

WITNESS FOR THE DEFENSE: THE COMPULSORY  
PROCESS CLAUSE AS A LIMIT ON  
EXTRATERRITORIAL CRIMINAL JURISDICTION

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## I. INTRODUCTION

In the winter of 1769, the British Parliament responded to unrest in the colonies with a stern rebuke to the inhabitants of Massachusetts Bay: their “daring insults offered to his Majesty’s authority” smacked of treason and those thought responsible were to be brought to England for trial.<sup>1</sup>

When the news reached American shores, the protest was swift. The Virginia House of Burgesses was in session and promptly resolved that “sending . . . Persons, to Places beyond the Sea, to be tried, is highly derogatory of the Rights of *British* subjects; as thereby the . . . Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.”<sup>2</sup> The resolution passed unanimously and was soon adopted in the other colonies.<sup>3</sup>

The Framers were mindful of this injustice when they drafted the Sixth Amendment. Justice Story reports in his *Commentaries on the Constitution* that a motivating concern behind the Sixth Amendment was that a “trial in a distant State or territory might subject the party . . . to the inability of procuring the proper witnesses to establish his innocence.”<sup>4</sup> Though Story quickly assured the reader that “[t]here is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner,”<sup>5</sup> recent developments suggest this confidence was misplaced.

Congress is increasingly criminalizing activities occurring entirely beyond our borders without sufficient attention to the Sixth Amendment promise that “in all criminal prosecutions, the accused shall” have “compulsory process for obtaining witnesses in his favor.”<sup>6</sup> It is not clear that

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1. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63 (1944).

2. *Id.* at 64 (internal quotation marks omitted).

3. EDWARD CHANNING, A STUDENT’S HISTORY OF THE UNITED STATES 128 (3d. ed. 1917).

4. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 658 (1987).

5. *Id.*

6. U.S. CONST. amend. VI.

such laws are constitutional given that the witnesses to the alleged crime are virtually guaranteed to be abroad, beyond the reach of U.S. courts' criminal process.

Without a great deal of analysis, the lower federal courts have generally held that the right to compulsory process extends only so far as the process power of the court and consequently no constitutional violation occurs simply by virtue of the fact that a defense witness is beyond that power.<sup>7</sup>

But the principal case cited for this proposition considered a very different context: *United States v. Greco*<sup>8</sup> involved a prosecution for trafficking in stolen property. Much of the activity occurred in the United States, but the items were initially stolen in Canada. At trial, the defendant made no request for a particular Canadian witness and raised the issue generally and for the first time only on appeal.<sup>9</sup>

There is a great difference between a prosecution under a statute generally applied to activity inside the U.S., where one element of the criminal enterprise happens to occur outside the United States, and a prosecution under a criminal statute having the purpose and intent of punishing conduct that occurred wholly beyond our borders. An almost certain consequence of such an extraterritorial criminal statute is that key defense witnesses will lie beyond the reach of American court process. Where this jurisdictional fact is inevitable, rather than incidental, it should not serve to excuse the government's Sixth Amendment obligations.

In an earlier period, the hesitancy of legislatures and courts to exercise extraterritorial personal and subject matter jurisdiction forestalled this problem. Since World War II, that reluctance has eroded particularly with respect to universal jurisdiction for narcotics, terrorism, and human-rights related crimes. Thus far, courts have declared the Fifth Amendment the primary limit on Congress's power in this context.<sup>10</sup> However, the malleable standards of due

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7. Email from Charles Doyle, Senior Specialist, Am. Law Div., Cong. Research Serv., to author (July 12, 2008) (on file with author).

8. 298 F.2d 247, 251 (2d Cir. 1962).

9. *Id.* at 251.

10. See e.g. Brian A. Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. U. L. REV. 1929, 1940 (2009).

process have not checked the legislature's increasingly aggressive assertions of extraterritorial criminal jurisdiction, usually because the targeted activity is found to have some effect on the U.S. or to be universally condemned.

Part II of this Article examines the early history of the Compulsory Process Clause. Part III distinguishes case law such as *Greco* limiting the right's application and scope. Part IV surveys the increasing number of federal laws which criminalize extraterritorial conduct and details the failure of due process analysis to halt this expansion. Part V anticipates the argument that the contemporaneous drafting of the Sixth Amendment and the Piracies and Felonies Clause indicates the Framers did not believe the requirements of compulsory process precluded assertions of extraterritorial criminal jurisdiction. Part V details how Congress and the Executive have magnified the inequity through Mutual Legal Assistance Treaties (MLATs), which aid prosecutors but not defendants in gathering evidence abroad.

## II. HISTORICAL BACKGROUND OF THE COMPULSORY PROCESS CLAUSE

Though it seems axiomatic that the criminal defendant should have access and opportunity to refute the government's case, it was not always so.<sup>11</sup> As late as the sixteenth century, English defendants were not permitted to call witnesses, even if they were present in the courtroom and prepared to testify.<sup>12</sup>

A prominent example of the rule was Sir Nicholas Throckmorton's 1554 trial at Guildhall for alleged involvement in the Wyatt Rebellion against Queen Mary. The court refused to permit Throckmorton to call a Mr. Fitzwilliams who was in the audience and would have vouched for Throckmorton's innocence. According to the *State Trials* report, he protested, "[W]hy be ye not so well

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11. The main source for the following historical survey is Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 83 (1974).

12. *Id.* at 83.

contented to hear truth for me, as untruth against me?”<sup>13</sup> Throckmorton’s prosecutors were so relentless that the jury was imprisoned and fined for failing to return a guilty verdict.<sup>14</sup>

The reason for the rule is unknown. Some speculate it was deemed unseemly to permit witnesses to offer sworn testimony against the Crown; while to admit unsworn testimony would be pointless because not carrying the penalty of perjury, it would not be believed.<sup>15</sup> Others suggest the rule was a vestige of an earlier time when “the jurors themselves were considered the sole ‘witnesses’ to the facts, and simply failed to adjust to reflect the new role of the jury as a trier of evidence presented by others.”<sup>16</sup> This latter theory of evolutionary lag is supported by the fact that Parliament soon relaxed the rule by acts of 1589 and 1606, and the rule was all but eliminated by the middle of the seventeenth century.<sup>17</sup>

This development was an important but incomplete victory for the accused. Defense witnesses might no longer be barred, but common law courts still declined to exercise their coercive power to compel witnesses’ appearance.<sup>18</sup> Common law courts had perfected their subpoena power by 1562 and even before that had authority to arrest witnesses and bind them over for trial<sup>19</sup>—a power federal courts still enjoy in the form of material witness warrants.<sup>20</sup> Nevertheless, the *State Trials* reports offer stark examples of courts refusing to exercise these powers to produce defense witnesses.<sup>21</sup>

Notable was the 1678 trial of William Ireland, who was charged as a conspirator in the pretended “Popish Plot” to assassinate Charles II. Throughout his trial at Old Bailey,

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13. *Id.* at 83 n.40 (quoting *Trial of Nicholas Throckmorton, in 1 COMPLETE COLLECTION OF STATE TRIALS 884–85* (T. Howell ed., 1816) (internal quotation marks omitted)).

14. *Id.*

15. *Id.* at 83.

16. *Id.* at 84.

17. *Id.*

18. Westen, *supra* note 11, at 85.

19. *Id.* at 84–85.

20. 18 U.S.C. § 3144 (2006) (providing that “a judicial officer may order the arrest” of a person whose “testimony . . . is material in a criminal proceeding”).

21. Westen, *supra* note 11, at 84–85.

Ireland bitterly complained that even though “a hundred or more” could confirm his alibi, he “had no time allowed [him] to bring in . . . witnesses, so that [he] could have none, but only those that came in by chance.”<sup>22</sup> Witnesses did not appear voluntarily, and the court declined to summon them. Ireland was then found guilty and executed. It was subsequently discovered that not only was Ireland innocent and his alibi authentic but the very existence of an assassination plot was a fabrication.<sup>23</sup>

These trials arose out of one of the most tumultuous periods in British history and taught English jurists the wisdom of the Golden Rule.<sup>24</sup> During the seventeenth century, one faction after another rose to power and persecuted its enemies only to be overthrown and subjected to the very abuses it had perpetrated on its predecessors.<sup>25</sup> It began with the Royalists who supported Charles I. They fell to Cromwell and the Puritans, who were displaced in turn by the Restored Stuarts.<sup>26</sup> The Stuarts lasted until 1688 when William of Orange overthrew the Catholic James II.<sup>27</sup> Thus, by the time of the Glorious Revolution, “Englishmen of every class and belief had experienced injustice in the criminal courts . . . thus [all were] eager [for] reform.”<sup>28</sup>

Accordingly, in 1695, Parliament relented and allowed defendants charged with treason the same access to court process for “compel[ling] their witnesses to appear for them . . . as is usually granted to compel witnesses to appear against them.”<sup>29</sup> By the time of the American Revolution, the rule had expanded to provide compulsory process in felony cases as well. Blackstone’s authoritative *Commentaries on the Laws of England*, published in 1765, averred that “in all cases of treason and felony . . . [the defendant] shall have the

22. Thomas Pickering & John Grove, *Trial of William Ireland*, in COBBET’S COMPLETE COLLECTION OF STATE TRIALS 79, 137, 142 (T. Howell ed., 1810).

23. Westen, *supra* note 11, at 85 n.51.

24. “[T]hat law of all men *quod tibi fieri non vis, alteri ne feceris* [What you do not want done to you, do not do to another].” THOMAS HOBBS, *LEVIATHAN* 114 (BiblioBazaar 2008) (1651).

25. Westen, *supra* note 11, at 88.

26. *Id.*

27. *Id.*

28. *Id.*

29. Treason Act. 1695, 7 & 8 Will. 3, c. 3, §§ 1, 7 (1695) (Eng.); *see also* Westen, *supra* note 11, at 90 n.73.

same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him.”<sup>30</sup>

This struggle for compulsory process was familiar both to the framers and the general public thanks to histories and inexpensive pamphlets available throughout the colonies.<sup>31</sup> Particularly significant was the ten volume 1765 edition of Salmon’s *State Trials* which detailed the great treason prosecutions, including those of Nicholas Throckmorton and William Ireland.<sup>32</sup> Many copies of the treatise were privately owned, and it was available at public libraries across America, including the one in Philadelphia used by the Framers.<sup>33</sup>

But collective memory was not their only source. The colonists had experienced associated injustices firsthand. In 1769, in response to unrest in the colonies, Parliament debated a proposal authorizing Americans charged with treason to be transferred to England for trial.<sup>34</sup> The Virginia House of Burgesses howled in protest. They immediately passed a series of resolutions condemning it as “highly derogatory of the Rights of *British* subjects; as thereby the . . . Liberty of summoning and producing Witnesses on such Trial, will be taken away from the Party accused.”<sup>35</sup> They also prepared a petition to King George, dated May 17, 1769, beseeching him to disapprove of the “unconstitutional and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in . . . a distant Land, . . . where no Witness can be found to testify his Innocence.”<sup>36</sup> Peyton Randolph, speaker of the House of Burgesses, circulated copies of the resolutions to the assemblies of the other colonies who “responded heartily” in

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30. 4 WILLIAM BLACKSTONE, COMMENTARIES \*354; *see also* Westen, *supra* note 11, at 90.

31. Westen, *supra* note 11, at 94.

32. *Id.*

33. *Id.*

34. Blume, *supra* note 1, at 63–64.

35. JOURNALS OF THE HOUSE OF BURGESSES, 1766–1769, at 214 (John P. Kennedy ed., 1906); *see also* Blume, *supra* note 1, at 64.

36. JOURNALS OF THE HOUSE OF BURGESSES, *supra* note 35, at 215–16; *see also* Blume, *supra* note 1, at 64–65.

approving them.<sup>37</sup> The wound festered until the American Revolution when the Declaration of Independence enumerated among its grievances against the King that he assented to legislation “for transporting us beyond Seas to be tried for pretended offences.”<sup>38</sup>

The newly independent colonies were determined not to perpetuate the abuse. Between 1776 and 1783, each of the Thirteen Colonies declared independence and established its own government. Nine of them specifically provided in their founding documents for the defendant’s right to produce witnesses in his favor.<sup>39</sup> Maryland’s explicitly guaranteed the defendant the right to “have process for his witnesses.”<sup>40</sup>

Some ratifying states insisted that the federal constitution contain similar safeguards. Four proposed amendments enshrining the defendant’s right to present witnesses. Virginia, Pennsylvania, and North Carolina, echoing language from various state constitutions, urged the defendant be guaranteed the right “to call for evidence . . . in his favor.”<sup>41</sup> Although New York was not one of the nine with analogous state law protections, it proposed more aggressive language promising the defendant “the means of producing his [w]itnesses.”<sup>42</sup> Thus, the states were split on whether the amendment should focus on compelling the appearance of defense witnesses or merely permitting them to testify.

The decision fell to James Madison who drafted much of the Bill of Rights.<sup>43</sup> With the exception of the Compulsory Process Clause, his draft for the Sixth Amendment was almost identical to an amendment Virginia had suggested in ratifying the Constitution.<sup>44</sup> However, on the right to defense witnesses, Madison deviated from Virginia’s proposal and focused instead on the subpoena power that

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37. J. THOMAS SCHARF, HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY 116 (1879).

38. THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776).

39. Westen, *supra* note 11, at 94–95.

40. MD. CONST., DEC OF RTS. Art. XIX (1776); *see also* Westen, *supra* note 11, at 95.

41. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 248 (1971); *see also* Westen, *supra* note 11, at 96.

42. Schwartz, *supra* note 41; *see also* Westen, *supra* note 11, at 96.

43. Westen, *supra* note 11, at 96.

44. *Id.* at 97.

New York had.<sup>45</sup> In a unique formulation, he guaranteed the defendant the “right . . . to have a compulsory process for obtaining witnesses in his favor.”<sup>46</sup>

On June 8, 1789, the proposed Bill of Rights was introduced in the House and referred to committee.<sup>47</sup> In the two and a half years of recorded debate that followed before the requisite number of states ratified it, the Compulsory Process Clause surfaced only once.<sup>48</sup> Representative Burke of South Carolina proposed to guarantee a continuance of the trial if the subpoenas for defense witnesses were not served.<sup>49</sup> The amendment was rejected as superfluous because the courts could be relied upon to require a continuance where necessary to preserve the substantive right as drafted.<sup>50</sup> Ultimately, the only change to Madison’s original draft was that the article “a” was removed so that the accused enjoyed a right to “have compulsory process” rather than to “have *a* compulsory process.”<sup>51</sup>

Scholars debate what significance to attach to Madison’s precise language. Professor Peter Westen, who undertook an exhaustive study of the Compulsory Process Clause’s history, goes to some length to demonstrate that Madison had not “intended to confine the defendant to the subpoena power” but rather more broadly to provide a right to “present evidence on an equal basis with the prosecution.”<sup>52</sup> For purposes of this Article, it suffices to observe that even according to the most parsimonious reading of the Clause, the purpose and intent of the Framers was to guarantee the defendant process power to compel the attendance of favorable witnesses.

### III. PRECEDENT REGARDING ITS APPLICATION ABROAD

At the outset, it is worth noting that the Constitution’s venue provisions appear to protect the same interests as the Compulsory Process Clause. Indeed, Justice Story, in

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45. *Id.*

46. *Id.* at 98 n.115.

47. *Id.*

48. *Id.*

49. *Id.* at 98.

50. *Id.*

51. *Id.* at 98 n.115.

52. *Id.* at 99.

*Commentaries on the Constitution*, explains the “object” of the Sixth Amendment’s Venue Clause is “to secure the party accused from being dragged to a trial in some distant state, away from . . . witnesses, . . . and thus to be subjected . . . perhaps even to the inability of procuring the proper witnesses to establish his innocence.”<sup>53</sup> The critical difference is that, on its face, the Compulsory Process Clause admits of no exceptions whereas the Venue Clauses do.

The Sixth Amendment’s Venue Clause guarantees defendants in “all criminal prosecutions” the right to an impartial jury trial in “the State and district wherein the crime shall have been committed,” but it qualifies that with “which district shall have been previously ascertained by law.”<sup>54</sup> Similarly, Article III states, “The Trial of all Crimes, . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”<sup>55</sup> Congress’s power to define the district means that the Venue Clauses are no bar to proscribing criminal activity occurring wholly extraterritorially provided Congress also sets venue for such crimes inside the United States. Congress did exactly that with 18 U.S.C. § 3238, which sets venue for extraterritorial offenses in the district where the offender is “arrested or . . . first brought” or failing that in the District of Columbia.<sup>56</sup> This statute resolves the venue issues but does nothing to clear the constitutional hurdle of compulsory process for defendants charged with extraterritorial crimes. That was left to the courts.

The principle case courts cite to brush aside compulsory process concerns in the context of extraterritorial crimes is *United States v. Greco*. The defendant there was charged with receiving stolen Canadian securities and transporting them to a conspirator in New York. At trial, Greco made no application to bring witnesses from Canada and no motion to take testimony abroad. Rather on appeal, he argued his compulsory process rights were violated because an

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53. STORY, *supra* note 4, at 658.

54. U.S. CONST. amend. VI.

55. *Id.* art. III, § 2, cl. 3.

56. 18 U.S.C. § 3238 (2006).

“essential element of the crimes charged was the theft which occurred in Canada and he did not have an absolute right to compel the attendance of Canadian witnesses on this issue.”<sup>57</sup> The court summarily rejected his argument on the grounds that “the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it.”<sup>58</sup>

The appellate court cited no authority for this proposition relying instead on its own reasoning that were it not so “any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor.”<sup>59</sup> This argument is persuasive provided a substantive element of the crime occurred inside the United States. But where the proscribed conduct occurs entirely outside the United States, protecting compulsory process rights means only that the prosecution cannot proceed in the U.S., which has no substantive nexus to the crime. This is hardly an absurd result. In fact, in that context, a contrary rule denying applicability of compulsory process has the perverse consequence of permitting the government to shed its Sixth Amendment obligations precisely when its interest in the case is weakest.

It is also worth noting that the *Greco* analysis was extremely brief. The entire opinion was only five pages of which just seven sentences were devoted to the compulsory process claim. Moreover, three of those sentences focused on the defendant’s failure to name at trial “what witnesses, if any, he would have liked to bring to this country.”<sup>60</sup> Nor did the court seem entirely confident in its pronouncement on the reach of compulsory process since it did not conclude with it, falling back instead on its earlier suggestion of forfeiture: “The fact that appellant could not compel the attendance of an unnamed witness for whom he never asked did not deprive him of any constitutional right.”<sup>61</sup>

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57. *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Subsequent courts have relied on the *Greco* holding without addressing the influence of these contextual factors. A prominent example is the widely publicized prosecution of Zacarias Moussaoui, the so-called twentieth hijacker. He was charged under a series of terrorism related statutes for which the government sought the death penalty. In pretrial motions, Moussaoui sought to compel the Bush Administration to produce certain enemy combatants in military custody for deposition. The *New York Times* editorial page echoed the call, accusing the government of “attempting to trample” Moussaoui’s compulsory process rights by denying him the opportunity to question Ramzi bin al-Shibh, who figured “prominently in Mr. Moussaoui’s indictment, and . . . could provide evidence that could assist . . . in his defense.”<sup>62</sup> The district court agreed and the government appealed.<sup>63</sup>

The Fourth Circuit began its analysis by citing *Greco* for the proposition that “[t]he compulsory process right is circumscribed . . . by the ability of the district court to obtain the presence of a witness through service of process.”<sup>64</sup> Since the “process power of the district court does not extend to foreign nationals abroad,” were the witnesses not in U.S. custody, the court would have agreed with the Bush Administration that “Moussaoui clearly would have no claim under the Sixth Amendment.”<sup>65</sup> “[I]t is well established,” the court continued, “that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries.”<sup>66</sup> Nevertheless, this was not the controlling principle here because the witnesses were not beyond the process power of the district court, which could have issued a testimonial writ to their military custodian.<sup>67</sup>

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62. Editorial, *The Trial of Zacarias Moussaoui*, N.Y. TIMES, July 28, 2003, at A16.

63. *United States v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004).

64. *Id.* at 463.

65. *Id.* at 463–64.

66. *Id.* at 464 (quoting *United States v. Zabaneh*, 837 F.2d 1249, 1259–60 (5th Cir. 1988)).

67. *Id.*

Notice, the court immediately conceded the general validity of the *Greco* holding and turned its attention to the narrow question of whether witnesses in military custody are beyond the reach of a district court's process. A more thorough analysis might have acknowledged that in contrast to the unsympathetic defendant in *Greco*, who raised an issue generally and for the first time on appeal, Moussaoui was making a pretrial demand for specific witnesses likely possessing relevant information.

In *U.S. v. Zabaneh*,<sup>68</sup> a South American grower faced drug importation charges stemming from a "single shipment of marihuana from the country of Belize to Texas."<sup>69</sup> On appeal, the defendant argued that he was "denied his Sixth Amendment right to compulsory process" concerning witnesses he sought in Belize.<sup>70</sup> After noting the question "is one of first impression in the Fifth Circuit," the court disposed of the claim in a single sentence with a citation to *Greco*.<sup>71</sup>

Again, the court moved too fast. Unlike the defendant in *Greco*, the penal statute under which Zabaneh was convicted explicitly "provided for extra-territorial application."<sup>72</sup> In *Greco*, the defendant had delivered the stolen Canadian bonds to an accomplice in New York and was prosecuted under two statutes, one of which prohibited receiving stolen goods "that have crossed a United States boundary."<sup>73</sup> The other prohibited transporting such goods in "interstate or foreign commerce" meaning commerce between a foreign country and the United States.<sup>74</sup> By contrast, Zabaneh's charges included a violation of then 21 U.S.C. § 955a, which stated specifically that it "is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States."<sup>75</sup>

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68. 837 F.2d 1249 (5th Cir. 1988).

69. *Id.* at 1251.

70. *Id.* at 1259.

71. *Id.* at 1259–60.

72. *Id.* at 1259.

73. *United States v. Greco*, 298 F.2d 247, 248 (2d Cir. 1962) (citing 18 U.S.C. § 2314 (1961) (current version at 18 U.S.C. § 2314 (2006))).

74. *Id.* (citing 18 U.S.C. § 371 (1948) (current version at 18 U.S.C. § 371 (2006))).

75. Pub. L. No. 96-350, 94 Stat. 1159, 1160 (codified as amended at 46 U.S.C. § 70503(b) (2006)).

There is a great difference between a prosecution under a statute generally applied to activity inside the U.S., where one element of the criminal enterprise happens to occur outside the United States, and a prosecution under a criminal statute having the purpose and intent of punishing conduct that occurred wholly beyond our borders. An almost certain consequence of such an extraterritorial criminal statute is that key defense witnesses will lie beyond the reach of American court process. Where this jurisdictional fact is inevitable, rather than incidental, it is tantamount to the prosecution deliberately sending a witness beyond the jurisdictional reach of a court's compulsory process, which the case law clearly prohibits.

The *Zabaneh* court failed to explore this distinction even though a case it cited alongside *Greco* would have provided the perfect platform. The court in that case, *U.S. v. Wolfson*,<sup>76</sup> acknowledged that no Sixth Amendment violation results from the "mere fact" that a foreign witness lies beyond court process. "However," it continued, "it is clear that the Sixth Amendment's right to compulsory process is violated by the prosecution deliberately sending a witness beyond the jurisdictional reach of a court's compulsory process."<sup>77</sup> *Zabaneh* only cited *Wolfson* for the first proposition, for which it is not even an independent source of authority, since it too cited *Greco*.<sup>78</sup> The *Zabaneh* court never considered where on the spectrum between incidental and deliberate the inability to procure defense witnesses lies when it is an inevitable result of extraterritorial criminal legislation.

That said, the conduct at issue in *Zabaneh* did not occur wholly beyond U.S. borders. The smuggler's aircraft landed in Texas laden with drugs.<sup>79</sup> Most of the counts on which *Zabaneh* was convicted relied on statutes specifically requiring an intent to import narcotics into U.S. territory or waters.<sup>80</sup> Thus, even though one of the statutes on its face would allow extraterritorial application, even without any

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76. 322 F. Supp. 798, 819 (D. Del. 1971).

77. *Id.*

78. *United States v. Zabaneh*, 837 F.2d 1249, 1259–60 (5th Cir. 1988).

79. *Id.* at 1251.

80. *Id.* at 1252.

substantive nexus to the United States, as applied, nexus was there.

Such is not the case with respect to the latest wave of extraterritorial criminal legislation targeting narcotics-, terrorism-, and human-rights-related crimes, even when they have no connection to the United States.

#### IV. INCREASED EXTRATERRITORIAL CRIMINAL LEGISLATION AND THE FAILURE OF DUE PROCESS

The last half century has brought a “modern boom of far-reaching legislation extending ambitiously our laws to conduct occurring literally around the globe.”<sup>81</sup> Courts consider the Fifth Amendment to be the primary limit on Congress’s power in this context, but the malleable standards of due process have not checked this expansion, usually because the targeted activity is found to have some effect on the U.S. or to be universally condemned.<sup>82</sup>

In this changing environment, the Compulsory Process Clause may prove a better shelter for defendants than the traditional refuge of due process. While the requirements of due process can vary with the status and location of the defendant, the right to compulsory process applies in “all” criminal prosecutions and confers a right on “the accused” without discriminating between citizen, alien, or enemy combatant.<sup>83</sup> In addition, the weaker the proscribed conduct’s American nexus, the less persuasive the *Greco* rationale becomes.

Whatever its limits, the Constitution undeniably confers some authority on Congress to proscribe extraterritorial misconduct.<sup>84</sup> For example, Article 1, Section 8 gives it the power to “define and punish Piracies and Felonies

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81. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 159 (2007).

82. *Id.* at 163.

83. U.S. CONST. amend. VI.

84. “It is beyond doubt that, as a general proposition, Congress has the authority to ‘enforce its laws beyond the territorial boundaries of the United States.’” *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

committed on the high Seas, and Offences against the Law of Nations.”<sup>85</sup>

The Eleventh Circuit relied on the Piracies and Felonies Clause to uphold the Maritime Drug Law Enforcement Act (MDLEA), which “was specifically enacted to punish drug trafficking on the high seas.”<sup>86</sup> The MDLEA prohibits manufacture, distribution, or possession with intent to do so aboard any ship subject to the jurisdiction of the United States or within its “customs waters.”<sup>87</sup> Those terms are very broadly defined. A vessel without nationality found anywhere in the world is deemed subject to U.S. jurisdiction, and vessels under foreign flags in international waters are nevertheless deemed within U.S. customs waters if any treaty allows U.S. authorities to board them.<sup>88</sup> In the particular case, the defendant was found in international waters off the coast of Ecuador.<sup>89</sup>

Congress has also resorted to the Foreign Commerce Clause as well as its enumerated and implied powers over foreign and military affairs including its authority to make “Rules concerning Captures on Land and Water” and for “Regulation of the land and naval Forces.”<sup>90</sup> In 2006, the PROTECT Act, which made it a crime to travel to a foreign country and engage in a commercial sex act with a minor, was upheld on Foreign Commerce Clause grounds.<sup>91</sup>

Courts’ due process analysis of these and other extraterritorial criminal statutes has taken one of two forms.<sup>92</sup> The Ninth and Second Circuits regard the central

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85. U.S. CONST. art. I, § 8, cl. 10; *see* discussion of the Piracies and Felonies Clause *infra* Part V. “The high seas lie seaward of the territorial sea,” defined as the three mile belt of sea measured from the low water mark.” *United States v. Rubies*, 612 F.2d 397, 402 n.2 (9th Cir. 1979). However, “in 1996, Congress extended the ‘territorial sea’ for purposes of federal criminal jurisdiction to . . . twelve miles” consistent with a 1988 Presidential proclamation. Robert D. Peltz & Lawrence W. Kaye, *The Long Reach of U.S. Law Over Crimes Occurring on the High Seas*, 20 U.S.F. MAR. L.J. 199, 213 (2008).

86. *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006).

87. 46 U.S.C. §§ 70501–07 (2006).

88. *Id.*

89. *Estupinan*, 453 F.3d at 1337.

90. U.S. CONST. art. I, § 8, cl. 3, cl. 11, cl. 14; *see also* CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1–3 (2010).

91. *United States v. Clark*, 435 F.3d 1100, 1116–17 (9th Cir. 2006).

92. DOYLE, *supra* note 90, at 4–6; Colangelo, *supra* note 81, at 162–63.

question as one of nexus. This issue arose in *U.S. v. Yousef*.<sup>93</sup> The defendant was convicted on various charges including the bombing of a Philippine Airlines jet in route from Manila to Japan, which was said to be a practice run in a larger conspiracy to blow up U.S. airliners in Southeast Asia.<sup>94</sup> Yousef was a noncitizen who had been forcibly transferred to the United States from Pakistan to face separate charges stemming from the first World Trade Center bombing.<sup>95</sup> On appeal, Yousef and his codefendants argued that their “prosecution in the United States was fundamentally unfair because of their difficulty in obtaining evidence and assistance from overseas.”<sup>96</sup> After noting that it was a question of first impression in the Second Circuit, the court concurred with the Ninth Circuit’s conclusion that in order for the extraterritorial application of a federal criminal statute to be consistent “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.”<sup>97</sup> Applying this standard, the court found no due process violation because the Philippine Airlines bombing was a “test run in furtherance” of a conspiracy whose “substantial intended effect” was to “inflict injury on this country and its people and influence American foreign policy.”<sup>98</sup>

The Fifth Circuit has approached the due process problem as one of notice. In the context of a foreign national’s prosecution for conspiracy to traffic drugs to Europe aboard a foreign vessel in international waters, it found that “where the flag nation has consented, . . . due process does not require a nexus for the MDLEA’s extraterritorial application.”<sup>99</sup> The court added that the First and Third Circuits too “have rejected a nexus requirement.”<sup>100</sup> While

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93. 327 F.3d 56 (2d Cir. 2003).

94. *Id.* at 79.

95. *Id.* at 82.

96. *Id.* at 111.

97. *Id.* at 111 (quoting *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)).

98. *Id.* at 112.

99. *United States v. Suerte*, 291 F.3d 366, 372 (5th Cir. 2002) (quoting 46 U.S.C. app. § 1903(c)(1)(C) (2002) (current version at 46 U.S.C.A § 70502(c)(1)(C) (West 2010))).

100. *Id.* at 370.

due process does require that extraterritorial application of criminal law “be neither arbitrary nor fundamentally unfair,” the MDLEA satisfies that criteria because “[t]hose subject to its reach are on notice.”<sup>101</sup> How so? Congress has found that “trafficking in controlled substances aboard vessels . . . is a serious *international* problem and is *universally* condemned.”<sup>102</sup>

Whether the issue is one of nexus or notice, a 2007 article reports that “courts have thus far refrained from striking down the application of federal criminal law to foreign actors abroad on Fifth Amendment due process grounds.”<sup>103</sup> Nevertheless, its author fears that even under the current weak tests, “some misguided court . . . might . . . reject an extraterritorial application of federal legislation to a deserving defendant” especially as prosecutions increase in light of the aggressive U.S. stance against terrorism around the world.<sup>104</sup> Accordingly, he proposes “a due process test that incorporates” international law principles of “universal jurisdiction,” which he explains provides the U.S. with a “virtually unconstrained legal basis from which to extend its criminal laws to dangerous extraterritorial conduct like acts of terrorism.”<sup>105</sup> “The premise of universal jurisdiction is that a state ‘may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern,’ . . . even where no other recognized basis of jurisdiction is present.”<sup>106</sup> Because the proscription of universal crimes “is not just one of national law, but also of a pre-existing and universally applicable international law, the accused cannot claim to be shielded [by due process] from the application of a prohibition to which he is already

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101. *Id.* at 377.

102. *Id.* at 377 (quoting 46 U.S.C. app. § 1902 (current version at 46 U.S.C.A § 70501 (West 2010))); *see also* United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3rd Cir. 1993) (“Inasmuch as the trafficking of narcotics is condemned universally by law-abiding nations, we see no reason to conclude that it is ‘fundamentally unfair’ for Congress to provide for the punishment of persons apprehended with narcotics on the high seas.”).

103. Colangelo, *supra* note 81, at 163.

104. *Id.* at 163.

105. *Id.* at 124, 188.

106. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (quoting RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 404 (Tentative Draft No. 2, 1981)).

and always subject.”<sup>107</sup>

Perhaps with this rationale in mind, Congress has been eagerly expanding the reach of federal criminal law. The most aggressive examples are those asserting some form of universal jurisdiction. There are various statutes, many implementing treaties that apply to conduct having absolutely no connection to the United States other than the fact that the perpetrator was brought here for trial. For example, 18 U.S.C. § 2340A implements the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. It applies exclusively to torture that occurs “outside the United States,” and its jurisdictional element requires only that the alleged offender be “present in the United States, irrespective of the nationality of the victim or alleged offender.”<sup>108</sup>

Similarly, the Genocide Convention Implementation Act of 1987 was amended in 2007 to apply if “after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States.”<sup>109</sup> The prior version at least required that the offender be a U.S. national or that the act occur within the United States.<sup>110</sup> With both statutes, the stakes for defendants are high. Where death results, torture and genocide are capital offenses.<sup>111</sup>

*U.S. v. Yunis*<sup>112</sup> is an example of an actual prosecution for a treaty-based universal crime. The case arose out of the 1985 hijacking of a Royal Jordanian Airlines flight on the tarmac in Beirut as it awaited a scheduled departure for Amman. The hijackers hoped to divert the aircraft to Tunis with the intention of meeting delegates at the Arab League Conference to demand the removal of all Palestinians from Lebanon. However, the Tunisians denied them entry so, after a dramatic thirty-hour zigzag over the Mediterranean, the plane returned to Beirut. The hijackers then released the hostages, held a press conference, blew up the aircraft,

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107. Colangelo, *supra* note 81, at 124–25.

108. 18 U.S.C. § 2340A(b)(2) (2006).

109. 18 U.S.C.A § 1091 (West 2010).

110. 18 U.S.C. § 1091 (2006)).

111. *See* 18 U.S.C. § 2340A(a) (2006); 18 U.S.C. § 1091(b)(1) (2006).

112. 681 F. Supp. 896 (D.D.C. 1988).

and fled. At no time, did the aircraft penetrate American airspace; nor did the hijackers seek to influence the United States government.<sup>113</sup>

Nevertheless, Yunis was convicted under 18 U.S.C. § 1203, which prohibits extraterritorial hostage taking if “the offender is found in the United States.”<sup>114</sup> Yunis had been forcibly brought to the United States after undercover FBI agents lured him into international waters off the coast of Cyprus.<sup>115</sup> The district court found jurisdiction proper because “in light of global efforts to punish . . . hostage taking, international legal scholars unanimously agree that these crimes fit within the category of heinous crimes for purposes of asserting universal jurisdiction.”<sup>116</sup>

Even though the “[u]niversal principle, standing alone, provides sufficient basis for asserting jurisdiction,” the court found additional grounds under the “passive personal principle” of international law which “authorizes states to assert jurisdiction over offenses committed against their citizens abroad.”<sup>117</sup> Only two of the passengers on the hijacked flight were Americans. The court acknowledged that the principle is controversial but cited a recent Restatement of Foreign Relations Law finding it “has been increasingly accepted when applied to terrorist . . . attacks on a state’s nationals by reason of their nationality.”<sup>118</sup> In fact, the Hostage Statute itself establishes as an alternate basis for jurisdiction that a “person seized . . . is a national of the United States.”<sup>119</sup> This point proved important on appeal when Yunis argued he was forcibly brought to rather than “found in” the United States.<sup>120</sup> Rather than decide the question, the D.C. Circuit simply fell back on the alternative

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113. *Id.* at 899.

114. 18 U.S.C. § 1203(b)(1)(B) (2006).

115. *Yunis*, 681 F.Supp. at 906.

116. *Id.* at 901.

117. *Id.*

118. *Id.* at 902. The court also noted the United States had “relied on this very principle” when it sought to extradite Muhammed Abbas Zaiden who led the hijacking of the *Achillo Lauro* in which Leon Klinghoffer was killed. “As here, the only connection to the United States was Klinghoffer’s American citizenship.” *Id.* at 902–03).

119. 18 U.S.C. § 1203(b)(1)(A) (2006).

120. *United States v. Yunis*, 924 F.2d 1086, 1090 (D.C. Cir. 1991).

jurisdictional ground.<sup>121</sup>

In all these examples, the universal crime principle has overcome the standard due process limitation of nexus. It is precisely in the same cases, though, that the compulsory process claim should be strongest. The crime may be universal, but where there is no American nexus, critical defense witnesses are all but guaranteed to lie beyond U.S. court process. Nor are they likely to appear voluntarily in regards to a universal offense for fear of being investigated themselves. In these circumstances, applying criminal law extraterritorially approaches the very abuse, suffered in the colonies, that the Sixth Amendment was designed to prevent. Recall the Virginia legislature's complaint that transferring colonists to England for trial would deprive them of the "Liberty of summoning and producing Witnesses on such Trial."<sup>122</sup>

Nor is the *Greco* holding any justification. The *Greco* rationale is a *post facto* accommodation to the reality that, in an interconnected world, a particular witness may lie beyond court process and that should not defeat the prosecution of a cross-border crime committed in part within the United States. It is not an a priori invitation for Congress to exercise universal jurisdiction unfettered by the requirement of compulsory process. And yet, that is exactly what has happened. Consider, again, 18 U.S.C. § 2340A. It applies exclusively to torture "outside the United States" which is, of course, beyond the reach of federal court process.<sup>123</sup> This means that under *Greco*, the statute only applies when compulsory process does not.

Certainly, universal crimes should not go unpunished. But recall that one of the chief complaints lodged against the government's detention facility in Guantanamo Bay, Cuba, was that it was designed, at the outset, to be a place where the Constitution did not apply.<sup>124</sup> In a similar vein, the

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121. *Id.* at 1090.

122. Blume, *supra* note 1, at 64.

123. 18 U.S.C. § 2340A(a) (2006).

124. William Glaberson, *For 20 at Guantánamo, Court Victories Fall Short*, N.Y. TIMES, Feb. 26, 2009, at A23. Glaberson noted,

Samuel Issacharoff, a professor at New York University Law School, said the standoff showed the limitations of the legal system in dealing with the prison set up seven years ago on the naval base in Cuba, partly

dissenter in the Ninth Circuit case upholding the PROTECT Act on Foreign Commerce Clause grounds persuasively argued, “The Constitution cannot be interpreted according to the principle that the end justifies the means. The sexual abuse of children abroad is despicable, but we should not, and need not, refashion our Constitution to address it.”<sup>125</sup> The same is true of torture, genocide, and terrorism.<sup>126</sup> If these are truly universal crimes, the rest of the world should be equally prepared to prosecute them; thus, there is no need for the United States to involve itself in a way that raises constitutional questions.

#### V. PIRACIES & FELONIES ON THE HIGH SEAS & OFFENSES AGAINST THE LAW OF NATIONS

In rejecting a First Amendment challenge to the Copyright Clause, the Supreme Court noted that the two provisions were “adopted close in time[, and] [t]his proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”<sup>127</sup>

At first glance, the same argument could be advanced against the proposition that the inability to provide compulsory process precludes assertions of universal criminal jurisdiction. The Sixth Amendment was adopted fairly soon after Article I, Section Eight, Clause Ten, which authorizes Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>128</sup> That close temporal proximity gives

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to be [sic] remain clear of American courts. “The Bush administration chose the path of holding people beyond the reach of the law,” Professor Issacharoff said.

*Id.*

125. *United States v. Clark*, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting).

126. Another examples is The Child Soldiers Accountability Act of 2008, prohibiting the “Recruitment or use of child soldiers” and permitting jurisdiction solely on the grounds that “the alleged offender is present in the United States.” 18 U.S.C.A § 2442 (West Supp. 2009). 21 U.S.C. § 960a prohibits drug trafficking for the benefit of terrorist organizations. It passed as part of the USA PATRIOT Improvement and Reauthorization Act of 2005 and provides that “[t]here is jurisdiction over an offense under this section 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.” 21 U.S.C. § 960a(b)(5) (2006).

127. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

128. U.S. CONST. art. I, § 8, cl. 10.

rise to the inference that, in the Founders' view, the Compulsory Process Clause does not limit the proscription of extraterritorial crime.

This argument has it backwards. It is not that the Framers felt compulsory process did not limit extraterritorial jurisdiction but rather that the grant of authority for extraterritorial jurisdiction was so limited that compulsory process rights were not implicated.

Despite its internationalist ring, Clause Ten, as understood by the Framers, supplied a basis for universal jurisdiction solely for the crime of piracy.<sup>129</sup> Prosecuting piracy presents no obvious compulsory process concerns because vessels under the control of pirates are deemed stateless, meaning U.S. authorities would be legally free to board them wherever found.<sup>130</sup> Accordingly, it is not inevitable that critical defense witnesses would be beyond the reach of U.S. officials seeking to compel their appearance at trial.<sup>131</sup>

Clause Ten has three components that appear to overlap. It authorizes Congress to define and punish both "Piracies and Felonies" committed on the high seas as well as offences against the law of nations. Piracy though is a subspecies of felony as well as an offence against the law of nations. There has been little scholarly work on this particular constitutional provision, but a 2008 article in the

129. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 152 (2009).

130. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 484–85 (2d ed. 1996) ("[B]ecause [stateless vessels] are not entitled to the protection of any State, they are subject to the jurisdiction of all States. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.").

131. The clearest example would be where a U.S. warship engages and captures a pirate vessel at sea. Such are the facts of the recent case *U.S. v. Hasan*, No. 2:10-cr-56, 2010 U.S. Dist. LEXIS 115746 (E.D. Va. Oct. 29, 2010). Defendants were captured on the high seas between Somalia and the Seychelles after allegedly mistaking the U.S. Navy frigate *Nicholas* for a merchant ship and attacking it. The *USS Nicholas* gave chase capturing defendants and their vessel. They were charged with piracy under 18 U.S.C. § 1651. The case is the third prosecution in the U.S. for piracy since 2009. Prior to then, the last one appears to have been in 1885. *Id.* at \*2–10. Admittedly, there will be cases where potential witnesses will have disembarked and dispersed by the time a prosecution commences. Whether compulsory process is adequate in these cases will turn on the specific facts. The conceptual point remains that, at least at the time the piracy is committed, U.S. jurisdiction would extend to the parties involved.

*Northwestern University Law Review* explains this “striking[] redundancy.”<sup>132</sup>

Piracy was well known to be jurisdictionally unique. “For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century) piracy was the only universal jurisdiction offense.”<sup>133</sup> While it had “a uniform technical meaning as an international law offense . . . nations could and did attach the term ‘piracy’ to a variety of different maritime crimes” either as a rhetorical indication of their severity or simply out of imprecision.<sup>134</sup> There was, however, an important jurisdictional difference between classic and statutory piracy. As the author of the foremost eighteenth-century treatise on international law explained, “piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction” or “on board of whose vessels, the offence thus created was committed.”<sup>135</sup> Thus, the Framers singled out the specific offense of piracy from the broader categories of felonies and offences against the law of nations precisely because its jurisdictional treatment was different. It alone admitted a universal jurisdiction.<sup>136</sup> All other felonies and offenses required a U.S. nexus.

This interpretation of original understanding is bolstered by the recognition that despite the “vast array of foreign high seas conduct that was available for criminalization in the Age of Sail” Congress, with “one exception, . . . did not use the Piracies and Felonies Clause to legislate universally over anything but piracy itself until [1980 with] the MDLEA.”<sup>137</sup>

The one exception, however, is significant and must be addressed. In 1790, the First Congress passed “[a]n Act for the Punishment of Certain Crimes Against the United States.”<sup>138</sup> The measure was “an omnibus act, creating every federal crime, such as treason, counterfeiting, and more

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132. Kontorovich, *supra* note 129, at 163.

133. *Id.* at 165.

134. *Id.* at 166.

135. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 124, at 194 (Richard Henry Dana Jr. ed., Boston, Little, Brown, & Co. 1866).

136. Kontorovich, *supra* note 129, at 165.

137. *Id.* at 174–75.

138. *United States v. Suerte*, 291 F.3d 366, 372 (5th Cir. 2002).

common crimes committed in areas of exclusive federal authority.”<sup>139</sup> Among its many provisions was § 8 which criminalized “robbery” committed on the high seas by “any person.”<sup>140</sup> That is classic piracy and unobjectionable. However, the statute went on to create a number of statutory piracies including captains absconding with vessels and sailors assaulting their commanders.<sup>141</sup> The statute made no jurisdictional distinction for these later offenses; so if taken literally, it would have extended jurisdiction “universally to a wide variety of crimes aboard any vessel on the high seas, and even to some offenses on land.”<sup>142</sup>

On its face, this act seems powerful evidence of Congress’s ability to legislate extraterritorially unconstrained. After all, it was passed by the First Congress which “included 20 Members who had been delegates to the [Constitutional] Convention.”<sup>143</sup> This was also the same Congress that had already drafted the Sixth Amendment and submitted it to the states.<sup>144</sup> However, the historical record reveals that the seeming universal jurisdiction conferred by § 8 was immediately greeted with suspicion by leading jurists, and the Supreme Court ultimately confined its application to piratical offenses only.<sup>145</sup>

In 1791, Supreme Court Justice James Wilson discussed it in the context of giving instructions to a Virginia grand jury. As was then customary, he expounded for the grand jurors at length on the Constitution and the entire corpus of federal law.<sup>146</sup> Upon arriving at § 8, he “expressed ‘an official obligation to state some doubts’ about the statute’s apparent extension of universal jurisdiction beyond classic piracy.”<sup>147</sup>

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139. Kontorovich, *supra* note 129, at 175.

140. 1 THE STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 113 (Richard Peters ed., Boston, Little, Brown & Co. 1845).

141. *Id.* at 114.

142. Kontorovich, *supra* note 129, at 176.

143. *Suerte*, 291 F.3d at 373 (quoting *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1986)).

144. *See id.*

145. Kontorovich, *supra* note 129, at 152–53.

146. *Id.* at 176.

147. *Id.*; *see also id.* at 177 (arguing that “[w]hile his charge repeatedly invoked the ‘law of nations’ and did not cite the Constitution . . . . There was no authority other than the Constitution for invalidating a statute, as Wilson said he would do”). Whether the constraints Wilson envisioned flowed from the Constitution or

On the other hand, Justice Iredell revealed no such qualms when instructing a New Jersey jury two years later. In a much more cursory treatment of the issue, he suggested that international law provided a basis for universal jurisdiction over crimes other than piracy when committed on the high seas outside the jurisdiction of any particular state.<sup>148</sup> Justice Iredell cited no authority for this proposition which appears at odds with both the “well-established contemporary view that only piracy was universally cognizable” as well as his own “views . . . expressed during the ratification suggesting that the purpose of Clause Ten was to reach crimes committed by or against Americans.”<sup>149</sup>

It may be no surprise then that in 1819 Justice Story, author of *Commentaries on the Constitution*, sided with Wilson in delivering his own jury instructions. While acknowledging that the statute “is manifestly designed to apply to all cases,’ including foreigners on foreign ships,” Story stated that statutory piracies “are punishable only when there is American involvement.”<sup>150</sup>

The future Justice Marshall took a similar position in a celebrated speech he made as a freshman congressman on the House floor. It was occasioned by the controversial extradition of a mutineer to England to answer for a brutal revolt aboard the English warship *Hermione*.<sup>151</sup> Justice Marshall explained that, although the mutineer Robbins could have been tried for piracy, the United States could not have prosecuted him for murder even under the Crimes Act. First, Justice Marshall distinguished between classic and statutory piracy: “[P]iracy . . . alone is punishable by all nations. . . . The people of the United States have no jurisdiction over offences [i.e. murder as distinguished from piracy] committed on board a foreign ship against a foreign nation.”<sup>152</sup> Justice Marshall then reasoned that “[the Define and Punish] Clause can never be construed to make to the

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international law, the point remains that the Framers and their contemporaries would not have viewed Clause Ten as authorizing universal jurisdiction for crimes other than classic piracy.

148. *Id.* at 177–78.

149. *Id.* at 178.

150. *Id.* at 179.

151. *Id.* at 179–82.

152. *Id.* at 183–84.

Government a grant of power, which the people making it do not themselves possess. . . . [T]he [Crimes Act], therefore, cannot act upon the case.”<sup>153</sup>

The first Supreme Court case addressing the reach of § 8 was *United States v. Palmer*<sup>154</sup> in 1818. The case arose amidst anarchy on the high seas caused by unscrupulous privateers operating under dubious letters of marque from insurgent Latin American republics hoping to disrupt Spanish shipping.<sup>155</sup> A number of defendants, including some foreigners, were charged with the armed robbery of a Spanish ship.

At the outset, Justice Marshall held that the “constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”<sup>156</sup> Nevertheless, he concluded, Congress did not intend with the Crimes Act to “inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag nor offending particularly against them.”<sup>157</sup>

Marshall’s construction is extremely difficult to reconcile with the plain language of the statute stating explicitly that it applies to “any person” as well as the fact that it was “clear to most observers that Congress had intended to punish piracy to the full extent sovereign nations punish it—universally.”<sup>158</sup> Justice Marshall’s dilemma was that any construction of § 8’s “any person” language would have to apply equally to all offenses enumerated in the statute, including the nonpiratical ones. Thus, a literal reading would have extended universal jurisdiction beyond classic piracy, which, as a legislator, Justice Marshall had argued Congress could not do.

The advantage of Justice Marshall’s statutory holding was that Congress could override it. Justice Marshall was very

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153. *Id.* at 184 (quoting 10 ANNALS OF CONG. 607 (1800)).

154. 16 U.S. 610 (1818).

155. Kontorovich, *supra* note 129, at 185.

156. *Palmer*, 16 U.S. at 630.

157. *Id.* at 631.

158. Kontorovich, *supra* note 129, at 187.

clear that the Constitution permitted universal jurisdiction over piracy; it was the nonpiratical offenses that raised problems. In fact, Congress immediately responded with a corrective statute that did just that. However, the statute expired at year's end, and "[r]emarkably, legislation to extend [it] . . . failed to do so because of . . . inarticulate draftsmanship."<sup>159</sup>

The Crimes Act statute, thus, reverted to its original form, and it was left to the Supreme Court to free it of *Palmer's* limiting construction. In two cases, *United States v. Klinton*<sup>160</sup> and *United States v. Furlong*,<sup>161</sup> the Court distinguished *Palmer* as holding merely that the Crimes Act did not create jurisdiction over foreign vessels. Pirate ships, on the other hand, are a different matter. "[A] vessel, by assuming a piratical character, is no longer included in the description of a foreign vessel."<sup>162</sup> "[A] crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act. . . . Persons of this description are proper objects for the penal code of all nations."<sup>163</sup>

Thus, "[b]y 1820, both Congress and the Supreme Court had rejected universal jurisdiction over anything but 'piracies.'"<sup>164</sup> According to the Court, the distinguishing feature of pirate ships is that they are stateless vessels under the protection of no recognized sovereign and so subject to the jurisdiction of all. Any indication of the 1790 Crimes Act to the contrary was merely the result of "artless drafting."<sup>165</sup>

Interestingly, the Fifth Circuit overlooked this nuance in the course of rejecting a due process challenge to the MDLEA.<sup>166</sup> Recall that the MDLEA "was specifically enacted to punish drug trafficking on the high seas" and is "America's most used criminal universal jurisdiction

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159. *Id.* at 188.

160. 18 U.S. 184, 192–93 (1820).

161. 18 U.S. 144, 147 (1820).

162. *Furlong*, 18 U.S. at 198.

163. *Klinton*, 18 U.S. at 152.

164. Kontorovich, *supra* note 129, at 153.

165. *Id.* at 189.

166. *United States v. Suerte*, 291 F.3d 366, 376–77 (5th Cir. 2002).

statute.”<sup>167</sup> The court read the early history to suggest that “the Fifth Amendment imposes no nexus requirement on the reach of statutes criminalizing felonious conduct by foreign citizens on the high seas.”<sup>168</sup> The court observed that “[t]he First Congress promptly enacted far-reaching legislation under the Piracies and Felonies power.”<sup>169</sup> The court was particularly persuaded by the Crime Act’s broad application to “any person” and Justice Marshall’s statement in *Palmer* that, as a constitutional matter, the Define and Punish Clause leaves “no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.”<sup>170</sup> Since drug trafficking is not piracy, the court added, “[W]hile at issue [in *Palmer*] was Congress’s power to define and punish *piracies*, Chief Justice Marshall’s assessment should apply with equal weight to *felonies* such as at issue here, a parallel provision within the same constitutional clause.”<sup>171</sup>

As an original rule of construction, that assumption would be reasonable, but in this case it is entirely improper. On the contrary, Justice Marshall confined his assessment to piracy precisely because universal jurisdiction could not be extended to felonies, which is exactly why the drafters mentioned it separately. As for the 1790 Act appearing to extend universal jurisdiction to crimes other than piracy, contemporary jurists denounced it and “[s]everal courts blamed it on shoddy draftsmanship, which would have been understandable given the massive work of the First Congress.”<sup>172</sup>

The only other thing left to explain is why Congress’s Clause Ten authority to define and punish “[o]ffences against the Law of Nations” does not plainly provide an alternate basis for extraterritorial jurisdiction and one which the Framers evidently did not feel was in tension with

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167. *United States v. Estupinan*, 453 F.3d 1336, 1338 (11th Cir. 2006); *Kontorovich*, *supra* note 129, at 151.

168. *Suerte*, 291 F.3d at 373.

169. *Id.* at 372.

170. *Id.* at 373.

171. *Id.* at 374.

172. *Kontorovich*, *supra* note 129, at 176.

the Sixth Amendment.<sup>173</sup> The answer is that the authority to punish offences against the law of nations was originally intended not as a broad mandate to punish extraterritorial crimes but rather as a mechanism to provide legal recourse to foreign dignitaries injured inside U.S. territory.

The Founders were motivated to include the Offences Clause in the Constitution “in the first place” by their fears that “the several . . . states had not provided adequate legal recourse to foreign ambassadors . . . who had suffered some insult . . . on U.S. territory, and . . . the need . . . to avoid possibly serious conflicts resulting from these failures at the state level.”<sup>174</sup> They were acutely aware that “under the Articles of Confederation[,] Congress ‘could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without control.’”<sup>175</sup>

Two prominent incidents highlighted the deficiency. In May 1784, in what became known as the Marbois Affair, a French adventurer, De Longchamps, assaulted the Consul General of France first at his home in Philadelphia and then again, two days later, on a public street.<sup>176</sup> In the face of the ensuing international uproar, the Continental Congress sheepishly explained that the “nature of a federal union” meant it could neither initiate its own prosecution nor force any state to do so.<sup>177</sup> Five years later, during the Constitutional Convention, a New York policeman entered the residence of the Dutch Ambassador in an attempt to arrest an employee.<sup>178</sup> In response to the Dutch government’s official protest, Secretary Jay could report only that “the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.”<sup>179</sup>

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173. *Id.* at 150.

174. Colangelo, *supra* note 81, at 143.

175. *Id.* at 143 n.135 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1966)).

176. *Respublica v. De Longchamps*, 1 U.S. 111, 111 (1784); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004).

177. 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, 466 (2000).

178. *Id.* at 466.

179. *Sosa*, 542 U.S. at 717.

Even more worrisome was the states' refusal to honor federal treaties. The agreement ending the American Revolution stipulated that British creditors would be repaid.<sup>180</sup> Nevertheless, state courts repeatedly blocked collection efforts prompting reciprocal English threats of reprisal.<sup>181</sup> The Continental Congress was held accountable for all this even though it lacked the power to rectify it.

Edmund Randolph recognized the existential threat this situation posed to the new nation. He warned repeatedly that the confederation might be “doomed to be plunged into war, from its wretched impotency to check offences against this law [of nations].”<sup>182</sup> Later, at the constitutional convention he reminded delegates that “[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender.”<sup>183</sup> As a remedy, he submitted a proposal that permitted the new federal government “[t]o provide tribunals and punishment for mere offenses against the law of nations.”<sup>184</sup> The Committee on Detail added the substance of it to a provision permitting Congress to define and punish piracy on the high seas and the crime of counterfeiting.<sup>185</sup> The Committee on Style made the authority to punish counterfeiting a separate provision and, with a few more adjustments, reported the version of Clause Ten we have today.<sup>186</sup>

None of this is to say the concepts of piracy, the Law of Nations, or Fifth Amendment Due Process cannot evolve with time. The point is merely that the compulsory process problem is only triggered once universal jurisdiction is expanded beyond piracy, a fairly recent development. Accordingly, it proves nothing that the Framers, whose conception of universal jurisdiction was confined to piracy, saw no inconsistency between Clause Ten and the Compulsory Process Clause.

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180. Stephens, *supra* note 177, at 466–67.

181. *Id.*

182. *Id.* at 467 (quoting A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981)).

183. *Id.* at 471 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25 (Max Farrand ed., 1937) (McHenry's notes, May 29, 1787)).

184. *Id.* at 471–72.

185. *Id.* at 472.

186. *Id.* at 472–73.

## VI. MUTUAL LEGAL ASSISTANCE TREATIES

Instead of exercising restraint because defendants currently lack compulsory process rights abroad, Congress has instead magnified the inequity by ensuring prosecutors pursuing extraterritorial crimes are not similarly disadvantaged in gathering evidence.

Since 1977, Congress has ratified nearly fifty treaties with foreign nations requiring them to assist U.S. law enforcement in obtaining witnesses and evidence for trial.<sup>187</sup> Signatories to these Mutual Legal Assistance Treaties undertake to establish a “Central Authority” through which to process requests, which in the United States is the Justice Department’s Office of International Affairs.<sup>188</sup> The treaties are careful that information is acquired “in a fashion so as to have it usable in [U.S.] courts.”<sup>189</sup> MLATs were originally designed to overcome the complications of foreign bank secrecy laws, but they also obligate their foreign signatories to assist U.S. law enforcement in locating and identifying witnesses, serving process, taking depositions, conducting searches, and obtaining documents.<sup>190</sup>

Thus, for example, the MLAT between the United States and Egypt provides that “[a] person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, under the laws of the Requested State to appear and testify” there.<sup>191</sup> President Clinton’s message to the Senate accompanying the treaty included an explanatory note from the State Department adding that “Egyptian authorities would permit a U.S. prosecutor . . . to be present during the taking of such . . . testimony in Egypt when such official could provide information relevant to the execution of the request.”<sup>192</sup>

187. See DOYLE, *supra* note 90, at 20–21; Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT’L L. 261, 276 (2006).

188. *Id.* at 276, 288.

189. *Extradition, Mutual Legal Assistance and Prisoner Transfer Treaties: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 8 (1998) [hereinafter *Extradition Hearings*] (statement of Mark M. Richard, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep’t of Justice).

190. DOYLE, *supra* note 90, at 20–21.

191. Treaty with Egypt on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, art. 8, May 3, 1998, S. Treaty Doc. 106-19.

192. *Id.* at 4.

But this crude form of compulsory process is only available to state and federal prosecutors. Most MLATs explicitly provide that they do “not give rise to a right on the part of any private person to obtain . . . any evidence.”<sup>193</sup> Since 1988, the National Association of Criminal Defense Lawyers has lobbied the Senate repeatedly for language permitting judges to order the government to make MLAT requests on behalf of criminal defendants.<sup>194</sup> The Justice Department vigorously opposed the request in a formal letter to the Senate Foreign Relations Committee appearing in the record. The letter explains that “MLATs . . . were never intended to provide benefits to the defense bar.”<sup>195</sup> The asymmetry was justified on the grounds that “it is not ‘unfair’ for MLATs to govern assistance solely between U.S. and foreign Government prosecutors and investigators, any more than it is improper for the FBI to conduct investigations for prosecutors and not for defendants.”<sup>196</sup>

The defect in this argument is that inside the United States defendants at least enjoy access to compulsory process. Abroad, under *Greco*, they do not. MLATs, thus, widen rather than maintain the ordinary domestic disparity between prosecutorial and defense resources.<sup>197</sup> So MLATs may not give prosecutors more, but they leave defendants with less. As recently as 2005, the position of the Justice Department remained that incoming requests “which appear to be purely for the benefit of foreign defendants will be

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193. Lyman, *supra* note 187, at 288 (quoting Treaty with Ukraine on Mutual Legal Assistance in Criminal Matters, U.S.-Ukr., art. 1, Jul. 22, 1998, S. Treaty Doc. 106-16).

194. *Extradition Hearings*, *supra* note 189, at 27 (letter from Mark M. Richard, Deputy Assistant Attorney Gen., to Patricia McNerney, Counsel, Foreign Relations Comm. (Oct. 8, 1998)).

195. *Id.* at 27.

196. *Id.* at 27.

197. Defendants do have access to “letters rogatory,” official requests from U.S. courts to foreign tribunals for assistance in taking depositions. However, the government has access to those as well so the net disparity remains. Moreover, the government has not found them effective: “[L]etters rogatory are inadequate for many evidence-gathering tasks, as the Justice Department has itself recognized . . . [which is] the very reason that a substitute, the MLAT, was invented.” Lyman, *supra* note 187, at 275; *see also* DOYLE, *supra* note 90, at 22 (noting that the State Department has emphasized that letters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available and that assistance is a matter of discretion rather than treaty obligation).

denied.”<sup>198</sup>

That said, even if defendants had access to MLATs that probably would still not satisfy the requirements of compulsory process were that right held to apply abroad. U.S. courts have no authority to force a foreign country to abide by its MLAT obligations. In addition, the State Department’s legal advisor has explicitly denied that MLATs are equivalent to compulsory process. In 1996, a number of MLATs came before the Senate for advice and consent.<sup>199</sup> Following the hearing, Senate Foreign Relations Committee Chairman Jesse Helms inquired as to the “fairness and even the constitutionality” of the fact that “defendants do not have access to information through MLAT procedures.”<sup>200</sup> State Department Deputy Legal Advisor Jamison Borek deflected the concerns on the grounds that “[n]one of the treaties require the treaty partner to compel its citizens to come to the United States . . . . Since the Government does not obtain compulsory process under MLATs, there is nothing the defense is being denied.”<sup>201</sup>

On the other hand, the State Department’s argument is weak. The mere fact the witnesses cannot be forced into a U.S. courtroom is immaterial. Many MLATs, like the one with Austria then before the Senate, use a familiar formula providing that prosecution witnesses “shall be compelled to appear [and] testify” in the requested state.<sup>202</sup> As long as the prosecution’s witness may be compelled to appear in the foreign state and the resulting testimony is admissible in U.S. courts, the government has obtained compulsory process even if the witness never sees American shores.

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198. Lyman, *supra* note 187, at 288–89.

199. *Extradition Treaties: Hungary; Belgium; Switzerland; Philippines; Bolivia; and Malaysia Mutual Legal Assistance Treaties: Korea; Great Britain; Philippines; Hungary; and Austria: Hearing Before the S. Comm. on Foreign Relations United States Senate*, 104th Cong. (1996).

200. *Id.* at 14.

201. *Id.*

202. Treaty with Austria on Mutual Legal Assistance in Criminal Matters, U.S.-Austria, art.8, Feb. 23, 1995, S. Treaty Doc. 104-21, at 10.

VII. CONCLUSION

Compulsory process is not some mere formality, it is a matter of basic fairness. As the Supreme Court put it in *Washington v. Texas*,<sup>203</sup> “[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense.”<sup>204</sup> Indeed, compulsory process is so “fundamental and essential to a fair trial” that the Court in that case held it applied to the States.<sup>205</sup> Federal statutes proscribing universal crimes, though admirable on their face, are deeply problematic inasmuch as they inevitably create jurisdictional circumstances where the accused will have no access to compulsory court process for proving his innocence.

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203. 388 U.S. 14 (1967).

204. *Id.* at 19.

205. *Id.* at 17.