness of extraterritorial jurisdiction have guided the development of U.S. anti-trust law.

2. Securities Fraud

The story regarding the extraterritorial application of U.S. securities fraud laws is similar to that in the anti-trust area: Since the 1950s and '60s, the federal government has sought civil penalties against firms on the basis of their extraterritorial activities; federal courts have enabled U.S. anti-fraud laws to apply abroad, but pursuant to notice test crafted in light of the Due Process Clause; and today, a notice requirement also appears to attach in extraterritorial criminal prosecutions under securities fraud statutes.

Section 10(b) of the Securities Exchange Act of 1934 is the nation’s primary anti-fraud law that regulates in the securities market; it prohibits using any “manipulative or deceptive device” in the purchase or sale of a security through an instrumentality of interstate commerce. It was not until the post-War decades

275 Dan K. Webb et al., Corporate Internal Investigations § 2.04(1)(c)(i) (2011) ("[W]hile one circuit has declared that a prosecution based solely on extraterritorial conduct may be brought, it remains unclear whether other circuits will follow suit. Furthermore, issues about whether the United States can obtain personal jurisdiction—as opposed to subject matter jurisdiction—over a foreign corporation and just how insubstantial or indirect the effect on commerce must be to preclude an antitrust prosecution essentially of overseas conduct are sure to be tested.")

276 According to a search by the author, it has been cited 669 times to date.

277 15 U.S.C.A. § 78j (West 2011) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or
when the extraterritorial application of Section 10(b) fell onto anyone’s radar screen.\textsuperscript{278} In those years, as had been the case with the Sherman Act, both the SEC and private litigants began bringing civil damages suits in U.S. courts premised on violations of Section 10(b) that presumptively occurred beyond the country’s borders.\textsuperscript{279} In turn, federal courts needed to determine whether Section 10(b) should be read as applying to activities overseas.

In \textit{Leasco Data Processing Equipment Corp. v. Maxwell}, the Second Circuit reached a key holding about the extraterritorial reach of U.S. securities fraud law. It held that under the Due Process Clause, Section 10(b) of the 1934 Exchange Act could be construed to apply extraterritorially, as long as the foreign defendant intended, knew, or should have known that his conduct abroad would cause harmful effects to securities investors in the United States.\textsuperscript{280} The court’s reasoning was even more expressly tied to the Fifth Amendment than Judge Hand’s opinion had been in \textit{Alcoa}. The Second Circuit explained that subject matter jurisdiction under the Securities Exchange Act was necessarily limited by the Fifth Amendment because Congress could only criminalize foreign conduct up to the point

\textsuperscript{278} The legislative history of the 1934 Act did not discuss extraterritorial subject matter jurisdiction. See H.R. REP. NO. 73-1383, at 28 (1934); S. REP. NO. 73-792, at 23 (1934); see also Louise Corso, Note, \textit{Section 10(b) and Transnational Securities Fraud: A Legislative Proposal To Establish a Standard for Extraterritorial Subject Matter Jurisdiction}, 23 GEO. WASH. J. INT’L L. & ECON. 573, 573–74 (1989) ("[T]he legislation establishing regulation of the securities market and the Securities and Exchange Commission . . . was written in the 1930s and did not anticipate . . . the impact [technological] advances are having, and will continue to have, in the international arena. The drafters of the securities laws were not concerned with the question of foreign trade in securities and did not address the issue of extraterritorial subject matter jurisdiction in cases of alleged fraud."). The first case involving extraterritorial jurisdiction in a securities fraud context was in 1960. See \textit{id.} at 581 n.45 (citing Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960)).


\textsuperscript{280} See \textit{Leasco Data Processing Equip. Corp.}, 468 F.2d at 1333–39.
that the Fifth Amendment permitted. Next, it held that personal jurisdiction in Section 10(b) cases, just as in all civil cases involving transnational activity, had to be premised on a strong notice requirement for the defendant. The court stated:

[I]t is 'essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'

... At minimum the conduct must meet... the important requirement that the effect 'occurs as a direct and foreseeable result of the conduct outside the territory.'... The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him.

The Second Circuit thus drew on Due Process Clause cases like International Shoe to condition extraterritorial jurisdiction under Section 10(b) on a "foreseeable result" standard. This became the universal benchmark for applying Section 10(b) overseas. Courts drew on Leasco Data Processing in cases brought by the SEC against foreign firms, and by the 1980s the case became binding precedent in numerous federal circuits.

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281 The court recognized that when a case involved wholly foreign conduct, a court could only effectuate Congress's intent with respect to § 10(b) in compliance with "Fifth Amendment" limitations. See id. at 1334 ("[I]f Congress ha[d] expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.").

282 Id. at 1340.
283 Id. at 1340–41.
284 Id.

285 E.g., SEC v. Capital Growth Co., 391 F. Supp. 593, 596–98 (S.D.N.Y 1974) (holding that jurisdiction over § 10(b) claims was proper as long as there was either "significant conduct within the territorial limits of the United States or... extraterritorial conduct which was harmful to and which had an impact upon United States investors" and that the SEC's pleadings satisfied both standards).

Moreover, as federal courts applied *Leasco Data Processing* to new extraterritoriality situations that emerged in the 1980s and '90s, they were careful to do so in light of due process principles. In *IIT v. Vencap*, for instance, the Second Circuit held that a foreign firm's activities abroad did not trigger liability under Section 10(b) because the firm had no shares listed on any American exchange and no reason to assume that its conduct, even if illegal under Section 10(b), would impact U.S. investors.287 In *Pinker v. Roche Holdings*, on the other hand, the Third Circuit held that a firm's fraudulent filings abroad could trigger liability in the United States because the firm had actively sought to reach U.S. investors.288 It concluded that "[a] foreign corporation that purposefully avails itself of the American securities market has adequate notice that it may be haled into an American court for fraudulently manipulating that market."289 The American Law Institute in 1987 reiterated the spirit of these cases when it directed courts to evaluate extraterritorial jurisdiction for securities frauds through a lens of "reasonableness"290 and to take into account the justifiable expectations of defendants.291

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287 *IIT v. Vencap*, Ltd., 519 F.2d 1001, 1016–17 (2d Cir. 1975) ("Taking the view most favorable to the plaintiffs, the 300 American fundholders were only .2% of IIT's fundholders. ... [W]e cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if Pistell, in London, had defrauded a British investment trust by selling foreign securities to it simply because half of one per cent of its assets was held by Americans. Clearly this is not within the formulation in Schoenbaum ... . And even though Schoenbaum does not necessarily set the outmost reaches for subject matter jurisdiction with respect to foreign activities having effect within the United States, the losses from this $3,000,000 investment to these 300 American investors, owning only some .5% of a foreign investment trust ... and the shares of which apparently were not intended to be offered to American residents or citizens, is not the 'substantial' effect within the territory of which the Restatement of Foreign Relations Law s 18(b) (ii) speaks."). *Compare id., with Consol. Gold Fields PLC v. Mincoro, S.A., 871 F.2d 252, 262 (2d Cir. 1989)" ("In this case, the District Court should have asserted jurisdiction once it noted that [the defendant company] knew that [its officers] were required by law to forward the tender offer documents to Gold Fields' shareholders and ADR depository banks in the United States. This 'effect' (the transmittal of the documents by the nominees) was clearly a direct and foreseeable result of the conduct outside the territory of the United States.").


289 *Id.; see also* Itoha Ltd. v. LEP Group PLC, 930 F. Supp. 36, 41 (D. Conn. 1996) (holding that jurisdiction was proper in a § 10(b) suit given that the foreign firm had issued ADRs on the NASDAQ).

290 *Restatement (Third) of Foreign Relations Law of the United States* § 416 cmt. a (1987) ("The reach and application of securities legislation of the United States depend on their reasonableness as determined by evaluation under § 403 in
The federal government has not yet brought any criminal prosecutions under Section 10(b) on the basis of extraterritorial conduct. The likely reason for this is that unlike the Justice Department’s Antitrust Division, the SEC has no criminal enforcement power and so would have to hand over cases that it deems ripe for criminal prosecution to United States attorneys’ offices, which would then start from square one. Nonetheless, were the government to start bringing criminal prosecutions under Section 10(b) for extraterritorial violations, it would almost certainly be required follow *Leasco Data Processing*. The Dodd-Frank Wall Street Reform Act of 2010 declared that “the district courts of the United States...shall have jurisdiction” over all civil and criminal actions brought under Section 10(b) whenever “conduct occurring outside the United States...has a foreseeable substantial effect within the United States.” This statute appears to codify the principles set forth in *Leasco Data Processing*, for when extraterritorial jurisdiction for a Section 10(b) violation is appropriate.

The lesson from the securities fraud cases is similar to that from the anti-trust cases. The United States government has sought extraterritorial application of federal statutes for decades,
and courts have in turn granted it, but pursuant to a framework that ensures that the defendant be put on notice of his potential to face liability in the United States. Just as Alcoa and its progeny used the defendant's intent to harm U.S. markets (or, for some courts in non-import cases, the defendant's causing of "direct, substantial, and reasonably foreseeable" effects), Leasco Data Processing used the defendant’s causing of "reasonably foreseeable" harms to U.S. securities markets as a proxy for notice and the fairness of imposing jurisdiction.

C. Positive Developments in Ninth Circuit Drug-Trafficking Cases

The two bodies of law surveyed in this Part thus far—domestic criminal law and cases involving the extraterritorial application federal civil statutes—both point in the same direction: The Due Process Clause should be playing a role in policing the fairness of extraterritorial criminal prosecutions. The good news is that in one area of extraterritorial criminal enforcement today, at least as dealt with by one federal circuit, courts appear to be getting the message. In drug-trafficking cases since the 1990s, district and appeals courts in the Ninth Circuit have been invoking the Due Process Clause to set the boundaries of jurisdiction in extraterritorial jurisdiction.

In recent years, foreign defendants have started to challenge their indictments and convictions for drug trafficking offenses under the Due Process Clause, claiming that their subjection to American penal law on the basis of their extraterritorial conduct deprived them of fair warning. In all seven circuits in which such claims have been raised in drug-trafficking cases, courts have acknowledged that the Due Process Clause does apply.

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294 See supra notes 264–65.
295 See, e.g., United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990)
296 See, e.g., United States v. Mohammad-Omar, 323 F. App'x 259, 260 (4th Cir. 2009).
297 See id. at 261 ("[W]hile Congress may clearly express its intent to reach extraterritorial conduct, a due process analysis must be undertaken to ensure the reach of Congress does not exceed its constitutional grasp."); United States v. Suerte, 291 F.3d 366, 372 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); Davis, 905 F.2d at 248; United States v. Marino-Garcia, 679 F.2d 1373, 1384 (11th Cir. 1982); United States v. Umeh, 762 F. Supp. 2d 658, 666 (S.D.N.Y. 2011) (holding that the indictment satisfies the "nexus" requirement that attaches under the Fifth Amendment).
Only the Ninth Circuit has developed a robust test for assessing whether due process was actually afforded based on the facts of the defendant's case. In the First Circuit, the due process standard is that prosecution cannot be "arbitrary or fundamentally unfair," but courts will deem the government's efforts to punish drug trafficking on the high seas as meeting that standard, ipso facto. In the Third, Fifth, and Eleventh Circuits, appellate courts have acknowledged that the Due Process Clause requires that the defendant have been afforded notice, but they conclude that such notice is categorically satisfied in drug trafficking cases given that the practice is condemned by many developed states. In the Fourth Circuit, there is only one, unpublished opinion linking

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298 See Davis, 905 F.2d at 248-49 (explaining that there must be a sufficient nexus between the defendant's conduct and the United States in order to satisfy the constraints of the Fifth Amendment).

299 E.g., Cardales, 168 F.3d at 553. But see United States v. Angulo-Hernandez, 576 F.3d 59, 61 (1st Cir. 2009) (Tourelle, J., dissenting from denial of rehearing en banc) (rejecting the claim "that drug trafficking, generally, is such a global threat that the United States is justified in protecting itself by prosecuting traffickers anywhere, regardless of the destination of the drug shipment" and urging that the First Circuit "require[] a showing that the particular conduct endangered the United States" (internal quotation marks omitted)).

300 United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) ("No due process violation occurs in an extraterritorial prosecution under the MDLEA when there is no nexus between the defendant's conduct and the United States. Since drug trafficking is condemned universally by law-abiding nations, we reasoned that there was no reason for us to conclude that it is fundamentally unfair for Congress to provide for the punishment of a person apprehended with narcotics on the high seas." (citation omitted) (internal quotation marks omitted)); Martinez-Hidalgo, 993 F.2d at 1056 ("Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.").

301 Suerte, 291 F.3d at 377 (citing the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature 20 Dec. 1988, 28 I.L.M. 493, as evidence that foreigners were on notice).

302 United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) (holding a Colombian captain of a ship, which had been detained on the high seas and was carrying a large quantity of cocaine, could be prosecuted under federal law without raising due process problems because drug trafficking is "generally recognized as a crime by nations that have reasonably developed legal systems").

303 See supra notes 300-02.
drug trafficking to due process, and in the Second Circuit, there are only district court level opinions on the topic, so it is too early to conclude what the doctrine in those circuits will be.

In the Ninth Circuit alone, the courts have developed a robust “nexus” test in drug trafficking cases to ensure that extraterritorial jurisdiction is consistent with the Due Process Clause of the Fifth Amendment. This test requires that a defendant have either intent or reasonable foresight that his activities abroad will result in the trafficking of illicit drugs within the United States in order for him to be deemed prosecutable. The Ninth Circuit’s nexus test was well articulated in the recent case of United States v. Perlaza, the one case to date in which a federal court dismissed a criminal indictment against a defendant based on a finding that the exertion of extraterritorial jurisdiction was inconsistent with the Due Process Clause.

In Perlaza, the United States charged seven foreigners with federal drug trafficking crimes after they were found aboard a Colombian vessel, the Gran Tauro, 300 miles from the coast of Colombia. From helicopter surveillance, the United States

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304 The Fourth Circuit has only resolved one extraterritorial drug trafficking case to date, and it did so in an unpublished opinion. United States v. Mohammad-Omar, 323 F. App’x 259, 261 (4th Cir. 2009). While the court in Mohammad-Omar followed the Ninth Circuit and adopted a rigorous due process test for evaluating extraterritorial jurisdiction in drug trafficking cases, it is too early to determine whether that holding will garner precedential value.

305 E.g., United States v. Umeh, 762 F. Supp. 2d 658, 666 (S.D.N.Y. 2011) (holding that the indictment satisfies the “nexus” requirement that attaches under the Due Process Clause). It is arguable that the Second Circuit’s opinion in United States v. Yousef, 327 F.3d 56, 111–12 (2d Cir. 2003), a hijacking case, adopted a nexus test that should apply in all extraterritoriality cases in the Second Circuit, including drug trafficking cases. However, there are post-Yousef district court opinions that fail to require a nexus in drug trafficking indictments—for example, United States v. Manuel, 371 F. Supp. 2d 404, 409 (S.D.N.Y. 2005)—and there is still no appellate decision that extends Yousef in such a criminal proceeding.

306 This test was first developed in United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990), and it has been applied consistently by courts in the Ninth Circuit ever since. E.g., United States v. Perlaza, 439 F.3d 1149, 1160 (9th Cir. 2006); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

307 E.g., Klimavicius-Viloria, 144 F.3d at 1257 (holding that “the plan for shipping the drugs [must have been] likely to have effects in the United States” (internal quotation marks omitted)); Davis, 905 F.2d at 249 (holding that Davis’s prosecution was constitutional because the government put forth sufficient evidence to show that “Davis intended to smuggle contraband into United States territory”).

308 439 F.3d at 1168.

309 Id. at 1153, 1155.
Navy had observed the Gran Tauro working with an unregistered speedboat in the middle of the ocean. The Coast Guard approached both ships, and the speedboat dropped 2,000 kilograms of cocaine into the sea. United States authorities interdicted the Gran Tauro and arrested all persons aboard, concluding that the vessel had been providing support to the speedboat as it made runs between Colombia and Mexico. After a three-week jury trial in the Southern District of California, the seven members of the Gran Tauro were found guilty of drug trafficking and were sentenced to years in prison.

On appeal, the defendants argued that their convictions ran afoul of the Due Process Clause. They claimed that the United States had not alleged in the indictment that there was any connection between them and the United States, and that without proving such, the government’s attempt to impose extraterritorial jurisdiction did not meet the Fifth Amendment’s notice requirement. The Ninth Circuit agreed and vacated the convictions. It held that for the United States to extend its criminal law to persons aboard foreign-flag vessels, it must prove that there was “nexus between the prohibited activity and the United States.” Nexus is what ensures that extraterritorial drug trafficking prosecutions comply with the Due Process Clause because it ensures that “a defendant is not improperly haled before a court for trial .... [It] serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction.” In Perlaza, the government had not shown that the persons aboard the speedboat or the Gran Tauro had any connection to a U.S. market. Thus, there was no reason that the defendants should have legitimately expected that their actions would make them criminals in the United States.

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310 Id. at 1155.
311 Id. at 1152–53.
312 Id. at 1153.
313 Id. at 1153–58.
314 Id. at 1160.
315 Id. at 1168.
316 Id. (alteration in original) (quoting United States v. Moreno-Morillo, 334 F.3d 819, 830 n.8 (9th Cir. 2003)).
317 Id. at 1169.
318 Id. at 1168 (citing United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998)).
The Ninth Circuit also rejected the United States’ claim that jurisdiction over the defendants met constitutional muster even without a showing of nexus because drug trafficking is both an offense outlawed internationally and a crime against the United States’ sovereign interests. In making these arguments, the prosecution was harkening back to the two types of extraterritorial jurisdiction that U.S. courts had long sanctioned—that over universal crimes and crimes against the sovereign. But the Ninth Circuit was not convinced. It did not find drug trafficking to be equivalent to piracy or slave trading, and it refused to accept that “foreign ships 500 miles offshore... that... might be bound for Canada, South America, or Zanzibar” necessarily offended our country’s “security or governmental functions.”

The imposition of extraterritorial jurisdiction in Perlaza, the Ninth Circuit concluded, did not fall into the universal jurisdiction bucket or into the Bowman bucket. Fair warning to the defendants of their potential criminal liability could not be assumed based on the nature of their offense, and the nexus requirement thus needed to be satisfied.

As the Perlaza case demonstrates, the Ninth Circuit’s nexus test imports a constructive notice requirement into the drug trafficking cases to ensure that due process is afforded. It functions very similarly to the Alcoa test that courts apply in extraterritorial anti-trust cases and to the Leasco Data Processing test that courts use in securities-fraud cases. Under Alcoa, a defendant’s intent to cause monopolistic effects in U.S. markets is what puts him on notice of his potential to stand in judgment. Under Leasco Data Processing, the defendant’s intent, knowledge, or causing of reasonably foreseeable harms to U.S. investors is what legitimates jurisdiction. Under the Ninth Circuit’s nexus test, it must be reasonably foreseeable to a defendant that the drug-scheme in which he participated “was likely to result in the distribution of illicit narcotics in U.S.

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319 Id. at 1161–63.
320 Id. at 1162 (second alteration in original).
321 Id. at 1163.
322 United States v. Aluminum Co. of Am., 148 F.2d 416, 443–44 (2d Cir. 1945).
markets. Accordingly, when a boat is hundreds of miles from the United States and there is no circumstantial or direct evidence that the narcotics aboard were likely to wind up within United States borders, as was the case in *Perlaza*, jurisdiction does not lie. It is promising that a few courts in the Fourth and Second Circuits have adopted the Ninth Circuit nexus test in drug trafficking in recent years, though only at the district court level and in unpublished opinions.

**CONCLUSION:**

**APPLYING THE LESSONS TO EXTRATERRITORIAL TERRORISM PROSECUTIONS**

The analysis in this Article, particularly in Part III, instructs that the Due Process Clause should be made to apply in extraterritorial terrorism prosecutions. The lack of a due process test in those cases is a product of historical fact and of the recent vintage of American criminal statutes that trigger “notice” concerns when applied abroad. But when courts fail to ensure that extraterritorial criminal jurisdiction is anchored in due process, they not only jeopardize the rights of the defendant, they also depart from key principles that govern in other areas of United States law. It is indefensible for courts to discard fairness and notice concerns when it comes to applying the criminal law overseas, but to be guided by such concerns for domestic criminal enforcement and for extraterritorial civil enforcement.

So, what might a due process test for the extraterritorial application of United States criminal law entail, and specifically, for terrorism statutes? Admittedly, the development of a comprehensive test will be best achieved through an iterative, case-by-case process in which the Justice Department and U.S. courts slowly carve out rules over time. Nonetheless, this Article suggests three principles that should animate a due process test for extraterritorial terrorism cases, going forward.

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324 United States v. Medjuck, 156 F.3d 916, 918–19 (9th Cir. 1998); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (holding that “the plan for shipping the drugs [must have been] likely to have effects in the United States” (internal quotation marks omitted)).

325 See *Perlaza*, 439 F.3d at 1168–69.

326 See supra notes 304–05 and accompanying text.
First, acts of terrorism that qualify as universal crimes should always fall under United States criminal jurisdiction, no matter where they are committed or by whom. Prosecuting such acts in the United States does not trigger notice concerns because if the act is universally condemned, it is by definition capable of being punished anywhere. Just as courts have sanctioned jurisdiction over piracy since the Founding, they should so do for terrorist activities that violate the law of nations.\footnote{327 There have been several international terrorism conventions passed since the 1970s that United States courts should look to for guidance. \textit{E.g.}, International Convention for the Suppression of the Financing of Terrorism, \textit{supra} note 239.} The defendant's plane hijacking in \textit{Yousef} was thus rightly punishable in an American court pursuant to this principle.

Second, acts of terrorism that directly affront United States sovereignty or governmental functions should also fall under United States jurisdiction without running afoul of the Due Process Clause. This is the lesson of the \textit{Bowman} doctrine. Attacks on U.S. military bases overseas or against U.S. officials located abroad, or cyber-attacks that seek to undermine United States governmental functions, would qualify. Again, due process is not an issue because notice of the potential to face criminal liability in the United States is provided for by the nature of the act itself. Anyone intentionally aiming to disrupt a governmental function should expect that government to hold him accountable.

Third, extraterritorial acts of terrorism that meet a “nexus” test—similar to the test deployed by federal courts in civil antitrust and securities fraud cases, or by the Ninth Circuit in extraterritorial drug trafficking cases—should also fall under United States jurisdiction, consistent with the Due Process Clause. When a foreign national perpetrates an act of terrorism abroad, a U.S. court should ensure that the act bears sufficient “nexus” to the United States before taking jurisdiction. The nexus test, in turn, should have two prongs. First, a mens-rea-to-harm-the-United-States prong: the defendant must possess a requisite degree of mens rea that his conduct will cause harm to an American person, place, or thing. Second, a constructive-notice-of-criminal-liability prong: the harm that the defendant
causes must, by its nature, constructively put the defendant on notice that he is likely to face criminal penalties in the United States.\footnote{328 See Brilmayer & Norchi, supra note 12, at 1243–44 (suggesting a similar test for extraterritorial jurisdiction generally in both civil and criminal cases; "[Our suggested] approach to fairness requires that the defendant, by his or her own actions, must have voluntarily affiliated him or herself with the United States... By purposefully bringing about harm within the United States, the defendant submits to United States law. On this view... the defendant's voluntary contacts are precisely what makes the assertion of jurisdiction fair. Numerous difficulties are posed by this consent-based or 'voluntarist' notion of jurisdiction. Yet there is no doubt that it captures some deeply held intuitions of Anglo-American political thought about fair subjection to sovereign power.").}

This third principle for extraterritorial jurisdiction will be difficult to apply in practice because each prong of the nexus test will require courts to draw difficult lines. For the first prong, what level of mens rea for harming a United States person, place, or thing should courts require? Surely, a defendant's \textit{intent} to harm an American or an American city, etcetera, should give rise to jurisdiction, and his \textit{reckless indifference} towards causing that harm will likely satisfy fairness concerns as well. But how about when a defendant undertakes conduct abroad for which it is \textit{reasonably foreseeable} that harm to a United States person, place or thing will result? The Ninth Circuit has held in drug trafficking cases that this degree of mens rea is sufficient; namely, that when a defendant commits acts abroad, and it is reasonably foreseeable that these acts will cause the harmful result of drug trafficking in the United States, jurisdiction is proper.\footnote{329 See, e.g., Medjuck, 156 F.3d at 919.} But federal courts might not always find this rationale to yield fair results in terrorism cases. For instance, when a person (located abroad) donates food to a group classified as an FTO (also located abroad), and it is reasonably foreseeable that the group will use its saved resources to subsequently cause harm to the United States, has the donor displayed sufficient mens rea to make him a criminal under United States law?

For the second prong, difficult line drawing, again, will be inevitable. What types of "harm" to an American person, place, or thing should be deemed to give a defendant constructive notice of the potential to face criminal penalty in the United States? Certainly, causing the harm of physical injury to an American person or property confers notice, but how about causing the...
“harm” of extra volunteering at an FTO’s relief center or of broadcasting an FTO’s message on the airwaves? United States law considers such acts of material support to terrorist groups to be sufficiently harmful to trigger criminal penalty, but would an extraterritorial defendant be on constructive notice of that fact? The nuances of the “nexus” test are not easily resolved, but the time has come for U.S. courts to start taking these questions seriously. A Due Process Clause test to ensure that extraterritorial criminal jurisdiction is consistent with American normative and constitutional principles is far past due.