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## “I [Won’t] Follow You”: The Misguided, and Dangerous, Interpretation of Constitutional Extraterritoriality in *United States v. Ali*

Isaac D. Chaput

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**“I [WON’T] FOLLOW YOU”: THE MISGUIDED,  
AND DANGEROUS, INTERPRETATION OF  
CONSTITUTIONAL EXTRATERRITORIALITY IN  
*UNITED STATES V. ALI***

Not only is United States citizenship a “high privilege,” it is a priceless treasure. For that citizenship is enriched beyond price by our goal of equal justice under law—equal justice not for citizens alone, but for all persons coming within the ambit of our power.<sup>1</sup>

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## INTRODUCTION

In recent decades, the United States has dramatically changed the way it conducts military operations. Civilians in small numbers have long accompanied the armed forces to war.<sup>2</sup> But civilian participation increased significantly in operations Desert Shield and Desert Storm<sup>3</sup> and remained elevated during the contingency operations in Somalia, Rwanda, Haiti, and the former Yugoslavia.<sup>4</sup> Civilians are now an essential constituent of our armed forces; as of 2007, the number of contractors in Iraq exceeded the number of troops.<sup>5</sup> With 180,000 contractors working in Iraq—and a comparable number in Afghanistan—they inevitably will commit crimes.<sup>6</sup> In order to maintain good relations with the “host country” and discipline

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2. OVERSEAS JURISDICTION ADVISORY COMM., REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES 12–13 (1997) [hereinafter OJAC REPORT]. The Overseas Jurisdiction Advisory Committee was appointed by Attorney General Janet Reno and Secretary of Defense William Perry. *Id.* at iv. The Report was requested from Congress in the National Defense Authorization Act for Fiscal Year 1996. Pub. L. No. 104-106, § 1151, 110 Stat. 186, 467–68 (1996).

3. OJAC REPORT, *supra* note 2, at 15–16.

4. *Id.* at 18.

5. Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 511 (2009). In 2007, there were 180,000 contractors and 160,000 troops in Iraq. *Id.* It is unclear whether these figures include civilian employees of the Department of Defense, who may therefore be unaccounted for. As of September 2007, there were 30,418 civilian employees in foreign countries. *Employment—September 2007*, OFFICE OF PERS. MGMT., [www.fedscope.opm.gov](http://www.fedscope.opm.gov) (follow “Employment” link; click “September 2007” link; click “Agency: Department of Defense (DoD Aggregate)” link) (last visited Mar. 21, 2014).

6. See Cullen, *supra* note 5, at 514–17. The author, a lieutenant colonel in the U.S. Army, cites numerous points of concern surrounding both security contractors and support contractors. *Id.* I am focusing here on support contractors, although there are numerous issues presented by security contractors. See, e.g., Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J.L. & HUMAN. 101 (2009). The primary concerns regarding crimes committed by support contractors include “theft of government property or assault on government personnel.” Cullen, *supra* note 5, at 516. As of 2010, the Department of Defense reported that 116 cases had been referred to the Department of Justice for Prosecution under the Military Extraterritorial Jurisdiction Act. U.S. DEP’T OF DEF., MEJA STATISTICS 5 (2010). Of those cases, seventy were charged or pending as of June 10, 2010. *Id.* at 3.

within the armed forces, jurisdiction over those crimes must rest somewhere.

The inevitability of criminal activity required a judicial solution.<sup>7</sup> During the 1990s, the Department of Defense had insufficient solutions for civilian disciplinary issues. Often the United States did not have Status of Forces Agreements (“SOFAs”) with the countries in which it was operating.<sup>8</sup> In other instances, the SOFA did not cover civilians.<sup>9</sup> This created a jurisdictional uncertainty that often left crimes unpunished—particularly crimes occurring on-base, where host nations were often hesitant to prosecute.<sup>10</sup> And because of the Supreme Court’s interpretation of the Uniform Code of Military Justice (“UCMJ”), it was not possible to subject civilians to courts martial.<sup>11</sup>

In 1996, recognizing the substantial issues related to civilians accompanying the armed forces, Congress created a DOD and DOJ advisory committee to recommend possible solutions.<sup>12</sup> On the advisory committee’s recommendation, Congress passed the Military Extraterritorial Jurisdiction Act (“MEJA”) in 2000, which granted jurisdiction to U.S. district courts over most contractors and DOD civilian employees accompanying the armed forces overseas.<sup>13</sup>

But MEJA has a jurisdictional gap: it does not apply defendants who are citizens of or “ordinarily resident[s]” in the “host nation.”<sup>14</sup> When MEJA was enacted, the UCMJ only allowed court-martial jurisdiction

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7. OJAC REPORT, *supra* note 2, at 12–28 (discussing solutions to the problem of prosecuting civilians accompanying the armed forces overseas).

8. *Id.* at 27–28. The United States has, at times, had Status of Forces Agreements (“SOFAs”) with Afghanistan, ensuring that the U.S. would have criminal jurisdiction over its forces. *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., May 28, 2003, State Dept. No. 03-67; *see also* Mark Landler & Michael R. Gordon, *Meeting With Karzai, Obama Accelerates Transition of Security to Afghans*, N.Y. TIMES, Jan. 12, 2013, at A5.

9. OJAC Report, *supra* note 2, at 27–28.

10. *Id.* at 18–19.

11. *See* *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 287 (1960) (holding that civilian employees of the Department of Defense were not subject to court-martial jurisdiction when Congress had not declared war).

12. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1151, 110 Stat. 186, 467–68 (1996).

13. Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261–67 (2006)).

14. *See* 18 U.S.C. § 3267(1)(C). “This limitation recognizes that the host nation has the predominant interest in exercising criminal jurisdiction over its citizens and other persons who make that country their home.” H.R. Rep. No. 106-778, at 21 (2000).

over civilians during times of war.<sup>15</sup> In 2006, in recognition of this issue, Congress expanded court-martial jurisdiction to include those defendants excluded from MEJA.<sup>16</sup> Yet very few defendants have been prosecuted in courts-martial under the expanded UCMJ jurisdiction.<sup>17</sup> Recent cases have highlighted the ongoing constitutional issues related to the exercise of jurisdiction over non-citizen military contractors working overseas.<sup>18</sup>

In *United States v. Ali*, an Iraqi–Canadian dual citizen was prosecuted in a court-martial, under the expanded UCMJ jurisdiction, for crimes arising out of an assault committed while accompanying the Army in Iraq.<sup>19</sup> On appeal, the Court of Appeals for the Armed Forces ruled that the exercise of jurisdiction over Ali was acceptable.<sup>20</sup> Ali also argued that trying him in a court-martial violated due process and his grand jury and jury rights. The court held that his constitutional claims were not cognizable because he did not have sufficient connections to the United States to qualify for any constitutional protections.<sup>21</sup> According to the Court of Appeals for the Armed Forces, Ali was sufficiently connected to the U.S. that he could be subject to criminal prosecution. But the court also held that Ali was insufficiently connected to be accorded constitutional protections during that prosecution—he was in “limbo, worse than hell.”<sup>22</sup>

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15. See 10 U.S.C. § 802(a)(10) (2000). In 1960, the Supreme Court held that § 802(a)(11), which provided court martial jurisdiction for persons accompanying the armed forces *anywhere*, not just in areas of conflict, was unconstitutional. See *McElroy*, 361 U.S. 281; *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). Lower courts had construed § 802(a)(10) narrowly, requiring that Congress actually have declared war. See *United States v. Avarette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363, 365 (1970).

16. 10 U.S.C. § 802(a)(10) (2006). Previously, jurisdiction was limited to “[i]n time of war, persons serving with or accompanying an armed force in the field.” *Id.* Pub. L. No. 109-364 replaced the word “war” with “declared war or a contingency operation.” See *id.*

17. See *Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1–2 (2011) (statement of Lanny A. Breuer, Assistant Att’y Gen. of the United States) [hereinafter Breuer Statement].

18. See *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013); *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 808 (2012). The concept for this Note came from a post by Professor Steve Vladeck at the Lawfare blog. 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/>.

19. *Ali*, 71 M.J. at 258. Iraq declined to prosecute Ali and Canada did not have jurisdiction over his crime. MEJA STATISTICS, *supra* note 6, at 4 n.1.

20. *Ali*, 71 M.J. at 259.

21. *Id.* at 268.

22. William Shakespeare, *Comedy of Errors* act 4, sc. 2, line 32.

*United States v. Brehm*<sup>23</sup> presented a similar, factual scenario but had a strikingly different legal outcome. There, a South African citizen was prosecuted in federal district court, under the Military Extraterritorial Jurisdiction Act, for an assault committed while accompanying the Air Force in Afghanistan.<sup>24</sup> Brehm pleaded guilty, while reserving the right to appeal the district court's refusal to dismiss for lack of personal jurisdiction. He argued that he, his victim, and his crime did not have a sufficient causal nexus to the United States and, therefore, prosecuting him violated the Fifth Amendment's Due Process Clause.<sup>25</sup> On appeal, the Fourth Circuit held that his employment created a causal nexus such that the prosecution comported with due process, to which he was (apparently) entitled.<sup>26</sup>

This Note will address whether employment by the United States, or a U.S. contractor, of "non-citizen, non-residents"<sup>27</sup> creates a sufficient connection with the United States such that the employees must be accorded constitutional protections during criminal prosecutions.<sup>28</sup> Part I

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23. 691 F.3d 547.

24. *Brehm*, 691 F.3d at 549.

25. *Id.* at 549; see also Brief of the Appellant at 13–29, *Brehm*, 691 F.3d 547 (No. 11-4755) [hereinafter Brehm Brief]. In his brief, Brehm asserted that the court lacked jurisdiction based on either of two tests. Brehm Brief, *supra*, at 13–29. First was a "sufficient nexus" test from the Second and Ninth Circuits. *Id.* at 13 (citing *United States v. Yousef*, 327 F.3d 56, 111 n.45 (2d Cir. 2003)); see also *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). The second test analogized to the minimum contacts jurisprudence from civil procedure. Brehm Brief, *supra*, at 22 (citing *Asahi Metal Indus. v. Superior Court of Cal.*, 480 U.S. 102, 112–13, 115 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 286 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

26. *Brehm*, 691 F.3d at 552–53.

27. Courts often use the phrase "non-resident aliens" to refer to persons of this status. Although it persists as a legal term of art, "alien" is widely regarded as de-humanizing. See, e.g., Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 292 (1996) ("[L]egal terminology is important. Legal construction of the 'alien' has facilitated the rationalization of severe treatment of noncitizens. . . . Although difficult choices must be made, we should make them honestly with a full realization that persons, not faceless, nonhuman, demon 'aliens,' are affected in fundamental ways."); see also Careen Shannon, *Stop calling people "aliens,"* SALON.COM (May 27, 2013, 4:00 PM), [http://www.salon.com/2013/05/27/stop\\_calling\\_people\\_alien/](http://www.salon.com/2013/05/27/stop_calling_people_alien/). As such, and in keeping with the tenor of my argument, I instead use "non-citizen, non-residents" (or "non-citizens," where appropriate).

[T]he terminological issue is not simply a word game. Alien terminology serves important legal and social functions. Alexander Bickel perhaps said it best in the context of analyzing citizenship: "It has always been easier, it always will be easier, to think of someone as a *noncitizen* than to decide he is a *nonperson* . . ." In Stephanie Wildman's words, "language veils the existence of systems of privilege." Lucinda Finley put it differently though with the same flavor: "[l]anguage matters. Law matters. Legal Language Matters." Johnson, *supra*, at 270 (footnotes omitted).

28. *Ali*, 71 M.J. at 268 (holding that non-citizen contractors are not to be accorded constitutional rights); *contra Brehm*, 691 F.3d at 552. A separate question is what connection the defendant must have to the United States in order for an exercise of personal jurisdiction to be permissible. See *Brehm*,

of this Note will present the statutory background and give a brief history of the two main cases, *Ali* and *Brehm*. Part II will address the holding of the Court of Appeals for the Armed Forces in *Ali* in light of Supreme Court and circuit court jurisprudence, including *Brehm*.<sup>29</sup> Part III will discuss the potential effects should the majority decision in *Ali* persist or be applied beyond the narrow facts of that case, particularly examining possible applications by the other branches of government.<sup>30</sup> Part III will also discuss the possible tests for determining whether constitutional protections should extend to a particular defendant, and why a uniform rule that constitutional rights apply to any prosecution, termed here the “any-exercise rule,” should be adopted.<sup>31</sup>

## I. JURISDICTION OVER MILITARY CONTRACTORS

### A. *The Military Extraterritorial Jurisdiction Act and United States v. Brehm*

Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”) “to establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces . . . and for other purposes.”<sup>32</sup> Persons subject to the Act include anyone “employed by or accompanying the Armed Forces outside the United States.” The Act defines “employed by or accompanying” as “a civilian employee of the Department of Defense,” a Department of Defense contractor (including a subcontractor), or as an employee of a Department of Defense contractor (including a subcontractor).<sup>33</sup> As of 2011, the Department of Justice had obtained seven convictions under

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691 F.3d at 552. This was the primary issue in *Brehm*, and is discussed in Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992). This Note will also not discuss the constitutionality of the expanded UCMJ jurisdiction under § 802(a)(1). See Ingrid L. Price, Note, *Criminal Liability of Civilian Contractors in Iraq and Afghanistan*, 49 STAN. J. INT’L L. 491 (2013).

29. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Reid v. Covert*, 354 U.S. 1 (1957); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

30. See *infra* Part III.A.

31. See *infra* Part III.B.

32. Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. § 3261–67 (2006)).

33. 18 U.S.C. § 3267. As discussed *supra* text accompanying note 14, MEJA does not extend to citizens or persons “ordinarily resident[s]” of the host nation. 18 U.S.C. § 3267(1)(C).

MEJA.<sup>34</sup> Of these, four were contractors and three were Department of Defense employees or their dependents.<sup>35</sup>

*United States v. Brehm* was one prosecution under MEJA.<sup>36</sup> Brehm, a South African national, was employed at Kandahar Airfield (“KAF”) in Afghanistan by DynCorp International LLC, a U.S. military contractor.<sup>37</sup> While working at KAF, Brehm instigated an altercation with a U.K. citizen who was employed by a U.K. contractor.<sup>38</sup> The incident ended with Brehm stabbing and seriously wounding the other contractor.<sup>39</sup> After a phone hearing by a magistrate judge, Brehm was flown to Alexandria, Virginia for prosecution.<sup>40</sup> He pleaded guilty to assault resulting in serious bodily injury, reserving the right to appeal the district court’s denial of his motion to dismiss for lack of jurisdiction.<sup>41</sup> On appeal, the Court of Appeals for the Fourth Circuit held that Brehm’s connections to the United States were sufficient to sustain jurisdiction without violating his Fifth Amendment right to due process.<sup>42</sup>

#### *B. Filling the MEJA Gap: The 2006 Expansion of Court-Martial Jurisdiction*

Like Brehm, most civilian contractors are covered by MEJA.<sup>43</sup> But MEJA does not cover contractors who are citizens or ordinarily residents of the country in which the operation is occurring.<sup>44</sup> To fill this gap, Congress amended the Uniform Code of Military Justice (“UCMJ”) in 2006 to expand court-martial jurisdiction over persons “serving with or accompanying an armed force in the field” to include contingency operations in addition to wartime.<sup>45</sup> There are numerous procedural

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34. Breuer Statement, *supra* note 17, at 2–4. Since 2000, attempts have been made to expand MEJA jurisdiction to contractors working with civilian branches of government. *See* S. Rep. 112-193, at 191 (2012). The most recent attempt, the Civilian Extraterritorial Jurisdiction Act, died in committee. *See* Civilian Extraterritorial Jurisdiction Act (CEJA) of 2011, S. 1145, 112th Cong. (2011), available at [beta.congress.gov/112/bills/s/1145/BILLS-112s1145is.pdf](http://beta.congress.gov/112/bills/s/1145/BILLS-112s1145is.pdf).

35. Breuer Statement, *supra* note 17, at 2–4.

36. *United States v. Brehm*, No. 1:11-CR-11, 2011 WL 1226088 (E.D. Va. Mar. 30, 2011).

37. *United States v. Brehm*, 691 F.3d 547, 549 (4th Cir. 2012).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 550.

42. *Id.* at 552.

43. *See* 18 U.S.C. § 3267 (2006).

44. 18 U.S.C. § 3267(2)(C).

45. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083 (codified at 10 U.S.C. § 802(a)(10) (2012)).

differences between courts-martial and civilian criminal trials.<sup>46</sup> “A court-martial accused has no Fifth Amendment grand jury right, no Sixth Amendment jury right, no right to a jury of at least six members, and no right to a unanimous guilty verdict.”<sup>47</sup> Accused in courts-martial also have no automatic right to appeal, except in limited circumstances.<sup>48</sup>

*Ali* was the first, and apparently only, prosecution under the expanded UCMJ jurisdiction.<sup>49</sup> The underlying facts are strikingly similar to *Brehm*, but there are two important distinctions. First, *Ali* was a citizen of Canada and Iraq, and was working as a translator in Iraq.<sup>50</sup> As such, he was working in one of his home countries.<sup>51</sup> Second, *Ali* was prosecuted in a court-martial under the expanded UCMJ jurisdiction.<sup>52</sup> During his defense, *Ali* raised constitutional defenses, including jurisdictional and procedural defenses.<sup>53</sup> The Court of Appeals for the Armed Forces held that *Ali*'s connections to the United States were insufficient to entitle him to constitutional protections.<sup>54</sup>

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46. See John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 751–52 (2010) (discussing the limited procedural protections in courts-martial).

47. *Id.* (citing U.S. CONST. amend. V; *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 123 (1866); *Ballew v. Georgia*, 435 U.S. 223, 245 (1978); *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

48. *Id.* at 752.

49. The Department of Defense Report on MEJA prosecutions noted that *Ali* was the sole prosecution under the expanded § 802(a)(10). See MEJA STATISTICS, *supra* note 6, at 4. Additionally, searches for other cases citing to 10 U.S.C. § 802(a)(10) on WestlawNext™, LexisNexis®, and BloombergLaw™ have yielded no other § 802(a)(10) prosecutions.

50. *United States v. Ali*, 71 M.J. 256, 259 (C.A.A.F. 2012). The procedural posture of *Ali* may seem odd to those unfamiliar with courts-martial. Because there is no automatic right of appeal for most prosecutions, appeals to the courts of criminal appeals for each branch must be forwarded by the Judge Advocate General for the respective branch. See *United States v. Ali*, 70 M.J. 514, 515 (A. Ct. Crim. App. 2011). Before the record from *Ali*'s trial was forwarded to the Judge Advocate General, he filed petitions for extraordinary relief in the Army Court of Criminal Appeals and Court of Appeals for the Armed Forces, both of which were denied. *Id.*

51. *Ali*, 71 M.J. at 259; see also 18 U.S.C. § 3267(2)(C) (2006). As was noted above, *Ali*'s nationality meant that he could not be prosecuted under MEJA. See *supra* text accompanying notes 43–45.

52. *Ali*, 71 M.J. at 260.

53. *Id.* at 260–61. Specifically, *Ali* claimed that prosecution violated his Article III and Sixth Amendment jury trial rights, and that the court-martial could not have had jurisdiction under the Fifth Amendment's due process clause. *Id.*

54. Specifically, the court noted:

Neither *Ali*'s brief predeployment training at Fort Benning, Georgia, nor his employment with a United States corporation outside the United States constitutes a “substantial connection” with the United States . . . . Ultimately, we are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States.

*Id.* at 268 (citations omitted).

Finally, the Court determined that “[w]hatever rights [Ali] had were met through the court-martial process.”<sup>55</sup> While that may be true, it does not address the underlying concern with the holding—that Ali’s connections with the U.S. were too attenuated for him to be accorded protections under the Fifth and Sixth Amendments.<sup>56</sup> Were *Ali* to go uncorrected, it would be possible for Congress, or even the President acting alone, to create an alternative structure, or simply prosecute non-citizen, non-residents without due process of law.<sup>57</sup>

*Ali* and *Brehm* present nearly identical factual scenarios. In each, a non-citizen contractor with no connection to the United States other than employment by a defense contractor was charged for assaulting a fellow non-citizen.<sup>58</sup> The two appellate courts that considered the cases came to opposite conclusions regarding the significance of the defendants’ connections with the United States. While agreeing that the defendants’ conduct was sufficiently connected to the United States for prosecution, they disagreed as to whether those connections entitled the defendants to constitutional protections.<sup>59</sup> This is a significant circuit split. The potential ramifications are wide-ranging and encompass military law, criminal law, and, potentially, civil law.

## II. IS *ALI* JUSTIFIED?

### A. *The Jurisprudential Backdrop*

#### 1. *Extraterritoriality up to Boumediene v. Bush*

Supreme Court jurisprudence around the question of whether, and what, constitutional protections should be accorded to defendants for

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55. *Id.* at 268. It is indeed possible that, under the circumstances, Ali was accorded sufficient constitutional protections. But the CAAF’s determination that he was not deserving of *any* is seriously troubling. See Lawfare Staff & Steve Vladeck, *Analysis of U.S. v. Ali: A Flawed Majority, Conflicting Concurrences, and the Future of Military Jurisdiction*, LAWFARE (July 19, 2012, 8:09 PM), <http://www.lawfareblog.com/2012/07/analysis-of-caaf-decision-in-ali/>. For an argument that the expanded UCMI jurisdiction is unconstitutional, see O’Connor, *supra* note 46.

56. See *Ali*, 71 M.J. at 269.

57. See discussion *infra* Part III (addressing potential ramifications of *Ali* outside of the military contractor context).

58. If anything, Ali was more connected to the U.S.—unlike *Brehm*, he had been to the U.S. before becoming employed. Compare *Ali*, 71 M.J. at 259 with *United States v. Brehm*, 691 F.3d 547, 549 (4th Cir. 2012).

59. It could be contended that there was no need to perform an extraterritoriality analysis in *Brehm* once he was brought into the U.S. But if that were the only line, the government could avoid the application of due process rights by keeping similar defendants outside of the U.S. At that point, the executive branch would have the power to decide whether and when the Constitution applies—a proposition that is impossible to uphold.

crimes committed extraterritorially extends back to the Nineteenth Century.<sup>60</sup> *In re Ross* concerned an appeal from a petition for a writ of habeas corpus.<sup>61</sup> Ross, a British citizen, was a sailor on an American ship and killed a fellow sailor while in Yokohama Harbor. The American consul in Japan constituted a tribunal, which sentenced Ross to death. President Hayes commuted his sentence to life imprisonment.<sup>62</sup> Ross claimed that the consular tribunal deprived him of his right to a jury trial.<sup>63</sup> The Court held that “[t]he Constitution can have no operation in another country.”<sup>64</sup>

While *Ross* dealt with constitutional extraterritoriality, it had no bearing on non-citizens residing in the United States. In *Wong Wing v. United States*,<sup>65</sup> the Court held that “even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.”<sup>66</sup> The Court rested its decision on the fact that the defendants, Chinese nationals, were “within the territorial jurisdiction” of the United States.<sup>67</sup> *Wong Wing* was a departure from earlier cases in which the Court had declined to grant due process protections to defendants in immigration exclusion proceedings.<sup>68</sup>

Professors Brilmeyer and Norchi argue, however, that:

[E]xtraterritoriality presents a stronger case for Fifth Amendment scrutiny [than deportation]. The relevant position is found in *Perez v. Brownell*: “The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.”<sup>69</sup>

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60. See, e.g., *In re Ross*, 140 U.S. 453 (1891).

61. *Id.* at 454.

62. *Id.* at 454–55.

63. See *id.* at 464.

64. *Id.*

65. 163 U.S. 228 (1896). *Wong Wing* is not properly termed a constitutional extraterritoriality case. It does, however, bear on the issues presented in *Ali* and *Brehm*.

66. *Id.* at 238.

67. *Id.*

68. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The [deportation] proceeding before a United States judge . . . is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country.”), *overruled recognized by* *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

69. Brilmeyer & Norchi, *supra* note 28, at 1239 (quoting *Perez v. Brownell*, 356 U.S. 44, 58 (1958), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253 (1967)). The authors also note that the

The Court's extraterritoriality jurisprudence during the Twentieth Century moved beyond historical concepts of territoriality when deciding constitutional issues as applied to non-citizen, non-residents.<sup>70</sup>

The modern jurisprudence stems primarily from *Johnson v. Eisentrager*.<sup>71</sup> In *Johnson*, a group of German nationals imprisoned in West Germany filed petitions for writs of habeas corpus in the U.S. District Court for the District of Columbia.<sup>72</sup> The petitioners had been prosecuted in a military tribunal after World War II for war crimes committed in China during the war.<sup>73</sup> In their petition, they "claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment . . . and other provisions of the Constitution . . . and provisions of the Geneva Convention governing treatment of prisoners of war."<sup>74</sup>

The Court began its opinion by discussing the different historical treatments of non-citizens.<sup>75</sup> Noting the customary international law norms of citizenship, the Court stated, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance."<sup>76</sup> The Court continued by discussing how a non-citizen gains constitutional rights, drawing a direct link between the rights accorded and the individual's "identity with our society."<sup>77</sup>

Ultimately, the Court determined that any "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment."<sup>78</sup> Although the Court rested the holding on the grounds that the prisoners were not entitled to constitutional protections, it later addressed the ancillary claims that the tribunal lacked jurisdiction.<sup>79</sup> Importantly, the military tribunal in question had jurisdiction and was competent to hear the prosecutions.<sup>80</sup>

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Restatement (Third) of Foreign Relations Law § 721 (1987) "takes a firm position that the Bill of Rights applies to exercises of the foreign affairs power." *Id.* at 1239 n.112.

70. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008).

71. 339 U.S. 763 (1950).

72. *Id.* at 765.

73. *Id.* at 766.

74. *Id.* at 767.

75. *Id.* at 768–69.

76. *Id.* at 769.

77. *Id.* at 770.

78. *Id.* at 784.

79. *Id.* at 785–91.

80. *Id.* at 789–90. Three justices in *Johnson* dissented, asserting that "the judicial rather than the executive branch of government is vested with final authority to determine the legality of

Seven years later, the Court decided companion cases on whether civilian dependents accompanying armed forces overseas could be subject to court-martial jurisdiction.<sup>81</sup> Both of the dependents there were wives of members of the armed forces.<sup>82</sup> Each woman had allegedly killed her husband and was subsequently charged, tried, and convicted by a court-martial.<sup>83</sup> At the outset, the Court stated, “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”<sup>84</sup> The Court held that prosecuting the defendants in courts-martial violated their Article III and Sixth Amendment jury trial rights, and their Fifth Amendment grand jury rights.<sup>85</sup>

The Court also determined in *Reid* that the “make rules” clause of Article I, sec. 8 “does not extend to civilians—even though they may be dependents living with servicemen on a military base.”<sup>86</sup> At the same time, the Court recognized “that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.”<sup>87</sup>

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imprisonment for crime.” *Id.* at 791 (Black, J., dissenting). For further discussion of the dissent’s reasoning, see *infra* Part III.B.

81. See *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion). The cases were initially decided separately during October Term 1955. *Id.* at 1; see also *Reid v. Covert*, 351 U.S. 487 (1956); *Kinsella v. Krueger*, 351 U.S. 470 (1956). On petition for rehearing, the Court reversed the previous decisions. *Reid*, 354 U.S. at 5. During October Term 1955, the Court also decided *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). There, the Court determined that a provision in the 1950 UCMJ permitting court-martial jurisdiction over ex-service members was unconstitutional. *Id.* at 23. “For given its natural meaning, the power granted Congress ‘To make Rules’ to regulate ‘the land and naval Forces’ would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.” *Id.* at 15.

82. *Reid*, 354 U.S. at 4–5.

83. *Id.*

84. *Id.* at 5–6 (footnote omitted).

85. *Id.* at 10, 41. See *supra* notes 46–48 and accompanying text for a discussion of the rights that are unavailable in courts-martial.

86. *Reid*, 354 U.S. at 19 (plurality opinion.).

87. *Id.* at 23. The Court also decided three court-martial cases in 1960. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). In *Kinsella*, the Court extended the holding in *Reid* to encompass non-capital crimes committed by civilian dependents of members of the armed forces. 361 U.S. at 249. In so doing, the Court rejected arguments by the government that not permitting court-martial jurisdiction over civilian dependents would have an adverse impact on discipline because of the small number of cases that had been filed. *Kinsella*, 361 U.S. at 243–44. In *Grisham* and *McElroy*, the Court considered exercises of court-martial jurisdiction over civilian employees of the armed forces. *Grisham*, 361 U.S. at 280 (holding that capital cases against civilian employees are controlled by *Reid*); *McElroy*, 361 U.S. at 284 (holding that civilian employees could not constitutionally be prosecuted in courts-martial under 10 U.S.C. § 802(a)(11)).

The next major case in which issues of constitutional extraterritoriality were raised was *United States v. Verdugo-Urquidez*.<sup>88</sup> Verdugo-Urquidez, a Mexican citizen, was suspected of involvement in the drug trade between Mexico and the United States.<sup>89</sup> After his arrest in Mexico by Mexican police officers, he was transported to the U.S. border, where he was arrested by the Drug Enforcement Agency, which had previously obtained a warrant for his arrest.<sup>90</sup> After his arrest, his residences in Mexico were searched by DEA agents, who were looking for evidence that would link Verdugo-Urquidez to drug trafficking.<sup>91</sup>

The Defendant challenged the search of his home on Fourth Amendment grounds, claiming that it was an unlawful search or seizure because the government had not obtained a warrant prior to the search.<sup>92</sup> On certiorari to the Ninth Circuit, which had drawn heavily on *Reid v. Covert* and held that the Fourth Amendment protected Verdugo-Urquidez, the Supreme Court reversed and held that the Fourth Amendment has no extraterritorial application for non-citizens.<sup>93</sup> The Court first distinguished *Reid*, based on textual differences between the clauses at issue there and the Fourth Amendment search and seizure clause, at issue in *Verdugo-Urquidez*.<sup>94</sup> The Court also relied on *Eisentrager*, stating that there, the “rejection of extraterritorial application of the Fifth Amendment was emphatic.”<sup>95</sup>

Constitutional extraterritoriality re-emerged as an important legal issue during the “War on Terror,” most recently in *Boumediene v. Bush*.<sup>96</sup>

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88. 494 U.S. 259 (1990).

89. *Id.* at 262.

90. *Id.*

91. *Id.*

92. *Id.* at 263. The District Court suppressed the evidence seized during the searches, finding that the Fourth Amendment was in force and that the failure to procure a warrant violated the defendant’s rights. *Id.*

93. *Id.* at 263–64. The Ninth Circuit recognized that a warrant would have no practical effect in Mexico, but found that it “would have ‘substantial constitutional value in this country,’ because it would reflect a magistrate’s determination that there existed probable cause to search and would define the scope of the search.” *Id.* (quoting *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1230 (9th Cir. 1988)).

94. *Id.* at 264–67.

95. *Id.* at 269. Thus, *Verdugo-Urquidez* created something of an anomaly in the constitutional extraterritoriality jurisprudence. Namely, that actions taken by the United States overseas are bound by the confines of the Constitution only when those acts affect United States citizens. *Id.* This is anomalous particularly because of the Plurality’s statement in *Reid* that “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.” *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) (footnotes omitted).

96. 553 U.S. 723 (2008).

*Boumediene* involved terrorism detainees held at the U.S. Naval Station at Guantanamo Bay, Cuba.<sup>97</sup> The group of non-citizen detainees filed petitions for writs of habeas corpus, which were denied because Congress had suspended the writ in the Military Commissions Act of 2006 (“MCA”).<sup>98</sup> In addition to the suspension, Congress had created an alternative structure under the Detainee Treatment Act of 2005 (“DTA”).<sup>99</sup>

The Court determined that the suspension of the writ in the MCA was unconstitutional because the alternatives provided for in the DTA were insufficient.<sup>100</sup> After a significant discussion of the purpose and policy behind the writ and its inclusion in the constitution, the Court addressed the extraterritoriality question.<sup>101</sup> The crux of the government’s argument was that the writ could not be applied at Guantanamo Bay because historically it “ran only to territories over which the Crown was sovereign.”<sup>102</sup> The Court disagreed with this interpretation, however, stating, “[t]he Court has discussed the issue of the Constitution’s extraterritorial application on many occasions. These decisions undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends.”<sup>103</sup> The

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97. *Id.* at 732.

98. *Id.* at 732–33. The opinion did not specify the detainees’ countries of citizenship. *See id.* The Court did note, however, that they were apprehended in Afghanistan, Bosnia, and The Gambia, among other countries. *Id.* at 734. The Military Commissions Act stated, in relevant part, that: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” 28 U.S.C. § 2241(e)(1) (2008), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723.

99. *Boumediene*, 553 U.S. at 735.

100. *Id.* at 771–92. The DTA only allowed the Court of Appeals to assess whether the [Combatant Status Review Tribunal] complied with the “standards and procedures specified by the Secretary of Defense” and whether those standards and procedures are lawful. . . . In passing the DTA Congress did not intend to create a process that differs from traditional habeas corpus process in name only. It intended to create a more limited procedure.

*Id.* at 777–78 (citation omitted).

101. *Id.* at 753–71. The two prevailing considerations in the history section were that the protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights” and that “settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ . . . [were] instructive for the present cases.

*Id.* at 739.

102. *Id.* at 746.

103. *Id.* at 755. The D.C. Circuit has held that the *Boumediene* holding is limited to Suspension Clause claims. *See, e.g.,* *Ali v. Rumsfeld (Ali II)*, 649 F.3d 762 (D.C. Cir. 2011). *But see* *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990) (holding that there must be a “sufficient nexus” between the defendant and the United States in order for extraterritorial application of a criminal statute to be constitutional). Additionally, it seems anomalous to hold that a writ of habeas corpus is available, but

Court recognized a “common thread” in the extraterritoriality cases: “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>104</sup>

## 2. *Due Process as Applied to Non-Citizen Corporate Defendants*

Any discussion of due process would be incomplete without reference to *International Shoe* and its progeny.<sup>105</sup> The Court’s personal jurisdiction jurisprudence should inform the present discussion. In *International Shoe*, the Court held that an exercise of personal jurisdiction over an out-of-state defendant satisfies due process only if the defendant has sufficient contacts with the forum state, such that an exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.”<sup>106</sup> That case, in and of itself, is not particularly useful in the present discussion. What is illustrative is how the Court has applied it since then. Although numerous cases could be utilized here, we will focus on the two most recent personal jurisdiction cases: *J. McIntyre Machinery Ltd. v. Nicaastro*<sup>107</sup> and *Goodyear Dunlop Tires Operations, SA v. Brown*.<sup>108</sup>

In *McIntyre*, the Court applied the *International Shoe* test to determine that J. McIntyre, the manufacturer of a metal-shearing machine, had insufficient contacts with New Jersey to be subject to suit in that state.<sup>109</sup> *Goodyear* involved the difference between specific and general personal jurisdiction.<sup>110</sup> The holding is inapposite here; what is useful is that the Court applied personal jurisdiction concepts derived from the Fifth Amendment to analyze an exercise of jurisdiction over foreign subsidiaries of Goodyear USA for a bus accident that occurred in France.<sup>111</sup>

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that the detainee has no underlying constitutional claim to bring once the habeas petition is in front of a court. *Contra Ali II*, 649 F.3d 762. For a scholarly discussion of this issue, see Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012).

104. *Boumediene*, 553 U.S. at 764. The Court also cited *In re Ross* favorably, *see id.* at 760–62.

105. *See, e.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

106. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

107. 131 S. Ct. 2780 (2011) (plurality opinion).

108. 131 S. Ct. 2846 (2011).

109. *McIntyre*, 131 S. Ct. at 2785 (plurality opinion).

110. *Goodyear*, 131 S. Ct. at 2851.

111. *Id.* at 2850. For a discussion of the continuing need for a “fully articulated theoretical justification that delineates the circumstances under which extraterritorial defendants may be subject to the jurisdiction of a state,” see Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicaastro*, 63 S.C. L. REV. 617, 619 (2012). The authors address the difficulties of a sovereignty-based

The Court has never explicitly held in its personal jurisdiction cases that constitutional protections apply to foreign corporations.<sup>112</sup> It has, however, consistently limited plaintiffs' ability to hale into court non-citizen, non-resident defendants along the same due process lines as U.S. citizens.<sup>113</sup> If corporations operating solely outside of the U.S. are entitled to constitutional protections in civil cases, it is intellectually untenable to refuse to apply the same protections to individual defendants in criminal cases.

### B. *The Ali Problem*

In *Ali*, the Court of Appeals for the Armed Forces analyzed Ali's claims as "constitutional protections," failing to recognize that the Bill of Rights limits governmental power.<sup>114</sup> This led to the erroneous statement that the court was "unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connection to the United States."<sup>115</sup> At the same time, however, the court upheld the exercise of court-martial jurisdiction over Ali.<sup>116</sup> This ruling is contrary to *Boumediene* and to the implicit recognition of constitutional protections for corporate non-residents in the personal jurisdiction jurisprudence.

The CAAF stated that there is no law "which mandates granting a noncitizen Fifth and Sixth Amendment rights when they have not 'come within the territory of the United States and developed substantial connections with this country.'"<sup>117</sup> It may be true that the Supreme Court

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analysis, *id.* at 623–25, and the meaning of *McIntyre* and *Goodyear* for international due process issues, *id.* at 632.

112. See, e.g., *McIntyre*, 131 S. Ct. at 2785 (plurality opinion) (applying the Fourteenth Amendment due process test for personal jurisdiction to a non-citizen, non-resident defendant without specifically holding that it applies); *Goodyear*, 131 S. Ct. at 2853 (same).

113. See *Goodyear*, 131 S. Ct. 2846; *McIntyre*, 131 S. Ct. 2780 (plurality opinion); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Ins. Corp. of Ir., Ltd. v. Compagnie de Bauxites de Guinee*, 456 U.S. 694 (1982).

114. *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012). But see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) ("The focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act . . ."); and *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) ("The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution.") (footnote omitted). For another analysis of the three opinions in *Ali*, see Lawfare Staff & Vladeck, *supra* note 55.

115. *Ali*, 71 M.J. at 268.

116. *Id.* at 265.

117. *Id.* at 268 (quoting *Verdugo-Urquidez*, 494 U.S. at 271 (majority opinion)).

has never *mandated* extraterritorial application of due process rights. That reasoning fails to account, however, for the holding in *Boumediene* that certain constitutional rights do limit the power of the United States when acting outside of its *de jure* sovereignty.<sup>118</sup> The CAAF also failed to recognize that its holding grants the President an extra-constitutional power. The executive can now prosecute any non-citizen, non-resident defendant for any crime without any due process, so long as the defendant is kept out of the grip of an Article III court and out of the United States.

There are four principal concerns with the *Ali* holding. First, the court read *Boumediene* too narrowly. Second, the court failed to acknowledge that Congress expressly contemplated the application of due process. Third, the court created the absurd result that a greater degree of protection is now given to enemy combatants than to civilian contractors. Finally, the court's failure to acknowledge the foundational concept of constitutional law that "[t]he United States is entirely a creature of the Constitution"<sup>119</sup> and that its power is limited by the Constitution.

### 1. *Boumediene Should Not be Limited to the Suspension Clause*

The government has attempted to limit the *Boumediene* holding solely to the Suspension Clause.<sup>120</sup> In the alternative, the government has attempted to limit *Boumediene*'s effects to Guantanamo Bay, because it has a unique history of sovereignty.<sup>121</sup> While these arguments are compelling, they fail to address two overriding concerns. First, the sections of the Constitution at issue are proscriptive—they limit how government can act.<sup>122</sup> Second, the United States exerts a pervasive and

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118. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'") (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)) (footnote omitted).

119. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion).

120. *See, e.g., Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

121. *Rasul*, 563 F.3d. at 531–32.

122. *Marbury v. Madison* states,

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

controlling influence in many parts of the world.<sup>123</sup> If the judicial power of the United States is going to follow its military and economic power, that jurisdictional exercise must be limited according to the Constitution's proscriptions.

In *Brehm*, the court held that “[a]lthough [Kandahar Airfield] 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.”<sup>124</sup> Thus, because American criminal statutes could have effect in Afghanistan as a result of the pervasive American influence at Kandahar Airfield, due process protections should necessarily follow. In *Brehm*, the court skipped a determination of whether due process protections attached, assumed they did, and used a due process analysis to determine whether an exercise of personal jurisdiction over the defendant was appropriate.<sup>125</sup>

The pervasive influence test is more adequately aligned with the reality of contemporary geo-politics than is a traditional sovereignty analysis. The sovereignty analysis in *Boumediene* was both the most expeditious and the most conservative approach possible in that case—but it need not be the outer limit of constitutional extraterritoriality. It may be possible to work out a case for *de facto* United States sovereignty on armed forces bases overseas. But such contortions are unnecessary. The Court should instead adopt the pervasive influence test from *Brehm*—an adequate, and more realistic, substitute.

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Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

*Marbury v. Madison*, 5 U.S. 137, 176–77 (1803).

123. As of March 31, 2014, there were 1,354,054 active duty military personnel. U.S. DEP'T OF DEF., TOTAL MILITARY PERSONNEL AND DEPENDENT END STRENGTH FOR MARCH 31, 2014 (2014), available at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg> (follow “Total DoD – March 31, 2014 (DMDC Data)” link) (last accessed June 28, 2014). The total civilian employment for the Department of Defense was 716,797 as of March, 2014. U.S. DEP'T OF DEF., QUARTERLY REPORT OF FEDERAL CIVILIAN EMPLOYMENT (SF-113\_A FORMAT) (2014), available at <https://www.dmdc.osd.mil/appj/dwp/getLinks.do?category=dod&subCat=reports&tab=3&clOn=reps> (follow “Civilian Personnel” link; click “FY 2014” link; click “March 2014” link; click “Consolidated DoD” link) (last accessed June 28, 2014).

124. *United States v. Brehm*, 691 F.3d 547, 553 (4th Cir. 2012).

125. *Id.* Of course, *Brehm* was also within the U.S. when he was tried, so although his crime was extra-territorial, his prosecution was not. This cannot resolve the issue presented, however, as previously discussed. *Supra* note 59 and accompanying text.

## 2. *Congress and an Advisory Committee Contemplated Due Process Protections*

The Report of the Overseas Jurisdiction Advisory Committee contemplated the issues presented in *Ali* and *Brehm*.<sup>126</sup> The OJAC was established by the 1996 Defense Authorization Act, in response to concerns regarding jurisdictional issues for civilians accompanying the armed forces overseas.<sup>127</sup> While noting that “the proposed legislation [MEJA] is intended primarily to apply to U.S. citizens or nationals serving with, employed by or accompanying the armed forces outside the United States,” the OJAC addressed at length the particular difficulties presented by “third country nationals,” or those who are not citizens of the U.S. or the host country.<sup>128</sup>

The Report stated that “in the view of the committee, the exercise of . . . jurisdiction could be justified when such individuals are present in the foreign jurisdiction *because of* their association or affiliation with the U.S. armed forces and when, but for prosecution by U.S. authorities, their crimes would go unpunished.”<sup>129</sup> Although the OJAC did not specifically address constitutional extraterritoriality, it is implicit in the Report that the committee expected that any extraterritorial criminal jurisdiction would necessarily be accompanied by procedural protections.<sup>130</sup>

In MEJA, Congress contemplated that jurisdiction over extraterritorial acts would necessarily be limited by the Bill of Rights.<sup>131</sup> First, § 3262(a) requires probable cause for arrest.<sup>132</sup> Second, § 3262(b) requires that a suspect be placed in civilian custody “as soon as practicable . . . for removal to the United States for judicial proceedings . . . .”<sup>133</sup> Finally, § 3265 addresses the initial hearing that was a point of concern for the OJAC.<sup>134</sup> Subsection (a) discusses the probable cause hearing, while subsection (b) speaks to the pretrial detention hearing.<sup>135</sup> Each of these three procedural aspects demonstrates recognition by Congress that

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126. OJAC REPORT, *supra* note 2, at 61.

127. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1151, 110 Stat. 186 (1996).

128. OJAC REPORT, *supra* note 2, at 61–62.

129. *Id.* at 62.

130. *See id.* at 63–64 (discussing timing of initial hearing before magistrate judge, which is required by the Fourth Amendment and supposed to take place within forty-eight hours of arrest).

131. 18 U.S.C. §§ 3262, 3265 (2000).

132. 18 U.S.C. § 3262(a) (2000).

133. 18 U.S.C. § 3262(b) (2000).

134. 18 U.S.C. § 3265 (2000).

135. *Id.*

criminal jurisdiction is accompanied by constitutional protections. Had Congress intended that third country nationals be treated differently than U.S. or host country nationals, it could have provided for that scenario. That is not what Congress did.<sup>136</sup>

### 3. *Civilian Contractors and Enemy Combatants*

The court in *Ali* relied heavily on *Johnson v. Eistentrager*<sup>137</sup> in holding that the Fifth Amendment has no extraterritorial effect for non-citizens.<sup>138</sup> *Johnson* is distinguishable, however, on a number of grounds. Most importantly, it dealt with enemy combatants.<sup>139</sup> The Court was careful to highlight the “inherent distinctions recognized throughout the civilized world . . . between aliens of friendly and of enemy allegiance.”<sup>140</sup> The Court noted that friendly non-citizens have “been accorded a generous and ascending scale of rights as [they increase their] identity with our society.”<sup>141</sup>

Although the Court’s discussion of enemy non-citizens in *Johnson* draws heavily on notions of territorial sovereignty, the overriding concern appears to be the maintenance of war-time security.<sup>142</sup> Even enemy non-citizens who are present within the United States are accorded less access to the courts and fewer protections.<sup>143</sup> In determining that the *Johnson*

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136. Of course, the fact that Congress extended procedural rights to contractors begs the question. Even if non-citizen, non-residents are not protected by the Constitution, Congress could extend the same protections to them. While the fact that they did so is not dispositive, it is persuasive evidence of that branch of government’s interpretation of the Constitution.

137. 339 U.S. 763 (1950).

138. *United States v. Ali*, 71 M.J. 256, 267–68 (C.A.A.F.) (citing *Johnson* to conclude that the court was “unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States.”).

139. *Johnson*, 339 U.S. at 765.

140. *Id.* at 769.

141. *Id.* at 770. The crucial aspect appears to be the connection between the defendant and American society. See *Ali*, 71 M.J. at 267–68. If, as in *Ali* or *Brehm*, the defendant is working for a military contractor overseas during a time of armed conflict, it would seem to follow that the defendant is quite connected to our society, even though he has never set foot in the United States. *United States v. Brehm*, 691 F.3d 547, 552 (4th Cir. 2012). But in *Johnson*, the Court discussed this primarily in terms of territoriality. *Johnson*, 339 U.S. at 770–71.

142. See *id.* at 774.

143. A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said:

The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

*Id.* at 776 (quoting *Ex parte Kawato*, 317 U.S. 69, 75 (1942)).

prisoners did not have standing, the Court cited six factors. Of these, four were specific to enemy combatants.<sup>144</sup>

In addition to the specifics of the *Johnson* decision, it is notable that there is an international regime governing the treatment of prisoners of war.<sup>145</sup> The Third Geneva Convention requires that prisoners of war “be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.”<sup>146</sup> Because the United States is bound by the Convention, which contains numerous procedural and substantive protections for prisoners of war, it is not necessary to accord duplicative constitutional protections to such defendants. Indeed, provisions of the Convention, such as Article 84, appear to permit limitations on certain constitutional rights, such as the right to trial by jury.<sup>147</sup>

If third country nationals, such as Ali and Brehm, are not to be accorded constitutional rights, they would therefore receive fewer protections than prisoners of war. While some might object to the rights

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144. *Id.* at 777. The six factors were:

[H]e (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

*Id.*

145. *See generally* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter Geneva Convention]. Ch. III (Arts. 82–108) of the Convention deals with Penal and Disciplinary Sanctions. Judicial Proceedings are addressed in Articles 99–108.

146. Geneva Convention, art. 84.

147. *Compare* Geneva Convention, art. 84 (“A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.”), *with* U.S. CONST. art. III, § 1 (guaranteeing life tenure and salary protection), U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia . . .”), and U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . .”).

Courts-martial are not overseen by Article III judges, do not require grand juries, and have no jury trial right or unanimous verdict requirement. Thus, the Geneva Convention mandates that enemy combatants will receive different procedural protections than civilian defendants. *See supra* text accompanying notes 46–48.

given to prisoners of war,<sup>148</sup> the United States is bound by the Third Geneva Convention.<sup>149</sup> But if Ali and Brehm are deserving of no constitutional protections, they will be placed at a disadvantage to those who have carried out acts of aggression against the United States.<sup>150</sup> Such an anomalous result cannot be justified when third country nationals have aided the war effort and are subjected to the judicial power of the United States.

#### 4. *Undermining the Foundational Principles Recognized in Reid*

*Reid v. Covert*<sup>151</sup> began with the proposition that “[t]he United States is entirely a creature of the Constitution.”<sup>152</sup> That proposition, of course, extends back to the earliest cases regarding the United States’ governmental structure.<sup>153</sup> And yet, the Court of Appeals for the Armed Forces held that the United States can exercise criminal jurisdiction over certain defendants outside of the constraints of the Constitution, so long as they are kept out of the United States’ *de jure* sovereignty.<sup>154</sup> That cuts against the recognition in *Reid*, reiterated in *Verdugo-Urquidez*, that the

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148. See, e.g., ROBERT H. DIERKER, JR., *Tolerance of Terror*, in *THE TYRANNY OF TOLERANCE: A SITTING JUDGE BREAKS THE CODE OF SILENCE TO EXPOSE THE LIBERAL JUDICIAL ASSAULT* 184–200 (2006).

Additionally, in the War on Terror, it is fairly easy to circumvent the need to give judicial protections to terrorists by simply not bringing them within the judicial power of the United States. Under President Obama, the number of drone strikes has increased significantly, most of them being used to summarily execute non-citizen terrorists, see Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, or even U.S. citizens, see Mark Mazzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1. See also Samuel S. Adelsberg, *Bouncing the Executive’s Blank Check: Judicial Review and the Targeting of Citizens*, 6 HARV. L. & POL’Y REV. 437 (2012). President Obama has been heavily criticized, in both scholarly legal circles and the press, for targeted drone strikes, particularly those on American citizens. See, e.g., Andrew Rosenthal, Op-Ed., *Are Targeted Killings Legal?*, TAKING NOTE, N.Y. TIMES (May 8, 2012, 4:00 PM), <http://takingnote.blogs.nytimes.com/2012/05/08/are-targeted-killings-legal/>; Michael Epstein, Note, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation when the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT’L L. 723 (2011).

149. Geneva Convention, *supra* note 145 (entered into force with respect to the United States, Feb. 2, 1956).

150. See discussion *infra* Part III.

151. 354 U.S. 1 (1957).

152. *Id.* at 5–6 (plurality opinion) (citing *Martin v. Hunter’s Lessee*, 14 U.S. 304, 326 (1816); *Ex parte Milligan*, 71 U.S. 2, 119, 136–137 (1866); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 477 (1939); *Ex parte Quirin*, 317 U.S. 1, 25 (1942)).

153. See, e.g., *Martin*, 14 U.S. at 326 (“The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.”).

154. *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012).

age of formalistic territoriality in constitutional jurisprudence is over.<sup>155</sup> As yet, no President has attempted to assert the ability to act beyond his constitutional powers, although some have come close.<sup>156</sup> Accepting the court's holding in *Ali* would undermine the consistent interpretation that the United States cannot act except within the strictures of the Constitution. It would also usher in a new era of unconstrained executive power—an era exclusively of the judiciary's creation.

### III. LOOKING BEYOND *ALI*

Although the facts of *Ali* are quite narrow, its potential applications are broad. This section will first address the potential application of the *Ali* rule in three situations outside of its narrow factual context. Part III concludes with proposed solutions to the *Ali* problem.

#### A. *Who Will be Harmed by the Ali Rule?*

##### 1. *Brehm-Type Defendants: Judge Effron's "Open Question"*

In his concurrence in *Ali*, Judge Effron asserted that the discussion of constitutional rights in the majority opinion was unnecessary to that case.<sup>157</sup> He then addressed the question that “would arise under the ‘least possible power adequate to the end proposed’ test if the conduct at issue involved a DoD civilian or DoD contractor employee who, as third-[country] national, would be subject to Article III coverage under MEJA.”<sup>158</sup> To Judge Effron, the predominant concerns in subjecting civilians to court-martial jurisdiction are separation of powers and constitutional structure, not due process.<sup>159</sup>

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155. Compare *Reid*, 354 U.S. at 5–6 (plurality opinion) (“The United States is entirely a creature of the Constitution.”), with *In re Ross*, 140 U.S. 453, 464 (1891) (“The Constitution can have no operation in another country.”).

156. President Obama has consistently refused to release Department of Justice memoranda regarding the constitutionality of his asserting sole authority to authorize the targeted killing of American citizens accused of participating in terrorist organizations. See Vicki Divoll, *Who Says You Can Kill Americans, Mr. President?*, N.Y. TIMES (Jan. 16, 2013), <http://www.nytimes.com/2013/01/17/opinion/who-says-you-can-kill-americans-mr-president.html>. President George W. Bush likewise refused to release memoranda regarding his power to authorize and utilize “enhanced interrogation techniques” (regarded by many as torture) against War on Terror detainees. See Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1.

157. *Ali*, 71 M.J. at 280 (Effron, J., concurring).

158. *Id.*

159. *Id.* at 282 (Effron, J., concurring) (“The import of the differences between courts-martial and Article III courts primarily concerns constitutional structure, not due process.”) (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

The structural issues at play include “separation of powers, the role of Article III as the foundation for criminal trials, and the function of trial by jury as a limitation on governmental power.”<sup>160</sup> Judges in courts-martial are military officers and therefore, unlike judges in Article III courts, serve at the pleasure of the President and do not have life tenure or salary protection.<sup>161</sup> As such, “[t]he organization of courts-martial . . . reflects a long tradition of concentrating power in the Executive Branch.”<sup>162</sup> Allowing further concentration of power in the executive would undermine the constitutional structure and devalue “[t]he Constitution, as a source of authority and limitation on power.”<sup>163</sup>

While courts-martial are concerned with criminal justice, they also serve a fundamental disciplinary role with which the civilian criminal justice system is not concerned.<sup>164</sup> Judge Effron concluded by noting that the civilian court-martial cases required

an assessment of whether the statute at issue, on its face and as applied, fits within the narrow range of constitutional exceptions to the requirements of Article III. Such an assessment requires consideration of whether the exercise of jurisdiction . . . involves the “least possible power adequate to the end proposed.”<sup>165</sup>

Although Judge Effron declined to answer his open question on standing grounds,<sup>166</sup> the answer is clear. Where it is practicable without sacrificing a legitimate and serious governmental interest, the UCMJ should not be applied to civilians who fall under MEJA jurisdiction.<sup>167</sup>

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160. *Id.* at 281 (citing *Singleton*, 361 U.S. at 237–38, 246–47; *Reid*, 354 U.S. at 10, 22, 36, 38–39; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17–18 (1955)).

161. Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1909 (1990).

162. *Ali*, 71 M.J. at 281 (Effron, J., concurring).

163. *Id.* at 282.

164. *Id.* (“The military justice system exists as an instrument of command . . .”).

165. *Id.* (citations omitted) (quoting *Toth*, 350 U.S. at 23).

166. *Id.* (“The constitutionality of UCMJ jurisdiction over civilians other than host-country nationals is an open question, and should remain so until properly developed and briefed in a case involving parties having a direct interest in the scope of such a decision.”). For a discussion of the benefits and drawbacks of the expanded UCMJ jurisdiction, see Cullen, *supra* note 5. For a discussion of the constitutionality of the expanded UCMJ jurisdiction, see O’Connor, *supra* note 46.

167. *Toth*, 350 U.S. at 23 (“Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘the least possible power adequate to the end proposed.’”) (quoting *Anderson v. Dunn*, 19 U.S. 204, 231 (1821)).

## 2. *Enemy Combatants in the War on Terror*

Much of the recent jurisprudence surrounding extraterritoriality has involved enemy combatants from the “War on Terror.”<sup>168</sup> Continued application of the *Ali* rule would strip *Boumediene* of its meaning and allow the continued detention of enemy combatants at Guantanamo Bay, Cuba, and other facilities around the world. Even if those combatants are eventually prosecuted, at least some of them could receive no due process, as the United States has consistently asserted that al Qaeda members are not prisoners-of-war under the Geneva Convention.<sup>169</sup>

Of particular concern are drone strikes against enemy combatants.<sup>170</sup> Here, there are two different issues posed. On the one hand are American citizens, the most notable of whom to have been executed is Anwar al-Awlaki.<sup>171</sup> On the other are non-citizen, non-residents.<sup>172</sup> If the Court were to decide that non-resident, non-citizen military contractors without significant connections to the United States are entitled to due process protections, it may be seen as anomalous to allow the targeted killing—without any judicial determination of guilt—of American citizens abroad.<sup>173</sup> Granting procedural rights to defendants like *Ali* and *Brehm*

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168. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

169. See Memorandum from Jay S. Bybee, Office of Legal Counsel of the U.S. Dep’t of Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Hynes II, General Counsel of the Dep’t of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf>.

170. Salman Masood & Ismail Khan, *Drone Kills a Pakistani Militant Behind Attacks on U.S. Forces*, N.Y. TIMES, Jan. 4, 2013, at A4.

171. Mazzetti, *supra* note 148.

172. Becker, *supra* note 148.

173. In *Al-Aulaqi v. Obama*, Anwar al-Awlaki’s father sued for injunctive relief to prevent al-Awlaki’s targeted killing. 727 F. Supp. 2d. 1 (D.D.C. 2010). The defendants, President Obama, the Secretary of Defense, and the Director of the Central Intelligence Agency, moved for dismissal. *Id.* at 8. After noting that the case was “unique and extraordinary,” the court posed a number of hypothetical questions in a lengthy paragraph at the outset of the opinion. *Id.* Most interesting to the present discussion is the first: “How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?” *Id.*

The court went on to hold in favor of the defendants on each defense, finding that (1) al-Awlaki’s father lacked “next friend” standing, *id.* at 17; (2) al-Awlaki’s father lacked *jus tertii* standing, *id.* at 25; (3) “[e]ven assuming [that standing was satisfied], there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing . . . constitutes a tort in violation of the ‘law of nations,’” *id.* at 37; (4) even if a threat constituted a violation of the law of nations, the father was not authorized to bring a claim under the Alien Tort Statute, *id.* at 40; and (5) the suit was barred by the political question doctrine, *id.* at 52.

could also be seen as opening the door to requiring judicial protections for non-citizen, non-residents targeted for killing.<sup>174</sup>

Targeted killings, however, are distinguishable.<sup>175</sup> Professors Murphy and Radsan offer a compelling analysis of how—and how much—process must be granted to targets.<sup>176</sup> They place particular emphasis on the impact of the *Hamdi* and *Boumediene* cases, and conclude that, because detained enemy combatants must have due process rights, so too must enemy combatants who are targeted for killing.<sup>177</sup> The authors suggest two main avenues for providing process protections.<sup>178</sup> First, limited access to courts to challenge killings *ex post*, similar to *Bivens* claims.<sup>179</sup> Second, procedural protections internal to the executive branch, including a review—independent of the CIA—of all decisions to target specific individuals.<sup>180</sup> Because of the unique nature of targeted killings, these protections could be sufficient even under the due process framework established by *Hamdi* and *Boumediene*.<sup>181</sup> But under the *Ali* majority's holding, the Constitution mandates no due process whatsoever.

### 3. *Defendants in Other Extraterritorial Criminal Prosecutions*

As the economy becomes ever more globalized, the United States is expanding its jurisdictional reach far beyond its territorial borders.<sup>182</sup> A number of recent extraterritoriality cases have made it into the news, including the indictment of five Chinese military hackers,<sup>183</sup> the arrest of

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174. See also *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (U.S. Dep't of Justice White Paper, Nov. 8, 2011), available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>.

175. See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009). Murphy and Radsan argue that there must be some semblance of process when terrorists are subjected to "targeted killing," defined as "extra-judicial, premeditated killing by a state of a specifically identified person not in its custody." *Id.* at 406, 409–10.

176. See generally *id.*

177. *Id.* at 450.

178. *Id.* at 437–50.

179. *Id.* at 437–45; see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* claims are suits against federal officials for violations of constitutional rights. *Bivens*, 403 U.S. at 389.

180. Murphy & Radsan, *supra* note 175, at 445–50.

181. *Id.* at 450.

182. See Brillmayer & Norchi, *supra* note 28, at 1223.

183. Press Release, U.S. Dep't of Justice, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), available at <http://www.justice.gov/opa/pr/2014/May/14-ag-528.html>; see also Michael S. Schmidt & David E. Sanger, *5 in China Army Face U.S. Charges of Cyberattacks*, N.Y. TIMES (May

Kim Schmitz (a.k.a. Kim Dotcom),<sup>184</sup> warrantless wiretapping,<sup>185</sup> and intellectual property theft.<sup>186</sup>

If, as the *Ali* court asserted, the Constitution is not binding on the United States government outside of the *de jure* territory, defendants in these and other, similar, prosecutions would not receive any procedural protections.<sup>187</sup> Any number of extreme hypotheticals could result, but it is also entirely possible that the stripping away of protections would be so gradual as to go nearly unnoticed.

In each of the three categories that could be harmed by the *Ali* rule, the fundamental concern is that our government is one of enumerated powers, and those enumerations include proscriptions on government's power in criminal prosecutions.<sup>188</sup> Individual rights and protections flow from that foundation. Certain constitutional rights are of limited value abroad, but many are fundamental to any criminal prosecution by the United States.<sup>189</sup> Our status as the global hegemon should not mean that we have free reign to assert our might wherever we please while treating foreign defendants more harshly than our own citizens. A solution to the *Ali* problem is therefore necessary in order to avoid the potential results of its broader application.

### *B. Defining the Necessary Nexus Between the Defendant and the United States*

In order for a non-citizen defendant to be accorded constitutional rights, it is necessary to discern a test to define when the individual has a connection with the United States sufficient to give rise to constitutional protections. Because the United States is a creation of the Constitution, it

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19, 2014), <http://www.nytimes.com/2014/05/20/us/us-to-charge-chinese-workers-with-cyberspying.html?smid=pl-share>.

184. Jonathan Hutchinson, *Mogul Goes From Shady to Admired*, N.Y. TIMES, July 4, 2012, at B1.

185. Alison Smale, *Anger Growing Among Allies on U.S. Spying*, N.Y. TIMES, Oct. 24, 2013, at A1; Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Were Illegal*, N.Y. TIMES, Apr. 1, 2010, at A1.

186. Press Release, U.S. Att'y's Office, E.D. Va., U.S. Dep't of Justice, Top Executives At Kolon Industries Indicted For Stealing DuPont's Kevlar Trade Secrets (Oct. 18, 2012), *available at* <http://www.justice.gov/usao/vae/news/2012/10/20121018kolonn.html>.

187. See *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012).

188. *Marbury v. Madison*, 5 U.S. 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

189. A search warrant, for example, has no effect outside of U.S. territory. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279 (1990) (Stevens, J., concurring in the judgment). But if the United States decides to enforce its criminal laws extraterritorially, the Constitution must follow. See *Brilmayer & Norchi*, *supra* note 28, at 1239.

should make sense that non-citizen, non-resident defendants should be accorded constitutional rights when they are prosecuted. The United States should not be capable of acting outside of the scope of its Constitution. The holding in *Verdugo-Urquidez*, however, indicates that certain rights, by their nature, may be incapable of attaching outside of the territorial confines of the United States.<sup>190</sup>

The cases indicate that there are at least three possible tests. First, the strict *de jure* sovereignty test, adopted in *Ali* and based on a generous reading of *Johnson v. Eisentrager*.<sup>191</sup> Second, “nature of the rights test”, based principally on *Verdugo-Urquidez*, under which the applicability of a right depends on the nature of that right.<sup>192</sup> Finally, the “any-exercise rule”: any exercise of the judicial power creates a nexus between the defendant and the United States, and the judicial power of the United States is always restricted by the procedural protections in the Constitution, absent a constitutional exception.<sup>193</sup> Having already discussed the problems with the *de jure* sovereignty test,<sup>194</sup> I will focus here on the two alternatives: the nature of the rights test and the any-exercise rule.

### 1. *The Nature of the Rights Test*

In *Verdugo-Urquidez*, the Supreme Court examined both the text of the Fourth Amendment and practical considerations before determining that it did not apply in Mexico, where the defendant’s home was located.<sup>195</sup> The *Verdugo-Urquidez* rationale was applied in *United States v. Davis*<sup>196</sup> to a ship apprehended by the U.S. Coast Guard approximately 100 miles off the coast of California.<sup>197</sup> Because the vessel was located outside of the territorial sovereignty of the United States, the Ninth Circuit held that the Fourth Amendment had no force.<sup>198</sup>

There are strong indications in *Verdugo-Urquidez* that the same considerations that factored into the Court’s decision on the Fourth

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190. *Verdugo-Urquidez*, 494 U.S. at 261 (holding that there is no Fourth Amendment search or seizure protection outside of the United States).

191. *See Ali*, 71 M.J. at 267 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)).

192. *See Verdugo-Urquidez*, 494 U.S. at 264–65.

193. *Id.* at 279 (Stevens, J., concurring in the judgment); *id.* at 279–97 (Brennan, J., dissenting); *Johnson*, 339 U.S. at 791 (Black, J., dissenting).

194. *See supra* Part II.

195. *Verdugo-Urquidez*, 494 U.S. at 273–74.

196. 905 F.2d 245 (9th Cir. 1990).

197. *Id.* at 247.

198. *Id.* at 251 (citing *Verdugo-Urquidez*, 494 U.S. at 261).

Amendment would require finding that certain other constitutional protections do apply extraterritorially.<sup>199</sup> First, the textual analysis contrasts the Fourth Amendment, which protects “the people,” with the Fifth and Sixth Amendments, which protect “person[s]” and “accused.”<sup>200</sup> Second, while the Court did not address the extraterritoriality of Fifth Amendment protections, it did note that “conduct by law enforcement officials prior to trial may ultimately impair [Fourth Amendment] right[s], [but] a [Fifth Amendment] violation occurs only at trial.”<sup>201</sup>

Because Fifth and Sixth Amendment violations are perfected only at trial, the case for applying those protections to all defendants becomes all the stronger. Once a defendant is in custody of the United States and subjected to its judicial power, it is not unduly burdensome to expect courts to apply the same standards that are applied to citizen or resident non-citizen defendants. The same notion should apply equally to both prosecutions in courts-martial and civilian courts. As such, a “nature of the rights” test would merely require courts to apply consistent standards at trial in order to prevent violation of foundational procedural rights.<sup>202</sup>

## 2. *The Any-Exercise Rule*

The preferable option is the any-exercise rule: whenever the United States asserts its judicial power, whether in Article III or non-Article III tribunals, that exercise of power is constrained by the Constitution.<sup>203</sup> The rule is founded on three sources. First, Justice Black’s dissent in *Johnson*.<sup>204</sup> Second, Justice Stevens’s concurrence in *Verdugo-Urquidez*.<sup>205</sup> Third, Justice Brennan’s dissent in *Verdugo-Urquidez*.<sup>206</sup> The

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199. See *Verdugo-Urquidez*, 494 U.S. at 264–69 (discussing differences in extraterritorial treatment of various rights).

200. *Id.* at 265–66.

201. *Id.* at 264 (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

202. It may be asserted that the effects on defendants would be slight and the burden on the government great, but

[s]light encroachments create new boundaries from which legions of power can seek new territory to capture. . . . “[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.”

*Reid v. Covert*, 354 U.S. 1, 39–40 (1957) (plurality opinion) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

203. See *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

204. *Id.* at 791–96.

205. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment).

206. *Id.* at 279–97 (Brennan, J., dissenting).

two dissents start from substantially the same proposition: “[E]qual justice [is] not for citizens alone, but for all persons coming within the ambit of our power.”<sup>207</sup>

Justice Brennan framed his argument around two concepts. First, “basic notions of mutuality[:] If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”<sup>208</sup> Second, a textual-historical argument that the Bill of Rights does not create rights in people, but instead focuses “on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken.”<sup>209</sup>

The any-exercise rule should be adopted because it recognizes the fundamental principle that any action of the United States must be both authorized and constrained by the Constitution. To adopt the nature of the rights test, the Court would have to hold that there are instances in which one or more branches of government are competent to act, but unconstrained in method. The extraterritoriality jurisprudence is complicated by the fact that much of it stems from the prosecution of enemy non-citizens.<sup>210</sup> Because the laws of war, in particular the Third Geneva Convention, apply to those prosecutions, those holdings are inapposite in a “run-of-the-mill assault” prosecution.<sup>211</sup> Prosecutions for run-of-the-mill assaults in the courts of the United States should all be subject to the constraints and protections of the Constitution.

It may be argued that the holding in *Verdugo-Urquidez* prevents adopting the any-exercise rule.<sup>212</sup> Such a reading of *Verdugo-Urquidez* would misconstrue that case and, more importantly, the nature of the rights at stake. There, the defendant asserted that the DEA violated his Fourth Amendment rights by searching his home in Mexico.<sup>213</sup> The case is distinguishable on two grounds. First, the Mexican government was the authority competent to authorize the search—not the United States.<sup>214</sup>

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207. *Johnson*, 339 U.S. at 791 (Black, J., dissenting); see also *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) (“Respondent is entitled to the protections of the Fourth Amendment because our Government . . . has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.”).

208. *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

209. *Id.* at 288.

210. See, e.g., *Johnson*, 339 U.S. at 765; *Ex parte Quirin*, 317 U.S. 1, 18 (1942).

211. *United States v. Brehm*, 691 F.3d 547, 551 (4th Cir. 2012).

212. See *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012).

213. *Verdugo-Urquidez*, 494 U.S. at 261.

214. See *id.* at 262. The DEA agents in Mexico City were not allowed to proceed until the search was authorized by the Director General of the Mexican Federal Judicial Police (“MFJP”). *Id.* The Director General authorized the search, and the MFJP and DEA carried out the search jointly. *Id.*

Because the Mexican government, and not the United States judiciary, possessed the sole capability to authorize the search, there can be no constitutional violation—a search is not “unlawful” if the competent authority has authorized it.<sup>215</sup> Second, the absence of a constitutional violation does not preclude a court from excluding the evidence at trial.<sup>216</sup>

That the United States government is limited to its enumerated powers cannot be doubted.<sup>217</sup> Those enumerated powers do not include the ability to investigate, arrest, prosecute, and punish any individual anywhere in the world without due process of law. If our government is to exert its judicial power over non-citizen, non-residents across the globe, it must give those defendants the same protections we would expect for our citizens were they subjected to the judicial power of another nation.<sup>218</sup> Once defendants are brought within the power of any judicial proceeding of the United States, those defendants must be given protections coextensive with those of citizens or residents.<sup>219</sup>

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Verdugo-Urquidez’s complaint was that the DEA agents had failed to obtain a warrant from a U.S. court. *See id.* at 263.

215. *Id.* at 279 (Stevens, J., concurring in the judgment). The bulk of Justice Stevens’ one-paragraph opinion reads:

I do agree, however, with the Government’s submission that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not “unreasonable” as that term is used in the first Clause of the Amendment. I do not believe the Warrant Clause has any application to searches of noncitizens’ homes in foreign jurisdictions because American magistrates have no power to authorize such searches.

*Id.*; *see also* *United States v. Calandra*, 414 U.S. 338, 354 (1974) (holding that the use of unlawfully obtained evidence as the basis of a line of questioning in a grand jury hearing is not entitled to the Fourth Amendment exclusionary rule because the questions are merely an extension of the initial violation).

216. *Verdugo-Urquidez*, 494 U.S. at 264 (majority opinion) (“Whether evidence obtained from respondents’ Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation.” (citing *United States v. Leon*, 468 U.S. 897, 906 (1984); *Calandra*, 414 U.S. at 354)).

217. *Marbury v. Madison*, 5 U.S. 137, 176 (1803); *see also Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”).

218. A notable recent example was the arrest, detention, and trial on espionage charges of three American hikers by Iran. *See* David D. Kirkpatrick, *In Rebuke to Iran’s President, Courts Void Release of Hikers*, *N.Y. TIMES*, Sept. 15, 2011, at A1.

219. Of course, the special situation of a true enemy combatant is the exception that proves the rule. International law and Supreme Court precedent require different treatment of enemy combatants. *See* discussion and text accompanying *supra* notes 146–50.

## CONCLUSION

The holding in *United States v. Ali*,<sup>220</sup> that due process protections categorically do not apply to non-citizen, non-residents, is deeply troubling. As was assumed in *United States v. Brehm*,<sup>221</sup> if a defendant is closely related enough to the United States that he is being subjected to its judicial power, that relationship should give rise to constitutional protections. The potential impact of *Ali* extends far beyond its limited circumstances. Courts should hesitate before following the flawed reasoning of the Court of Appeals for the Armed Forces in order to avoid either trampling on the rights of those brought within our power or offending other sovereigns. It is only by preserving constitutional protections for all criminal defendants that we can preserve United States citizenship as both a “high privilege” and a “priceless treasure.”<sup>222</sup>

*Isaac D. Chaput\**

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220. 71 M.J. 256 (C.A.A.F. 2012).

221. 691 F.3d 547 (4th Cir. 2012).

222. *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

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