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Due Process by Proxy: United States v. Brehm and the Problem of Extraterritorial Jurisdiction over Foreign Nationals

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INTRODUCTION

In carrying out its overseas military operations, the United States government relies on the support of an increasing number of private contractors from around the globe.[1] Nearly 2.5 million private contractors are currently employed in conflict zones, outnumbering troops in some areas.[2] The contract workers assist with everything from security to translation services to "technical support."[3] While their work is essential, their presence inevitably gives rise to some new challenges.

One such challenge recently came before the Fourth Circuit in *United States v. Brehm*.[4] The case stemmed from a violent altercation between two private contractors at a NATO base in Kandahar, Afghanistan.[5] The victim, a British national identified only as "J.O.," underwent emergency surgery for stab wounds and was then transported three hundred miles to Bagram, Afghanistan, for additional surgery.[6] The perpetrator, a South-African national by the name of Sean Brehm, was arrested, detained, and eventually transported seven thousand miles to Alexandria, Virginia, where he was indicted in federal court.[7]

Brehm would eventually plead guilty and serve prison time in the United States, a country he had never visited and to which he had few

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1. *See* MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 6–7 (2011), http://www.fas.org/sgp/crs/natsec/R40835.pdf (showing that only five percent of U.S. government contractors in Iraq were American citizens, and only eight percent were citizens of Iraq).

2. *See* LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE 3 (2011).

3. *See* CONG. BUDGET OFFICE, PUB. NO. 3053, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 5 (2008), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/96xx/doc9688/08-12-iraqcontractors.pdf.

4. 691 F.3d 547 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012).

5. *See* United States v. Brehm, No. 1:11-CR-11, 2011 WL 1226088, at *3 (E.D. Va. Mar. 30, 2011), *aff'd*, 691 F.3d 547, *cert. denied*, 133 S. Ct. 808.

6. *See id.*

7. *See id.* at * 2–3.

ties.[8] His victim was a foreign national, and his crime harmed no American citizens or property.[9] Therein lay the question for the Fourth Circuit: under these circumstances, was the district court's exercise of jurisdiction consistent with the Due Process Clause of the Fifth Amendment?[10]

The Fourth Circuit concluded that jurisdiction was proper and Brehm's conviction should therefore be affirmed,[11] but just as important as the court's conclusion was its reasoning. Eight other circuits had already weighed in on the issue and had split in two directions on the criteria for determining whether jurisdiction comports with due process.[12] There are no signs that the military's reliance on an ever-growing contingent of private contractors will change any time in the near future.[13] As a result, there will be an ongoing need to police the conduct of this unique population. Federal courts are therefore likely to be required on an increasingly regular basis to decide due-process-based jurisdictional questions like the one raised in *Brehm*.

In deciding *Brehm*, the Fourth Circuit unsuccessfully attempted to steer a middle course between the two conflicting lines of authority that had divided the other circuits—one holding jurisdiction to be consistent with due process when the defendant has a sufficient "nexus" with the United States, and the other holding the jurisdictional requirements of due process to be satisfied when jurisdiction exists under international law.[14] Rather than engaging with the strengths and weaknesses of the different approaches, the Fourth Circuit used an opaque, "proxy-based" method of analysis and left several significant gaps in its reasoning.[15]

This Recent Development argues that the Fourth Circuit's treatment of the due process issue in *Brehm* is unsatisfactory.

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8. *See Brehm*, 691 F.3d at 549–50.

9. *See id.* at 550–51.

10. *See id.* at 549.

11. *See id.*

12. *See infra* Part I.C (discussing the two different approaches used by the circuits).

13. *See* DICKINSON, *supra* note 2, at 37 (citing an interview with a Department of Defense official on Nov. 7, 2007); *see also* U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 81 (2006), http://www.defense.gov/pubs/pdfs/QDR20060203.pdf ("The Department's policy now directs that performance of commercial activities by contractors . . . shall be included in operational plans and orders."); Press Release, U.S. Army Sustainment Command Pub. Affairs, ASC Selects LOGCAP IV Contractors (June 28, 2007), *available at* http://www.army.mil/-news/2007/06/28/3836-asc-selects-logcap-iv-contractors/ (announcing a ten-year, $150 billion logistics support contract).

14. *See infra* notes 34–58 and accompanying text.

15. *See infra* Part II.B.

Although the outcome makes sense on narrow grounds, the court failed to properly analyze the issues underlying the impact of the Due Process Clause on the question of jurisdiction. Therefore, the *Brehm* opinion will be unhelpful to military authorities, prosecutors, defendants, and lower courts as they confront similar issues in future cases.

This Recent Development further argues that the jurisdictional due process issue depends, at its core, on the defendant's actual or constructive notice of the application of American law to his criminal conduct. By focusing on notice, the *Brehm* court could have made a far more compelling argument for due process, while also tapping into a theme that could potentially repair the circuit split.

Analysis proceeds in four parts. Part I provides the statutory and constitutional background on the issue of extraterritorial jurisdiction over non-citizen military contractors and others, and describes the circuit split that currently exists. Part II discusses in detail the decision of the Fourth Circuit in *Brehm*. Part III analyzes that decision and shows why it was unsatisfactory. Part IV explains how notice-based reasoning would have been a preferable approach in *Brehm*, and would work well in many of the other extraterritorial jurisdiction cases.

I. STATUTORY AND DUE PROCESS LIMITS ON EXTRATERRITORIAL JURISDICTION OVER FOREIGN NATIONALS

A. Background

Congress may enact laws that have effects beyond the territorial borders of the United States.[16] If Congress "clearly expresse[s]" its intent for a statute to apply extraterritorially, courts will abide by that intent.[17] In exercise of this legislative jurisdiction,[18] Congress enacted the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA")[19]

16. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citations omitted).

17. *See id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)) (internal quotation marks omitted).

18. "Legislative jurisdiction" is "the authority ... to make laws." BOLESLAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 77 (2005). Legislative jurisdiction is also known as "prescriptive jurisdiction." *Id.* The Court in *Arabian American Oil Co.* was discussing the legislative jurisdiction of Congress. *See* 499 U.S. at 253. This must be distinguished from the question of adjudicative jurisdiction, which is the subject of this Recent Development, and which is defined below. *See infra* note 24 and accompanying text.

19. Pub. L. No. 106-523, § 2(a), 114 Stat. 2488, 2488 (codified as amended at 18 U.S.C §§ 3261–3267 (2006)).

with the clearly expressed intent to ensure that the reach of American criminal law would extend to cover contractors and other civilians accompanying the military overseas. MEJA provides, in pertinent part:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense.[20]

MEJA defines persons "employed by the Armed Forces outside the United States" as including employees of Department of Defense contractors and subcontractors.[21] The statute applies to American citizens and non-citizens alike.[22]

However, even when Congress has taken advantage of its *legislative* jurisdiction by enacting a statute that applies extraterritorially, the question of *adjudicative* jurisdiction still applies.[23] That issue involves a country's "authority to subject persons or things to the process of its courts."[24] MEJA gives district courts a statutory basis for adjudicative jurisdiction over defendants accused of crimes covered by the statute.[25] However, a court must still determine whether the exercise of that jurisdiction in a particular case is constitutional under the Due Process Clause of the Fifth Amendment.[26]

B. Due Process As an Independent Constraint on Courts

Before Congress enacted MEJA, a lively debate existed over whether or not courts should even consider the Due Process Clause in

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20. 18 U.S.C. § 3261(a)(1).

21. *Id.* § 3267(1)(A).

22. *Id.* The statute contains only one limitation that relates to nationality: it applies only to a contractor who is "not a national of or ordinarily resident in the host nation." *Id.* § 3267(1)(C).

23. *See* BOCZEK, *supra* note 18, at 77.

24. *Id.*

25. *See, e.g.*, 18 U.S.C. § 3262(b) (providing that a defendant "shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings"); *id.* § 3265(a)(1)(A) (providing for a federal magistrate judge to hold an initial appearance).

26. *See, e.g.*, United States v. Davis, 905 F.2d 245, 248 (9th Cir. 1990) (requiring both that the statute clearly apply extraterritorially, and "that [the] application of the statute to the acts in question not violate the due process clause of the fifth amendment" (citations omitted)).

determining whether they had jurisdiction. On one side, scholars argued that the clause was clearly relevant.[27] Once a court finds that a statute confers extraterritorial jurisdiction, those scholars claimed, it should then answer the separate question of whether jurisdiction was consistent with due process.[28] Others argued that the Fifth Amendment should impose no independent constraint on courts as they determine whether they may exercise extraterritorial jurisdiction.[29] According to the proponents of the latter position, a court's inquiry should be limited to whether jurisdiction is conferred by statute, and whether its jurisdiction is consistent with international law.[30] Although the Supreme Court has yet to decide the issue, it has suggested in dicta that the Due Process Clause does impose an independent constraint on courts.[31] Moreover, all of the circuits to address the issue have found themselves—or at least reasoned as if they are—obligated to consider whether jurisdiction comports with due process.[32] These considerations lead to the conclusion that "the present jurisprudential landscape undeniably reveals potential Fifth Amendment due process barriers to the extraterritorial application of U.S. law."[33] Therefore, this Recent Development assumes that the Due Process Clause *does* impose an independent constraint on courts' exercise of jurisdiction beyond the constraints of statutory authority and international law. Even with that larger question set aside, however, the circuits differ on the following more narrow inquiry:

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27. *See, e.g.*, Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (reasoning by analogy to the doctrine of state extraterritoriality under the Fourteenth Amendment).

28. *See id.*

29. *See* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 383 (1997).

30. *See id.* at 383 ("[T]o argue that the Due Process clause of the Fifth Amendment could impose general limitations upon U.S. extraterritorial jurisdiction stricter than those required by customary international law is to argue that the Fifth Amendment denies to the United States a degree of authority recognized and asserted by most of the other nations of the world.").

31. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.").

32. *See* United States v. Angulo-Hernández, 565 F.3d 2, 10–11 (1st Cir. 2009); United States v. Perez-Oviedo, 281 F.3d 400, 402–03 (3d Cir. 2002); United States v. Bustos-Useche, 273 F.3d 622, 627 (5th Cir. 2001); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993).

33. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 162 (2007).

how should a court determine whether the Due Process Clause is satisfied?

C. The Circuit Split on the Due Process Issue

Courts agree that, in order to satisfy due process, the exercise of extraterritorial jurisdiction over a foreign national defendant must not be arbitrary or fundamentally unfair.[34] However, no consensus exists regarding the standard for determining whether jurisdiction is arbitrary or unfair in a particular situation. The circuits divide into two broad camps.

The first camp, which includes the First,[35] Third,[36] and Eleventh Circuits,[37] takes what this Recent Development calls the "international law approach."[38] Courts taking the international law approach hold that jurisdiction is consistent with due process if jurisdiction is proper under international law.[39] These courts look to

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34. *See, e.g.*, United States v. Ali, 885 F. Supp. 2d 55, 59 (D.C. Cir. 2012) (citation omitted); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378 (11th Cir. 2011); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); *Martinez-Hidalgo*, 993 F.2d at 1056; United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

35. *See Angulo-Hernández*, 565 F.3d at 11 (basing jurisdiction over defendants arrested in a flagged vessel on the consent of the flag nation). This argument is clearly premised on international law. "The legitimacy of a flag nation's consent is a question of international law that can be raised only by the foreign nation." *Bustos-Useche*, 273 F.3d at 627 (citing United States v. Greer, 223 F.3d 41, 55–56 (2d Cir. 2000) (explaining that a domestic statute's requirement that the flag nation consent to jurisdiction existed "for purposes of international comity and diplomatic courtesy, not as a protection for defendants")).

36. *Perez-Oviedo*, 281 F.3d at 402–03; *Martinez-Hidalgo*, 993 F.2d at 1056.

37. *See* United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003).

38. Although the Seventh Circuit has not officially decided the issue, it seems inclined to fall into this first group. *See In re* Hijazi, 589 F.3d 401, 407 (7th Cir. 2009) (declining to rule on the case for lack of an extradition treaty). "International law approach" is a label I have assigned to the approach. There is no common name for this method of analysis, although one author calls it the "notice test." *See* Brian A. Lichter, Comment, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. U. L. REV. 1929, 1942 (2009). While I argue below that the most coherent and rational analysis of approach focuses on notice, *see infra* Part IV.C, my view of the cases differs slightly from Lichter's since the defendant does not always have notice when jurisdiction is exercised pursuant to international law. Lichter himself provides one example of this, based on the passive personality principle. *See* Lichter, *supra*, at 1945 n.112 (querying whether due process would be satisfied when the defendant lacks notice that the victim is a U.S. citizen). Another example is when jurisdiction under international law is based on a treaty. While I will later argue for a "notice test," *see infra* Part IV.C, I am less generous than Lichter in my current description of the courts' analysis as the "international law approach."

39. *See, e.g.*, *Perez-Oviedo*, 281 F.3d at 403 ("[C]onsent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair."); United States v. Caicedo, 47 F.3d 370, 373 (9th Cir. 1995) (finding

the recognized sources of international law and, if one (or more) of those sources provides a basis for jurisdiction, these courts find the Due Process Clause satisfied.[40]

For example, in *United States v. Perez-Oviedo*, the defendant was the captain of a Panamanian ship that was destined for Canada and carrying two tons of cocaine.[41] U.S. Coast Guard agents intercepted the ship in the Caribbean, far from American territorial waters, and requested permission from Panama to board and search the ship.[42] Panama consented to both the search and the application of U.S. law to the defendant after the agents found the cocaine on board.[43] Perez-Oviedo pled guilty in federal district court to a charge of conspiracy to distribute cocaine.[44] On appeal, the First Circuit found that the district court's exercise of jurisdiction over the defendant was consistent with the Due Process Clause because Panama, the "flag nation" of the ship, had consented to the application of American law.[45] The exercise of jurisdiction on the basis of the consent of the flag nation is an international law concept.[46] Thus, the court deemed the existence of a basis of jurisdiction under international law sufficient to satisfy the Due Process Clause, even though neither the defendant nor his crime had any connection with the United States.[47]

The second group of courts, which includes the Second and Ninth Circuits, takes what this Recent Development calls the "nexus

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that due process was satisfied when jurisdiction was exercised over a stateless vessel in compliance with international law).

40. *See, e.g.*, United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) (explaining that courts look to jurisdictional principles under international law such as the objective territoriality principle, the protective principle, and the principle allowing jurisdiction over stateless vessels). For more information on the sources of international law, from which jurisdictional principles and all other principles are drawn, see WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 13–18 (3d ed. 2000).

41. *Perez-Oviedo*, 281 F.3d at 401.

42. *See id.*

43. *See id.* at 401, 403.

44. *Id.* at 401.

45. *See id.* at 403. A previous case in the First Circuit had very similar facts to *Perez-Oviedo*, and the court adopted almost identical reasoning. *See* United States v. Cardales, 168 F.3d 548, 551–53 (1st Cir. 1999).

46. *See* Lauritzen v. Larsen, 345 U.S. 571, 585 (1953) (explaining that a vessel flying the flag of a nation is under the jurisdiction of that nation); United Nations Convention on the Law of the Sea art. 92, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.").

47. *See Perez-Oviedo*, 281 F.3d at 403.

approach."[48] In order for due process to be satisfied using this method, a sufficient "nexus" must exist between the defendant and the United States such that the exercise of jurisdiction over the defendant is not "arbitrary or fundamentally unfair."[49] The Second Circuit took this approach in *United States v. Yousef*.[50] The defendant in that case appealed multiple convictions from the district court, all of which stemmed from his part in a conspiracy to place bombs on board twelve American commercial airplanes operating flights in Southeast Asia.[51] As a test run for these bombings, the defendant had placed a bomb on a Philippine Airlines flight traveling to Japan.[52] The defendant disembarked during a layover, and the bomb later exploded, killing a Japanese citizen.[53] The defendant argued that the district court's exercise of jurisdiction over him violated the Due Process Clause,[54] since the only act in furtherance of the conspiracy had taken place outside the United States and had not harmed any American citizens or property.[55] The Second Circuit, explicitly borrowing the nexus test from the Ninth Circuit,[56] held that the district court's jurisdiction over Yousef was consistent with due process.[57] The court noted that the defendant's attack on the Philippine Airlines flight was a "test-run in furtherance of [the] conspiracy" to attack American airplanes, and held that the nexus

48. *See* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 2374 (2012); United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003); United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

49. *See Al Kassar*, 660 F.3d at 118 (quoting *Yousef*, 327 F.3d at 111) (internal quotation marks omitted); *Davis*, 905 F.2d at 248–49.

50. 327 F.3d at 111–12.

51. *See id.* at 79–80.

52. *See id.* at 79.

53. *Id.*

54. *See id.* at 111.

55. *See id.* at 79, 111.

56. *Id.* at 111 ("The Ninth Circuit has 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, so that such application would not be arbitrary or fundamentally unfair.' . . . We agree." (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990))). In *Davis*, the Coast Guard encountered the defendant's vessel thirty-five miles off the California coast, sailing toward San Francisco. *Davis*, 905 F.2d at 247. Officers boarded the ship, found marijuana, and arrested the defendant. *See id.* Following the defendant's conviction in federal district court, the Ninth Circuit found that the district court's exercise of jurisdiction was consistent with due process because a sufficient nexus existed between the defendant and the United States. *See id.* at 249. Such a nexus existed because the defendant's "attempted transaction [was] aimed at causing criminal acts within the United States, [and so] there [was] a sufficient basis for the United States to exercise its jurisdiction." *Id.* (quoting United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987)) (internal quotation marks omitted).

57. *See Yousef*, 327 F.3d at 111–12.

requirement was satisfied by "the substantial intended effect of their attack on the United States and its citizens."[58]

The remaining circuits have yet to commit to either the international law approach or the nexus approach.[59] Until recently, this uncommitted group included the Fourth Circuit.

II. *UNITED STATES V. BREHM*

A. Factual and Legal Background

Sean Brehm, a South-African national, was a contractor on a NATO military base in Kandahar, Afghanistan.[60] Brehm worked for DynCorp, an American company providing logistics and support to the U.S. Army in Afghanistan under a contract with the Department of Defense.[61] Brehm was a travel coordinator, stationed at all times on the base in Afghanistan.[62] His contract required him to "comply with applicable laws and regulations of the United States."[63] By signing the contract, Brehm also confirmed that he "has been informed of, understands and accepts that [he] may be subject to U.S. . . . federal civilian criminal jurisdiction under the Military Extraterritorial Jurisdiction Act by accompanying the U.S. Armed Forces outside the United States."[64] The Department of Defense issued Brehm an official Letter of Authorization, permitting him to

58. *Id.* at 112 (internal quotation marks omitted).

59. The Sixth, Eighth, and Tenth Circuits have not yet considered the issue. The Fifth Circuit and the District of Columbia Circuit have so far refused to commit to either approach. *See* United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004); United States v. Suerte, 291 F.3d 366 (5th Cir. 2002). At least one author has placed the Fifth Circuit among the courts that favor the international law approach. *See* Lichter, *supra* note 38, at 1941 (citing *Suerte*, 291 F.3d at 375). The Fifth Circuit in *Suerte* did apply the international law approach, *see Suerte*, 291 F.3d at 375–76, but the court carefully restricted its decision to "the issue at hand," which involved an application of the Maritime Drug Law Enforcement Act, a statute invoking some particularized constitutional issues relating to the Piracies and Felonies Clause. *See id.* at 372–75; *see also* Colangelo, *supra* note 33, at 173–74 (explaining the significance of the Piracies and Felonies Clause in the *Suerte* decision). Even in that limited context, the court did not find that the international law approach was correct, but instead "[a]ssum[ed], *arguendo*, that resolution of this issue does require consulting international law." *Suerte*, 291 F.3d at 375.

60. *See* United States v. Brehm, No. 1:11–CR–11, 2011 WL 1226088, at *2 (E.D. Va. Mar. 30, 2011), *aff'd*, 691 F.3d 547 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012). Of the NATO military personnel stationed at the base, around eighty percent were from U.S. military units. *See id.*

61. *See id.*

62. *See id.*

63. *Id.* (internal citation and quotation marks omitted).

64. *Id.* (internal citation and quotation marks omitted).

work at the NATO base in support of the U.S. military.[65] The letter also informed him that he would receive various benefits and services from the American government, including transportation, food, and medical care.[66]

On the afternoon of November 25, 2010, Brehm was working at the airport on the military base.[67] He came across the victim, a British citizen identified only as "J.O.," with whom he had a pre-existing personal dispute.[68] Upon seeing each other, Brehm and J.O. began a verbal altercation, which turned violent when Brehm stabbed J.O. with some kind of weapon.[69] An agent from the U.S. Army, who witnessed the attack, approached the men with his firearm drawn and ordered Brehm to drop his weapon.[70] Brehm eventually complied after the order was repeated several times.[71] J.O. received treatment at the scene and was rushed to the American military hospital at the NATO base for emergency surgery, before being flown to a U.S. military base in Bagram.[72] The U.S. military police arrested Brehm and detained him on the base for over two weeks.[73]

Afghanistan had no intention of taking any action against Brehm. In 2003, Afghanistan entered into an agreement with the United States, disavowing any interest in prosecuting military or civilian personnel working for the Department of Defense.[74] Consequently, on December 10, 2010, a U.S. magistrate judge issued an arrest warrant for Brehm and conducted a preliminary hearing by telephone.[75] Following the judge's orders, Brehm was transported on

65. *See id.*

66. *See id.* The medical benefit was described as "resuscitative care." *Id.*

67. *Id.* at *3.

68. *See id.* J.O. was working in Afghanistan for a contractor to the United States Agency for International Development. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. *See* Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., Sept. 26, 2002–May 28, 2003, Hein's No. KAV 6192, at iv [hereinafter Personnel Agreement] ("The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel.").

75. *See Brehm*, 2011 WL 1226088, at *3.

December 21, 2010, to the Eastern District of Virginia.[76] On January 5, 2011, a grand jury indicted Brehm on two counts: assault with a dangerous weapon, and assault resulting in serious bodily injury.[77] The indictments cited MEJA as the statutory basis for jurisdiction.[78] At his arraignment, Brehm pled not guilty to both counts.[79]

Brehm then moved to dismiss the indictment on two grounds. First, he argued that MEJA, as applied to him, exceeded the enumerated powers of Congress.[80] Second, he claimed that the district court's exercise of jurisdiction over him was inconsistent with the Due Process Clause of the Fifth Amendment because his "connection to the United States is so lacking" that the district court could not, "consistent with the requirements of the Due Process Clause [of the Fifth Amendment], exercise jurisdiction under MEJA."[81] The court denied the motion.[82] Thereafter, Brehm pled guilty to one of the two counts of assault.[83] As part of the plea agreement, he retained the right to appeal the denial of his motion to dismiss.[84]

B. The Fourth Circuit's Decision

On August 10, 2012, the Fourth Circuit affirmed the district court's decision, upholding Brehm's conviction.[85] The Fourth Circuit made two holdings, one of which was that the Due Process Clause did

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76. *Id.* There is no recorded explanation as to why authorities took Brehm to the Eastern District of Virginia. DynCorp is headquartered in Falls Church, Virginia, *Contact Us*, DYNCORP INT'L, http://www.dyn-intl.com/about-us/contact.aspx (last visited Feb. 11, 2013), which falls within the Eastern District. *Eastern District of Virginia Jurisdiction*, U.S. DIST. COURT E. DIST. VA., http://www.vaed.uscourts.gov/jury/jurisdiction.html (last visited Oct. 10, 2012). However, whether the company's location was a factor in the decision remains unclear. The government could have chosen to try Brehm in any district in the United States, since MEJA's venue provision provides that "[t]he trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought." Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3238 (2006).

77. *Brehm*, 2011 WL 1226088, at *1, *3. The offenses were defined by 18 U.S.C. §§ 113(a)(3), (6), and are federal crimes when committed "within the special maritime and territorial jurisdiction of the United States." *Id.* § 113(a).

78. United States v. Brehm, 691 F.3d 547, 550 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012).

79. *Brehm*, 2011 WL 1226088, at *3.

80. *Id.* at *6. Specifically, Brehm argued that Congress lacked the authority "to police routine assaults between foreigners that occur abroad and do not harm the United States." *Brehm*, 691 F.3d at 550.

81. *Brehm*, 691 F.3d at 550.

82. *See Brehm*, 2011 WL 1226088, at *7.

83. *See Brehm*, 691 F.3d at 550.

84. *See id.*

85. *Id.* at 554.

not prevent the district court from exercising adjudicative jurisdiction over Brehm.[86] This Recent Development focuses only on that holding.[87]

The Fourth Circuit failed to provide a clear statement of the test it used to determine whether jurisdiction was consistent with the Due Process Clause. However, the court indicated that due process would be satisfied if the exercise of jurisdiction "would not be arbitrary or fundamentally unfair."[88] The remainder of the court's opinion, in which it found the due process standard to be satisfied, blended three steps. At the first step, the court cited the aforementioned decisions from the Second and Ninth Circuits that have required a "nexus" between the defendant and the United States to satisfy due process.[89]

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86. *Id.* at 552–54. The court's holding also had another component beyond the scope of this Recent Development: the court held MEJA constitutional as applied because Congress had the authority to apply its criminal laws to foreign nationals extraterritorially. The court reasoned that Congress had legislative authority under Article I, Section 8 of the Constitution, especially under its power "to raise and support Armies," *id.* at 551 (citing U.S. CONST. art I, § 8, cl. 12), along with the Necessary and Proper Clause, *id.* (citing U.S. CONST. art I, § 8, cl. 18). The court's holding on this issue, being very recent, has yet to receive thorough analysis from commentators. A few authors, however, have already cast some doubt on this aspect of the decision. *See, e.g.*, Steve Vladeck, Brehm: *Fourth Circuit Creates Split in Contractor-Contacts Analysis*, LAWFARE (Aug. 12, 2012, 7:00 PM), http://www.lawfareblog.com/2012/08/brehm-fourth-circuit-creates-split-in-contractor-contacts-analysis/ ("I don't think it is immediately obvious that Congress's power over civilian contractors can fairly be traced to the Make Rules Clause of Article I, which only extends to 'Rules for the Government and Regulation of the land and naval Forces.' ").

87. Professor Colangelo succinctly describes the difference between the issues that the two separate holdings address: "Unlike structural limits, due process interests do not restrict Congress's general authority to make and project law extraterritorially, but act instead to shield the individual accused from the application of an otherwise constitutional enactment." Colangelo, *supra* note 33, at 136 (citing Weisburd, *supra* note 29, at 384–85).

88. *See Brehm*, 691 F.3d at 552 (citations omitted). The reader must extrapolate the content of this test from the court's cryptic language. Rather than explicitly stating the standard that it planned to apply, the court merely began its analysis by saying that some courts have, as a proxy for due process, required "a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *Id.* (citing United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990)). The court then proceeded to explain that no "nexus" existed in the present case, *see id.*, but appeared to stand by the requirement that the exercise of jurisdiction must not be arbitrary or fundamentally unfair. *See id.* at 553 ("[T]he imposition of American criminal law . . . is not arbitrary."); *id.* (finding that, in the circumstances that existed in the case, the law's application "is unlikely to be arbitrary"); *id.* ("Nor do we perceive any inherent unfairness in Brehm's prosecution.").

89. *Id.* at 552 (citing *Davis*, 905 F.2d at 248–49 (finding a sufficient nexus to exert jurisdiction over a British national seized off the coast of California while attempting to smuggle marijuana into the United States)); United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (finding jurisdiction over foreign nationals tried for planning to carry out terrorist bombings on American commercial aircraft in Asia).

However, the *Brehm* court acknowledged that the nexus test did not apply directly because, unlike the defendants in the other "nexus" cases, "Brehm did not target his conduct toward American soil or American commerce."[90] However, the court decided that the nexus requirement in the other circuits was a mere proxy for due process,[91] and that another proxy existed in Brehm's case. There, "the American influence was so pervasive" on the base that the court found it to be "a suitable proxy for due process purposes, such that the imposition of American criminal law there is not arbitrary."[92] The court explained some of the American interests at stake: "preservation of law and order on the base, the maintenance of military-related discipline, and the reallocation of Department of Defense resources to confine Brehm, provide care for J.O., and investigate the incident."[93]

Having dispensed with the nexus test by finding a suitable proxy, the court moved on to consider whether international law impacted the due process analysis. It found that the agreement between the United States and Afghanistan made the exercise of jurisdiction non-arbitrary, and therefore weighed in favor of the Due Process Clause being satisfied.[94] The arrangement authorized the United States to exercise its jurisdiction over "United States personnel" in Afghanistan, including civilians.[95] The court referred to *United States v. Angulo-Hernández*,[96] a case in which the First Circuit had found jurisdiction to be consistent with due process based on an international agreement.[97] The *Brehm* court then applied similar reasoning to the case before it, explaining why the agreement between the United States and Afghanistan satisfied the Due Process Clause:

> With Afghanistan having disclaimed any interest in prosecuting criminal conduct . . . by those situated similarly to Brehm, due process is not offended by the United States stepping into the

90. *Brehm*, 691 F.3d at 552.
91. *Id.* at 552–53.
92. *Id.* at 553.
93. *Id.* at 552–53.
94. *Id.* at 553–54 (citing Personnel Agreement, *supra* note 74).
95. *Id.* (citing Personnel Agreement, *supra* note 74). The agreement states: "The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel." Personnel Agreement, *supra* note 74, at iv.
96. 565 F.3d 2 (1st Cir. 2009).
97. *See Brehm*, 691 F.3d at 553 (citing *Angulo-Hernández*, 565 F.3d at 11).

> jurisdictional void.... The risk of ... random lawlessness is readily seen as inimical to the success of the military mission in Afghanistan, and thus contrary to the American interest in that mission. Insofar as the enactment of MEJA serves to legitimately advance that interest, its application is unlikely to be arbitrary.[98]

Third, the court found that there was "no inherent unfairness" in the district court's exercise of jurisdiction over Brehm.[99] He should have known, the court reasoned, that committing an assault would lead to prosecution, especially in light of the notice in his employment contract that he might be subject to criminal jurisdiction in the United States.[100] As a result of these factors, the court deemed that the district court's exercise of jurisdiction over Brehm was consistent with due process.[101]

III. THE SHORTCOMINGS OF THE FOURTH CIRCUIT'S APPROACH

The Fourth Circuit's discussion of the due process issue was unsatisfactory for several reasons. The court's reasoning is likely to confuse lower courts because it combined three separate strands of analysis—the American influence (the "proxy" for due process), the basis in international law, and the lack of inherent unfairness—without explaining how those strands interrelate.[102] In addition, the court's reasoning contained three specific deficiencies. First, it failed to explain why the strong American influence on the military base sufficed as a "proxy for due process," or even what "proxy for due process" means. Second, it borrowed the international law approach from some of the other circuits. As will be explained, this approach is flawed. Third, the view that there was "no inherent unfairness" in exercising jurisdiction over Brehm, though correct, was used in an illogical place in the court's analysis.

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98. *Id.*

99. *Id.* at 553–54.

100. *See id.* at 554.

101. *Id.*

102. It seems likely that courts will have to decide similar cases relatively frequently given the Department of Defense's increasing use of contractors on overseas military bases, many of whom are foreign nationals. *See supra* notes 1–3 and accompanying text. MEJA will apply to almost every contractor that commits a crime while accompanying the military, *see supra* notes 19–22 and accompanying text, and courts will then have to decide whether the exercise of jurisdiction is consistent with due process.

A. *The Lack of Clarity and Transparency*

An unenviable task awaits lower courts, defendants, and law enforcement authorities seeking to apply *Brehm*'s reasoning, even to a case with facts very similar to *Brehm*. The Fourth Circuit's opinion lacked the clarity necessary to allow its precedent to be fully understood or faithfully followed.

One source of confusion was the court's amalgamation of lines of analysis that had previously been kept separate.[103] As discussed, the court gave three separate reasons for finding that due process was satisfied: the "pervasive" American influence, the foundation in international law, and the absence of "inherent unfairness."[104] However, the court failed to explain the interrelation between these factors.[105] Instead, it simply listed the reasons, without beginning or ending its discussion with any indication of the significance or weight of the individual factors at play. While most other circuits were content to rely either on the nexus approach or the international law approach,[106] the *Brehm* court analyzed both, and also inserted its own, proxy-based reasoning.[107] It then moved on to consider whether there was inherent unfairness in the exercise of jurisdiction.[108] The reader is left guessing whether any one aspect of the court's reasoning was dispositive or whether the court was deciding based on the totality of the circumstances.[109] The lack of explanation will limit *Brehm*'s

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103. Other courts have occasionally applied both the international law test and the nexus test. However, they have only done so when they have explicitly found that due process was satisfied under either test, and have therefore seen no need to choose between them. *See* United States v. Delgado-Garcia, 374 F.3d 1337, 1343, 1345 (D.C. Cir. 2004); United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002). The *Brehm* court failed to explain whether it believed the pervasive influence or the basis in international law would each have been sufficient alone. *See infra* notes 104–10 and accompanying text. It also failed to explain how the absence of inherent unfairness factored into its analysis. *See infra* notes 104–10 and accompanying text.

104. *See supra* Part II.B.

105. *See Brehm*, 691 F.3d at 552–54; *supra* Part II.B.

106. *See supra* Part I.C.

107. *See Brehm*, 691 F.3d at 552–54.

108. *See id.* at 553–54.

109. Of course, the Fourth Circuit was limited by the facts of the case before it, and could not have applied the law to every possible permutation of facts. However, in deciding cases in other areas of law, the Fourth Circuit has provided comprehensive and effective guidance in dicta. For example, the court has considered the application of the subject-matter jurisdiction rules to inactive corporations. *See* Athena Auto., Inc. v. DiGregorio, 166 F.3d 288, 290–92 (4th Cir. 1999). In holding that the corporation at issue was subject to diversity jurisdiction under 28 U.S.C. § 1332(c)(1), the court did not need to determine the state in which the inactive corporation had its principal place of business. *Id.* at 292. The court continued: "If, however, we were required to find a principal place of business for applying § 1332, we might . . . [apply] our 'nerve center test' . . . ." *Id.* When

precedential value in cases with facts that are even slightly different.[110]

In addition to the court's conflation of these three different approaches, each of these individual approaches suffered from its own particular deficiencies.

B. The Court Should Not Have Determined Due Process by Proxy

There are significant problems with the court's conclusion that the "pervasive" American influence on the NATO base was a sufficient "proxy" for due process.[111] The court purportedly derived its reasoning from two cases using the nexus approach: the decision of the Ninth Circuit in *Davis*[112] and the Second Circuit's opinion in *Yousef*.[113] However, by the Fourth Circuit's own admission, the facts of *Brehm* did not satisfy the nexus test because, unlike in *Davis* and *Yousef*, the defendant in *Brehm* "did not target his conduct toward American soil or American commerce."[114] Unable to rely on the nexus analysis as the Second and Ninth Circuits had used it, the court reasoned that the nexus approach was just an example of an analytical framework serving as a proxy for due process.[115] The court then held that the "pervasive American influence" could also be such a proxy, and applied it to the facts to find that the exercise of jurisdiction over Brehm satisfied due process.[116]

One major problem is the court's choice of terminology. The Fourth Circuit's language implies that the term "proxy for due

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required to determine an inactive corporation's principal place of business several years later, a lower court referred to the *Athena Automotive* decision as "guidance," and applied the nerve center test. Toporek v. MBT Int'l, Inc., Civil Action No. 2:07-1610-CWH, 2007 WL 3306696, at *3–4 (D.S.C. Nov. 6, 2007).

110. For example, if the assault had taken place at a bar outside of a military base, presumably negating the pervasive American influence as a basis of jurisdiction, would the other factors have been sufficient to satisfy due process? Alternatively, would the exercise of jurisdiction be consistent with due process if the two contractors had been based in a country that did not have a jurisdictional agreement with the United States?

111. *Brehm*, 691 F.3d at 553 ("Although [the base] was not technically territory of the United States, the American influence was so pervasive that we think it a suitable proxy for due process purposes, such that the imposition of American criminal law there is not arbitrary.").

112. 905 F.2d 245 (9th Cir. 1990). For an explanation of the *Davis* court's reasoning, see *supra* note 56.

113. 327 F.3d 56 (2d Cir. 2003). For the *Brehm* court's discussion of *Davis* and *Yousef*, see *Brehm*, 691 F.3d at 552.

114. *See Brehm*, 691 F.3d at 552–53.

115. *See supra* text accompanying notes 91–92.

116. *Brehm*, 691 F.3d at 553.

process" is a term of art that is used by other courts in similar cases.[117] This is not the case. Neither *Davis* nor *Yousef* uses the word "proxy."[118] In fact, no other court deciding a due process question in the context of extraterritorial jurisdiction has ever mentioned a "proxy" for due process.[119] Moreover, the term is not self-defining in this context.[120] It was therefore essential for the Fourth Circuit to explain what it meant by a "proxy for due process," and why a proxy is constitutionally legitimate. The court instead left this for lower courts to decipher.

Given the plain meaning of the term "proxy" and the Fourth Circuit's language, lower courts are most likely to find that the Fourth Circuit intended to establish a "pervasive American influence" test as an alternative method, alongside the nexus approach and the international law approach, of establishing due process.[121] This raises a number of concerns. First, contrary to the court's suggestion, this alternative test for due process is not supported by precedent.[122] In

117. *Id.* at 552 ("Some courts have [used the nexus test] as a proxy for due process . . . .").

118. *See Yousef*, 327 F.3d at 111–12 (noting only that "there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair" (citing United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990))); *Davis*, 905 F.2d at 248–49 (using the "nexus" language).

119. The author conducted a Westlaw terms and connectors search in the "All Federal Cases" database using the following search string: " 'due process' & territor! /100 jurisdiction /100 proxy." The search yielded five results, of which only two were criminal cases. Neither of those two cases used the word "proxy" in the context of analyzing whether the exercise of jurisdiction was consistent with due process.

120. "Proxy" is defined as "[o]ne who is authorized to act as a substitute for another," and is perhaps most familiar in corporate law as "a person who is authorized to vote another's stock shares." BLACK'S LAW DICTIONARY 1346 (9th. ed. 2009).

121. The court described the nexus approach as "a proxy for due process," *Brehm*, 691 F.3d at 552, and went on to label the pervasive American influence as another "suitable proxy for due process purposes." *Id.* at 553. Taking into account the notion of a proxy as a substitute, *see supra* note 120, the court's language indicates that the nexus test is one test for due process, and the "pervasive American influence test" is another. In other words, in order to comply with the Due Process Clause, the exercise of jurisdiction must satisfy one of the alternative tests. Another possible interpretation is that the court saw the "pervasive American influence" as a type of nexus, so that the nexus approach was satisfied on the facts. This appears to be a more strained interpretation. If the facts had satisfied the nexus test, the court would have stated this in a far more straightforward manner. There would have been no need to introduce the proxy language. In addition, the court's language shows that it intended to distinguish *Brehm* from the nexus cases, rather than drawing parallels with them: "It is undoubtedly the case that, unlike the defendants in *Davis* and *Yousef*, Brehm did not target his conduct toward American soil or American commerce." *Brehm*, 691 F.3d at 552.

122. As discussed, no other court uses the word "proxy" in this area of the law. *See supra* notes 118–19 and accompanying text. More importantly, no other court suggests that there should be several different tests available. Some courts apply the nexus test, *see*

addition, it is unclear why the presence of a proxy, such as the pervasive American influence on the base, means that jurisdiction is consistent with the Due Process Clause. The court acknowledged the rationale behind the nexus approach: when a nexus exists, courts have found the exercise of jurisdiction to be neither arbitrary nor fundamentally unfair.[123] In fact, the need for jurisdiction to be neither arbitrary nor fundamentally unfair is the only aspect of this area of the law on which *all* courts are able to agree.[124] Other circuits have justified their chosen test by explaining why satisfaction of the test is indicative of an absence of arbitrariness or unfairness.[125] The Fourth Circuit is silent on the question of why an American influence, in the absence of a nexus, should be sufficient to establish due process.

The *Brehm* court's omission of an explanation leaves the reader to supply the missing link between the "pervasive American influence" and the satisfaction of the Due Process Clause. However, it is far from clear that the American influence alone should be sufficient. The opinion identified the American interests at stake as the resources required to treat the victim, detain the defendant, and investigate the crime.[126] If these are sufficient to establish due process, was the court suggesting that due process depends on to the interests of the United States rather than fairness to the defendant? Such a suggestion would be problematic. First, it would distort the nature of the Due Process Clause, which provides individual defendants with

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supra notes 48–58 and accompanying text, and others apply the international law approach, *see supra* notes 35–47 and accompanying text. When courts have used both tests, this has only been because both tests are satisfied on the facts and the court need not choose between them. *See supra* note 103. The cases that the Fourth Circuit cites do not view a nexus as one way of establishing due process, but as the only way. *See, e.g.*, *Yousef*, 327 F.3d at 111 (citing *Davis*, 905 F.2d at 248–249) (explicitly adopting the nexus standard from the Ninth Circuit)); *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." (internal citations omitted)); *see also* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (repeating the nexus test and further explaining that, "[f]or non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests").

123. *See Brehm*, 691 F.3d at 553–52.

124. *See supra* note 34 and accompanying text.

125. For example, when there is a nexus between the defendant's criminal conduct and the United States, "it cannot be argued seriously that the defendant['s] conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair" because of the threat posed to the nation and its citizens. *Yousef*, 327 F.3d at 112.

126. *See Brehm*, 691 F.3d at 553.

procedural rights.[127] The interests of the United States should not dictate the defendant's procedural rights. Second, the suggestion would mean that the Due Process Clause would be satisfied in virtually every case because it is difficult to imagine a federal prosecution in which the United States does not have an interest. The court also noted that the United States had an interest in exercising jurisdiction over Brehm as part of its concern with maintaining law, order, and discipline on the base.[128] However, the court failed to explain why it was non-arbitrary to simply assume that the United States' responsibility for maintaining law, order, and discipline on the base encompassed Brehm's prosecution. Was this conclusion a function of the sheer number of American troops that were stationed on the base, or was it because both the defendant and the victim were working for Department of Defense contractors? There was no mention in the opinion of the involvement of South Africa, the home country of the defendant,[129] or the United Kingdom, the home country of the victim.[130] Were either of these nations in a position to prosecute Brehm, and, if so, would this have made a difference to whether the American influence was sufficient to establish jurisdiction?

The third concern is the implications of the proxy-based reasoning for future cases. Even if lower courts accept that the new concept of proxies allows alternative tests for due process, and that the pervasive American influence is one such test, will they assume that there will also be others? If so, how will they determine what these other alternatives are? As discussed previously, the Fourth Circuit was not required, or even able, to discuss every possible permutation of facts that may arise in another case.[131] However, its conclusion that an American influence is a "proxy for due process," without any coherent explanation or limitation, tells lower courts nothing more than that due process will be satisfied when the court finds that it is satisfied. As lower courts will struggle to resolve this puzzle, the uncertainty will afflict both defendants and the government. It will be difficult for both sides to assess whether, in any

127. U.S. CONST. amend. V ("No *person* shall ... be deprived of life, liberty, or property, without due process of law." (emphasis added)); *see also* Colangelo, *supra* note 33, at 169 (describing the rights contained in the Due Process Clause as "personal to the accused").

128. *See infra* note 135 and accompanying text.

129. *See Brehm*, 691 F.3d at 549.

130. *See id.*

131. *See supra* note 109 and accompanying text.

given case, jurisdiction is consistent with due process according to the Fourth's Circuit's circular "proxy" test.

C. The Court's Reliance on the International Law Approach Was Problematic

The *Brehm* court's partial reliance on the international law approach was misplaced because that approach itself is highly flawed. The court adopted the international law approach only implicitly, and only as one of several bases for jurisdiction.[132] Nonetheless, although several circuits have embraced this approach,[133] any automatic determination of due process by reference to international law is logically unsatisfactory.

1. The *Brehm* Court Adopted the International Law Approach

In relying on the Personnel Agreement[134] between the United States and Afghanistan, the court was unmistakably adopting the international law approach. The agreement was a bilateral treaty, giving the United States the ability, as a matter of international law, to exercise extraterritorial jurisdiction over those working with the American military in Afghanistan.[135] The Fourth Circuit found that, because jurisdiction existed under the treaty, jurisdiction was also consistent with the Due Process Clause.[136] In reaching this conclusion, the court explicitly followed a First Circuit decision that adopted the international law approach.[137]

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132. *See Brehm*, 691 F.3d at 553–54 (citing Personnel Agreement, *supra* note 74). For an explanation of the different bases of jurisdiction that the court used, see *supra* Part II.B.

133. *See, e.g.*, United States v. Angulo-Hernández, 565 F.3d 2, 10–11 (1st Cir. 2009) ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under [federal law] when the flag nation has consented to the application of United States law to the defendants." (citing United States v. Cardales, 168 F.3d 548, 552 (1st Cir. 1999))); United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) ("[T]his circuit ... [has] not embellished the MDLEA with a nexus requirement."); United States v. Perez-Oviedo, 281 F.3d 400, 402–03 (3d Cir. 2002); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir.1993).

134. Personnel Agreement, *supra* note 74, at iv.

135. *See id.* The United States describes this document as a bilateral treaty. *See* U.S. DEP'T OF STATE, BILATERAL TREATIES IN FORCE AS OF NOVEMBER 1, 2007, at 1 (2007), http://www.state.gov/documents/organization/83017.pdf. A treaty, also known as an international agreement, is a source of international law. SLOMANSON, *supra* note 40, at 19.

136. *Brehm*, 691 F.3d at 553.

137. *Id.* (citing *Angulo-Hernández*, 565 F.3d at 11). In *Angulo-Hernández*, the First Circuit found that jurisdiction was consistent with due process because Bolivia, the flag nation of the vessel in which the defendants were arrested, had consented to the United States's exercise of jurisdiction. *Angulo-Hernández*, 565 F.3d at 11.

A potential counterargument to this characterization of the court's approach is that the court was not simply relying on the international agreement, but was instead finding due process to be satisfied based on the particular circumstances of the case. After all, the court found that "Afghanistan [had] disclaimed any interest in prosecuting criminal conduct ... by those situated similarly to Brehm," and that the United States had an interest in exercising jurisdiction in response to "[t]he risk of ... random lawlessness."[138] Arguably, the United States does have some general interest in preventing crime and enforcing the law in combat areas. However, the agreement established that, as a matter of international law, enforcing law and order was the responsibility of the United States rather than Afghanistan.[139] The court was using what is widely recognized under international law as the "territorial principle," whereby a "state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state."[140] The *Brehm* court was therefore relying directly on international law to determine whether the Due Process Clause was satisfied, which is the essence of the international law approach.[141]

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138. *Brehm*, 691 F.3d at 553.

139. *See* Personnel Agreement, *supra* note 74, at iv ("The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel.").

140. United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (quoting United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988)).

141. In addition, as discussed above, a court should not condition due process purely on the interests of the United States. *See supra* note 127 and accompanying text. As a result, it is unsatisfactory to conclude that international agreements like this give the United States an interest that automatically justifies the exercise of jurisdiction within the bounds of the Due Process Clause. A second potential counterargument is that Afghanistan, by entering into the agreement, ceded some of its territory to the United States. As a result, one may argue, the *Brehm* court was not really deciding on whether the exercise of *extraterritorial* jurisdiction comported with the Due Process Clause. Instead, perhaps, the court was deciding that the United States was simply exercising jurisdiction within its extended territory. This argument does not withstand scrutiny. The court did not discuss any transfer of territorial jurisdiction, and explicitly stated that the United States was exercising its jurisdiction extraterritorially. *Brehm*, 691 F.3d at 552 (referring to "a criminal statute having extraterritorial reach"). In addition, nothing in the agreement suggests any transfer of territory. *See* Personnel Agreement, *supra* note 74, at iv. There is no indication that the agreement would allow the United States to prosecute anybody who happened to be present on the base; only "United States personnel," including non-citizen contractors, are covered. *See id.* Furthermore, the agreement does not restrict American control over its contractors to the geographic boundaries of the base. *See id.* On the face of the agreement, the United States could prosecute one of its contractors for a crime

2. The International Law Approach Is Fundamentally Flawed

Regardless of how the Fourth Circuit employed it in this case, the international law approach is logically and practically unsound. Whether or not a government action, such as a criminal prosecution, is consistent with international law is a distinct question from whether or not the action is consistent with the United States Constitution.[142] The Constitution and international law have been developed by different actors, for different purposes, and to regulate conduct between different parties.[143] Although both happen to address the issue of jurisdiction, they approach the issue from different angles. Some of the jurisdictional rules that exist under international law only concern the relations between states, without any regard for the rights of the individual defendant.[144] The Due Process Clause concerns the relationship between the United States and an individual.[145] In this context, it determines whether the exercise of jurisdiction over the individual is fair and non-arbitrary.[146] As a result, it seems counterintuitive to assume, as several circuits do, that international law and the Due Process Clause are equivalent on questions of jurisdiction. None of the courts adopting the international law approach has provided any explanation of why two completely different bodies of law should happen to converge so precisely on the issue of jurisdiction.

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committed anywhere in Afghanistan. *See id.* The agreement did not, therefore, give rise to any transfer of territory.

142. *See, e.g.*, Brilmayer & Norchi, *supra* note 27, at 1221–22.

143. SLOMANSON, *supra* note 40, at 3, 5 (defining international law as "the body of rules by which nations are bound in their mutual relations," but also acknowledging that some aspects of international law have come to apply to other actors, including individuals); OPPENHEIM'S INTERNATIONAL LAW 4 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996) ("International law is the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law." (citations omitted)).

144. For example, jurisdiction under international law may be based only on a unilateral agreement between two countries. *See* Colangelo, *supra* note 33, at 169 ("[I]f Fifth Amendment due process rights are truly personal to the accused, how can international law rules prescribing the jurisdictional reach of *governments* impair or reduce the fundamental liberty rights of *individuals?*").

145. U.S. CONST. amend. V ("No *person* shall . . . be deprived of life, liberty, or property, without due process of law." (emphasis added)).

146. *See* United States v. Ali, 885 F. Supp. 2d 55, 59 (D.C. Cir. 2012); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378 (11th Cir. 2011); United States v. Cardales, 168 F.3d 148, 553 (1st Cir. 1999); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993); United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

More fundamentally, the Constitution cannot logically be tied to international law. It is a fundamental principle of constitutional law that the Constitution constrains the legislative power of Congress.[147] Courts will not give effect to an act of Congress that is unconstitutional; they will instead strike the statute down.[148] By contrast, Congress is *not* constrained by international law. Courts will give effect to a statute that directly contradicts international law, provided Congress makes clear its intention to legislate inconsistently with its international obligations.[149]

However, the *Brehm* court, and several other circuits, tie the Due Process Clause and international law together.[150] This has the effect of "constitutionalizing" the jurisdictional requirements of international law.[151] Because the Constitution takes precedence over a statute, this approach means that Congress and other branches of government can no longer take actions that are contrary to international law.[152] Whatever the constraints of international law on the issue of

147. This occurs in two broad ways. First, the Constitution limits the legislative authority of Congress. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995) (describing the powers of Congress as "limited to those powers enumerated in the Constitution"). This first limitation on Congress was the subject of the first holding in *Brehm*: that Congress had the authority to make MEJA apply extraterritorially to defendants in Brehm's position. United States v. Brehm, 691 F.3d 547, 552 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012). The second type of limitation is the type that is relevant to the second holding in *Brehm*, and to this Recent Development: Even when Congress legislates within the scope of its authority, its legislation will be unconstitutional if it is inconsistent with a constitutional right, such as a right existing under the Due Process Clause. *Id.*

148. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[A] law repugnant to the constitution is void . . . .").

149. Hong Long & Shanghai Banking Corp. v. Simon, 153 F.3d 991, 995 (9th Cir. 1998) ("Congress has the unquestioned authority to enforce its laws beyond the territorial boundaries of the United States. . . . Whether Congress has exercised that authority in a particular case is a matter of statutory construction[,] . . . [and the court begins] with the presumption that the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (citations omitted) (internal quotation marks omitted)); Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) (holding that a statute was still enforceable, even thought it was in direct conflict with a U.S. treaty obligation); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1), 115(1)(a) (2012) (stating that when a U.S. court is applying a domestic statute that conflicts with a rule of customary international law, the statute overrides the treaty obligation). An example of Congress explicitly legislating contrary to international law on an issue of jurisdiction can be found in the U.S. Maritime Drug Enforcement Laws: "[A] failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter." 47 U.S.C.A. § 70505 (West 2009 & Supp. 2012).

150. *See supra* notes 35–47 and accompanying text.

151. *See* Weisburd, *supra* note 29, at 382.

152. *Id.*

jurisdiction, those will also exist under the Due Process Clause. The U.S. government is then bound by those constraints, whether or not Congress expressly intends to contradict them. The international law approach therefore fundamentally changes the nature of the relationship between the United States and its international obligations.

As a result, the approach makes the jurisdiction of a U.S. district court both too narrow (by making it impossible for the court to exercise jurisdiction in any circumstance in which that exercise would not conform to international law) *and* too broad (by allowing the Due Process Clause to extend to the outer limit of jurisdiction under international law).[153] When viewed in this light, wherein the Constitution is deprived of any independent effect, the international law approach does not seem appealing. Views remain divided as to whether American judges should look beyond this country's borders in interpreting the Constitution.[154] However, even the strongest proponent of using foreign law would see it as only one of several tools of interpretation.[155] No jurist has gone so far as to say that non-American law should be dispositive in determining the content of the Constitution. Taken to its logical conclusion, the international law approach breaks new, undesirable ground.

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153. As the Ninth Circuit noted when disavowing the international law approach, "danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?" United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990).

154. *Compare* Justice Antonin Scalia, Introductory Remarks to *Outsourcing American Law*, AM. ENTERPRISE INST. (Feb. 21, 2006), http://www.c-spanvideo.org/program/191294-3 (arguing that "foreign legal material can never be relevant to an interpretation of . . . the United States Constitution"), *with* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 637 (2007) (arguing that the Supreme Court's use of foreign law is "not illegitimate" and that objections are overstated).

155. *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (reviewing, as part of the Court's consideration of whether the Due Process Clause provided a right to homosexual sodomy, a decision of the European Court of Human Rights that found a right to private, consensual sexual conduct between a same-sex couple). *But see id.* at 598 (Scalia, J., dissenting) ("[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans." (citation omitted) (internal quotation marks omitted)). Of course, there is a clear distinction between the discussion of foreign law and the influence of international law. International law, in some senses at least, is binding on the United States, whereas foreign law is clearly not. However, the analogy is noteworthy. It should also be noted that some aspects of international law may be directly incorporated into American domestic law. *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 415 (2003) (observing that some aspects of international law are directly incorporated under Article VI, Clause 2 of the Constitution). This Recent Development's thesis is that it should not be so incorporated into the consideration of jurisdiction under the Due Process Clause.

One counterargument is that courts using the international law approach may not have intended to go as far as described. Instead, these courts may have simply found, as a matter of fact, that the current international law standard happens to be sufficiently reasonable and non-arbitrary to meet the requirements of due process. However, this argument is not persuasive, primarily because it does not properly reflect the type of analysis in which courts are engaging.[156] Courts adopting the international law approach do not appear to be making any attempt to compare the international jurisdictional standards with the requirements of due process. They are not setting out criteria for ensuring that jurisdiction is fair and non-arbitrary, and then comparing the international standards with those criteria. Instead, judges are simply concluding that, provided international law is satisfied, there is no constitutional problem.[157] The courts are not, therefore, finding that the current international and constitutional *standards* are equivalent; they are taking the less rigorous route of analysis, and merely concluding that whenever jurisdiction is proper under international law, it automatically comports with due process.[158] For the reasons discussed, the *Brehm*

156. A second problem with the counterargument is that even if judges taking the international law approach are, in their own minds, merely drawing a parallel between the current requirements of international law and the demands of the Due Process Clause, they are confusing their audiences. By conflating the two questions, the courts are suggesting to parties and lower courts that due process is automatically satisfied when jurisdiction is consistent with international law. For all of the reasons discussed, this understanding is both mistaken and problematic. As a result, even if the alternative explanation of the international law approach is accepted, the approach remains unsatisfactory.

157. *See* United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1379 (11th Cir. 2011) (concluding that due process was satisfied because international law permitted the United States to exercise jurisdiction over stateless vessels); United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003) (avoiding a full due process analysis and simply citing to other circuits that endorse the international law approach); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002) (finding that no due process violation existed because the foreign national defendant's government consented to the exercise of jurisdiction over the defendant); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States . . . when the flag nation has consented to the application of United States law to the defendants.").

158. This would be a problem if the jurisdictional requirements under international law changed. The courts' current approach would not allow them to determine whether the new rules on jurisdiction still complied with the Constitution because courts are not comparing the two bodies of law; they are simply concluding that jurisdiction under international law will *automatically* satisfy the Due Process Clause. To be sure, the jurisdictional requirements of international law are not changing by the day. At the same time, they are certainly not insulated from change. Many of the rules governing jurisdiction under international law are derived from custom. *See* The S.S. Lotus (Fr. v.

court should have avoided this approach, and all courts should avoid the approach in the future.[159]

D. *The "No Inherent Unfairness" Rationale Is Necessary but Not Sufficient*

Having discussed both the proxy and international law approaches, the court went on to explain that jurisdiction was consistent with due process because there was "no inherent unfairness" in subjecting Brehm to jurisdiction in the United States.[160] Although the court was correct to conclude that there was "no inherent unfairness" in subjecting Brehm to jurisdiction in the United States, this should not, by itself, have been a sufficient basis for finding that jurisdiction was consistent with due process. The court found that Brehm had fair warning that, by committing his criminal acts, he would be prosecuted somewhere.[161] Fairness, the court reasoned, did not require a defendant to be aware that he could be subject to prosecution in the United States in particular.[162] The conclusion that the exercise of jurisdiction over Brehm was not inherently unfair seems to be based on sound policy, provided it is considered at the appropriate place in the analysis. It is unfair for a defendant to be subject to extraterritorial jurisdiction when he has no reason to know that his conduct will be subject to prosecution in a foreign country.[163] It made sense for the Fourth Circuit to join the

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Tur.), 1927 P.C.I.J. 26 (ser. A) No. 10 (Sept. 7) (determining jurisdiction by reference to the practice of "the courts of many countries"). Customary international law is unlikely to change overnight. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5–7 (4th ed. 1990) (explaining that a norm of customary international law develops not just as a result of states' customary practice, but as a result of this practice being settled and recognized as binding). However, a United States court could find jurisdiction called "universal by treaty" under international law as a result of a bilateral or multilateral treaty to which the United States is a party. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 95 (3d ed. 2007).

159. However, as this Recent Development will propose, there is a way for courts, by adopting a more nuanced understanding of the relationship between international law and the Constitution, to harness some of the wisdom of international law in making their judgments. *See infra* Part IV.B.

160. *See supra* notes 99–101 and accompanying text.

161. *See* United States v. Brehm, 691 F.3d 547, 554 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012).

162. *Id.* (citing United States v. Al Kassar, 660 F.3d 108, 119 (2d Cir. 2011)).

163. For example, if a defendant's conduct was legal where it was performed, and the defendant had no reason to believe that the United States had any particular interest in asserting jurisdiction, there would be a strong argument that it would be unfair for the United States to in fact exercise jurisdiction. "If a crime is not evil in itself, but is only criminal because it is declared so by a legislature, then it is malum prohibitum." DANIEL E. HALL, CRIMINAL LAW AND PROCEDURE 60 (6th ed. 2012). On the other hand, if the

majority of its fellow circuits in considering, as part of the due process analysis, whether jurisdiction is fundamentally unfair.

However, the "no inherent unfairness" analysis is only appropriate at a certain point in a court's reasoning. The other circuits uniformly require that jurisdiction be both non-arbitrary *and* not inherently unfair.[164] Following this line of reasoning, the presence of inherent unfairness should negate due process, but the absence of inherent unfairness should not, by itself, satisfy due process. In other words, a court should consider any last-resort argument by a defendant that the exercise of jurisdiction is inherently unfair, but should not use the defendant's "fair warning" of the criminal nature of his conduct as the sole basis of jurisdiction. Using this as an independent basis for jurisdiction would defeat the entire purpose of the due process analysis. If due process were satisfied every time a *malum in se* act was committed abroad, this would eliminate all considerations of whether it was non-arbitrary to subject the defendant to jurisdiction in the United States. This would be undesirable and would contradict courts' current position requiring that jurisdiction be both non-arbitrary *and* not inherently unfair.[165]

IV. MAKING SENSE OF *BREHM*

Notice is the unifying thread that ties together the conflicted jurisprudence in this area, and is the factor that should have been decisive in *Brehm*. All courts should focus on notice as the core concept in determining whether the exercise of extraterritorial jurisdiction is consistent with the Due Process Clause. Notice should be relevant to the two criteria: non-arbitrariness and inherent fairness. First, courts should ask whether the exercise of jurisdiction

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defendant's conduct is of the kind that is considered *malum in se*, there is much less of a compelling argument that American jurisdiction is unfair. *See id.* ("If a crime is inherently evil, it is malum in se."). These crimes should be carefully distinguished from the overlapping but distinct category of crimes of universal jurisdiction. A crime is one of universal jurisdiction when it is not only universally condemned, but considered so serious that all countries have a role in enforcing the crime. *See infra* notes 173–76 and accompanying text.

164. *See supra* notes 34–58 and accompanying text.

165. Due to its opaque reasoning, it remains unclear whether or not the *Brehm* court intended to use the "no inherent unfairness" rationale as an independent basis for jurisdiction, or as a final safety valve for the defendant. The court may have intended to use it in the latter sense, having already cited the proxy argument and the international law approach as other bases for jurisdiction. *Brehm*, 691 F.3d at 552–53. However, as discussed above in detail, *see supra* Parts III.B–C, neither of those bases provides a satisfactory basis for due process, which leaves the "no inherent unfairness" rationale as the court's last remaining argument in favor of jurisdiction.

over the defendant is non-arbitrary. It will be non-arbitrary if the defendant had actual or constructive notice that he could be subject to the laws of the United States generally.[166] If jurisdiction is non-arbitrary, courts should move on to the second step: fundamental fairness. Jurisdiction should only be deemed inherently unfair if the defendant demonstrates that he lacked actual or constructive notice that his specific conduct was *criminal* under the laws of the United States. The "inherent unfairness" step should not easily defeat jurisdiction because the defendant will only be able to show a lack of constructive notice if three criteria are satisfied: the act was legal where committed, the act was not inherently wrong by nature (i.e. it was *malum prohibitum* rather than *malum in se*), and the defendant had no other reason to believe that the act was criminalized in the United States.

Viewing the cases through the lens of notice would reconcile the circuit split that currently exists. Courts can decide the second "inherent unfairness" step in a uniform manner in all types of cases because the criteria, stated above, are straightforward. However, the first step, which asks whether the exercise of jurisdiction is non-arbitrary, is more complex. Different vehicles may be used to reach the concept of notice in different types of cases. This Section will show first that the nexus approach can be explained by reference to notice and, second, that courts can use international law in certain cases to gain insight into the question of constructive notice. Finally, this Section will show that *Brehm* itself can be explained on the basis of the defendant's actual notice.

A. Notice Explains the Nexus Approach

The notice principle explains cases in which courts have required a nexus between the defendant and the United States. When a defendant's actions are aimed at causing negative effects within the United States, this aim provides a clear basis for the non-arbitrary exercise of jurisdiction because the defendant has constructive notice that he will be subject to the laws of the United States. As the Second Circuit explained, when an extraterritorial crime is directed at the

166. *But see* Brilmayer & Norchi, *supra* note 27, at 1243 (arguing against a notice-based approach to due process "because states can avoid surprise simply by making it clear that they will subject all litigants in their courts to local law," and adding that "[i]f mere notice would suffice, the fairness requirement would be empty, for such notice could always be provided"). This criticism appears to envisage a more generalized form of notice than this Recent Development suggests. A decree by a state's courts that they will apply local law would rarely seem to provide a defendant with actual or constructive notice.

United States or its citizens, "it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary."[167] When a defendant's conduct threatens the United States, he should be on notice that the laws of the United States will apply to him. The nexus is therefore one way in which a court can find the required constructive notice.[168]

B. The Notice Test Can Draw on Principles of International Law

The available bases for jurisdiction under international law will often provide courts with a valuable clue as to whether jurisdiction is consistent with the Due Process Clause. The concepts of jurisdiction under international law and under the Constitution are distinct, and must be analyzed separately.[169] This Recent Development has advocated against the "international law approach," which conflates the two concepts.[170] However, "although principles of international law might not determine conclusively the constitutionality of Congress's extraterritorial legislative reach, they nonetheless inform the analysis."[171] If jurisdiction exists under certain bases of international law, this will demonstrate that the defendant had constructive notice that the laws of the United States applied to him, thus satisfying the non-arbitrariness requirement. This subsection will first discuss the bases of international jurisdiction that should be sufficient to satisfy the non-arbitrariness standard under the Due Process Clause and will then explain those that should not be sufficient.

1. Some Principles of International Law Assist the Analysis Under the Due Process Clause

There is widespread agreement that the jurisdictional component of due process is always satisfied when the United States is exercising

167. United States v. Yousef, 327 F.3d 56, 112 (2d Cir. 2003).

168. Of course, this would not have helped the *Brehm* court because "Brehm did not target his conduct toward American soil[,] . . . American commerce," or American citizens. *Brehm*, 691 F.3d at 552.

169. PAUST, *supra* note 155, at 415 ("[A] threshold inquiry should be whether or not there is a basis for jurisdiction under international law. If not, our courts must decline jurisdiction. And conversely, if jurisdiction is possible under international law but is not permissible under the Constitution, it would be equally . . . improper for a court to exercise jurisdiction.").

170. *See supra* Part III.C.

171. Colangelo, *supra* note 33, at 169.

universal jurisdiction under international law.[172] Universal jurisdiction exists over certain crimes that are "sufficiently heinous to be crimes against the entire community of nations."[173] These include piracy, torture, and war crimes.[174] Countries are not only permitted to exercise jurisdiction over such crimes, but may be obligated to play a role in their enforcement, whether by allowing extradition or by themselves prosecuting.[175] When adjudicating crimes of this character, a U.S. court is not just enforcing American law, but also a law that is globally recognized and thus applied to the defendant regardless of the location or target of his criminal actions.[176] Because the offense is internationally proscribed and enforced, the defendant has constructive notice of the application of the law to him.[177] The exercise of jurisdiction over him is therefore not arbitrary.[178]

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172. *See id.* at 124–25; *see also* Brilmayer & Norchi, *supra* note 27, at 1253 ("In the context of universal jurisdiction, the exercise of extensive congressional powers seems unproblematic because only especially heinous crimes, as identified by international law, give rise to the power to prosecute without a nexus."); Lichter, *supra* note 38, at 1945 ("Assertions of universal jurisdiction . . . satisfy Fifth Amendment due process notice requirements per se.").

173. SLOMANSON, *supra* note 40, at 214.

174. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 143, at 469–70.

175. SLOMANSON, *supra* note 40, at 214 ("Any nation where the perpetrator is found is expected to arrest and try the perpetrator or extradite the criminal to a State that will prosecute.").

176. United States v. Furlong, 18 U.S. (5 Wheat.) 144, 147–48 (1820) (finding that piracy "is against all, and punished by all . . . within this universal jurisdiction"); Brilmayer & Norchi, *supra* note 27, at 1253; Colangelo, *supra* note 33, at 124–25 ("Because the proscription 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 from the application of a prohibition to which he is already and always subject.").

177. Colangelo, *supra* note 33, at 167–68 ("[B]ecause the legal prohibition on universal crimes is fundamentally international . . . defendants cannot claim lack of notice of the law as applied to them."); *see also id.* at 124–25 (explaining that, when jurisdiction is being exercised, "the accused cannot claim lack of notice of the illegality of his conduct, or for that matter, of the substantive law being applied to him").

178. When the crime is one of universal jurisdiction, the exercise of jurisdiction will surely always satisfy the "no inherent unfairness" step in addition to the non-arbitrariness step. *See supra* text accompanying notes 161–62. Constructive notice may not be easily established if there is disagreement as to whether or not the crime is subject to universal jurisdiction. However, these cases are likely to be extremely rare, as the list of universal crimes is relatively well-defined. That list includes piracy, war crimes, apartheid, slave trading, the hijacking and sabotage of aircraft, and serious breaches of the humanitarian principles embodied in the Geneva Convention of 1949. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 143, at 469–70; SLOMANSON, *supra* note 40, at 214. Significant debate surrounds whether certain additional crimes are subject to universal jurisdiction. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, AM. J. INT'L L. 554, 569 (1995) ("[I]t is increasingly recognized by leading commentators that the crime of genocide . . . may also be cause for prosecution by any state."). *See generally* Luz E. Nagle, *Terrorism and Universal Jurisdiction: Opening a Pandora's Box?*, 27 GA. ST. U. L. REV.

Other bases for jurisdiction under international law may also inform the due process analysis. For example, the nexus the court identified in *Davis* was the defendant's aim of causing criminal acts within the United States.[179] This link between the defendant and the United States would also be sufficient to establish jurisdiction under international law by way of the objective territoriality principle.[180] Under that principle, international law recognizes that a nation may exercise jurisdiction over a defendant whose extraterritorial act caused harmful effects within the nation's borders.[181] Again, it would be inappropriate to find that due process was satisfied just because there was some international basis for jurisdiction. However, when the objective territoriality principle allows jurisdiction, this will usually also supply a rationale for due process. If the defendant is aiming conduct at the United States, causing detrimental effects within its territory, it will not be arbitrary for an American court to exercise jurisdiction. Similarly, international law permits a nation to exercise jurisdiction over its own nationals, no matter where their crimes may be committed.[182] When the United States is exercising jurisdiction over one of its own citizens, it appears that the Due Process Clause will also be satisfied in most cases because the citizen will usually have the requisite actual or constructive notice.

2. Other Bases of Jurisdiction Under International Law Do Not Assist the Due Process Analysis

In other instances, the basis for jurisdiction under international law does not supply any appropriate rationale for due process. For example, some courts have found that jurisdiction over defendants accused of crimes on a flag vessel is consistent with due process when

339 (2011) (analyzing whether terrorism is a crime of universal jurisdiction). Not only will these borderline cases be rare, but it will be even rarer that they exist without giving rise to another basis for constructive notice. For example, jurisdiction over a defendant whose terrorist acts are aimed at causing effects within the United States would exist under the objective territoriality principle of international law. *See infra* note 180 and accompanying text. As discussed, constructive notice will be present in such cases, and due process would therefore be satisfied under the notice principle, because a defendant aiming to cause negative effects in the United States should be aware of the potential application of American law. *See supra* note 168.

179. United States v. Davis, 905 F.2d 245, 249 (1990) (quoting United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987)).

180. Colangelo, *supra* note 33, at 169 (citing *Davis*, 905 F.2d at 249).

181. SLOMANSON, *supra* note 40, at 209–10.

182. Where a country is exercising jurisdiction over one of its own citizens, it appears that the requisite actual or constructive notice will usually be present. This concept is widely known under international law as the nationality principle. SLOMANSON, *supra* note 40, at 212.

the flag nation has consented to the exercise of jurisdiction by the United States.[183] The consent of the flag nation may satisfy international law, but it should have no bearing on due process. The personal rights belonging to the defendant should not be subject to alteration by a political agreement between two governments.[184] Looking at the situation from the perspective of the defendant, the exercise of American jurisdiction is both unfair and arbitrary because the defendant "would have a legitimate expectation that . . . other nations will not be entitled to exercise jurisdiction without some nexus."[185]

The basis for jurisdiction under international law in *Brehm* was the agreement between the United States and Afghanistan.[186] This falls into the latter category of bases that are incapable of explaining due process. The agreement only affects the relationship between those two countries. It should not affect Brehm's personal rights under the Due Process Clause. As a result, the principle of international law should not have been relevant to the court's due process analysis.

C. *Notice Is the Best Explanation for the Outcome in* Brehm

Buried in the penultimate sentence of the Fourth Circuit's opinion is the factor that should have been decisive in determining whether jurisdiction was consistent with the Due Process Clause: "Brehm's acknowledgement and acceptance of the warnings [in his employment contract] regarding the criminal jurisdiction asserted by the United States constituted notice of the same sufficient to dispel any surprise."[187] An opinion centered on this fact would have been far

183. Colangelo, *supra* note 33, at 173. For an explanation of the significance under international law of the flag flown on the vessel, *see supra* notes 45–46 and accompanying text.

184. *See* Colangelo, *supra* note 33, at 169 ("[I]f Fifth Amendment due process rights are truly personal to the accused, how can international law rules prescribing the jurisdictional reach of *governments* impair or reduce the fundamental liberty rights of *individuals?*").

185. *Id.* at 173 (alteration in original) (citation omitted). The point here is that the exercise of jurisdiction is unfair and arbitrary when based on the international law approach. As will be discussed, jurisdiction was fair on the particular facts of *Brehm* because the defendant had actual notice of the likelihood of the United States exercising jurisdiction. *See infra* Part IV.C.

186. United States v. Brehm, 691 F.3d 547, 553–54 (4th Cir. 2012) (citing Personnel Agreement, *supra* note 74), *cert. denied*, 133 S. Ct. 808 (2012).

187. *Id.* at 554; *see also id.* at 549 ("The agreement provided, in pertinent part, that Brehm 'has been informed of, understands and accepts that [he] may be subject to U.S. . . . federal civilian criminal jurisdiction under the [MEJA] by accompanying the U.S. Armed Forces outside the United States.' " (alterations in the original) (citations omitted)).

more convincing, coherent, and instructive than the muddled decision the court provided. Of all of the facts of the case, the existence of notice appears to be the most compelling reason for finding the exercise of jurisdiction to be non-arbitrary. Having been made directly aware of the United States' intent to exercise jurisdiction over contractors, Brehm should have expected that committing certain crimes would subject him to jurisdiction not just anywhere, but in the United States specifically. Even if Brehm did not have actual notice, he at least had constructive notice.

Brehm's case is therefore different from the cases in which the nature of the crime demonstrates, through reasoning based on a nexus or international law, that the defendant had actual or constructive notice of the application of U.S law.[188] The notice in Brehm's case was based on the individual facts of the case. However, where the facts establish actual or constructive notice, this should be sufficient to prove that the exercise of jurisdiction is non-arbitrary. Where the nature of the offense does not automatically demonstrate that the defendant was on notice, courts should determine notice through a fact-specific inquiry.

CONCLUSION

Although the Fourth Circuit correctly concluded in *Brehm* that jurisdiction over the defendant was consistent with due process, the court's reasoning was cryptic, and contained several specific deficiencies. First, its use of the pervasive American influence on the military basis as a proxy for due process was circular, and lacked any meaningful explanation of why jurisdiction was fair and non-arbitrary in the circumstances. Second, the "international law approach," which the court borrowed from other circuits, is highly flawed, and should be permanently discarded. Third, the court's finding that the exercise of jurisdiction contained "no inherent unfairness," though necessary to establish due process, was not sufficient to do so.

Given the limited facts before it, the *Brehm* court cannot have been expected to solve the entire conundrum of the application of the Due Process Clause in the exercise of extraterritorial jurisdiction. Nonetheless, the court could have taken a significant step forward by basing its decision on the defendant's notice that U.S. law would be applied to his criminal conduct. Notice, whether actual or constructive, is the thread that unifies much of the conflicted

188. As discussed, this type of reasoning would not have been dispositive in *Brehm*. *See supra* notes 163, 177 and accompanying text.

jurisprudence on the subject. The area is too complex to allow for a single, uniform test for notice in any given case. However, whether the defendant's notice exists by virtue of the universal nature of the crime, the projection of harmful effects into the United States, or the type of actual notice that existed on the facts of *Brehm*, the concept ensures that jurisdiction is fair, non-arbitrary, and therefore consistent with due process. At the same time, this formulation gives the United States an appropriate level of authority to police extraterritorial conduct, while also providing defendants, prosecutors, military authorities, and lower courts with the predictability they all require.

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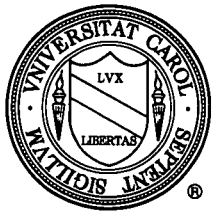
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