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THE OFFENCES CLAUSE, DUE PROCESS, AND THE EXTRATERRITORIAL REACH OF FEDERAL CRIMINAL LAW IN NARCO-TERRORISM PROSECUTIONS

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INTRODUCTION 1929
I. CONGRESSIONAL POWER UNDER THE OFFENCES CLAUSE 1933
 A. *Defining the "Law of Nations"* 1934
 B. *Congress's Power to Define Offenses* 1936
II. FIFTH AMENDMENT DUE PROCESS AND EXTRATERRITORIAL CRIMINAL JURISDICTION 1940
 A. *The Competing Conceptions of Extraterritorial Due Process* 1941
 B. *Courts Should Adopt the Notice Test as the Proper Due Process Standard in Extraterritorial Prosecutions* 1943
III. NARCO-TERRORISM, THE OFFENCES CLAUSE, AND DUE PROCESS 1952
 A. *Narco-Terrorism and the Offences Clause* 1953
 B. *Section 960a and Fifth Amendment Due Process* 1956
CONCLUSION 1959

INTRODUCTION

November 2002, San Diego: Two Pakistani nationals and one U.S. citizen are charged with dealing 600 kilograms of heroin and five metric tons of hashish in exchange for cash and four anti-aircraft missiles to supply the Taliban and Al-Qaeda.[1]

November 2002, Houston: Four Colombians are charged with trading $25 million in cash and cocaine in exchange for anti-aircraft missiles, rocket-propelled grenade launchers, 300,000 grenades, 9,000 rifles, and 53 mil-

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[1] *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 2–3 (2003) [hereinafter *Hearing*] (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

lion rounds of ammunition to supply a right-wing revolutionary group in Colombia.[2]

These examples are not drawn from the television series "24." Instead, these crimes show that the link between narcotics trafficking and terrorism poses a clear threat to the national security of the United States. In the 1980s, with the rise of Colombian drug lord Pablo Escobar, a new name emerged for this phenomenon: narco-terrorism.[3] Testifying before the Senate Committee on the Judiciary, Steven W. Casteel, Drug Enforcement Administration Assistant Administrator for Intelligence, defined narco-terrorism as "an organized group that is complicit in the activities of drug trafficking in order to further, or fund, premeditated, politically motivated violence perpetrated against noncombatant targets with the intention to influence (that is, influence a government or group of people)."[4]

As state-sponsored terrorism declines, terrorist organizations increasingly look to narcotics trafficking as a source of funding.[5] This threat is particularly prevalent in Colombia through the operations of the Revolutionary Armed Forces of Colombia (FARC) and in Afghanistan through the operations of the Taliban and Al-Qaeda.[6]

In response to the growing threat of narco-terrorism, Congress enacted 21 U.S.C. § 960a as part of the USA PATRIOT Improvement and Reauthorization Act of 2005.[7] In short, § 960a criminalizes the use of drug trafficking proceeds to finance a terrorist organization or terrorist activity and does not require any nexus to the United States. More specifically, § 960a(a) proscribes trafficking any controlled or counterfeit substance—as punishable under 21 U.S.C. § 841(a)[8]—and prohibits a person from knowingly providing, or attempting or conspiring to provide, "directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism."[9] The statute's jurisdictional component, § 960a(b), provides jurisdiction over an offense if "after the conduct required for the offense occurs an offender is brought into or found

[2] *Id.*

[3] *Id.* at 48 (statement of Steven W. Casteel, Assistant Administrator for Intelligence, U.S. Drug Enforcement Administration).

[4] *Id.*

[5] *Id.* at 94 (statement of Deborah McCarthy, Deputy Assistant Secretary for International Narcotics and Law Enforcement Affairs, U.S. Department of State).

[6] *Id*. at 96–98.

[7] Pub. L. No. 109–77, 120 Stat. 225 (2006).

[8] The statute makes it illegal for "any person knowingly or intentionally—(a) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a) (2006).

[9] 21 U.S.C. § 960a(a) (2006). The statute defines "terrorist activity" pursuant to 8 U.S.C. § 1182(a)(3)(B) and "terrorism" pursuant to 22 U.S.C. § 2656f(d)(2).

in the United States, even if the conduct required for the offense occurs outside the United States."[10]

The statute casts a wide jurisdictional net, allowing U.S. law enforcement to combat narco-terrorist activities throughout the world. Section 960a is only three years old, and only one defendant has been convicted under the statute.[11] In that case, *United States v. Mohammed*,[12] the defendant planned to traffic opium to the United States to finance a Taliban attack on U.S. military personnel and Afghani civilians at Jalalabad Airfield in Afghanistan.[13] To finance these activities, the defendant, Khan Mohammed, trafficked opium that he knew was intended for distribution in the United States. Mohammed was convicted on May 15, 2008, and was sentenced to life in prison on December 22, 2008.[14] This case, however, did not invoke the legally tenuous jurisdictional provisions of § 960a. Instead, it involved a planned attack on U.S. nationals and the intended importation of narcotics into the United States, conduct over which, as this Comment will show, the United States clearly has jurisdiction.[15] Imagine, however, that Mohammed had intended to traffic opium to London to fund an attack on British soldiers. Trafficking opium clearly violates U.S. criminal law, but could the U.S. government constitutionally prosecute Mohammed for these crimes under § 960a?

As this Comment argues, the answer to the above question is likely "yes." But the explanation of why this prosecution could move forward implicates two constitutional concerns: first, whether Congress's enumerated powers allow it to pass such a statute; and second, whether Fifth Amendment due process constraints limit the extraterritorial reach of § 960a. This Comment ultimately concludes that the Offences Clause permits the enactment of § 960a and that due process limits will not bar most

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[10] 21 U.S.C. § 960a(b)(5). The statute provides four other bases of jurisdiction: (1) over drug trafficking or terrorism affecting interstate or foreign commerce; (2) over financing a terrorist offense that causes or is intended to cause death or serious injury to a U.S. national in a foreign country or substantial harm to foreign property owned by a U.S. legal entity; (3) over perpetrators who are U.S. nationals or legal entities organized under U.S. law; and (4) over offenders who are found in the United States even if all conduct occurs outside the United States. 21 U.S.C. § 960a(b). For a full analysis of these five bases of jurisdiction, see *infra* Part III.B.2.

[11] *See* Press Release, U.S. Dep't of Justice, Member of Afghan Taliban Convicted in U.S. Court on Narco-Terrorism and Drug Charges (May 15, 2008), http://www.justice.gov/criminal/pr/press_releases/2008/05/05-15-08_taliban-membr-conv.pdf. Prosecutors may have filed sealed indictments invoking § 960a in other cases. The single prosecution is not necessarily an indication that the statute is underutilized. Rather, complex international terrorism prosecutions are incredibly lengthy and secretive, making it likely that other uses of § 960a are not yet part of the public record.

[12] No. 06-357 (CKK) (D.D.C. May 15, 2008).

[13] Press Release, U.S. Dep't of Justice, *supra* note 11.

[14] *See* Press Release, U.S. Dep't of Justice, Member of Afghan Taliban Sentenced to Life in Prison in Nation's First Conviction on Narco-Terror Charges (Dec. 22, 2008), http://justice.gov/criminal/pr/press_releases/2008/12/12-22-08_taliban-membr-sent.pdf.

[15] *See infra* Part II.

prosecutions under the statute. Importantly, the analysis developed below shows how the Offences and Due Process Clauses can be read in conjunction with internationally recognized principles of extraterritorial jurisdiction to use federal criminal law as a potent weapon to protect U.S. national security interests abroad.

This Comment proceeds in three parts. Part I discusses Congress's power to enact the statute under the Offences Clause, which grants Congress the power "[t]o define and punish . . . Offences against the Law of Nations."[16] This Comment argues that the law of nations—known as customary international law—encompasses two sets of norms: peremptory norms (or *jus cogens* norms), which warrant universal jurisdiction;[17] and nonperemptory norms, which do not warrant universal jurisdiction.[18] The Offences Clause grants Congress the power to criminalize conduct violating both sets of norms because it grants Congress the power to define offenses in addition to punishing them. Therefore, although narco-terrorism does not rise to the level of a *jus cogens* violation, it violates a nonperemptory norm that Congress can proscribe under its power to define offenses.

Part II discusses possible Fifth Amendment due process limits to § 960a prosecutions. First, this Comment argues that due process does apply to extraterritorial applications of U.S. law, and that due process requires that a defendant be on notice—aware or likely to be aware—that the United States could assert jurisdiction.[19] Second, Part II argues that in the case of

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[16] U.S. CONST. art. I, § 8, cl. 10.

[17] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004) (affirming that customary international law may provide a cause of action for suits filed under the Alien Tort Statute); *see also* Note, *The Offences Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378, 2384 (2005) [hereinafter Harvard Note] (noting that after *Sosa*, federal courts can give substantive force to a limited range of offenses which violate customary international law). For a critique of the argument that customary international law is self-executing in U.S. courts, see Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–70 (1997) (concluding that customary international law should not be treated as federal common law absent codification by Congress). For a detailed explanation of universal jurisdiction, see *infra* notes 113–117 and accompanying text. In general, though, universal jurisdiction permits any sovereign government to prosecute certain crimes, regardless of whether that government has any connection to the crime. For example, the Mongolian government could prosecute the perpetrators of genocide in Luxembourg under the universal principle.

[18] *See Sosa*, 542 U.S. at 729–30. See *infra* Part I.A for a more detailed discussion of peremptory and nonperemptory international norms. In general, however, peremptory or *jus cogens* norms are the five international law norms that are considered inviolate: piracy, slavery, genocide, torture, and crimes against humanity. Based on the principle of universal jurisdiction, any country can prosecute violations of these norms. Nonperemptory norms are widely accepted prohibitions of other acts, notably terrorism and drug trafficking. Under international law, countries cannot exercise universal jurisdiction over violations of these norms. *See Sosa*, 524 U.S. at 732–33.

[19] *See* United States v. Suerte, 291 F.3d 366, 376 (5th Cir. 2002) (rejecting the nexus test and noting that Fifth Amendment due process is met so long as a defendant has notice that the crime is illegal in the United States); United States v. Cardales, 168 F.3d 548, 552–53 (1st Cir. 1999) (rejecting the nexus requirement); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1055 (3d Cir. 1993) (accord); *but see* United States v. Yousef, 327 F.3d 56, 111–12 (2d Cir. 2003) (requiring a sufficient nexus between a

entirely extraterritorial prosecutions, the United States can assert jurisdiction under the protective principle of extraterritorial jurisdiction, which permits states to prosecute extraterritorial conduct that threatens their national security.[20]

Part III applies the principles developed in Parts I and II to § 960a. First, Part III concludes that because the Offences Clause power is broad, § 960a is facially valid. Second, Part III analyzes due process concerns relating to the five bases of jurisdiction granted by § 960a in the context of two hypothetical prosecutions. The first hypothetical imagines a prosecution of an organization or individual trafficking Afghani-grown opium to finance the Taliban and al Qaeda; the second hypothetical explores due process limits in the context of a Colombian trafficking cocaine to the United States and using the proceeds to finance the FARC. These hypothetical examples indicate that due process will not bar most assertions of U.S. jurisdiction. The Taliban example, however, demonstrates that another state may be the preferred forum for a prosecution, rendering a U.S. prosecution only likely or valid if that other state cedes venue.

I. CONGRESSIONAL POWER UNDER THE OFFENCES CLAUSE

The Offences Clause grants Congress the power "[t]o define and punish . . . Offences against the Law of Nations."[21] The broad reach of the Offences Clause provides the most solid grounding for Congress's power to enact 21 U.S.C. § 960a.[22] An analysis of the cryptic text of the Offences

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criminal defendant and the United States to comport with Fifth Amendment due process); United States v. Davis, 905 F.2d 245 (9th Cir. 1990) (Ninth Circuit decision to adopt the nexus test for Fifth Amendment due process); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (arguing that the extraterritorial Fifth Amendment due process test should mirror the minimum contacts analysis used in civil litigation, thus requiring a nexus between a criminal defendant and the United States). For a recent general summary of the literature on Fifth Amendment due process in extraterritorial actions, see Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 158–65 (2007).

[20] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987). See *infra* Part II for an in-depth examination of protective jurisdiction.

[21] U.S. CONST. art. I, § 8, cl. 10. For a more detailed explanation of the Offences Clause, see generally J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (providing a history and analysis of Congress's power under the Offences Clause); Harvard Note, *supra* note 17 (discussing the relationship between the Offences Clause and the Alien Tort Statute); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000) (arguing that Congress can use its Offences Clause power to pass a statute banning the death penalty); *see also* Colangelo, *supra* note 19, at 137–46 (providing a history of the Offences Clause).

[22] There are three other enumerated powers under which Congress could possibly enact its broad prohibition on narco-terrorism: (1) the Foreign Commerce Clause, (2) the treaty power combined with the necessary and proper power, and (3) the inherent congressional foreign affairs power. *See* Colangelo, *supra* note 19, at 137–58. The Offences Clause provides the strongest constitutional basis for § 960a, however. First, although an argument can be made that both narcotics trafficking and interna-

Clause reveals that the Clause likely supports Congress's proscription of narco-terrorism and passage of § 960a.[23] Section A discusses the meaning of the "law of nations" as used in the Offences Clause and argues that the law of nations is equivalent to modern customary international law (CIL). Section B examines the breadth of Congress's power to define offenses under the Offences Clause, arguing that Congress's power is broad and should receive judicial deference.

A. *Defining the "Law of Nations"*

When the Constitution was drafted, the law of nations applied to a limited set of offenses. In his *Commentaries*, William Blackstone noted that the law of nations included only "1. Violation of safe conducts; 2. infringement of the rights of ambassadors; and 3. Piracy."[24] While the reach of the Offences Clause was limited in 1789, the law of nations proved an evolving concept.[25] The Supreme Court recognized this evolution in *United States v. Arjona*,[26] where it held that the Offences Clause granted Congress the power to criminalize the counterfeiting of foreign government securi-

tional terrorism affect foreign commerce, this link is more tenuous than reading narco-terrorism as an offense against the law of nations. Moreover, the Supreme Court's recent reining in of Congress's interstate commerce power could potentially translate to narrowing Congress's foreign commerce power, given that the analytical framework of *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q), violated Congress's Commerce Clause power because it did not substantially affect interstate commerce), applies to questions of foreign as well as interstate commerce. *See* United States v. Cummings, 281 F.3d 1046, 1049 n.1 (9th Cir. 2002) (applying the *Lopez* analytical framework to foreign commerce). Second, justifying § 960a under Congress's treaty power is likely too narrow, as the applicability of the statute to the citizen of a country that is not a party to the relevant treaty would be unclear. *See* Colangelo, *supra* note 19, at 152 (noting that whether Congress may extend U.S. law implementing a treaty into the borders of a nonparty country is unclear). Finally, the scope of Congress's inherent foreign affairs power is uncertain, and only one court has thus far indicated that Congress may have the power to criminalize acts of international terrorism under its inherent foreign affairs power. *See id.* at 155 (citing *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220–21 (S.D.N.Y. 2000) (noting this in dicta)). Therefore, this Comment confines its discussion to the Offences Clause.

[23] There is some scholarly debate as to whether the Offences Clause gives Congress the power to pass only extraterritorial criminal statutes, or whether it also permits Congress to impose extraterritorial civil liability. *Compare* Kent, *supra* note 21, *with* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865 (1988) (arguing that the Offences Clause authorizes only criminal penalties). Because § 960a is an exclusively criminal statute, however, this debate is moot for purposes of this Comment.

[24] 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

[25] Colangelo, *supra* note 19, at 138 ("[T]he Supreme Court sees this law [the law of nations] as an evolving body of norms against which congressional action is measured at the time Congress legislates."); Kent, *supra* note 21, at 942 (noting that the Framers contemplated that the law of nations would evolve given their understanding that the law of nations encompasses the customs and practices of nation-states); Stephens, *supra* note 21, at 478 (commenting that *Arjona* makes apparent the evolving notion of the law of nations).

[26] 120 U.S. 479 (1887).

ties.[27] Although such counterfeiting was not an offense against the law of nations in 1789, the law of nations evolved over time.[28] Because counterfeiting did violate the law of nations by 1887, this proscription fell within Congress's Offences Clause power.[29] Thus, conduct covered by the Offences Clause evolves in accordance with the changing nature of international law.[30]

Furthermore, the phrase "law of nations" as used in the Offences Clause is equivalent to modern day customary international law (CIL).[31] CIL comprises a set of international legal norms to which sovereign states adhere out of a sense of legal obligation.[32] CIL derives from two sources: (1) international treaties and (2) the general practice of nation-states.[33]

Two categories of legal norms constitute CIL: peremptory norms and nonperemptory norms.[34] Peremptory international norms—also known as *jus cogens* norms—occupy the highest status in international law[35] and are therefore nonderogable.[36] Six offenses are widely considered to have achieved *jus cogens* status: piracy, slavery, genocide, crimes against humanity, war crimes, and torture.[37] Some commentators and federal courts have argued that certain acts of terrorism, sex trafficking, and narcotics traffick-

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27 *Id.* at 486.

28 *Id.* at 486–87.

29 *Id.*

30 *Id.* (claims under the Alien Tort Statute, which provides federal jurisdiction for torts violating the law of nations, must be measured against current notions of international law).

31 Kent, *supra* note 21, at 845 ("Today's customary international law is the closest modern analogue of the eighteenth-century 'law of nations.'").

32 Harvard Note, *supra* note 17, at 2381; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

33 Colangelo, *supra* note 19, at 131 (citing North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 4, 44 ¶ 77 (Feb. 20)); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). International law that derives from state practice is also known as *opinio juris*. *Id.* § 102 cmt. c.

34 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k. (1987).

35 United States v. Emmanuel, No. 06-20758, 2007 WL 2002452, at *10 (S.D. Fla. July 5, 2007) (internal citations omitted) (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714–15 (9th Cir. 1992)). This Comment uses the terms "peremptory norm" and "*jus cogens* norm" interchangeably.

36 *Emmanuel*, 2007 WL 2002452, at *10; *see also* Regina v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3), [1999] 1 A.C. 147 (H.L. 1999) (holding that former Chilean President Pinochet could be extradited to Spain to face prosecution for torture, a violation of *jus cogens*). Although courts have abrogated head-of-state immunity for *jus cogens* violations, *see, e.g.*, Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment (July 28, 2004), ¶¶ 63-66, *available at* http://www.un.org/icty/indictment/english/mil-2ai020728e.htm, federal circuit courts have held that Nazi Germany did not waive its sovereign immunity under the Foreign Sovereign Immunities Act, despite its rampant violations of *jus cogens* norms. *See* Sampson v. F.R.G., 250 F.3d 1145, 1149 (7th Cir. 2001); Princz v. F. R. G., 26 F.3d 1166, 1173, 1180 (D.C. Cir. 1994).

37 Colangelo, *supra* note 19, at 130.

ing have also attained the status of *jus cogens*,[38] but others have rejected this argument.[39] Offenses recognized as *jus cogens* are self-executing in United States courts because they have attained the status of federal common law in civil actions.[40] In the criminal context, offenses violating *jus cogens* warrant universal jurisdiction.[41]

Nonperemptory norms are all other CIL norms that have not attained *jus cogens* status.[42] Thus, while acts that violate nonperemptory norms are widely prohibited, individual countries can alter their obligations under these norms through the use of treaties.[43] Narcotics trafficking and terrorist acts, for example, are widely prohibited but have not attained *jus cogens* status.[44] Congress may still proscribe this conduct, however, because Congress can criminalize conduct that violates only nonperemptory norms under its Offences Clause power to define.

B. Congress's Power to Define Offenses

An examination of the drafting history of the Offences Clause, of Supreme Court and lower court precedent, and of normative theory shows that Congress possesses substantial flexibility in its power to define offenses. First, historical evidence offers insight into the original understanding of the Offences Clause. The Articles of Confederation did not grant the federal government power to conduct foreign affairs, so the primary purpose of the Offences Clause was to centralize the foreign affairs power in the federal

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[38] *Id.*; *see also* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (noting that narcotics trafficking is "universally condemned" by law-abiding countries); United States v. Yunis, 924 F.2d 1086, 1092 (D.C. Cir. 1991) (suggesting in dictum that universal jurisdiction may be available to prosecute airplane hijacking).

[39] *See* United States v. Yousef, 327 F.3d 56, 106–08 (2d Cir. 2003) (rejecting universal jurisdiction over crimes of international terrorism); United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990) (exercising protective, not universal, jurisdiction under the Maritime Drug Law Enforcement Act).

[40] Self-executing *jus cogens* norms are in force as a matter of international law and apply to civil actions regardless of whether Congress has enacted an applicable statute. Sosa v. Alvarez-Machain, 542 U.S. 692, 731–33 (2004) (citing lower court cases). *Jus cogens* norms cannot be self-executing federal common law in the criminal context. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (prohibiting federal criminal common law). Although one could argue that the nonderogability of *jus cogens* norms requires Congress to enact statutes criminalizing violations of these norms under international law, this argument fails to recognize that Congress can choose to breach international law. *See* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 687 (2000) (noting that "it is well established that Congress can violate international law"). As a political matter, however, Congress is likely to criminalize all violations of *jus cogens* norms.

[41] *Sosa*, 524 U.S. at 732–33; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); Colangelo, *supra* note 19, at 130. See *infra* Part II.B for an explanation of universal jurisdiction.

[42] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. j & k. (1987).

[43] *Id.* at § 331 cmt. e.

[44] *See infra* Part III.

government and thereby prevent individual states from provoking conflicts with foreign nations.[45]

The original draft of the Offences Clause allowed Congress "[t]o define and punish piracies and felonies on the high seas, and 'punish' offences against the law of nations."[46] Notably absent in this draft was the power to define offenses.[47] Perceiving a drafting deficiency, Gouverneur Morris suggested granting Congress the power to "define and punish" offenses against the law of nations.[48] Delegate James Wilson disagreed, stating it would be arrogant of the United States to "pretend to *define*" the law of nations because only international consensus can create international law.[49] Morris responded that the law of nations was "often too vague and deficient to be a rule," and that the defining power was necessary to ensure all congressional enactments under the Offences Clause specifically described the prohibited conduct.[50] Thus, "even in the founding days, it was clear that the Offences Clause gives Congress some latitude in the domestic implementation of international law."[51]

In his *Commentaries*, Justice Story further elaborated on the Offences Clause power, noting that a law must relate to U.S. foreign affairs to fall within the scope of this power:

> As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nationals, congress ought to possess the power to define and punish all such offenses, which may interrupt our intercourse and harmony with, and our duties to them.[52]

This historical evidence—from the Constitutional Convention and from Justice Story—suggests the Framers intended for Congress's power under the Offences Clause to include more than just the ability to punish the limited range of offenses that had assumed *jus cogens* status. Rather, because of the power to define offenses, the Offences Clause permits Congress to criminalize acts that affect U.S. foreign affairs but do not violate *jus cogens* norms,[53] thus conferring on Congress substantial flexibility when legislating pursuant to the Offences Clause.[54] Congress can therefore fa-

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[45] Harvard Note, *supra* note 17, at 2385.

[46] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614 (Max Farrand ed., 1911); *see also* Kent, *supra* note 21, at 899.

[47] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 614.

[48] *Id.*

[49] *Id.* at 615.

[50] *Id.*

[51] Harvard Note, *supra* note 17, at 2386.

[52] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 57–58 (1833).

[53] Harvard Note, *supra* note 17, at 2386–87.

[54] *Id.* at 2386.

shion criminal laws that tailor and modify international norms to adequately address domestic problems that implicate foreign relations.

In addition to finding support in historical evidence, this broad reading of the Offences Clause is confirmed by judicial precedent. *United States v. Arjona*, the seminal Supreme Court decision analyzing Congress's Offences Clause power, establishes that Congress can use its necessary and proper power in conjunction with its Offences Clause "defining" power to criminalize acts that violate CIL and are related to U.S. foreign affairs.[55] The *Arjona* Court recognized that "a law which is necessary and proper to afford this protection [against the counterfeiting of foreign government securities] is one that [C]ongress may enact, because it is one that is needed to carry into execution a power conferred by the [C]onstitution on the government of the United States exclusively."[56]

The United States District Court for the Southern District of New York recently acknowledged this view when it decided *United States v. Bin Laden*.[57] The court examined the constitutionality of two federal statutes that criminalize conspiring to kill a U.S. national outside the United States[58] and using or conspiring to use a weapon of mass destruction against a U.S. national or U.S.-owned property inside or outside the United States.[59] When ruling on the constitutionality of the statutes, the court noted that Congress is not precluded from criminalizing these acts under the Offences Clause just because the offenses are not universally regarded as violating international law.[60] Indeed, because Congress has the power to define offenses, it can criminalize offenses so long as the offenses are "recognized by at least some members of the international community as being offenses against the law of nations."[61] Congress's power is therefore broad and permits the criminalization of acts that violate CIL and are related to U.S. foreign affairs.

But Congress's Offences Clause power is not limitless, and the Supreme Court did, very early on, suggest a possible limiting principle. In *United States v. Furlong*, the Court held that Congress could not criminalize

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[55] 120 U.S. 479, 483–88 (1887); *see also* Kent, *supra* note 21, at 861, 863 (noting that congressional penalization of "individual conduct that harms interests recognized by international law or relates somehow to U.S. foreign relations . . . . encompasses congressional actions regulating the conduct of individuals not when that conduct violates customary international law by itself, but when the conduct could impinge on interests either required to be protected by international law (including treaties), recognized as important by international law, or, at the least, related to the foreign affairs of the United States"); *see also* Harvard Note, *supra* note 17, at 2386; Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 609 (1987) ("The [O]ffenses [C]lause thus extends jurisdiction beyond the limits allowed by customary international law.").

[56] 120 U.S. at 487.

[57] 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

[58] 18 U.S.C. § 2332 (2006).

[59] 18 U.S.C. § 2332a.

[60] *Bin Laden*, 92 F. Supp. 2d at 220.

[61] *Id.*

murder on a foreign vessel of a foreigner by a foreigner under the Offences Clause because this murder, even if it occurred on the high seas, is not the same as piracy.[62] While murder is widely prohibited, it is typically not connected to foreign affairs. But the Court went on to suggest that as long as a congressional enactment prohibits crimes that implicate foreign relations,[63] it should be upheld under the Offences Clause power.[64] Therefore, if the crime is not international in nature, it falls outside of the scope of the Offences Clause. But if the crime implicates foreign affairs, Congress has acted within the scope of its enumerated power.[65]

Professor Curtis Bradley succinctly sums up the jurisprudential landscape relating to Congress's Offences Clause power: "While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to 'define.'"[66] This deferential jurisprudence is not only doctrinally correct, but also normatively justified.

Courts are traditionally deferential to congressional actions involving foreign affairs due to the lack of judicial expertise in the foreign policy arena.[67] Given the connection between the Offences Clause and foreign policy, this classical form of deference should apply when courts confront Offences Clause questions. Besides, the strongest check on congressional overreaching in enacting statutes under the Offences Clause is the Executive Branch, not the courts.[68] If Congress overreaches and enacts a law that is likely to raise the ire of the international community, the Executive is under no obligation to enforce this law in all situations in which the law could apply.[69]

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[62] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 198 (1820). It is important to note that Congress's power to define offenses is not a nonjusticiable political question. *See* Siegal, *supra* note 23, at 930–38 (concluding that the Offences Clause is justiciable); *see also* United States v. Arjona, 120 U.S. 479, 487 (1887) (interpreting Congress's Offences Clause power).

[63] Although the Offences Clause could reach international financial crimes (namely international antitrust violations), the enactment of statutes criminalizing extraterritorial financial conduct is more directly supported by Congress's foreign commerce power than by its Offences Clause power.

[64] *Furlong*, 18 U.S. (5 Wheat.) at 197–98.

[65] *But see* Stephens, *supra* note 21, at 549–52 (concluding that Congress could prohibit the juvenile death penalty under the Offences Clause).

[66] Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 (2001).

[67] *See* Regan v. Wald, 468 U.S. 222, 242 (1984) (noting the Court's traditional deference to the political branches in matters of foreign policy).

[68] Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 531–32 (1998) (arguing that disputes over the intersection between international law and foreign policy should usually be addressed by the Executive and Legislative Branches).

[69] *See In re* United States, 345 F.3d 450, 453 (7th Cir. 2003) ("The Constitution's Take Care [C]lause (art. II., § 3) places the power to prosecute in the [E]xecutive."). Under the Take Care Clause, the Executive has broad discretion in determining when and whether to prosecute and can lawfully choose to indict one case while choosing not to pursue another case with similar or identical facts. *See, e.g.*, James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal*

Thus, if the Judiciary is too quick to rule on an enactment under the Offences Clause, it would undermine the Executive's prerogative to exercise prosecutorial discretion and could lead to a constitutional ruling that could be avoided by deferring to the Executive's discretion.

In sum, Congress's Offences Clause power is broad and flexible, and actions under this power should and do receive substantial deference from Article III courts. Under this broad power, Congress has the power to criminalize narco-terrorist offenses.[70] Indeed, the political branches, not the courts, are best equipped to determine whether an offense violates the law of nations. Because of this deference, courts are more likely to rely on Fifth Amendment due process as a means of limiting the reach of Congress's power to apply federal criminal law extraterritorially under the Offences Clause.

II. FIFTH AMENDMENT DUE PROCESS AND EXTRATERRITORIAL CRIMINAL JURISDICTION

The Fifth Amendment's Due Process Clause mandates that "[n]o person . . . be deprived of life, liberty, or property without due process of law."[71] This Clause protects individuals from invalid applications of facially valid federal legislation.[72] The recent rise in extraterritorial prosecutions has rendered Fifth Amendment due process a potential barrier to extraterritorial application of federal criminal law,[73] but federal courts and academic commentators differ on the appropriate due process standard for extraterritorial federal prosecutions.

Section A examines two competing due process standards for extraterritorial prosecutions in existing case law and academic literature. While courts agree that due process requires that the exercise of extraterritorial jurisdiction be "neither arbitrary nor fundamentally unfair,"[74] courts differ on whether fundamental fairness requires a nexus between the crime and U.S.

System Revisited, 96 J. CRIM. L. & CRIMINOLOGY 527, 533–34 n.28 (2006) (noting that Article II, Section 3 of the U.S. Constitution vests the power to prosecute in the Executive Branch).

[70] *See infra* Part III.A.

[71] U.S. CONST., amend. V.

[72] United States v. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991) ("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."); *see also* Colangelo, *supra* note 19, at 158. Although the Supreme Court has never squarely addressed whether the Fifth Amendment applies extraterritorially, it noted in dictum that this amendment likely has extraterritorial effect. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the [foreign national] defendant.").

[73] Colangelo, *supra* note 19, at 159; *see also* United States v. Davis, 905 F.2d 245, 247–49 (9th Cir. 1990) (discussing due process in the context of extraterritorial application of the law).

[74] Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981); *see also* Colangelo, *supra* note 19, at 162.

territory.[75] Section B argues that due process requires only notice of the proscribed conduct, not a territorial nexus.

A. The Competing Conceptions of Extraterritorial Due Process

There are three views of how Fifth Amendment due process impacts extraterritorial prosecutions: the nexus test, the notice test, and a nonapplicability view. Under the nexus test, due process requires a territorial nexus between the proscribed conduct and the United States.[76] The nexus test controls in the Second and Ninth Circuits[77] and was advocated by Professors Lea Brilmayer and Charles Norchi in an influential law review article.[78] The First, Third, Fifth, and Eleventh Circuits adopted a less stringent standard—the notice test.[79] This test holds that due process requires only notice to the defendant that his conduct is illegal.[80] Finally, expressing a third view, Professor Mark Weisburd argues that Fifth Amendment due process never applies to the extraterritorial application of federal law.[81] No court has yet adopted this view, however, so this Comment does not offer an in-depth analysis of Professor Weisburd's argument.[82] The following subsec-

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[75] *Compare* United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (requiring a nexus between the defendant and the United States) *and Davis*, 905 F.2d at 248–49 ("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), *with* United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002) ("[T]he Due Process Clause . . . does not impose a nexus requirement . . . ."); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("We decide today that due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States . . . ."); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("We decline to follow *Davis* as we see nothing fundamentally unfair in applying section 1903 [the Maritime Drug Law Enforcement Act] exactly as Congress intended—extraterritorially without regard for a nexus between the defendant's conduct and the United States."); United States v. Gonzalez, 776 F.2d 931, 939–40 (11th Cir. 1985) ("The protective principle does not require that there be proof of an actual or intended effect inside the United States. The conduct may be forbidden if it has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.") (citations omitted).

A final strain of scholarship argues that Fifth Amendment due process concerns do not apply extraterritorially. *See, e.g.*, A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997).

[76] *See, e.g.*, *Davis*, 905 F.2d at 248–49.

[77] *See supra* note 75 and accompanying text.

[78] Brilmayer & Norchi, *supra* note 19, at 1239–40.

[79] *Suerte*, 291 F.3d at 375; *Cardales*, 168 F.3d at 553; *Martinez-Hidalgo*, 993 F.2d at 1056; *Mena*, 863 F.2d at 1529.

[80] *See supra* note 79 and accompanying text.

[81] Weisburd, *supra* note 75.

[82] The thrust of Professor Weisburd's argument stems from three principles. First, the United States is a sovereign nation, so it must have the same authority under international law as other nations. Weisburd, *supra* note 75, at 383–84. Therefore, the Fifth Amendment cannot apply extraterritorially because it would undermine the concept of the United States as a sovereign nation. *Id.* Second, constitutional history shows that the Framers did not intend for the Fifth Amendment to limit or negate Congress's enumerated powers. *Id.* at 408. As such, Congress's enumerated powers are the only barrier to the

tions outline the nexus and notice tests and conclude that the proper due process standard in extraterritorial criminal actions is the notice test.

1. The Nexus Test.—The Ninth Circuit offered an extensive discussion of the nexus test in *United States v. Davis*.[83] In that case, the defendant challenged his conviction under the Maritime Drug Law Enforcement Act (MDLEA)[84] by arguing that the statute did not apply to persons on foreign vessels outside of U.S. territory.[85] The Ninth Circuit held that "[i]n 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."[86] The court found that Davis's prosecution satisfied due process because Davis intended to import narcotics into the United States, creating a sufficient nexus between the crime and the United States.[87]

The nexus test aligns with the due process test set forth by Professors Lea Brilmayer and Charles Norchi in their 1992 article, *Federal Extraterritoriality and Fifth Amendment Due Process*.[88] Professors Brilmayer and Norchi argue that the Fifth Amendment due process test should mirror the due process test for state long-arm statutes.[89] Under this standard, due process "requires 'contacts' with the forum, 'interests' arising out of these contacts, and 'fairness' to the defendant."[90] An extraterritorial prosecution will consequently meet the fairness prong of this test only if the defendant "by his or her own actions . . . voluntarily affiliated him or herself with the United States."[91] Professors Brilmayer and Norchi therefore essentially adopt the nexus test by arguing that fundamental fairness requires voluntary territorial affiliation with the United States.[92]

2. The Notice Test.—The First, Third, Fifth, and Eleventh Circuits apply the notice test, a less rigorous due process standard which requires only that the defendant have notice that he will be subject to U.S. law. In *United States v. Suerte*, the Fifth Circuit examined whether due process requires a nexus between the defendant and the United States in MDLEA

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extraterritorial application of U.S. law. *Id.* at 413. Third, the analogy of minimum contacts under the Fourteenth Amendment is improper because of the different roles of the state and federal governments, particularly in the foreign affairs and national security arenas. *Id.* at 416–17.

[83] 905 F.2d 245 (9th Cir. 1990).

[84] 46 U.S.C.A. §§ 70501–07 (West 2006).

[85] *Davis*, 905 F.2d at 247–49.

[86] *Id.* at 248–49 (internal citations omitted).

[87] *Id.* at 249.

[88] *See* Colangelo, *supra* note 19, at 163.

[89] Brilmayer & Norchi, *supra* note 19, at 1242.

[90] *Id*. These three requirements—contacts, interests, and fairness—are adopted from the Supreme Court's decision in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

[91] Brilmayer & Norchi, *supra* note 19, at 1243–44.

[92] *See* Colangelo, *supra* note 19, at 163.

prosecutions.[93] After reviewing the history of the Offences Clause and the MDLEA, the court held "that [the Fifth Amendment Due Process] [C]lause does not impose a nexus requirement, in that Congress has acted pursuant to the [Offences] Clause."[94] Rather, when the conduct is generally criminalized by law-abiding nations,[95] fundamental fairness is satisfied so long as the defendant has notice that he is subjecting himself to U.S. law.[96] International law provides five bases of extraterritorial jurisdiction—territorial, nationality, passive personality, protective, and universal jurisdiction.[97] As long as the United States asserts jurisdiction under one of these five bases, the notice test is satisfied.[98]

B. Courts Should Adopt the Notice Test as the Proper Due Process Standard in Extraterritorial Prosecutions.

Reading the Due Process and Offences Clauses in conjunction with one another shows that due process should not require a nexus between the United States and the challenged conduct. Unfortunately, the First, Third, Fifth, and Eleventh Circuits have neglected to provide a detailed analysis of the relationship between the Offences and Due Process Clauses in their justifications for the notice test. This section examines the relationship between the Offences Clause and the Due Process Clause in the context of the five internationally accepted bases of extraterritorial jurisdiction. Subsection 1 analyzes how the five forms of extraterritorial jurisdiction fit with the notice test. Subsection 2 argues for greater usage of protective jurisdiction, which in general terms permits jurisdiction over extraterritorial crimes threatening U.S. national security, in extraterritorial prosecutions.[99] Subsection 3 argues that when Congress invokes its Offences Clause power to criminalize an entirely extraterritorial act that violates a nonperemptory norm, protective jurisdiction is the only basis by which the United States

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[93] 291 F.3d 366 (5th Cir. 2002).

[94] *Id.* at 375.

[95] *See* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (stating that notice exists when the proscribed conduct is widely criminalized); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (1987). The Third Circuit specifically stated that due process problems could arise if Congress criminalized conduct that is generally lawful throughout the world, but that this issue is moot so long as the statute involves accepted criminal conduct. *Martinez-Hidalgo*, 993 F.2d at 1056. Indeed, if the conduct is widely criminalized, the defendant should know that his act is illegal. The only remaining question is whether the defendant would have notice of being tried in a U.S. court.

[96] United States v. Suerte, 291 F.3d 366, 376 (5th Cir. 2002); *see also* Colangelo, *supra* note 19, at 163.

[97] *See infra* Part II.B.1.

[98] United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("In determining whether due process is satisfied, we are guided by principles of international law [the bases of jurisdiction]."). See *infra* Part II.B.3 for a discussion of these five bases. In contrast to the nexus test, the notice test does not define fundamental fairness by a territorial nexus.

[99] See *infra* notes 119–129 and accompanying text for a discussion of protective jurisdiction.

can assert jurisdiction while still complying with international law. Therefore, protective jurisdiction can serve as a safety valve by which courts can reconcile due process, international law, and § 960a.

1. The Five Bases of Extraterritorial Jurisdiction.—An extraterritorial prosecution is fundamentally fair under the notice test if the defendant is on notice of a potential prosecution in a U.S. court.[100] In this context, fundamental fairness has two requirements: (1) the conduct is generally criminalized by law-abiding nations, and (2) the United States has an interest in prosecuting the defendant.[101] In the second prong, the federal interest is measured in accordance with the five bases of extraterritorial jurisdiction, which are the principles of territorial, nationality, passive personality, universal, and protective jurisdiction.[102]

First, territorial jurisdiction is itself divided into two parts: the subjective territorial principle and the objective territorial principle.[103] The subjective territorial principle permits jurisdiction over acts that take part wholly or partially within a state's territory.[104] The objective territorial principle, on the other hand, authorizes jurisdiction when the result of a criminal act has effects in or impacts the state asserting jurisdiction, even if no acts occur within that state.[105] Second, the nationality principle permits states to assert jurisdiction over their citizens for crimes committed in a foreign country.[106] Both the territorial and nationality principles of jurisdiction require a U.S. nexus (location of the crime or nationality), so due process is satisfied even under the more stringent nexus test.[107]

The third basis for jurisdiction is passive personality. The passive personality principle permits countries to assert jurisdiction over individuals who commit criminal acts that harm citizens of the country asserting jurisdiction.[108] Courts have held that exercising jurisdiction on the basis of pas-

[100] *See, e.g.*, *Martinez-Hidalgo*, 993 F.2d at 1056.

[101] *See infra* notes 156–157 and accompanying text.

[102] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). The five bases of jurisdiction were first suggested in the Draft Convention on Research in International Law of the Harvard Law School, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (Supp. 1935). For a general overview of these jurisdictional bases, see Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., Transnational 2d ed. 1999).

[103] Blakesley, *supra* note 102, at 47.

[104] *Id.*

[105] *Id.* Objective territoriality is also known as the "effects principle."

[106] *Id.* at 61.

[107] *See* United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006) (holding that prosecution of a U.S. national for sex crimes committed in Cambodia satisfies the due process nexus requirement because jurisdiction existed under the nationality principle).

[108] Blakesley, *supra* note 102, at 67.

sive personality is constitutional.[109] In *United States v. Benitez*, for example, Colombian nationals shot two U.S. Drug Enforcement Agency (DEA) agents in Cartagena, Colombia.[110] Before committing the attempted murders, the defendants examined the credentials of the agents and stated, "These are the guys. They are both DEA agents."[111] The defendants clearly knew their victims were not only U.S. citizens, but U.S. government agents. Accordingly, the defendants were on notice that they were subjecting themselves to U.S. law, satisfying due process.[112]

Fourth, universal jurisdiction permits any state to prosecute a limited range of internationally condemned acts that violate *jus cogens* norms.[113] When exercising universal jurisdiction, federal courts do not apply U.S. law but instead apply preexisting international norms.[114] Because violations of *jus cogens* norms are internationally prohibited, defendants are presumptively on notice that their conduct could trigger prosecution in any sovereign nation.[115] Assertions of universal jurisdiction therefore satisfy Fifth Amendment due process notice requirements per se.[116] Although universal jurisdiction does not satisfy the nexus test, courts employing the nexus test have an exception for crimes warranting universal jurisdiction.[117]

Fifth, the protective principle provides jurisdiction over offenses committed completely outside the territory of the state exercising jurisdiction when the crime "poses a danger of causing an adverse effect on a state's security, integrity, sovereignty or important governmental function."[118] The

[109] United States v. Yunis, 924 F.2d 1086, 1090–92 (D.C. Cir. 1991) (affirming jurisdiction over the prosecution of the hijacker of a Jordanian commercial aircraft that had two passengers who were U.S. citizens); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) (exercising jurisdiction over two Colombian nationals who tried to kill two DEA agents in Colombia based on the principle of passive personality). The *Yunis* court merely assumed that due process was followed because the Hostage Taking Act permitted passive personality jurisdiction. *Yunis*, 924 F.2d at 1090–92 (citing 18 U.S.C. § 1203 (2006)). Such an analysis is circular, however, because Congress cannot define what does and does not comport with due process.

[110] 741 F.2d at 1314–15.

[111] *Id.* at 1314.

[112] An interesting question is whether due process requires a defendant to have knowledge that the victim was a U.S. citizen when passive personality jurisdiction applies. This conundrum, however, is beyond the scope of this Comment.

[113] Blakesley, *supra* note 102, at 70; *see also supra* Part I.A.

[114] Colangelo, *supra* note 19, at 167–68.

[115] United States v. Juda, 46 F.3d 961, 966–67 (9th Cir. 1995); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); *see also* Colangelo, *supra* note 19, at 167–68.

[116] *See* Bradley, *supra* note 66, at 339–40.

[117] *See* United States v. Shi, No. 06-10389, slip op. at 4381 (9th Cir. Apr. 24, 2008) ("[A] nexus is not required when the offender's conduct is proscribed universally."); United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (noting that crimes warranting universal jurisdiction automatically satisfy due process).

[118] Blakesley, *supra* note 102, at 54. As Professor Blakesley further notes, the protective principle permits jurisdiction over acts that pose a potential threat to the interests of the state. *Id.* at 54–55.

assertion of jurisdiction based on the protective principle is constitutional.[119] In *United States v. Gonzalez*, for example, the six defendants—all foreign nationals—were crew members aboard a Honduran vessel that was intercepted by a Coast Guard cutter 125 miles off the coast of Florida.[120] The defendants were indicted under the Marijuana on the High Seas Act of 1980,[121] and filed an interlocutory appeal, claiming that their prosecution violated due process because the statute did not give fair warning of the proscribed conduct.[122] The Eleventh Circuit rejected this argument. First, the court noted that jurisdiction existed under the protective principle because (1) the conduct had a potentially adverse effect in the United States, and (2) drug trafficking was recognized as a crime by reasonably developed legal systems.[123] Second, the court held that the prosecution did not create a notice problem: "Congress has provided clear notice of what conduct is forbidden: any possession of marijuana on the high seas with intent to distribute. The United States will enforce this law to the full extent of its ability under international law."[124]

Other courts have also invoked the protective principle to justify extraterritorial jurisdiction in drug trafficking and terrorism prosecutions.[125] In *United States v. Yousef*, for example, the Second Circuit invoked the protective principle as the basis for jurisdiction.[126] The defendant, Yousef, plotted to destroy U.S. commercial aircraft in order to influence U.S. foreign policy.[127] Yousef thus intended to interfere with the "governmental functions" of the United States, rendering the invocation of protective jurisdiction appropriate.[128] As these examples show, the territoriality, nationality, and passive personality principles all require some sort of nexus with the United States, while the universal and protective principles do not. Although courts have invoked the Offences Clause as a basis of congressional power to enact statutes such as the MDLEA,[129] courts have failed to recognize the link between the Offences Clause and the Fifth Amendment Due Process Clause. The next subsection examines the historical relationship between

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[119] *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968).

[120] 776 F.2d 931, 934 (11th Cir. 1985).

[121] 21 U.S.C. § 955a–d (2006).

[122] *Gonzalez*, 776 F.2d at 938.

[123] *Id.* at 939 ("The protective principle does not require that there be proof of an actual or intended effect inside the United States. The conduct may be forbidden if it has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.") (citations omitted); *see also* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993).

[124] *Gonzalez*, 776 F.2d at 940.

[125] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 110–11 (2d Cir. 2003) (terrorism); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (drug trafficking).

[126] *Yousef*, 327 F.3d at 110–11.

[127] *Id.*

[128] *Id.*

[129] *See, e.g.*, United States v. Suerte, 291 F.3d 366, 372–77 (5th Cir. 2002).

these two Clauses and argues that reading them in conjunction shows how the notice test is the proper due process standard in extraterritorial prosecutions.

2. The Due Process and Offences Clauses.—The Offences Clause gives Congress the power to punish extraterritorial offenses that violate peremptory (*jus cogens*) and nonperemptory international norms.[130] Wholly extraterritorial crimes in violation of a peremptory international norm warrant the assertion of universal jurisdiction,[131] and courts that require a U.S. nexus have crafted an exception to the nexus requirement for these universal crimes.[132] Congress, however, can also proscribe nonperemptory norms—namely, norms which do not warrant universal jurisdiction but are entirely extraterritorial.[133] If we read due process to require a territorial nexus, there exists a limited subset of extraterritorial acts that Congress could criminalize under the Offences Clause but over which courts could not exercise jurisdiction under the nexus test.[134] The nexus test therefore leads to a contradictory result because it places the Offences Clause and Fifth Amendment Due Process Clause squarely in tension with one another by reading due process to prohibit criminalization of extraterritorial violations of nonperemptory norms. To avoid this result, due process should not require a U.S. nexus, and instead the notice test should be adopted.

Some might argue, however, that this view has things backwards. The Bill of Rights, including the Fifth Amendment, was adopted to modify and limit the enumerated powers. As such, any tension between the Offences and Due Process Clauses should be resolved in favor of the chronologically later provision—the Due Process Clause.[135] This argument fails for two reasons. First, while many of the amendments do limit the types of laws Congress can enact,[136] Fifth Amendment procedural due process protects particular parties from specific applications of facially valid legislation.[137] Indeed, due process rights exist as a shield to protect individuals from invalid applications of governmental action, not as a sword with which defendants can challenge the government's general power to act.[138] Therefore, adopting the nexus test would distort the purpose of due process because

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[130] *See supra* Part I.

[131] *See supra* Part I.A.

[132] United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (finding that stateless vessels are subject to universal jurisdiction, so MDLEA prosecutions of stateless vessels do not require a U.S. nexus).

[133] *See supra* Part I.B.

[134] This anomaly would primarily arise in prosecutions for extraterritorial crimes of terrorism and drug trafficking. *See infra* Part III.

[135] Brilmayer & Norchi, *supra* note 19, at 1252-54.

[136] The First Amendment is the most obvious example.

[137] *See* Weisburd, *supra* note 75, at 385.

[138] *See id.* ("That is, such [due process] rights exist to shield individuals from government actions; they do not divest the government of competence to act.").

the test would permit due process to become a tool by which defendants could challenge Congress's power to legislate extraterritorially, rather than a right with which defendants can protect themselves from government overreaching.

Second, the above counterargument becomes even more tenuous when one considers the context in which the Framers drafted the Constitution. In 1789, the United States was a fledgling democracy whose future existence remained uncertain. The primary reason for ratifying the Constitution and replacing the Articles of Confederation was to strengthen the federal government, particularly in the realm of foreign policy.[139] Indeed, the Framers viewed foreign affairs as an essential aspect in preserving the Union,[140] and the ability to legislate extraterritorially was a fundamental component of the new federal government's power to conduct foreign relations.[141] As such, it seems somewhat nonsensical for the Framers to have deliberately expanded federal power in foreign affairs—both to avoid conflict between states and to strengthen foreign relations—only to significantly reduce this power through the Due Process Clause two years later.

Furthermore, many courts have adopted the notice test for entirely functional reasons. Analyzing the link between the Offences and Due Process Clauses is particularly important because this analysis provides a nonfunctional justification for adopting the notice test. The Third Circuit in *United States v. Martinez-Hidalgo*, for example, asked who would prosecute drug dealers if the United States did not, observing that due process does not require turning the high seas "into a sanctuary highway for drug dealers."[142] Even in *Suerte*, which does note the link between the Offences and Due Process Clauses,[143] the court commented that because Congress found that drug trafficking was a serious and widely condemned international problem, the Due Process Clause should not require a U.S. nexus.[144] While these are compelling policy arguments in support of Congress's decision to enact the MDLEA, they do not acknowledge the compelling textual support for the use of the notice test as the proper due process standard. Reading the Offences and Due Process Clauses in conjunction with one another provides normative and historical arguments for the use of the no-

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139 *See id.* at 408.

140 *See id.*

141 Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) ("[A nation's] power to secure itself from injury, may certainly be exercised beyond the limits of its territory.") (Marshall, C.J.). Rules of statutory construction require that Congress include a plain statement that the law will apply extraterritorially. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

142 993 F.2d 1052, 1057 (3d Cir. 1993).

143 291 F.3d 366, 372–75 (5th Cir. 2002). The *Suerte* court implied that the Due Process Clause did not impose a nexus requirement on the Offences Clause, but the court did not fully develop this analysis.

144 *Id.* at 377.

tice test as the proper due process standard in extraterritorial prosecutions.[145] The next subsection examines how protective jurisdiction relates to the notice test for certain extraterritorial prosecutions.

3. Protective Jurisdiction for Extraterritorial Crimes.—The Offences Clause permits Congress to criminalize entirely extraterritorial acts.[146] Furthermore, the five bases of extraterritorial jurisdiction inform the Fifth Amendment due process analysis[147] because asserting one of these five bases provides notice to defendants that the United States can prosecute.[148] While Congress can enact statutes that violate international law, courts interpret statutes to comply with international law unless no other possible construction exists.[149] Absent a clear statement that Congress intends to breach international jurisdictional law, courts will accordingly interpret statutes—§ 960a in this case—to comply with one of the five bases of jurisdiction.

The proper basis of jurisdiction for wholly extraterritorial violations of nonperemptory norms is protective jurisdiction. Only the universal and protective principles permit jurisdiction over crimes with no U.S. nexus, but universal jurisdiction only applies to a limited range of *jus cogens* offenses.[150] Therefore, protective jurisdiction is the only remaining legal basis for jurisdiction. But not only is protective jurisdiction the only potential jurisdictional ground, it is also the proper basis for jurisdiction for wholly extraterritorial violations of non-*jus cogens* norms.[151] Federal courts have invoked the protective principle as a basis for jurisdiction in prior cases,[152] but this invocation is usually buttressed by other applicable bases of jurisdiction, such as the objective territorial principle in drug trafficking prosecutions.[153] When Congress criminalizes an entirely extraterritorial act under the Offences Clause, however, due process can only be satisfied if jurisdiction exists under the protective principle unless, contrary to the *Charming Betsy* canon, courts presume that Congress intended to violate international law.[154] Some might argue that protective jurisdiction could potentially lead

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[145] *See supra* notes 130–141 and accompanying text.

[146] *See supra* Part I.B.

[147] United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); *see also* Colangelo, *supra* note 19, at 169.

[148] *See supra* note 98 and accompanying text.

[149] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

[150] *See supra* Part II.B.1.

[151] This argument assumes, of course, that Congress has the power to pass the statute in question in the first place.

[152] *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8, 10–11 (2d Cir. 1968).

[153] *See* United States v. Suerte, 291 F.3d 366, 377 (5th Cir. 2002).

[154] Given that Congress and the Executive can violate international law and still act constitutionally, it follows that a prosecution in violation of international law can still comport with due process. Exactly

to the application of U.S. law to virtually any act.[155] These concerns are unwarranted, however. Not only does the notice test still prevent certain applications of U.S. law, doctrines of separation of powers and comity also limit the reach of American law under the protective principle.

When the government asserts protective jurisdiction, a defendant can anticipate prosecution in the United States when two elements are met: first, the challenged conduct must be generally criminalized by law-abiding nations by a widely ratified treaty;[156] and second, the United States must have an interest in prosecuting individuals that engage in the proscribed conduct. In short, the first prong—widespread criminalization—requires that many countries have signed a treaty prohibiting the conduct, and the second prong—a U.S. interest—requires the United States to be a party to the treaty.

This binary test is necessary for two reasons. First, the requirement of widespread criminalization ensures that defendants have a general sense that their conduct is wrong; that is, widespread criminalization essentially requires the crime to be a *malum prohibitum* crime at international law. Whether the challenged conduct violates a treaty-based norm of customary international law can serve as a measure of widespread criminalization. The first prong of the notice test is therefore satisfied if a large number of states are party to a treaty proscribing the relevant conduct.

Second, the interest requirement is necessary to ensure that the federal government does not assert jurisdiction arbitrarily. Whether or not the U.S. government has a general interest in combating the challenged conduct is gauged by whether the United States is a party to the relevant treaty. If the United States is a party to the treaty, then it has declared a general ex ante interest in prosecuting the challenged conduct. An ex ante interest is crucial because justifying the interest ex post would be loosely analogous to an ex post facto law, potentially rendering the prosecution fundamentally unfair. By itself, however, the ex ante interest does not satisfy due process. Rather, the United States must also demonstrate that it has an interest in prosecuting the specific act in question in the given case. This specific interest is meas-

how the due process test would play out in such a situation, however, is beyond the scope of this Comment. Rather, my claim is that pursuant to the *Charming Betsy* canon, courts should apply due process in a way that complies with international law. This is particularly true in the context of narco-terrorism laws because Congress has given no statement that these laws should be construed to violate international law.

[155] Protective jurisdiction exists when the crime "poses a danger of causing an adverse effect on a state's security, integrity, sovereignty or important governmental function." Blakesley, *supra* note 102, at 54.

[156] *See* United States v. Martinez-Hidlago, 993 F.2d 1052, 1056 (3d Cir. 1993).

ured by whether jurisdiction exists under one of the five bases of extraterritorial jurisdiction at international law.[157]

Policy reasons support this conception of due process and the corresponding role of protective jurisdiction. First, justifying jurisdiction under a principle of international law makes diplomatic sense. While there is no due process requirement that extraterritorial jurisdiction coincide with an international jurisdictional principle,[158] a potentially controversial prosecution will likely be less so if grounded in international law. Second, aligning the exercise of protective jurisdiction with existing treaty commitments gives other states notice of when the United States may be likely to assert jurisdiction. In other words, grounding jurisdiction in a preexisting commitment provides advance notice to other states of when the United States might initiate a prosecution. Those states can take necessary action to preserve or assert jurisdiction if they so choose. Thus, due process under the notice test could preclude extraterritorial jurisdiction if the conduct was not widely criminalized or if the United States was not a party to the treaty establishing that widespread criminalization.

Although the notice test grants the government substantial power to conduct extraterritorial prosecutions, doctrines of separation of powers and comity protect against certain assertions of jurisdiction. First, the Executive's exercise of prosecutorial discretion as permitted by the Take Care Clause[159] guards against unwise prosecutions. The Executive is not required to initiate a prosecution every time a federal statute is violated, so the Executive is not obligated to initiate a prosecution under § 960a if the diplomatic costs of the prosecution outweigh the prosecutorial benefits. Indeed, while Congress can authorize certain types of prosecutions, it cannot mandate those prosecutions. Conversely, the Executive might overreach or err—either politically or legally—and initiate a politically unwise or illegal extraterritorial prosecution. However, if Congress believes that the Executive improperly initiates a prosecution (or more likely, routinely initiates improper prosecutions), it can redefine the jurisdictional limits of the statute in question to constrain the Executive. Therefore, while protective jurisdiction allows broad extraterritorial application of federal law, competing Executive and Legislative Branch agendas can limit the application of this law.

In addition to interbranch separation of powers, intrabranch checks also prevent ill-advised prosecutions. Justice Department career attorneys and political appointees have different institutional interests—broadly speaking, the protection of the Justice Department as an institution and advancing the administration's agenda respectively. These diverging interests may also

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[157] *See, e.g.*, United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999). Both cases note that whether jurisdiction exists under one of the five bases is a guide to whether the prosecution satisfies due process.

[158] *See* Bradley, *supra* note 66, at 333.

[159] U.S. CONST. art. II, § 3.

provide an extra layer of decisionmaking accountability by balancing short-term political objectives of political appointees and longer term institutional interests of career employees.[160]

Second, the fact that the United States may assert jurisdiction broadly does not mean that American courts are always the superior forum. If, for example, the United States grounds its jurisdictional claim in the protective or passive personality principle, whereas another country has a claim of territorial or nationality jurisdiction, the United States must cede jurisdiction to that other country because the other country has a stronger basis to prosecute the defendant.[161] Accordingly, principles of international comity and choice of venue mitigate potential international tensions and protect against potential abuses (or unwise uses) of federal power.

III. NARCO-TERRORISM, THE OFFENCES CLAUSE, AND DUE PROCESS

In 2006, as part of the USA PATRIOT Reauthorization and Improvement Act of 2005,[162] Congress enacted 21 U.S.C. § 960a. The substantive prohibition of the statute reads:

> Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism . . . shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section 841(b)(1).[163]

Simply put, the law prohibits selling narcotics and using the funds to finance a terrorist group or terrorist act.[164] Furthermore, the sentencing provision essentially serves as a sentence enhancement when other charges (most likely drug charges) are filed. This Part proceeds in two sections. First, section A examines Congress's power to pass § 960a under the Offences Clause. It concludes by arguing that because drug trafficking, terrorism, and terrorist financing—the three predicate offenses underlying narco-terrorism—violate nonperemptory international norms, Congress can crimi-

[160] *Cf.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317, 2328–31 (2006). Although Professor Katyal makes this argument in the context of the State Department's Foreign Service, his reasoning also applies to federal prosecutors within Main Justice and United States Attorney's Offices because these prosecutors, like Foreign Service Officers, are highly talented and educated individuals with substantial opportunity for career advancement within the bureaucracy.

[161] *See* Christopher L. Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 909 (1987) (noting a hierarchy among the five bases of extraterritorial jurisdiction).

[162] Pub. L. No. 109–177, 120 Stat. 225 (2006).

[163] 21 U.S.C. § 960a(a) (2006) (internal citations omitted). 21 U.S.C. § 841 (2006) prohibits the manufacture, distribution, and possession of controlled substances.

[164] 21 U.S.C. § 960a.

nalize narco-terrorism under the Offences Clause. Section B examines due process concerns that could arise in the context of a hypothetical narco-terrorism prosecution.[165] This hypothetical involves the prosecution of a trafficker of Afghani-grown opium who finances Al-Qaeda or the Taliban, illustrating a likely use of § 960a.

A. *Narco-Terrorism and the Offences Clause*

Section 960a was likely passed for two principle reasons. First, the double penalty provision[166] strengthens the government's ability to prosecute international drug traffickers. For example, in July 2007, Anayibe Rojas Valderrama, a high-level FARC official, was sentenced to nearly seventeen years in prison on cocaine trafficking charges.[167] Including a § 960a charge, however, would have automatically doubled the sentence. Jurisdiction in such a situation is straightforward because the defendant intended to traffic narcotics into the United States. It is consequently easy to imagine how the sentencing provision could serve as a potent tool for prosecutors. Second, the statute is also a tool to combat international terrorism. At the time the statute was enacted, the financing of the Taliban was a major political issue.[168] Substantial evidence suggested that the Taliban was largely financed through the trafficking of Afghani-grown opium and heroin,[169] suggesting that cutting off the funding for the Taliban may have been a driving force behind the passage of § 960a.[170] Thus, § 960a has a twofold purpose of cutting off the funding of terrorist organizations and providing another means to prosecute international drug traffickers.

For this enactment to fall within Congress's Offences Clause power, terrorist financing, acts of terrorism, and drug trafficking must violate a peremptory or nonperemptory norm of international law.[171] Although none of these offenses violates a peremptory, or *jus cogens*, norm,[172] an examination of treaties and state practice can determine whether they rise to the level of

[165] Although one defendant has been tried and convicted under § 960a, *see supra*, note 11 and accompanying text, this prosecution did not raise serious jurisdictional or due process issues because there was evidence that the defendant intended to import narcotics into the United States. *Id.* Therefore, hypothetical situations help to contextualize more problematic jurisdictional and due process issues that might arise under the statute.

[166] 21 U.S.C. § 960a(a) (imposing a "term of imprisonment of not less than twice the minimum punishment under section 841(b)(1)").

[167] Press Release, U.S. Dep't of Justice, High Ranking Member of Colombian FARC Narco-Terrorist Organization Sentenced on U.S. Drug Charges (July 2, 2007), http://www.usdoj.gov/criminal/pr/press_releases/2007/07/07-02-07arvalderrma-sent.pdf [hereinafter FARC Press Release].

[168] *See Hearing*, *supra* note 1.

[169] *Id.*

[170] There is little to no legislative history on the statute, but one may infer a connection between the events in Afghanistan and § 960.

[171] *See supra* Part I.B.

[172] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004).

nonperemptory norms,[173] which Congress can proscribe pursuant to its power to define offenses.[174]

Terrorist financing is prohibited by the International Convention for the Suppression of the Financing of Terrorism (Financing Convention).[175] The Financing Convention was enacted to ensure international cooperation in preventing the financing of terrorism and terrorist activity.[176] The Financing Convention demonstrates that an international consensus exists that: (1) terrorist financing is an international issue of great concern; and (2) states should have the power to prosecute terrorist financing. Although terrorist financing likely does not violate a *jus cogens* norm,[177] the convention shows that there is a wide international consensus that terrorist financing is a serious international problem. Therefore, through its flexibility to define offenses, the Congress has the authority under the Offences Clause to proscribe extraterritorial terrorist financing.[178]

Congress also has the authority to proscribe acts of international terrorism under the Offences Clause,[179] as shown by the several conventions to which the United States is a party that demonstrate the existence of an international consensus against acts of transnational terrorism. The following conventions condemn acts of international terrorism and authorize party states to exercise jurisdiction over such acts: the Convention for the Suppression of Unlawful Seizure of Aircraft;[180] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;[181] the International Convention Against the Taking of Hostages;[182] the Protocol

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[173] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. i (1987).

[174] International drug trafficking, terrorist financing, and terrorism clearly affect U.S. foreign relations, so the Offences Clause should serve as the enumerated power by which Congress could criminalize these acts. Due to the clarity of the international impact of these crimes, the inquiry must focus on whether they violate customary international law (the law of nations).

[175] International Convention for the Supression of the Financing of Terrorism, *concluded* Dec. 9, 1999, S. TREATY DOC. 106-49 (2000), 2178 U.N.T.S. 197 [hereinafter Financing Convention]. There are 150 parties to this convention. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2006 (2007) [hereinafter COUNTRY REPORTS], *available at* http://www.state.gov/s/ct/rls/crt/2006/83238.htm.

[176] Financing Convention, *supra* note 175.

[177] *But see* Colangelo, *supra* note 19, at 176–88 (arguing that U.S. courts can exercise universal jurisdiction to prosecute terrorist financing and terrorism offenses).

[178] *See also* 18 U.S.C. § 2339C (2006) (implementing the Financing Convention).

[179] Acts of solely domestic terrorism or political violence, such as those perpetrated by Sri Lanka's Tamil Tigers, would likely not fall under the Offences Clause power because absent an international element to the offense, it likely does not implicate the "law of nations."

[180] Art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (codified at 18 U.S.C. § 37 (2006)). There are 181 parties to this convention. COUNTRY REPORTS, *supra* note 175.

[181] Art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178 (codified at 18 U.S.C. § 32 (2006)). There are 183 parties to this convention. COUNTRY REPORTS, *supra* note 175.

[182] Art. 1, Dec. 17, 1979, T.I.A.S. No. 11,081, 1136 U.N.T.S. 205 (codified at 18 U.S.C. § 1203 (2006)). There are 153 parties to this convention. COUNTRY REPORTS, *supra* note 175.

for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation;[183] and the International Convention for the Suppression of Terrorist Bombings.[184]

Congress has the authority to prohibit the third predicate offense—international drug trafficking—under its Offences Clause power. Three major conventions promote drug control on the international level: the 1961 Single Convention on Narcotic Drugs;[185] the 1971 Convention on Psychotropic Substances;[186] and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[187] The purpose of the 1988 Convention is "to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs."[188] Party states are further authorized to "take necessary measures" to ensure the Convention's enforcement.[189] The broad acceptance of the 1988 Convention thus suggests a formal international consensus against transnational narcotics trafficking.[190]

Thus, all the requirements are met for Congress to use its Offences Clause power to outlaw narco-terrorism. Congress can criminalize acts so long as the acts are "recognized by at least some members of the interna-

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[183] Art. 2, Feb. 24, 1988, S. Treaty Doc. No. 100-19, 27 I.L.M. 627 (Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) (codified at 18 U.S.C. § 37). There are 156 parties to this protocol. COUNTRY REPORTS, *supra* note 175.

[184] International Convention for the Suppression of Terrorist Bombings, Art. 2, *concluded* Dec. 15, 1997, 116 Stat. 721 (codified at 18 U.S.C. § 2332f (2006)), 2149 U.N.T.S. 256. There are 145 parties to this Convention. COUNTRY REPORTS, *supra* note 175.

[185] 1961 Single Convention on Narcotic Drugs, *concluded* Mar. 30, 1961, 18 U.S.T. 1407 (as amended by the 1972 Protocol, Aug. 8, 1975, 26 U.S.T. 1439), 520 U.N.T.S. 204. There are 183 parties to this convention. United Nations, Office on Drugs and Crime, *Single Convention on Narcotic Drugs: Status of Treaty Adherence* (Mar. 14, 2008), *available at* https://www.unodc.org/documents/treaties/treaty_adherence_convention_1961.pdf.

[186] 1971 Convention on Psychotropic Substances, *concluded* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. There are 183 parties to this convention. United Nations, Office on Drugs and Crime, *Convention on Psychotropic Substances: Status of Treaty Adherence* (Mar. 14, 2008), *available at* http://www.unodc.org/documents/treaties/treaty_adherence_convention_1971.pdf.

[187] 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *concluded* Dec. 20, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 493 [hereinafter 1988 Convention]. There are 183 parties to this convention. United Nations, Office on Drugs and Crime, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: Status of Treaty Adherence* (Mar. 14, 2008), *available at* http://www.unodc.org/documents/treaties/treaty_adherence_convention_1988.pdf.

[188] 1988 Convention, *supra* note 187, art. II(1).

[189] *Id.*

[190] Federal circuit courts have also noted the widespread international condemnation of drug trafficking. Most explicitly, the Third Circuit commented that "the trafficking of narcotics is condemned universally by law-abiding nations." United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993). The Fifth Circuit has made similar findings: "Congress has also found that such activity [drug trafficking on the high seas] 'is a serious *international* problem and is *universally* condemned.'" United States v. Suerte, 291 F.3d 366, 377 (5th Cir. 2002) (quoting the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1902) (emphasis added by the Fifth Circuit).

tional community as being offenses against the law of nations."[191] There is broad international agreement on the need to curb all three offenses. A strong multilateral consensus condemns terrorist financing, transnational terrorism, and international narcotics trafficking, the three suboffenses which comprise the broad crime of narco-terrorism. Moreover, each offense relates to U.S. foreign affairs. Indeed, the United States has a national security interest in promoting the suppression of international terrorism and drug trafficking, and Congress can exercise its Offences Clause power to criminalize conduct related to U.S. foreign affairs.[192] Therefore, Congress was within its Offences Clause power when it enacted 21 U.S.C. § 960a. Although constitutional structural provisions are not a bar to Congress's broad proscription of narco-terrorism, the next section shows that the Fifth Amendment Due Process Clause may prevent the Executive Branch from enforcing the law in certain situations.

B. Section 960a and Fifth Amendment Due Process

The Due Process Clause of the Fifth Amendment does apply to extraterritorial criminal actions.[193] Due process requires that every prosecution be fundamentally fair,[194] which in the extraterritorial context means that a defendant must be on notice that a U.S. court could assert jurisdiction over his conduct.[195] Therefore, the pertinent question is whether a defendant can reasonably anticipate the United States asserting jurisdiction over a narco-terrorism offense. This section analyzes the five bases for jurisdiction provided by § 960a in conjunction with Fifth Amendment due process.

Section 960a grants jurisdiction if: (1) the prohibited drug or terrorist activity violates U.S. law; (2) the offense occurs in or affects interstate or foreign commerce; (3) the offense causes harm or injury to a U.S. citizen or to property owned by an entity organized under U.S. law; (4) the offense occurs in whole or in part outside the United States and the defendant is a U.S. citizen; or (5) if the offender is brought in or found in the United States after the proscribed conduct occurs.[196]

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[191] United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000).

[192] United States v. Arjona, 120 U.S. 479, 483–88 (1887); *see also* Kent, *supra* note 21, at 863–64.

[193] *See supra* Part II.A.

[194] *See supra* Part II.A.

[195] *See supra* Part II.B.

[196] 21 U.S.C. § 960a(b) (2006). The exact text of the statute reads:

> There is jurisdiction over an offense under this section if—(1) the prohibited drug activity or terrorist offense is in violation of the criminal laws of the United States; (2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce; (3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property is outside the United States; (4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States (including the high seas), and a

The first jurisdictional prong requires that the conduct actually violate a U.S. criminal law. So, unless that law runs afoul of the Due Process Clause, the prosecution under § 960a will comport with due process. The second, third, and fourth bases of jurisdiction are also fairly straightforward from a due process standpoint because they all require some sort of territorial nexus. The remainder of this Comment examines the fifth jurisdictional prong, which poses more significant constitutional questions.

This final jurisdictional hook is triggered if "after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States."[197] Before any prosecution may proceed, however, the government must establish both adjudicative and prescriptive jurisdiction. Adjudicative jurisdiction is the authority to subject an individual to the judicial process and generally refers to the exercise of personal jurisdiction.[198] Prescriptive jurisdiction, on the other hand, is the state's ability to enforce laws by applying those laws to persons or entities.[199] The first four jurisdictional prongs relate to prescriptive jurisdiction, and adjudicative jurisdiction is presumed given that criminal trials in absentia are unconstitutional.[200] But the fifth prong, on its face, would permit a prosecution under § 960a regardless of where the conduct occurred so long as the defendant is found in the United States. And, pursuant to the *Ker-Frisbie* doctrine, the federal government can constitutionally gain personal jurisdiction over a criminal defendant by engaging in extraordinary rendition—kidnapping that defendant and forcibly bringing him or her to the United States for trial.[201] In short, then, under this fifth prong, the United States could potentially prosecute anyone who engages in conduct fulfilling the elements of § 960a(a) so long as that person eventually winds up on U.S. soil.

A prosecution relying on such weak jurisdictional footing poses obvious due process problems. Because only one § 960a prosecution has taken place, it is helpful to analyze these due process concerns in the context of

> perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or (5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.

Id.

[197] 21 U.S.C. § 960a(b)(5).

[198] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (1987); *see also* Colangelo, *supra* note 19, at 126.

[199] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987); *see also* Colangelo, *supra* note 19, at 126.

[200] *See* Hopt v. Utah, 110 U.S. 574 (1884); FED. R. CRIM. P. 43.

[201] The *Ker-Frisbie* doctrine permits the federal government to exercise jurisdiction over a defendant within the United States, regardless of how the defendant arrived within U.S. territory. *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952) (citing Ker v. Illinois, 119 U.S. 436 (1886)); *see also* United States v. Shi, No. 06-10389, slip op. at 4383 (9th Cir. Apr. 24, 2008) (upholding a prosecution under 18 U.S.C. § 2280(b)(1)(C), which permits jurisdiction if the defendant is "later found" in the United States).

a hypothetical situation involving the prosecution of a foreign trafficker of Afghani-grown opium who finances the Taliban or Al-Qaeda. As a threshold matter, because the fifth jurisdictional prong does not establish prescriptive jurisdiction, prescriptive jurisdiction must derive from another recognized jurisdictional principle—in this case, protective jurisdiction.[202]

In order for the prosecution to be fundamentally fair—the basic tenet of due process—the trafficker of Afghani-grown opium must reasonably anticipate being tried in an American court for his narco-terrorism offense.[203] Assume that our potential defendant is not an American citizen or resident alien and sells his opium in London to a buyer who is not an American citizen or resident alien. The drug trafficker then uses the proceeds from the opium sale to finance an Al-Qaeda or Taliban bombing attack at the Kabul International Airport. This conduct satisfies the requirements of § 960a(a). Next, assume that the defendant is either arrested and extradited to the United States, or that the United States captures the defendant abroad and renders him onto U.S. soil. At trial, the due process analysis will hinge on whether the defendant had notice of the potential to be prosecuted in a U.S. court.[204]

In this case, the assertion of protective jurisdiction satisfies due process under the notice test because the United States has identifiable national security interests in combating terrorist financing generally and in cutting off Al-Qaeda financing specifically. Although this particular hypothetical attack did not directly target American interests, the United States—and numerous other nations—openly declared their national security interest in cutting off terrorist financing by signing the Financing Convention,[205] which permits party states to exercise broad jurisdiction over a variety of terrorist offenses.[206] In addition, prior Al-Qaeda attacks both on American soil and against U.S. interests abroad show the clear national security interest in eliminating Al-Qaeda financing.

While the wide jurisdiction of § 960a will often comport with due process under the protective principle, the United States may not be the preferred forum for the prosecution. In this example, either Afghanistan or the United Kingdom would have superior jurisdictional claims because both forums have a territorial nexus to the crime—the location of the drug transaction and the location of the bombing. The fact that the United States is not

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[202] Reading a requirement of prescriptive jurisdiction into § 960a(b)(5) is necessary to avoid a due process violation, making such a requirement implicit in the statute under the canon of constitutional avoidance. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (holding that statutes will not be construed in a manner that raises serious constitutional questions).

[203] *See supra* Part II.A.

[204] I assume that bombing an airport does not necessitate the exercise of universal jurisdiction.

[205] Financing Convention, *supra* note 175. Significantly, the United States is also a party to The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation. *See supra* note 183.

[206] Financing Convention, *supra* note 175, at art. 2(1)(a).

the preferred forum, however, does not necessarily preclude any assertion of its prescriptive jurisdiction. Indeed, if the two countries with primary jurisdiction both suffered problems of corruption and felt that their legal systems could not carry out a prosecution, they could cede jurisdiction to the United States, and the prosecution could proceed under § 960a. As such, this statute provides a safety net whereby the United States can use its criminal law to protect its security interests abroad when other nations are unwilling or unable to prosecute. Furthermore, the statute also allows the United States to use criminal prosecutions to protect the security of other nations if those nations choose not to prosecute a particular crime. In short, the broad jurisdictional grant of § 960a provides a safety net by which the United States can protect its security interests and the security interests of other states.

CONCLUSION

The new narco-terrorism statute raises important constitutional issues that warrant further scholarly exploration. In a world of increasingly globalized crime, the constitutional rights of foreign nationals, the extraterritorial jurisdiction of federal courts, and Congress's power to legislate extraterritorially will become central questions within our constitutional framework. These issues, taken together, raise the broader question of the proper balance between individual liberties and national security interests in a post-9/11 world.

This Comment argues that the government's power to proscribe narcoterrorism is broad. But while the Constitution should act as a shield for national interests rather than a sword in extraterritorial prosecutions,[207] the government's power is not—and cannot be—exercised without constraint. Although Congress's Offences Clause power is broad, it is not limitless. To check this broad power, the Executive is under no obligation to initiate § 960a prosecutions, particularly if a prosecution would pose thorny political and diplomatic questions.

The Fifth Amendment's Due Process Clause also limits the extraterritorial reach of federal law. Although this Comment argues that due process does not require a territorial nexus, measuring due process pursuant to internationally accepted bases of jurisdiction in extraterritorial prosecutions is advantageous for policy reasons. Exercising jurisdiction in accordance with international law is politically beneficial because it demonstrates the United States' compliance with accepted norms and puts other countries on notice as to when the United States will likely assert jurisdiction. Moreover, international law, through protective jurisdiction, provides a tool by which federal courts can exercise jurisdiction over extraterritorial violations of nonperemptory norms. As this Comment suggests, this jurisdiction is a safety net that permits the U.S. government to protect its own security in-

[207] *See* Brilmayer & Norchi, *supra* note 19, at 1262.

terests, along with those of allied governments, through the criminal law. In this way, § 960a can become a powerful prosecutorial tool in the fight against international crime.