

Due Process Limitations on the Application of Federal Criminal Law to Crimes Committed Abroad: A Venue-Based Approach

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Most criminal prosecutions arise out of activities that occur within the jurisdiction of prosecution. But some prosecutions arise out of activities that take place abroad. Courts have held that there are due process limitations on such prosecutions, but they, and the few academic works that have considered the problem, have been frustratingly vague about what those limitations are. Courts hold that such prosecutions must not be “arbitrary or fundamentally unfair,” and, borrowing from the notion of personal jurisdiction in civil cases, they require that there be a “nexus” between the criminal activity and the United States.

This essay argues that the analogy with civil long-arm jurisdiction is inapt, and that the “arbitrary and fundamentally unfair” standard is too vague to be meaningful. It further argues that the notion of due process in prosecutions for actions taking place abroad must be given content by reference to the Constitution’s venue provisions. Venue in criminal cases was of critical importance to the founding fathers, and the values that it promotes—especially the values of having a defendant’s case heard by her or his peers, and of the community having an understanding of the impact of the alleged crime—are important in every criminal prosecution, regardless of where the alleged criminal activity takes place.

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INTRODUCTION

Most criminal prosecutions arise out of activities that occurred within the jurisdiction of the prosecuting authority. For example, when the Manhattan District Attorney prosecutes a murder, it is a safe bet that the murder occurred in Manhattan; and when the state of Kentucky prosecutes a Ponzi schemer, you can be rest assured that some aspect of the Ponzi scheme took place within the Bluegrass State. Similarly, when the federal government prosecutes a crime—say, wire fraud, bank fraud, a Hobbs Act violation—it is usually the case that the criminal activity took place within the territory of the United States.

Because the overwhelming number of criminal prosecutions arise out of activities occurring within the jurisdiction of the prosecuting authority—to use a common and useful parlance, because the overwhelming number of criminal prosecutions arise out of *local* crimes—one might be forgiven for thinking that all criminal prosecutions are for local crimes. But that is only partially correct. The Sixth Amendment’s venue provision ensures that crimes that are committed within a district of the United States must be prosecuted within the district in which they were committed: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed”¹ But what about criminal prosecutions for activities that take place wholly outside of the United States?

This paper considers the question whether the due process clause of the Fifth Amendment imposes any limitation on federal prosecutions arising out of activities abroad. The Supreme Court has never addressed this issue, and it has been addressed by only a few courts of appeals² and scholars.³ I will argue that the due process clause does impose constraints

¹ See U.S. CONST., amend. VI.

² See, e.g., *United States v. Baston*, 818 F.3d 651, 669–70 (11th Cir. 2016) (internal citations omitted) (“The Due Process Clause requires at least some minimal contact between a State and the regulated subject.”); *United States v. Rojas*, 812 F.3d 382, 393 (5th Cir. 2016); *United States v. Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998) (“[T]o satisfy the strictures of due process, the Government [must] demonstrate that there exists ‘a sufficient nexus between the conduct condemned and the United States’ such that the application of the statute [to the overseas conduct of an alien defendant] would not be arbitrary or fundamentally unfair to the defendant.”) (citing *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (citing *Davis*, 905 F.2d at 248–49.); *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003); *United States v. Perlaza*, 439 F.3d 1149, 1163 (9th Cir. 2006); *United States v. Moreno-Morillo*, 334 F.3d 819, 828 (9th Cir. 2003); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1256 (9th Cir. 1998); *United States v. Thomas*, 893 F.2d 1066, 1068 (9th Cir. 1990); *United States v. Quemener*, 789 F.2d 145, 156 (2d Cir. 1986); *United States v. Henriquez*, 731 F.2d 131, 134 n.4 (2d Cir. 1984); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983); *United States v. Aikins*, 946 F.2d 608, 613–14 (9th Cir. 1990); *United States v. Robinson*, 843 F.2d 1, 5–6 (1st Cir. 1988); *United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *United States v. Gonzalez*, 776 F.2d 931, 938–41 (11th Cir. 1985); *United States v. Howard-Arias*, 679 F.2d 363, 371–72 (4th Cir. 1982); *United States v. Greer*, 956 F. Supp. 531, 534–36 (D.Vt. 1997).

³ See, e.g., Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507 (2016) (focusing, for due process purposes, on conflicts between federal criminal law in the United States and local criminal law in the country in which the defendant acted); CHARLES DOYLE, CONG. RESEARCH SERV., 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2016) (surveying generally the practical, diplomatic and constitutional obstacles to the extraterritorial application of federal criminal statutes); Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN’S L. REV. 1483 (2011) (focusing on due process constraints primarily in the terrorism context); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (focusing on the extraterritorial application of federal drug laws and civil and criminal RICO); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation*, 35 COLUM. J. TRANSNAT’L L. 379 (1997) (concluding that the due process clause imposes no limitations on the prosecution of extraterritorial conduct); Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46

on federal prosecutions of foreign conduct that are more stringent, and different in kind, than courts of appeals and scholars have held or recognized.

Most scholars and courts have based their analyses on international comity or concepts of notice or fundamental fairness, which are, of course, important, but are not tethered to any particular constitutional provision. I argue, however, that the due process constraints on prosecutions of activities taking place abroad should be determined by reference to the values underlying a criminal defendant's constitutional right to a jury trial. The founding fathers felt that jury trials were critically important in criminal trials because they ensured that criminal defendants would be tried by their peers, who would presumably have greater empathy for the defendants than would those who were strangers to the defendants.⁴ Jurors would also be able to understand the particulars of any crime with which the defendant was charged, because the crime typically took place in the jurisdiction from which the jurors were selected.⁵ The jury therefore ensured that a criminal trial was, in addition to a sterile fact-finding endeavor, an assertion of the community's judgment about whether criminal sanctions were appropriate. Because in many trials of criminal defendants for actions

CATH. U. L. REV. 907 (1997) (focusing on the extraterritorial application of the Helms-Burton Act and international comity concerns); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121 (2007) (focusing on the United States' anti-terrorism legislation).

⁴ See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81–104 (1998) (describing the central role of the jury in the founders' thinking); AKHIL REED AMAR, *AMERICA'S CONSTITUTION, A BIOGRAPHY* 233–42 (2005) (describing the central role of the jury in the founders' thinking and describing juries as “in a sense, the people themselves, tried-and-true embodiments of late-eighteenth-century republican ideology”).

⁵ See U.S. CONST., art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.”) (emphasis added); U.S. CONST, amendment VI (giving the criminal defendant the right to a “speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”) (emphasis added); See also *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (“[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life and death.”); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 77 (2003) (“The jury adds a unique perspective to the criminal justice system: the views of the community.”).

taking place abroad, the jury cannot perform that function, either because the defendant is not a local or because the crime has no nexus to the jurisdiction in which the crime is charged, it is the job of the court, exercising its authority under the due process clause, to step into the void and attempt to ensure that the defendant receives the benefits that a jury trial would ordinarily confer.

**I. PROSECUTIONS FOR ACTIVITIES TAKING PLACE ABROAD:
EXPLICIT STATUTORY AUTHORIZATION OR
EXTRATERRITORIAL APPLICATION OF BROAD STATUTES**

Some statutes explicitly criminalize activities occurring abroad. For example, 18 U.S.C. § 2340A(a), the Torture Act, makes it a federal crime to commit or attempt to commit torture outside the United States. 18 U.S.C. § 2421(a) makes it a crime for anyone to “knowingly transport[] any individual in . . . foreign commerce . . . with intent that such individual engage in prostitution.” This would appear to make it a crime to transport a person from, say, England to France to engage in prostitution. Similarly, 18 U.S.C. § 2423(c) makes it a crime for a United States citizen or a permanent resident alien “who resides, either temporarily or permanently in a foreign country,” to engage in any “illicit sexual conduct with another person.” Title 18 U.S.C. § 2332 makes it a federal crime to “kill a national of the United States, while such national is outside of the United States.” “National of the United States” means a citizen of the United States or a non-citizen who “owes permanent allegiance to the United States.”⁶ Title 18 U.S.C. § 2332a(b) makes it a crime for a “national of the United States” to use a “weapon of mass destruction,” anywhere in the world. The Foreign Corrupt Practices Act⁷ makes it a crime to bribe a foreign public official (although it requires some connection to the United States).

Even statutes that are not explicitly aimed at foreign activity may be used against such activity under certain circumstances. For example, wire fraud has been punished extraterritorially pursuant to 18 U.S.C. § 1343,⁸ as has being an accessory-after-the-fact under 18 U.S.C. § 3,⁹ and possession of a weapon in connection with a crime of violence under 18

⁶ See 18 U.S.C. § 2331(3) (incorporating definition from “section 101(a)(22) of the Immigration and Nationality Act,” 8 U.S.C. § 1101(a)(22)).

⁷ 15 U.S.C. §§ 78dd-2, 78dd-3

⁸ See, e.g., *United States v. Kim*, 246 F.3d 186, 189–90 (2d Cir. 2001).

⁹ See *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991)

U.S.C. § 924(c).¹⁰

In any instance in which a defendant is indicted for having allegedly violated one of these statutes, or any others, for activity that took place abroad, two questions immediately arise. First, does the statute apply to conduct taking place abroad, or does it apply only to domestic conduct? Statutes are presumed to apply domestically only, and therefore the government must demonstrate that the defendant's conduct, though foreign, is still properly apprehended under the statute. This is a matter of statutory interpretation that I will briefly discuss in Part IV. Second, if the statute is determined to apprehend the defendant's conduct, there is still a constitutional question: Does the prosecution of the defendant's actions violate any of his or her constitutional rights, in particular, how does the due process clause apply to a prosecution for actions taken abroad?

II. WHAT'S WRONG WITH THE FEDERAL PROSECUTION OF ACTIVITY TAKING PLACE ABROAD?

It is appropriate to consider what is wrong, or just odd, about the federal prosecution of activity taking place abroad. I here identify three factors, although not all of them will be present in all such prosecutions.

First, the federal prosecution of activity taking place abroad challenges the sovereignty of the state in which the activity took place. This seems obvious: The regulation or punishment by the United States of activity taking place in another state challenges the authority of the state's government. This factor does not apply if the activity being punished takes place outside the jurisdiction of any nation, for example, if it is on the high seas. The factor may also apply differently if the perpetrator or victim of the crime is a United States citizen; in either case the United States would presumably have a stronger sovereignty interest, although it would not necessarily diminish the foreign nation's sovereignty interest in regulating conduct taking place on its own soil.

That the federal prosecution of activity taking place abroad may infringe upon another state's sovereignty may provide a reason not to engage in such prosecution, but it would not appear to implicate any due process concerns. Whether and how the United States should recognize the sovereignty of any other state is a matter of foreign policy, and it is for the executive branch, not the judicial branch.¹¹

The sovereignty infringement problem also explains why the

¹⁰ See *United States v. Belfast*, 611 F.3d 783, 814 (11th Cir. 2010).

¹¹ See Farbiarz, *supra* note 3, at 526–27.

analysis of federal prosecutions of activity taking place abroad is different from that of state prosecutions for activity taking place abroad: state prosecutions of foreign activity would infringe upon the foreign nation's sovereignty just as much as would federal prosecutions, but whereas federal prosecutions are under the direction of the executive branch, state prosecutions are not. State prosecutions can muck up the foreign policy of the United States, and must therefore be limited.¹²

Second, the federal prosecution of activities taking place abroad may be aimed at people who have never voted for the laws under which they are being prosecuted, and who may not have otherwise consented to the applicability of those laws to them. One of the fundamental principles of any democracy is that legal power emanates from the people, who choose to be subject to the legal power. That is, consent of the people is a bedrock of our Constitution.¹³ Criminally prosecuting a person for violating laws that she had no ability to influence and to which she has not manifested consent runs against this bedrock notion.

As with the first factor, this second factor may apply differently in different cases. It does not apply, for example, when the defendant is a United States citizen.

Third, the Constitution plainly evidences a preference for trials taking place where the criminal activity occurred. The idea underlying that preference is that the jurors should understand the magnitude of the crime, and evaluate whether the prosecution is fair or not.¹⁴ Furthermore, inherent to the right to a jury trial is the notion of a trial before the defendant's peers. As the Supreme Court explained in *Strauder v. West*

¹² *See id.*

¹³ Thus, the Constitution begins "We the People," and was effective only upon ratification by popularly elected assemblies in nine states. *See* U.S. CONST. pmbl, art. VII; *see generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION (2011) (describing the ratification process in the states). To be sure, there have been deviations from the principle of consent. Slavery is an egregious violation of the principle, but it is recognized today as such, and as a national shame.

¹⁴ *See, e.g.*, *Witherspoon v. Illinois*, 391 U.S. at 519 (quoted *supra* note 5); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1401 (2003) ("The jury serves as the chorus of a Greek tragedy, 'the conscience of the community'" and it "applies the community's moral code, pronounces the judgment, and brands or exonerates the defendant."); Barkow, *supra* note 5; Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1277 (2000) (explaining that the point of the jury is to "bring the considered judgments of the community to bear on significant questions of justice").

Virginia, “[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”¹⁵ In federal prosecutions for actions taking place abroad, the jury may not understand the culture and mores of the foreign nation in which the allegedly criminal activity took place, and the jurors may not have any connection with the defendant.

III. WHAT IS THE SOURCE OF THE FEDERAL GOVERNMENT’S AUTHORITY TO PROSECUTE ACTIONS COMMITTED ABROAD?

One’s first inclination might be that criminal activity taking place outside of the United States cannot be prosecuted within the United States, any more than criminal activity in Tennessee can be prosecuted in Alaska. What business is it of the United States if a murder, or say a bank fraud or a drug deal, takes place in, for example, France?

The Constitution expressly refers in two passages to the possibility that activity taking place abroad may be prosecuted by federal prosecutors in the United States. Article I, Section 8, Clause 10, expressly provides that Congress may “define and punish piracies and felonies on the high seas.”¹⁶ Article III, Section 2, Clause 3, provides that criminal trials “shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.”¹⁷

Neither of these provisions clearly provide a basis for federal criminal prosecutions of acts taking place in foreign nations. Article I, Section 8, Clause 10 is, by its terms, limited to felonies taking place “on the high seas,” i.e., not in a foreign nation. And Article III, Section 2, Clause 3’s reference to crimes “not committed within any state,” could refer to crimes committed on federal property, such as military bases, or federal territories, such as Puerto Rico, but not within a foreign nation.¹⁸

Some courts have cited to the venerable case of *Church v. Hubbard*¹⁹ in support of the proposition that the United States may

¹⁵ 100 U.S. 303, 308 (1879).

¹⁶ U.S. CONST. art. I, § 8, cl. 10.

¹⁷ U.S. CONST. art. III, § 2, cl. 3.

¹⁸ See, e.g., *O’Callahan v. Parker*, 395 U.S. 258, 273 (1969); *Reid v. Covert*, 354 U.S. 1 (1957); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904).

¹⁹ 6 U.S. (2 Cranch) 187 (1804).

prosecute defendants for actions performed abroad.²⁰ But *Church v. Hubbard* provides only limited support for this proposition. First, while it is correct that the Court stated that a nation's "power to secure itself from injury may certainly be exercised beyond the limits of its territory"²¹—and that is the line that is often quoted by subsequent courts—that statement was merely dictum. *Church* was a civil case that had nothing to do with the assertion of federal criminal authority for actions taking place abroad. Furthermore, *Church* involved actions taken on the high seas, not within the territory of another nation. As to the former, the Court stated: "The authority of a nation within its own territory is absolute *and exclusive*."²² This passage, also dictum, seems to suggest strongly that the United States could not criminally prosecute anyone for actions that the defendant undertook within another state's territory.

The most commonly-cited foundation for the federal government's authority to punish activity taking place in foreign states comes from a common principle of international law. That principle is that a nation may assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security.²³ That interest is not expressed in the Constitution, and so it must be considered as almost a universal attribute of any nation-state: any nation-state has the right to criminally prosecute acts taking place abroad that threaten its security, regardless of whether those acts could be prosecuted in the nation-state in which they took place.

Recognizing this foundation is helpful, but leads to nearly endless questions. How much of a threat to a nation-state's security must there

²⁰ See, e.g., *United States v. Belfast*, 611 F.3d 783, 810 (11th Cir. 2010); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980); *United States v. Noriega*, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990).

²¹ *Church*, 6 U.S. at 234.

²² *Id.* (emphasis added).

²³ See, e.g., *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."); *Belfast*, 611 F.3d at 814; *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985); *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1222 (D. N.M. 2008). See also U.N. Charter art. 39 (empowering the United Nations Security Council to consider and respond to "any threat to the peace, breach of the peace, or act of aggression"). Notably, *Strassheim v. Daily*, which is often invoked to support jurisdiction over actions taking place abroad, did not involve international or foreign jurisdiction at all; it involved the right of Michigan to prosecute a bribe paid by a private contractor to a Michigan official, in Ohio. 221 U.S. at 281.

be to justify the application of the nation-state's criminal law? How capaciously is the term "security" to be interpreted? Must it be an existential threat? Or, would a threat to a nation's citizen itself suffice? These questions are important, and answering them in any meaningful way would require an extensive analysis. For now, it suffices to note that they may be relevant to the due process analysis below.

IV. STATUTORY AND CONSTITUTIONAL LIMITATIONS ON FEDERAL PROSECUTIONS ARISING FROM ACTIVITY TAKING PLACE ABROAD

In this section, I will outline the current law regarding due process limitations on federal prosecutions arising from activity taking place abroad. Before I do that, I will briefly outline the statutory hurdles that a court must clear before considering constitutional questions.

A. Statutory limitations on federal prosecutions arising from activity taking place abroad

In any federal criminal case in which the defendant's alleged wrongful conduct occurred abroad, the first question that must be addressed is one of statutory construction: whether the criminal statute that was allegedly violated applies to conduct occurring abroad.²⁴

It is presumed that statutes only apply domestically, not to conduct occurring abroad;²⁵ however, this presumption may be overcome in two ways. First, the statute itself might state or firmly indicate that it is intended to apply to conduct occurring abroad.²⁶ If it does give such an indication, then the statutory construction threshold is met. If the statute in question does not provide a firm indication that it was intended to apply abroad, then the court moves to the second step of the analysis: it considers the "focus" of the statute. As the Supreme Court has explained: "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad."²⁷

²⁴ See *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2099–2100 (2016).

²⁵ See *id.* at 2100; see also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 115 (2013); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U. S. 247, 255 (2010); *Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 454 (2007) ("United States law governs domestically but does not rule the world . . .").

²⁶ See *RJR Nabisco*, 136 S. Ct. at 2101 (The first question is whether "the statute gives a clear, affirmative indication that it applies extraterritorially.").

²⁷ *Id.*

The first test for extraterritorial application of statutes—clear statement—makes intuitive sense, but the second test is murkier. It is not always clear what the “focus” of a statute is. The difficulty of the question was demonstrated recently in the Second Circuit’s opinions in *Microsoft Corp. v. United States*,²⁸ in which the court struggled to decide whether the focus of the Stored Communications Act was protecting information or disclosing it.²⁹

Furthermore, one may wonder why resorting to the “focus” of a statute is necessary: criminal statutes define crimes, and they do so by setting forth the elements of the crimes. It would have been easier and more intellectually coherent to say that unless a statute expressly provides that it applies to conduct occurring abroad, a statute applies to activity abroad only if the elements of the statute occurred in the United States. By limiting the analysis to elements, the Court would have avoided the vague concept of the “focus” of the statute and would have made it relatively easy to determine whether the statute applied to activity. Furthermore, the proposed test is consistent with tests that the courts have used for similar issues. For example, when determining where a crime that takes place in several judicial districts may be prosecuted, courts have found that such a crime may be prosecuted in any district in which any element of the crime occurred.³⁰

B. Constitutional limitations on federal prosecutions arising from activity taking place abroad

After assuming the statutory hurdle has been cleared, next comes the question of what limits the due process clause of the Fifth Amendment places on federal prosecutions arising from activity taking place abroad.

There is some temptation and scholarly support³¹ for dividing this question into two, as is done in analyzing due process limitations in civil

²⁸ 829 F.3d 197 (2d Cir. 2016), *op. denying rehearing en banc*, 855 F.3d 53 (2d Cir. 2017).

²⁹ Compare 829 F.3d at 217 (The Stored Communications Act provisions at issue in the case “focus on protecting the privacy of the content of a user’s stored electronic communications.”) with 855 F.3d at 66 (“[T]he conduct relevant to the SCA’s ‘focus,’ and which the SCA seeks to regulate is a provider’s *disclosure* or *non-disclosure* of emails to third parties . . .”) (Cabranes, J., dissenting from order denying rehearing en banc).

³⁰ See, e.g., *United States v. Tzolov*, 642 F.3d 314, 319–20 (2d Cir. 2016) (holding that venue for a conspiracy lies in any district in which an overt act was done by any member of the conspiracy to accomplish the objectives of the conspiracy).

³¹ See, e.g., Farbiarz, *supra* note 3, at 514.

cases. The first is the question of “judicial jurisdiction,” which is akin to the question of personal jurisdiction in civil cases: are there defendants who are simply beyond the reach of the federal district court? The second is the question of “legislative jurisdiction,” which is akin to the choice of law inquiry in civil cases: does the sovereign have the power to “prescribe substantive rules to govern a situation?”³²

However, this division is not sound because of two important differences between civil and criminal procedure. First, whereas the doctrine of personal jurisdiction in civil procedure is quite robust, it is absent from the criminal law. The Supreme Court has established in a series of cases beginning with *Ker v. Illinois*,³³ through *Frisbie v. Collins*,³⁴ to *United States v. Alvarez-Machain*,³⁵ that the notion of judicial jurisdiction in federal criminal law is almost a nullity. Even a defendant who has been abducted from another country by the United States or at its behest does not have a defense to the jurisdiction of the federal district courts.³⁶ These cases stand for the proposition that the federal court has jurisdiction to hear the case of any defendant who is brought before it, even if the defendant is brought kicking and screaming by law enforcement. Second, in a civil case, the court that has jurisdiction can apply the law of another sovereign. Indeed, this often happens. For example, the California court may apply the law of New York, or the federal district court for the Southern District of New York may apply the law of Scotland. Conversely, in a criminal case, the federal district court applies only the law of the federal government; it does not apply the criminal law of any other state or sovereign.

We are left with a single question: What, if any, limit does the due process clause of the Fifth Amendment place on federal prosecutions for activity taking place abroad? Courts that have considered this question have held that the defendant has a right under the due process clause that the charges against him be dismissed unless there is “a sufficient nexus between the defendant and the United States, so that [the] application [of the criminal statute to his conduct] would not be arbitrary or

³² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987), §§ 401(a), 401(b); Farbiarz, *supra* note 3, at 514.

³³ 119 U.S. 436 (1886).

³⁴ 342 U.S. 519 (1952).

³⁵ 504 U.S. 655 (1992).

³⁶ *See id.* at 657; *see also* Frisbie, 342 U.S. at 520 (describing Ker and progeny for the rule that “a state could constitutionally try and convict a defendant after acquiring jurisdiction by force”); Ker, 119 U.S. 436.

fundamentally unfair.”³⁷ Applying this test, courts have focused the due process inquiry on whether “the aim of [the defendant’s] activity is to cause harm inside the United States or to U.S. Citizens or interests.”³⁸ Outside of the national security and drug trafficking contexts, a sufficient nexus has typically been found only where the charged conduct has a substantial and direct connection to the United States.³⁹ Courts have found that the question for due process purposes is whether the acts underlying the alleged crime have sufficient links to the United States such that it would not be arbitrary for the crime to be prosecuted in the United States.⁴⁰

The obvious problem with this standard is that “arbitrary and fundamentally unfair” is extremely vague. The phrase might be interpreted, for example, to allow for any prosecution where the evidence against the defendant appears to the court to be particularly strong. In such cases, the court might reason that there is nothing unfair about prosecuting someone who is plainly guilty. Such reasoning is similar to that which courts used for many years in analyzing the Sixth Amendment’s confrontation clause, which provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁴¹ According to this clause, out-of-court declarations were admissible against the defendant, notwithstanding the clear injunction of the confrontation clause against the admissibility of such declarations, so long as the declarations bore, in the court’s judgment, sufficient “indicia

³⁷ *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (quoting *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)).

³⁸ *Id.* at 118 (emphasis added); *see also United States v. Mostafa*, 965 F. Supp. 2d 451, 459 (S.D.N.Y. 2013) (noting that when analyzing whether a sufficient nexus exists, “the determinative issue is whether defendant’s actions were calculated to harm American citizens and interest”).

³⁹ *See, e.g., United States v. Budovsky*, No. 13cr 368, 2015 WL 5602853, at *5 (S.D.N.Y. Sept. 23, 2015) (finding nexus where company “had over 200,000 users in the United States; [and] the site’s users included criminal rings operating in the United States”).

⁴⁰ *See, e.g., United States v. Mohammad-Omar*, 323 F. App’x 259, 261–62 (4th Cir. 2009) (finding jurisdiction proper where defendant’s partner knew contraband was destined for United States and defendant met with agent he believed to be American drug distributor); *Davis*, 905 F.2d at 249 (reviewing defendant’s U.S. contacts related to the charged crimes); *see also United States v. Davis*, 689 F.3d 179, 188–89 (2d Cir. 2012) (To prove venue, government must show that “it was more probable than not that [the defendant] understood the likelihood” that an act in furtherance of the offense would take place in the district of prosecution.).

⁴¹ U.S. CONST., amend. VI.

of reliability.”⁴² The Supreme Court has since rejected the reliability test, but only after it was enforced for many years.⁴³

Michael Farbiaz, a former federal prosecutor and scholar at N.Y.U. School of Law, has a different interpretation of the term “arbitrary and fundamentally unfair.” He argues that the only unfairness a defendant could complain of would be if her activity were lawful in the nation in which she undertook it. So long as the activity was unlawful in that nation, Farbiaz reasons that the defendant knew that she was at risk of being prosecuted, and it is therefore not unfair to prosecute her in the United States.⁴⁴

Neither of these tests for determining when a prosecution would be “arbitrary and fundamentally unfair” strikes me as persuasive. Arbitrariness and unfairness are different from reliability; a strong case against a defendant might still be an unfair one.⁴⁵ Furthermore, the notion that a person is on notice that she might be violating the law of a foreign nation—perhaps the nation in which she lives and engages in the wrongful behavior—does not mean that she is on notice that she can be hauled into court and tried for crimes in the United States, or that it would be fair to her to force her to defend herself in the United States.

The problem with these tests is not simply that neither of them gives convincing or meaningful substance to the notions of arbitrariness and unfairness, but is also that neither is connected by any clause or provision of the Constitution. They are made out of whole cloth. My goal here is to provide a definition to the “arbitrary and fundamentally unfair” standard that is rooted in the Constitution. My key point is that in many federal prosecutions for actions committed abroad, the defendant does not have the benefits that a jury trial is intended to bestow upon the accused. The defendant has a jury trial, of course, but in many federal prosecutions for actions committed abroad, the jury cannot do what it is supposed to do because it is neither comprised of the defendant’s peers, nor is it comprised of members of the community affected by the crime itself.

Consider, for example, alleging a violation of the Foreign Corrupt Practices Act that arises out of the alleged bribery of an African leader by

⁴² See *Ohio v. Roberts*, 448 U.S. 56 (1980).

⁴³ See *Crawford v. Washington*, 541 U.S. 36 (2004).

⁴⁴ See Farbiaz, *supra* note 3, at 543.

⁴⁵ See, e.g., *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (reversing conviction where lab tests were admitted into evidence without the testimony of the technician who conducted the tests); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (same).

a citizen of Hong Kong, acting on behalf of a Chinese company with a minor subsidiary in the United States.⁴⁶ So long as any act in furtherance of the scheme was carried out in the United States,⁴⁷ or if it could be argued that the defendant was acting on behalf of the United States-based subsidiary of the Chinese company,⁴⁸ then the statutory requirements for a FCPA prosecution might be satisfied. But the jurors would likely not have the same level of understanding of the defendant's circumstances. Subsequently, they would have less empathy for the defendant—they would not be his peers, and their understanding and empathy would not reach the same extent as if he were from their own community. Nor would the jurors have the same understanding of the context of the crime: How much harm did the crime cause? Is it one that should be prosecuted? Is the conduct of the kind that everyone engages in where the defendant is from, such that to prosecute this defendant would be unfair? Was there anything about the defendant's circumstances that might excuse the crime?

The situation would be different if either of two conditions were satisfied. First, if the defendant were a United States citizen, or a resident of the United States, then one might argue that he had chosen in some meaningful way to comply with the laws of the United States. He would then, at least arguably, be more of a peer with his jurors than otherwise. Second, if the victim of the crime was the United States, then one could argue plausibly that a criminal prosecution is necessary to protect the nation.⁴⁹ But if neither of those conditions is met, then the prosecution of a foreigner, a non-U.S. citizen living abroad, for actions undertaken abroad is entirely unfair and deprives the person of the most significant values that his right to a jury trial is intended to confer.

Against this, one might argue that so long as some actions took place in the United States, the prosecution is a fair one. This is what I would call the “minimum contacts” theory of jurisdiction, pursuant to which if one's actions touch the United States in any way whatsoever, one

⁴⁶ Such a prosecution is not fanciful. The case I have described is *United States v. Ho*, 17 Cr. 779, 2018 WL 6082514 (S.D.N.Y. Nov. 21, 2018). I am among the attorneys representing the defendant.

⁴⁷ 15 U.S.C. § 78dd-3(a).

⁴⁸ 15 U.S.C. § 78dd-2(a).

⁴⁹ That, of course, was the justification for federal prosecutions for actions taking place abroad given by the Supreme Court in *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804) (noting that a nation's “power to secure itself from injury may certainly be exercised beyond the limits of its territory”).

may be prosecuted here, so long as it can be argued that the actions somehow contributed to the crime. A common type of “touching” is accomplished by a wire of funds. For example, if a foreigner illegally derives funds in Ethiopia, wires these funds to his account in Switzerland, the wire, because it is denominated in dollars, will likely pass through the United States.⁵⁰ The federal government may argue that it has jurisdiction to prosecute the foreigner for money laundering simply because his wire passed through the United States.⁵¹

The problem with the minimum contacts theory of jurisdiction is that it turns federal criminal jurisdiction into a game of “gotcha.” A criminal prosecution is not simply an exercise in crime-detection; it is a political event in the sense that it consists of the community, represented by the jury, passing judgment on alleged wrongdoing that affected the community itself. The jury shall be selected from residents of the state and district “wherein the crime shall have been committed.”⁵² Prosecutions for criminal activity taking place abroad ensure that the jury will not be selected from a state or district “wherein the crime shall have been committed,” and, unless the perpetrator has some connection to the place of trial, neither will the jurors be the defendant’s peers.

One might respond that the benefits of a local jury trial are good, but the Constitution expressly provides that where crimes do not take place in a state the authorities are not handcuffed by the absence of venue as defined in the Sixth Amendment.⁵³ As noted above, the Constitution gives Congress the apparently unfettered power to have a trial wherever it directs; venue be damned! Though it is hard to believe that something that the founding fathers felt was so important⁵⁴ could be left behind in an instant, it has. The more reasonable position is that when the literal demands of venue could not be satisfied—that is, when a trial could not be held in the state and district in which the alleged crime occurred—the purposes of the venue provisions should be furthered and protected

⁵⁰ *United States v. All Assets Held at Bank Julius, Baer & Co.*, 251 F. Supp. 3d 82, 95 (D.D.C. 2017) (“As [Defendant] acknowledges, U.S. dollars are the dominant reserve currency for the international financial system, and 95 percent of all international transfers in U.S. dollars pass through the United States as [Electronic Funds Transfers.]” (Internal quotations and citations omitted).

⁵¹ *See United States v. Kim*, 246 F.3d 186, 189 (2d Cir. 2001).

⁵² U.S. CONST., amend VI.

⁵³ *See* U.S. CONST., art. I, § 8, cl. 10; *id.* art. III, § 2, cl. 3.

⁵⁴ *See* AMAR, *THE BILL OF RIGHTS*, *supra* note 4; AMAR, *AMERICA’S CONSTITUTION, A BIOGRAPHY*, *supra* note 4.

insofar as possible.

To remedy the vague and inadequate “arbitrary and fundamentally unfair” standard they currently invoke, courts should weigh the following:

- a) whether the defendant has ties to the United States such that he could be said to have consented to its exercise of jurisdiction over him;
- b) whether the alleged criminal activity harms the United States, and especially whether there are identifiable victims of the crime in the United States;
- c) whether any of the elements of the alleged crime occurred in the United States.

Each of these factors is intended to advance the goals underlying the venue provisions of the Constitution.

- a) If the defendant has significant ties to the United States, then it can be that he would be tried by his peers.
- b) And if the alleged criminal activity harms the United States, then the jurors may have been affected by that criminal activity. Cases involving conspiracies to engage in acts of terrorism in the United States, or to sell controlled substances in the United States would satisfy this standard relatively easily. Cases involving violations of the Foreign Corrupt Practices Act, or that charge defendants with engaging in child prostitution abroad, would not.
- c) The third factor, whether an element of the crime occurred in the district of prosecution, explicitly aligns the due process analysis with the venue analysis, for there is venue in any district in which an element of the crime occurred.⁵⁵

Like any multi-factor test, there is some play in the joints because no single factor is dispositive. The court will have to interpret and weigh all of the factors in every case. For example, the very notion that a United States citizen is more of a “peer” to a jury than a foreign-born-and-bred defendant may be subject to debate. A very rich or prominent defendant—say, Harvey Weinstein—may say that a jury of less wealthy, less prominent people are not his “peers,” and are in fact more different from him than they would be from a foreign-born-and-bred defendant of wealth or fame comparable to the jurors’.

⁵⁵ See U.S. CONST., amend. VI; Fed. R. Crim. P. 18 (“Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”)

One way to think about peers in the context of a foreign defendant tried for a crime occurring abroad may be to consider the character witnesses that the defendant might call, should he be inclined. In some cases, a defendant might call a witness to testify about the defendant's character hoping that the witness's prominence and status will give her or his testimony particular resonance with the jury. A foreign defendant might be at a distinct disadvantage because the jury may not appreciate the prominence of the witness. For example, a defendant might want to call as a character witness the mayor of his town, or the head of an important and respected local organization. The significance of this witness would be lost on the jury, whereas the testimony of an analogous local figure might have a significant impact on the jury.⁵⁶ If that were so, it would be one factor going into the question of whether trying the defendant in a federal court would be unfair.

A notable aspect of the proposed test is that it would apply differently depending on the status of the defendant. For example, the analysis might apply differently to two otherwise identical defendants because one of them is a U.S. citizen and the other of whom is a foreign citizen with no or minimal ties to the United States. I do not think, however, that this difference argues against the proposed test. To the contrary, it makes sense that the constitutionality of trying a person for a crime may depend on the person's ties to the community in which the trial would take place.

To explore the proposed test, let's try to use it on a few plausible hypothetical cases:

1. Hypothetical 1 – The FCPA

Consider the FCPA case referred to earlier: alleged bribery by a citizen of Hong Kong on behalf of a Chinese company with a minor subsidiary in the United States. Assume that there were some wires in furtherance of the bribery sent through the United States, and that the defendant was acting on behalf of the United States subsidiary. To

⁵⁶ I am reminded of a story that a friend of mine, a lawyer from Tennessee, told me once about a case that he was scheduled to try in federal district court in New York. He moved for a transfer of the case, pursuant to Fed. R. Crim. P. 21, to Tennessee where the defendant lived. When the New York judge asked the grounds for the motion, counsel explained that he intended to have Mr. X and Mr. Y to testify as character witnesses on the defendant's behalf. "Who are they?" the judge asked. "That is just the point," the lawyer said, "they are the mayor and the head of the chamber of commerce back home." My friend reports that the Court granted the transfer.

analyze whether the defendant's due process right would be violated by prosecuting him in the United States, the court should consider:

- a) Defendant's Ties to the United States: Was he a frequent visitor, or did he visit only occasionally? Was he a citizen? If he was a frequent visitor, or a citizen, then it is more likely that his consent to federal jurisdiction could be inferred.
- b) Harm to the United States: If, as is often the case in FCPA cases, the only harm to the United States is the general harm that corruption abroad causes—the United States' interest is simply in seeing a level playing field for all businesses abroad—then this factor would weigh against the assertion of federal criminal jurisdiction. If there were identifiable victims in the United States, then, of course, that would weigh in favor of federal criminal jurisdiction. But, in many FCPA cases there are no such victims.
- c) Elements of the Alleged Crime: If elements of the crime occurred in the United States, and, in particular, in the district in which the prosecution is brought, then the argument for venue would be stronger, but not absolute. The due process question focuses on the defendant's behavior; thus, it may be very important whether the defendant himself caused the element to occur in the district. If another defendant did, or if the only element that occurred in the district was a wire passing through, and the defendant had no control over the path of the wire, then this factor would weigh against the assertion of federal criminal jurisdiction.

Although it is difficult to make a blanket rule for all cases, in general, element (b) may be absent in FCPA cases and thus the due process test proposed in this essay may be more difficult to satisfy than it would be in other cases. Or it may be more difficult to satisfy than the general "arbitrary and fundamentally unfair" standard.

2. *Hypothetical 2 – A case of illicit sexual conduct*

Consider the case of someone who engages in illicit sexual conduct—say, conduct with an underage partner—with a partner abroad.

- a) Defendant's Ties to the United States: Let us assume that the defendant is a citizen of the United States, and so his conduct would run afoul of 18 U.S.C. § 2423(c). Nevertheless, it might still be important to ask whether the person has lived in the United States, and if so when and for how long. Is his connection to the United States a meaningful one beyond merely carrying a U.S.

passport?

- b) Harm to the United States: If the illicit sexual conduct involved foreign children with no connection to the United States, then it is hard to see how the defendant's conduct harms the United States. Again, we should be careful for broad or generalized harms, such as the psychic harm or repugnance elicited by any immoral behavior. That harm is more theoretical than real. This factor would likely be satisfied, however, if the child victim had a connection to the United States.
- c) Elements of the Alleged Crime: If the defendant intentionally used the facilities of the United States—its wires or its mail—then this factor might be satisfied; otherwise probably not.

3. Hypothetical 3 – Wire fraud

Wire fraud cases may depend on what the United States' real interests are and whether there are any identifiable victims with ties to the United States (factor (b)). Absent such interests and victims, the defendant's right to due process may be violated by a federal criminal prosecution. The proposed test is thus more restrictive than the current "arbitrary and fundamentally unfair" test may be, for that test is often satisfied so long as a wire passes through the United States.⁵⁷ The test proposed here would likely require more in such cases.

The identification of particular factors makes this a more meaningful test than the "arbitrary and fundamentally unfair" standard that courts currently use, in which no factors are identified. And the factors are derived from the values underlying the concept of venue, which is enshrined in the Constitution.

CONCLUSION

Federal prosecutions of crimes taking place abroad are authorized by principles of international law, but they are difficult to square with the Sixth Amendment's venue provision, which is central to the constitutional mandate that criminal juries keep a close check on the prosecutorial powers of the federal government. The only constitutional check on such prosecutions is the due process clause, requiring that such prosecutions be "fundamentally fair." That limitation is unexceptionable, of course, but

⁵⁷ See, e.g., *United States v. Kim*, 246 F.3d 186, 189–90 (2d. Cir. 2001).

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difficult to apply. This paper has attempted to give some structure and content to the idea of “fundamental fairness” by informing it with values underlying the Sixth Amendment’s venue provision.