NOTE

UNITED STATES CONSTITUTIONAL LIMITS ON THE EXECUTIVE IN DETERMINING REFUGEE POLICY: APPLYING UNITED STATES CONSTITUTIONAL RIGHTS EXTRATERRITORIALLY

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ABSTRACT

In US refugee policy, and foreign affairs in general, the Executive branch has an enlarged role in determining the law. While there are concurrent US constitutional powers between the Executive and Congress in foreign affairs, often, the US Supreme Court abdicates to the Executive. In particular, Sale v. Haitian Centers Council, Inc. highlights this division of power in US foreign affairs. In Sale, the US Supreme Court ruled that the US president's discretion in foreign affairs, based on a generalized delegation of power from Congress, outweighed any international or domestic obligations to provide asylum applicants status determination proceedings. Additionally, the Court made this ruling despite congressional acts that required determination proceedings for asylum applicants. These policies of interdiction seen in Sale remain largely intact in modern US foreign policy and continue to plague Haitian migrants into 2022. With this in mind, this Note analyzes potential extraterritorial application of the US Constitution ("the Constitution"), namely rights to procedural due process. Following

this analysis, this Note then highlights the ways that applying the Constitution to asylum applicants abroad can act as a safeguard to ensure that the United States upholds important international and domestic obligations despite the US Supreme Court's tendency to defer to the Executive in foreign affairs.

I. INTRODUCTION

In 1981, US President Ronald Reagan entered into an agreement with Haiti that gave the US Coast Guard unlimited authorization to intercept boats with Haitian migrants before they entered the territory of the United States.[1] The original agreement established that the US government would return all undocumented immigrants aboard these ships to Haiti, with the exception that they would not return Haitian migrants who qualified for refugee status.[2] The Reagan administration wrote that "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States [was] a serious national problem detrimental to the interests of the United States."[3] Thus, according to the Reagan administration, the domestic concerns of a mass influx of refugees warranted this policy of interdiction.[4]

Following the implementation of this policy, the US Coast Guard intercepted ships containing approximately 25,000 Haitian migrants from 1981 to 1991.[5] During the first ten years of this policy, the US Coast Guard conducted interviews on board their own ships following interceptions to determine whether any of these Haitian migrants qualified for refugee status.[6] If the Haitian migrant did not make a showing of potential refugee status, the

1. *See* Sale v. Haitian Centers Council, inc., 509 U.S. 155, 160 (1993).

2. *See id.* at 160-163; Exec. Order No. 12324, 3 C.F.R. § 181 (1981–1983).

3. Proclamation No. 4865, 3 C.F.R. § 50–51 (1981–1983).

4. *See id*. For the purposes of this Note, interdiction refers to the policy of "intercepting and preventing the movement of a prohibited commodity or person" as they sail from one country to another. *Interdiction*, DICTIONARY.COM, https://www.dictionary.com/browse/interdiction [https://perma.cc/R38Q-JANJ] (last visited Monday, Aug. 8, 2022).

5. *See Sale*, 509 U.S. at 161.

6. *See id.*

Coast Guard would immediately repatriate[7] the person per the US agreement with Haiti.[8] However, if a Haitian migrant "made a credible showing of political refugee status," they were "transported to the United States to file formal applications for asylum."[9]

In October 1991, a military coup ravaged Haiti, toppling the Jean-Bertrand Aristide regime and forcing thousands to flee the country to seek asylum in the United States.[10] Initially, the US "Coast Guard suspended repatriations for a period of several weeks," while "the United States imposed economic sanctions on Haiti."[11] However, after only a few weeks of this new policy, the Coast Guard resumed interdiction and forced repatriation to Haiti.[12]

During the six months following this coup, over 34,000 Haitian migrants tried to enter the United States.[13] The US Coast Guard intercepted all vessels coming from Haiti to the United States while they were still outside US territory.[14] US Coast Guard ships became increasingly full as "so many interdicted Haitian migrants could not be safely processed" there.[15] As a result, the US government created "temporary facilities at the US Naval base in Guantanamo Cuba."[16] However, even with the addition of these centers, there was not enough space to accommodate the mass influx of Haitian migrants. By May 1992, "the US Navy determined that no additional migrants could safely be accommodated at

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7. For purposes of this Note, repatriate means "send (someone) back to their own country." *Repatriate,* DICTIONARY.COM, https://www.dictionary.com/browse/repatriate [https://perma.cc/2E4J-PSWL] (last visited Monday, Aug. 8, 2022).

8. *See Sale*, 509 U.S. at 161.

9. *Id.* at 161-62.

10. *See id.* at 162; Douglas Jehl, *Bush Orders U.S. Ships to Turn Back Haitians: Immigration: White House seeks to ease a 'dangerous situation.' A foe sees a violation of international law,* L.A. TIMES (May 25, 1992), https://www.latimes.com/archives/la-xpm-1992-05-25-mn-228-story.html [https://perma.cc/28JM-WHJT].

11. *Sale*, 509 U.S. at 162.

12. *See id.*

13. *See id.*

14. *See id.*

15. *Id.* at 163.

16. *Id.*; *see* William C. McCamy, *Care for Haitians at Guantanamo Bay*, WASH. POST (Oct. 3, 1992), https://www.washingtonpost.com/archive/opinions/1992/10/03/care-for-haitians-at-guantanamo-bay/96fff1bb-339a-4c8f-8bb5-668e90fb07e4/ [https://perma.cc/JQ67-KLMY].

Guantanamo."[17] Consequently, President George H.W. Bush issued a new Executive Order to intercept and repatriate *all* fleeing Haitian migrants, eliminating any interviews that would identify potential refugees.[18] Application of this Executive Order meant that the US government would automatically send all interdicted Haitian migrants back to Haiti even if they qualified for refugee status. Arguing that this violated US and international law, the Haitian Centers Council ("HCC") sued the Commissioner of the Immigration and Naturalization Service under both Article 33 of the United Nations Protocol ("Article 33") and § 243(h) of the Immigration and Nationality Act ("INA").[19]

Under Article 33.1, party-states to the United Nations Protocol cannot "expel or return ('refouler') a refugee . . . to . . . territories where his life or freedom would be threatened."[20] Under the protocol, non-refoulement, returning a qualified refugee to his home country, applies to any person for "whom there are reasonable grounds for regarding as [in] danger . . . [in the] country in which he is located."[21] However, even though the United States was a party-state to this agreement, the non-refoulement obligations did not automatically apply to US domestic law as the United States has both a monist and a dualist system when it comes to the implementation of international agreements into its domestic law.[22]

Under a monist system of government, any international agreement automatically becomes a part of the party-state's domestic law.[23] Under a dualist system, international obligations have no footing in the domestic system until the legislature

17. Sale v. Haitian Centers Council, inc., 509 U.S. 155, 163 (1993).

18. *See id.* at 163-164.; Exec. Order No. 12807, 57 Fed. Reg. § 23133 (June 1, 1992).

19. *See Sale*, 509 U.S. at 166-167.

20. Harold Koh, *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, T.I.A.S. No. 6577.

21. *Id.*

22. *See generally* Foster v. Neilson, 27 U.S. 253, 253 (1829) (ruling on whether a non-self-executing treaty providing that Spanish land grants ceded to the people in possession of those lands upon United States acquisition would require subsequent legislative acts to take effect. The Court found that if the treaty did not contain self-executing language, then it was merely a pledge by the US government to ratify and confirm the treaty through a subsequent legislative act).

23. *See* DAVID SLOSS, *Domestic Application of Treaties, in* THE OXFORD GUIDE TO TREATIES 2 (Duncan B. Hollis ed., 2011), https://digitalcommons.law.scu.edu/facpubs/635/ [https://perma.cc/ZHC9-GHYY].

incorporates the treaty through additional legislation.[24] Based on a strict textualist reading of the Constitution, the United States appears to reject dualism by the inclusion of treaty in the Supremacy Clause.[25] By including treaty as an additional source of law alongside the Constitution and statutory law, the Framers implied that it has equal footing to both statutory and constitutional law.[26] Therefore, the rational assumption would be that the United States has a monist system of government. However, in *Foster v. Nielson*, Chief Justice John Marshall distinguished between treaties that contain self-executing language and treaties that do not contain such language.[27] Self-executing language in a treaty allows the treaty to become domestic law automatically; however, non-self-executing language requires there to be an additional legislative act for the treaty's contents to be effective.[28] Thus, in some ways the US system is a dualist system. This dual theory of the domestic application of international agreements that turns on self-execution remains prevalent in modern cases. As recently as 2008, in *Medellin v. Texas*, the Court ruled that language in international protocols must clearly state that the treaty self-executes into domestic law because there is a presumption in US law against self-executing treaties.[29] The distinction between monism and dualism is particularly important in international affairs because the United States does not have domestic obligations to abide by treaties

24. *See id.*

25. *See* U.S. CONST. art. VI, § 2.

26. *See id.*

27. *See* 27 U.S. at 254.

28. *See id.*

29. *See* 552 U.S. 491, 526 (2008). The presumption against self-executing treaties allows the United States to maintain separate obligations in international relations and domestic law. *See International Law and Agreements: Their Effect Upon US Law*, CONGRESSIONAL RESEARCH SERVICES 1 (Oct. 6, 2020), https://sgp.fas.org/crs/misc/R40504.pdf. [https://perma.cc/9BLW-QVJ9]. The authors point out that "the effects that international legal agreements entered into by the United States have upon U.S. domestic law are dependent upon the nature of the agreement; namely, whether the agreement (or a provision within an agreement) is self-executing or non-self-executing, and possibly whether the commitment was made pursuant to a treaty or an executive agreement." *Id.* Thus, by requiring an international agreement to state explicitly that its contents apply domestically, the Court ensures that either this law explicitly becomes a part of US domestic law or, if the explicit statement is absent, the contents only apply domestically if Congress passes a separate domestic statute. *See id.*

unless there is self-executing language or they have brought down the contents of the treaty into domestic law.

Nothing within the UN protocol speaks to self-execution in US domestic law. However, Congress enacted a law that brought the essence of Article 33 down into US domestic law. Through the INA, Congress ensured that the United States would not only have obligations of non-refoulement on the international level, but also within domestic law. In particular, § 243(h) of the INA reads:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[30]

Thus, in suing under both Article 33.1 and § 243(h) of the INA, the HCC used both international and domestic law to sue the United States.

Regardless, the Supreme Court majority found in favor of the US government.[31] The shallow summation of the opinion is that the Act should only apply domestically and that § 243(h) and Article 33, while prohibiting the return of a refugee to his home country, does not apply extraterritorially[32] to asylum applicants.[33] Thus, the United States is not in violation of non-refoulement.[34]

Alongside these notions of extraterritoriality, the opinion in the case detailed above, *Sale v. Haitian Centers Council,* contained an implicit dialogue between its majority and dissent over the separation of powers between the Executive and Congress, particularly in determining refugee status and rights.[35] This Note aims to first analyze the concurrent powers between the branches of government in foreign affairs with a particular emphasis on the right to draft refugee policy and law. Finding these concurrent powers as insufficient protections for asylum seekers, this Note

30. 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV).

31. *See* Sale v. Haitian Centers Council, inc., 509 U.S. 155, 155 (1993).

32. In this context, extraterritoriality refers to the "applicability or exercise of a sovereign's laws outside its territory." *Extraterritoriality*, DICTIONARY.COM, https://www.dictionary.com/browse/extraterritoriality [https://perma.cc/5Y2W-M7UR] (last visited Monday, Aug. 8, 2022).

33. *See Sale,* 509 U.S. at 155-56.

34. *See id.* at 156-57.

35. *See generally id.*

analyzes three tests—a Membership Theory, a Universal Approach, and a Balancing Test— used to apply the Constitution extraterritorially. Through the extraterritorial application of the Bill of Rights, in particular, those who seek asylum but have yet to enter the United States would have solid procedural protections.

Thus, Part II of this Note analyzes the constitutional arguments both in favor and against unilateral Executive authority in determining refugee policy. Following that analysis, Part III proposes that the Court should apply those three arguments (discussed *supra*) to asylum seekers in similar circumstances to those in *Sale.* In particular, the US government continues to use interdiction policies, and there is a spike in its use specifically on Haitian migrants into 2022.[36] Therefore, understanding *Sale*, which upheld the use of these policies, is critical in understanding modern day issues in interdiction policies. Therefore, ensuring that asylum seekers have a right to procedural due process proceedings would require the United States to perform cursory administrative checks to determine refugee status. This would then ensure the United States is aware of said status and can abide by obligations of non-refoulement within US and international law. Most notably, ensuring due process rights to asylum seekers would override the arguments for a unilateral Executive or concurrent powers between the Executive and Congress as the Constitution's provisions take precedence over any additional laws in the United States.[37] This could lead to stronger and more stable protections for asylum seekers in the United States by ensuring access to fair administrative processes.

Part IV first discusses the modern influx of Haitian migrants into the United States and continued interdiction policies that highlight the relevance of the Note. It then compares a 2009 European Court of Human Rights opinion to *Sale* This analysis

36. *See* Muzaffar Chisti & Jessica Bolter, *Rise in Maritime Migration to the United States is a Reminder of Chapters Past*, MIGRATION POL'Y INST. (May 25, 2022), https://www.migrationpolicy.org/article/maritime-migration-united-states-rise [https://perma.cc/3H3M-KHE8].

37. *See* U.S. CONST. art. VI, §2. The Supremacy Clause establishes that the provisions of the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "supreme Law of the Land." *See id.* Based on a textual understanding of this clause, it is clear that any laws passed must not conflict with the Constitution. *See id.* Thus, were the president or Congress to pass a law that violates a section of the Constitution, the Constitution's provision remains supreme. *See id.*

makes it clear that if the tests discussed in Part III apply to asylum seekers, the United States will uphold similar values to its European allies. Part IV then discusses international perspectives on the procedural rights asylum applicants should have and the ways those rights are met through application of the tests outlined in Part III.

II. YOUNGSTOWN SHEET AND TUBE V. SAWYER PROVIDES A FRAMEWORK FOR THE CONCURRENT POWERS ISSUES PRESENT IN SALE V. HAITIAN CENTERS COUNCIL

Youngstown evaluated a "unilateral Executive action that implicated both constitutional rights and the conduct of foreign affairs."[38] The Executive action in question was President Truman's Executive Order to "seize the nation's steel mills" in an attempt "to keep them operating . . . during the Korean War."[39] President Truman issued this Executive Order in response to a nationwide strike by the United Steelworkers Union.[40] Fearing that the steel mills may shut down their operations, jeopardizing the US effort in Korea as steel was critical to its armaments, the Executive Order gave the federal government, through the secretary of commerce, power to possess the steel mills.[41] Several steel mill operators, including Youngstown Sheet & Tube Co., brought action against the Executive Order, alleging that the Executive Order was unconstitutional as, under Article I of the Constitution, it was Congress who possessed the power to draft such actions.[42] After an injunction from the district court and the court of appeals, the Court "granted direct review" of the action.[43]

In his majority opinion, Justice Black determined that "the [p]resident's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[44] Here, no act of Congress gave the president authority to seize the steel mills.

38. MARTIN FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN FOREIGN AFFAIRS 97 (2019).

39. *Id.; see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-3 (1952).

40. *See* FLAHERTY, *supra* note 38, at 98-99.; Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952).

41. *See* FLAHERTY, *supra* note 38, at 98–99.

42. *See Youngstown*, 343 U.S. at 583-84; U.S. CONST. art. I, § 8.

43. *See* FLAHERTY, *supra* note 38, at 98–99.

44. *Youngstown*, 343 U.S. at 585.

Perhaps more importantly, Justice Black also addressed potential Article II powers a president may have in drafting such Executive Orders. He first found that the Commander-in-Chief Clause was insufficient as grounds to seize production of steel in Ohio because the United States was outside the "theater of war" that took place in Korea.[45] Examining whether any additional authority existed in Article II, Justice Black ruled that neither the Take Care nor the Vesting Clause[46] gave the president unilateral power to authorize property seizure in an emergency.[47] Instead, Congress must authorize the [p]resident's action through "explicit or implicit law."[48]

Despite Justice Black writing the majority opinion, *Youngstown's* immortality rests in two concurrences by Justice Jackson and Justice Frankfurter which, combined, create a succinct model for determining the separation of powers issues between the Executive and Congress. Therefore, this Part will first examine these concurrences in *Youngstown* and how they outline the allocation of constitutional powers between Congress and the Executive. Next, it will discuss the implicit references to *Youngstown* found within both the majority and dissent in *Sale*, along with a discussion of the implications of *United States v. Curtiss-Wright Exp. Co.* Finally, this Part will conclude that despite concurrent constitutional powers between the Executive and Congress in refugee policy, the outcome in *Sale* would remain the same due to recent trends that emphasize abdication to the president in foreign affairs.

45. *See id.* at 587.

46. The Vesting Clause places executive power in the president of the United States and the Take Care Clause imposes a duty on the president to take due care when he executes laws. *See* Saikrishna Prakash, & Christopher Schroeder, *Interpreting the Vesting Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/347 [https://perma.cc/H24G-EC5J] (last visited Sep. 5, 2022);. Lyle Denniston, *Constitution Check: What does the "Take Care Clause" Mean?*, NAT'L CONST. CTR. (Feb. 4, 2016), https://constitutioncenter.org/blog/constitution-check-what-does-the-take-care-clause-mean [https://perma.cc/MWQ3-2MSE].

47. *See Youngstown,* 343 U.S. at 587.

48. FLAHERTY, *supra* note 38, at 98.

A. Justice Black's Majority and Justice Frankfurter's and Jackson's Concurrences Created a Model to Allocate Constitutional Powers Between Congress and the Executive in Foreign Affairs

Justice Jackson's concurrence further analyzed President Truman's Executive Order through a tripartite separation of powers framework.[49] The framework included three levels to evaluate the president's power in connection with Congress's delegation of authority: Zenith, Zone of Twilight, and Low Ebb.[50] First, the Zenith level of power is when the president "acts pursuant to an express or implied authorization of Congress."[51] Because the president acts in conjunction with authorization of Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[52]

The president acts in the Zone of Twilight when "he and Congress may have concurrent authority, or [if the "power] distribution is uncertain."[53] As such, if Congress fails to respond when the president exerts certain authority, the Court may find that the president acted appropriately.[54] Justice Frankfurter's concurrence outlined the importance of "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,"[55] which commentators usually use to describe the president's source of authority in the Zone of Twilight.[56]

Finally, if the president acts against the expressed or implied will of Congress, he is in the Low Ebb,[57] and "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[58] In *Youngstown*, the president acted within the Low Ebb of his power because Congress "implicitly denied the president's power to seize industrial property . . . since

49. *See Youngstown*, 343 U.S. at 634 (outlining the various ways that separation of powers can work within the actions of the two political branches of government—Congress and the executive).

50. *See* FLAHERTY, *supra* note 38, at 101.

51. *Youngstown*, 343 U.S. at 635.

52. *Id.*

53. *Id.* at 637.

54. *See id.*

55. *Id.* at 610.

56. *See id.*; FLAHERTY, *supra* note 38, at 101.

57. *See Youngstown*, 343 U.S. at 637.

58. *Id.*

it had considered a bill delegating that authority but rejected it."[59] Therefore, the president can find himself in the Low Ebb even if Congress did not pass an enumerated law but made their intentions clear through either rejection of other laws or other legislative documents.[60]

However, presidents can still find authority in the Low Ebb through their enumerated constitutional powers.[61] In particular, the Court recently found in *Zivotofsky ex rel. Zivotofsky v. Kerry* that the president had exclusive power to recognize foreign countries and governments under Article II and may act against congressional acts in exercising such power.[62]

B. Sale Does Not Explicitly Cite Youngstown but Both the Majority and Dissent Implicitly Rely on Youngstown Reasoning

The central issue in *Sale* was President H.W. Bush's Executive Order. Thus, just as in *Youngstown*, *Sale* turned in part on whether President H.W. Bush had the constitutional authority to issue the Executive Order.[63] In addressing the Executive Order, both the majority and the dissent analyzed the INA through an implicit *Youngstown* framework.[64] The pertinent text of the Act read that "the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened."[65] However, the Executive Order at

59. FLAHERTY, *supra* note 38, at 101.

60. *See id*.

61. *See Youngstown*, 343 U.S. at 637.

62. *See* 576 U.S. 1, 13 (2015). The Court determined that Zivotofsky's request to have Jerusalem as a place of birth on his passport was solely under the president's discretion through Article II's Reception Clause. *See* 576 U.S. 1, 2 (2015). Thus, even though the president directly contradicted a Congressional order, the Court still considered his order constitutional. *See* U.S. CONST. art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their either of them, and in Case of Disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

63. *See* Sale v. Haitian Centers Council, inc., 509 U.S. 155, 160 (1993); Exec. Order No. 12807, 57 Fed. Reg. (June 1, 1992).

64. *See generally Sale*, 509 U.S. at 161. The opinion in *Sale* does not directly discuss Youngstown, nor does it use the terms discussed *supra.* However, the ways that the *Sale* decision discusses the separation of powers is solidly planted in a *Youngstown* framework. *See generally Youngstown*, 343 U.S. at 637.

65. 8 U.S.C §1253(h)(1) (1988 & Supp. IV).

issue "expressly relied on statutory provisions that confer authority to the [p]resident to suspend the entry of 'any class of aliens' or to 'impose on the entry of aliens any restrictions he may deem to be appropriate.'"[66] The Court's majority found this language to be a direct grant of power from Congress to the Executive to determine the fate of refugees.[67] In *Youngstown* terms, the Executive was at its Zenith.

The dissent focused on Congress's adoption of the United Nations Convention Relating to the Status of Refugees ("the Convention") because "it is undisputed that the Refugee Act of 1980 was passed to conform [United States] law to Article 33" of the Convention.[68] Under Article 33 of the Convention, signatories have non-refoulement obligations, which mean that they cannot "return a refugee in any manner . . . to the . . . territories where his life . . . would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."[69] "The nondiscretionary duty imposed by §243(h) of the Refugee Act parallels these mandatory *non-refoulement* obligations" found within Article 33 of the Convention.[70] In response, the majority argued that the Executive Order does not violate non-refoulement as it intercepted refugees before they arrived at the border.[71] Thus, the Executive was not in violation of the Convention as adopted by Refugee Act of 1980, and he remained at his Zenith due to the delegation of authority.[72]

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66. *Sale*, 509 U.S. at 172; *see* 8 U.S.C. § 1182(f).

67. *See Sale*, 509 U.S. at 172.

68. *Sale*, 509 U.S. at 189; *see* United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

69. *See* United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

70. *See* INS v. Doherty, 502 U.S. 314, 331 (1992).

71. *See Sale*, 509 U.S. at 171, 186-87. Additionally, in *Sale,* the Court accepted petitioner's argument that "a fair reading of the INA as a whole demonstrates that §243(h) does not apply to actions taken by the president or Coast Guard outside the United states; that the legislative history of the 1980 amendment supports their reading; and that both the text and negotiating history of Article 33 of the [UN] Convention indicate that it was not intended to have any extraterritorial effect." *See id.* Thus, in this distinguishing between those applicants who are within the territory of the United States and those that are not, the Court implicitly accepts that both the UN Convention and subsequent congressional acts would trigger non-refoulement obligations that would apply to refugees that are within the territory of the United States. *See id.* at 186-87.

72. *See id.* at 189.

C. A Citation to United States v. Curtiss-Wright Refers to an Argument for the Unilateral Executive in Refugee Policy

The lengthy opinion turned almost entirely on readings of these various acts, and whether the Executive Order was in direct violation of congressional acts.[73] However, the majority briefly mentioned a "unique responsibility" the president has in "construing treaty and statutory provisions that may involve foreign and military affairs," citing to the famed Supreme Court Case *United States v. Curtiss-Wright Exp. Co* and implicitly drawing on the theory that the president is the sole organ in foreign affairs.[74] The citation to *Curtiss-Wright*[75] suggested that "in some areas, the president, and not Congress, has sole constitutional authority."[76] Therefore, the majority suggested that even if the dissent were correct that the president acted in violation of a congressional act, he still maintained his constitutional authorization through Article II Commander-in-Chief powers.[77]

The subtly of this citation by the majority was not lost on the dissent. By simply evoking the name of the case, the majority referenced an unbroken line of presidents who relied on Curtiss-Wright since its ruling.[78] For presidents, the case stands for the supposition that because of "*Curtiss-Wright* . . . I'm right."[79] In

73. *See generally id.* at 186-87.

74. *See id.* at 188; FLAHERTY, *supra* note 38, at 91 (discussing that the "sole organ" language here is likely a mischaracterization of Chief Justice Marshall's discussion of the phrase).

75. *See generally United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304 (1936). In *Curtiss-Wright*, the Court gave the president an extraordinarily wide breadth to act unilaterally in foreign affairs. Following a Joint Resolution of Congress that authorized the president to prohibit the sales of arms to Paraguay and Bolivia, President Roosevelt enacted an embargo against both countries. *See id.* at 311-12. The Curtiss-Wright Export Company continued to sell arms, and eventually, the US government charged them with conspiracy to sell weapons in Bolivia as this action was in direct contradiction to the embargo. *See id.* The company argued that this was an unconstitutional delegation of powers as the power of the Executive to unilaterally place these embargos violated the Separation of Powers between Congress and the Executive. *See id.* at 314. The Supreme Court determined that the president's powers in foreign affairs are open-ended and inherent in his position as the executive authority of a sovereign nation. *See id.* at 316-22.

76. *Id.* at 207.

77. *See id.* at 304, 311, 319 (1936) (ruling that the president has sole organ status in foreign affairs); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. at 13 (2015) (ruling that the president can disregard congressional orders if he is acting within the confines of Article II); *see generally* U.S. CONST. art. II, § 2, cl.1.

78. *See* FLAHERTY, *supra* note 38, at 94.

79. FLAHERTY, *supra* note 38, at 95.

Youngstown terms, *Curtiss-Wright* gave the president constitutional authority to disobey a direct order of Congress and the opportunity to win a separation of powers argument even if he violates a congressional act.[80] Thus, in *Sale,* the majority not only argued that the president acted appropriately under Congressional orders, but also that in foreign affairs such as refugee policy, the Executive, through Commander-in-Chief powers, had constitutional authority to determine such policy even if it directly contradicted a congressional action.[81]

D. Concurrent Powers Between the Executive and Congress in Refugee Policy Would Not Change the Outcome in Sale Based on the Deference Courts Still Give to the Executive in Foreign Affairs

The dissent in *Sale* responded to this *Curtiss-Wright* argument by holding that "immigration is decidedly not one of those areas" in which the president has "sole constitutional authority."[82] The Court had previously ruled that under the Naturalization Clause of the Constitution, Congress has the authority to "establish [a] uniform Rule of Naturalization."[83] In a subsequent case, the Court defined naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[84] Additionally, "[a]s a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."[85]

On its face, concurrent powers between Congress and the Executive in immigration seem to offer more protections for asylum seekers. In the case of *Sale,* several of the congressional acts at issue rely on international obligations the United States entered in accordance with the Convention.[86] Thus, the acts would appear to offer protection against an Executive with political obligations and unilateral authority over its cabinet officials. Regardless,

80. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
81. *See* Sale v. Haitian Centers Council, inc., 509 U.S. 155, 188 (1993).
82. *Id.* at 207.
83. U.S. CONST. art. I, § 8, cl. 4.
84. Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892).
85. Mackenzie v. Hare, 238 U.S. 299, 311(1915).
86. *See* United Nations Convention Relating to the Status of Refugees, *supra* note 68; *Sale*, 509 U.S. at 189.

language is subject to interpretation, and the Court in *Sale* deftly interpreted the congressional actions to give authorization to the Executive, even if the Executive uses such authorization to implement orders that directly contradict other congressional acts.[87] Additionally, this Court applied the presumption against extraterritoriality to avoid forcing the Executive to comply with a congressional order, and even implied extreme *Curtiss-Wright* type unilateral authority in foreign affairs as an alternative argument.[88]

This type of Supreme Court deference, while not as extreme as what is seen in *Curtiss-Wright*, still exists into the 21st century. As recently as 2018, the Court has shown proclivities to abdicate to the Executive branch in foreign affairs.[89] In the case *Trump v. Hawaii,* Hawaii, on behalf of several parties, "brought pre-enforcement action against [the] president, Executive Branch officials and agencies, and the United States, seeking to prohibit implementation and enforcement of [a] Presidential Proclamation."[90] President Trump issued the proclamation in question in September of 2017 during his first year in office.[91] The proclamation, titled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats*, addressed current immigration policies, and, specifically, sought to prohibit entry of immigrants from certain countries.[92] The stated goal of the proclamation was "to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat."[93]

87. *See generally Sale,* 509 U.S. at 189 (ruling that the grant of power to the Executive and the subsequent policy decisions that come from that delegation outweigh any other congressional act that the Executive's chosen policy may contradict).

88. *See id.* at 173, 188.

89. *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (interpreting the president's Executive Order in a way that suggests that if a presidential policy is foreign affairs related then it warrants a presumption in favor of it by the Court).

90. *Id.*

91. *See id.* at 2399.

92. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 1(a) (2017) (showing that President Trump's Presidential Proclamation sought to prohibit entry of immigrants from countries where his administration detected internationals associated with terrorism).

93. *Id.* (noting that the proclamation, by creating a plan to detect foreign nationals who may commit, aid, or support acts of terrorism, the Trump administration sought to prohibit entry of immigrants from the identified countries); *see Trump*, 138 S. Ct. at 2403.

President Trump's administration used the Department of Homeland Security, the State Department, and intelligence agencies to "develop[] an information and risk assessment baseline . . . then collect[] and evaluate[] data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns."[94] After the assessment, President Trump's administration banned entrance of immigrants from eight specific countries: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.[95] The president found his basis for executing this order under the same INA discussed in *Sale*.[96] President Trump argued that the confines of INA § 1182(f) gave the Executive power to suspend immigration as long as he gave reasoning that showed that said immigration would be harmful to US domestic interests.[97]

The plaintiffs in *Trump*, argued that the president overstated and overused the deference that the INA affords him.[98] The plaintiffs agreed with the president that the INA allows a president to "suspend the entry of all aliens or any class of aliens" if the Executive determines that entrance "would be detrimental to the interests of the United States."[99] However, the dissent, who accepted the plaintiff's argument, honed in on additional language within §1152(a)(1)(a) of the act, which provides that "no person shall be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[100] The dissent, thus, argued that there was a clear theme contained within the eight countries the Trump administration chose to ban immigration: six out of the eight are majority-Muslim countries.[101] The plaintiffs, and the dissent, also highlighted previous Executive Orders, predating the proclamation, that contained *only* Muslim-majority countries and the general lack of clear reasoning for the inclusion or exclusion of

94. *Trump*, 138 S. Ct. at 2399.

95. *See* Proclamation No. 9645, 82 Fed. Reg. 45161.

96. *See* 8 U.S.C. § 1182(f).

97. *See id.*; *Trump*, 138 S. Ct. at 2404.

98. *See Trump*, 138 S. Ct. at 2404 (showing that the plaintiffs did not argue this explicitly but implicitly through recognition of potential Establishment Clause issues discussed infra).

99. 8 U.S.C. § 1182 (f).

100. 8 U.S.C. § 1162 (a)(1)(a).

101. *See Trump*, 138 S. Ct. at 2430.

certain countries.[102] This, they argued, called into question whether the proclamation was about national security or religion.[103] As such, there were grounds for an analysis of whether this law violated the Establishment Clause of the First Amendment.[104]

Despite potential Establishment Clause issues revolving around the largely Islamic nature of these eight countries, the Court found in favor of President Trump.[105] In his majority opinion, Justice Roberts cited *Sale* as precedent for "comprehensive delegation" to the president in determining refugee policy in foreign affairs.[106] Justice Roberts ruled that "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control."[107] In this ruling, the Court avoided any Establishment Clause analyses and instead focused only on the four corners of the document at issue.[108] In doing this, the Court avoided a strict scrutiny assessment.[109] Were the Court to apply strict scrutiny, the president would have to show that there was a compelling interest in national security that was narrowly tailored to the Executive stopping immigration from these primarily Islamic countries.[110] The proclamation would likely fail the strict scrutiny assessment were the Court to look to documentation outside the four corners of the proclamation document, as former executive orders containing only Muslim-majority countries would point to both radical under-inclusivity and radical over-inclusivity of Muslim-majority countries that may be a threat to national security.[111]

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102. *See id.* at 2417, 2430.

103. *See id.* at 2430.

104. *See id.* at 2430-34.

105. *See generally id.* at 2392-93.

106. *See id.* at 2408; *Sale*, 509 U.S. at 187. While *Trump* does not discuss refugees or asylum applications, this citation, and the general nature of the Executive within foreign affairs, make this ruling highly relevant for the way the Court views the Executive's power in foreign affairs and, thus, the necessity for additional protections discussed infra.

107. *Trump*, 138 S. Ct. at 2418 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1952)).

108. *See id.* at 2400.

109. *See id.* at 2402.

110. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 753 (1995).

111. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (establishing the strict scrutiny assessment for protected classes).

Instead, the Court refused to evaluate anything beyond the four corners of the proclamation and chose not to question the Executive's potential religious motivation behind the action.[112] Therefore, the Executive only had to prove a rational relationship between banning immigration from these eight countries and national security.[113] The Court has rarely struck down policies as illegitimate under this review.[114] This case was no different. The Court ruled that the proclamation was "expressly premised on legitimate purposes, . . . says nothing about the religion, . . . and the entry restrictions on Muslim-Majority countries are limited to countries that were previously designated by Congress or prior administrations as posing national security risks."[115] Thus, the proclamation sailed through this rational basis review as the three-part explanation showed a rational relationship between banning immigration from certain countries and national security.[116]

In avoiding strict scrutiny and using this rational basis review, Justice Roberts took great care to avoid constitutional issues. This is likely because if the president was in violation of the Constitution, there would be no grounds for the Court to abdicate to the president in this manner, see *infra* discussion in Part III.[117] Thus, while the concurrent powers between the Executive and Congress do not provide stable procedural safeguards in both refugee policy and immigration in general, constitutional protections are a pathway to more stability in asylum applicant rights.

III. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION CAN PROVIDE STABLE PROTECTIONS FOR ASYLUM SEEKERS IN THE UNITED STATES

Part III outlines the potential constitutional rights a refugee may have. To discuss this, it is important to note that if the

112. *See generally Trump*, 138 S. Ct. at 2392 (highlighting the Court's clear avoidance of any external evidence of the Executive's potential religious discrimination).

113. *See id.* at 2402.

114. *See id.*

115. *Id.*

116. *See id.* at 2392.

117. *See* U.S. CONST. art. VI, § 2 (establishing that all laws in the United States are made pursuant to its constitution. Thus, if any law stands in violation of the Constitution, the Constitution is supreme to that law).

Constitution applied to asylum seekers, the Executive would have to abide by its confines when passing any Executive Order.[118] Based solely on the structure of the Supremacy Clause of the Constitution, all federal laws are made pursuant to the Constitution itself.[119] As such, the Constitution and its enumerated rights are superior to any congressional statute or international treaty.[120] Article III judicial powers, as interpreted by Chief Justice Marshall in *Marbury v. Madison*, tasks the judiciary with ensuring that any statute Congress enacts or Executive Order the president issues complies with the Constitution.[121] Thus, while the Constitution delegates powers to Congress and the president to determine immigration and refugee policy, both are required to uphold the protected rights of the Constitution for those to whom it applies. Amending the Constitution would require a two-thirds vote in both the House and Senate, and ratification by three-quarters of the states.[122] As such, unless Congress and the states amend a provision of the Constitution to change a portion of the Constitution either an Executive Order or congressional act violates, both the Executive and Congress are required to abide by the provisions of the Constitution in both congressional acts and Executive Orders subject to judicial review.[123]

Therefore, were the enumerated rights of the Constitution to apply to asylum applicants like the Haitian migrants in *Sale*, all three branches of government would be required to ensure that migrants are afforded those rights. To apply constitutional rights to asylum applicants that are outside the territory of the United States, one must analyze whether the interactions between the asylum applicants and the US government warrant extraterritorial application. Part III analyzes tests the Court can use to determine extraterritorial application of the Constitution's rights. First, it will outline the Membership Theory to extraterritorial application of the Constitution, which the Court started to use as early as the 1950s. Next, it will discuss a Universal Approach to extraterritorial

118. *See id.*

119. *See id.*

120. *See id.*; *see generally* 5 U.S. 137 (1803) (establishing judicial review—the power of federal courts to declare legislative and executive acts unconstitutional).

121. *See* U.S. CONST. art. III, § 2.

122. *See* U.S. CONST. art. V, § 2.

123. *See id.*; U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. 137 at 147-48 (1803).

application of Constitutional rights. Finally, it will conclude with an analysis of a Balancing Test for extraterritoriality.

A. The Membership Theory to Extraterritorial Applicability Suggests Potential Wide-Spread Constitutional Application of the Fifth and Sixth Amendment Regardless of Citizenship

In *Reid v. Covert,* the Supreme Court found that Fifth and Sixth Amendment rights apply to citizens abroad.[124] The case concerned two US military wives who had killed their husbands while overseas.[125] Both women were tried and convicted by court martials pursuant to the Uniform Code of Military Justice and in compliance with agreements between the United States, Japan, and the United Kingdom.[126] Both women filed habeas corpus claims, pleading that these courts martials deprived them of their right to trial by a jury of their peers, and that the Constitution prohibited a trial by military authorities as they were lay citizens.[127]

The Court found "that the Constitution in its entirety" applied to these women, both citizens of the United States, even though they committed the crime in Japan and the United Kingdom.[128] Additionally, *Reid* rejected the application of two previous cases, *Ross v. McIntyre* and the *Insular Cases.*[129] *Ross,* a case decided in 1891, followed a territorial approach for constitutional extraterritoriality in which the Constitution only applied when a

124. *See* Reid v. Covert, 354, U.S. 1, 8 (1957). The Fifth Amendment of the Constitution states: "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, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Sixth Amendment of the Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

125. *See Reid,* 354 U.S. at 4-5.

126. *See id.* at 4, 15-16.

127. *See id.* at 4-5.

128. *Id.* at 18.

129. *See id.*

person was physically present on US soil.[130] The only cases to offer less protection than this territorial approach were a series of cases tried in the beginning of the 20th century.[131] Titled the *Insular Cases,* the Court determined that certain territories recently acquired by the United States, but not yet integrated into the Union, did not receive constitutional protections. [132] In rejecting these cases, *Reid* established a new norm that the Constitution applies to any US citizen in a proceeding by the US government, even if they were abroad when they committed the crime.[133] Thus, the Court ruled that citizens' Fifth and Sixth Amendment rights apply even if they were abroad or if there is an international agreement between the United States and another country to try US citizens under a different court system.

The reach of the Membership Theory, however, currently turns on textual differences between the various amendments of the Constitution. Thirty-seven years after *Reid*, the Court ruled in *United States v. Verdugo-Urquidez* that the Fourth Amendment did not apply to actions by US officials against foreign citizens abroad.[134] In this case, the Drug Enforcement Administration ("DEA") believed that Verdugo-Urquidez, a Mexican citizen and resident, was the leader of a drug narcotics gang.[135] Mexican officials cooperated with the United States and allowed US officials to arrest Verdugo-Urquidez, search his home, and bring him into the United States where he was officially detained.[136] Verdugo-Urquidez argued that when the DEA agents searched his Mexican residence and seized certain documents without a warrant, they were in clear violation of the Fourth Amendment.[137] However, Justice Rehnquist in his majority opinion distinguished the Fourth Amendment from the Fifth and Sixth Amendments, which were at issue in *Reid,* through a textual reading of the Constitution.[138] In his

130. *See* Ross v. McIntyre*,* 140 U.S. 453, 464 (1891).

131. *See Reid,* 354 U.S. at 13.

132. *See id.*

133. *See id.* at 18; *see generally* United States v. Verdugo Urquidez*,* 494 U.S. 259 (1990) (highlighting that it is an inarguable fact that extraterritorial application of the Constitution applies to US Citizens as the main issue in *Verdugo-Urquidez*, discussed infra, is whether extraterritorial application of the Constitution applies to a non-US citizen).

134. *See Verdugo Urquidez*, 494 U.S. at 259.

135. *See id.* at 262.

136. *See id.*

137. *See id.* at 263.

138. *See id.* at 265-67.

reasoning, Rehnquist highlighted the differences between the use of "the people" in the Fourth Amendment and the use of "the accused" in the Fifth and Sixth Amendments.[139] "The people," based on its use elsewhere within the Constitution points to US citizens whereas "the accused" suggests a broader applicability.[140] Notably, Justice Rehnquist did not simply rule that since Verdugo-Urquidez was a Mexican national, the constitutional rights did not apply to him outside the confines of the United States territory. [141] Additionally, while in *Reid* the Court widely focused on the citizenship of the two women at issue, in *Verdugo-Urquidez* Justice Rehnquist used textual analysis of the Amendments instead of using citizenship as a differentiating factor. In this textual distinguishment of the Fourth Amendment from the Fifth and the Sixth Amendments, he suggests that if the United States detention and proceedings occurred in Mexico, the Fifth and Sixth Amendments might still apply.[142] This is regardless of whether Verdugo-Urquidez is a US citizen or if there is an international agreement between Mexico and the United States, which, while informal, some may argue there was here as Mexico had cooperated with US actions in *Verdugo-Urquidez.*

B. Justice Brennan's Dissent in Verdugo-Urquidez Coupled with Aspects of Reid Establishes a Universal Approach to the Application of the Constitution Abroad

Justice Brennan's dissent outlined a drastically more inclusive test than Justice Rehnquist's approach in determining whether these constitutional rights should apply to *Verdugo-Urquidez*. Under his Universal Approach, the rights protected by the Constitution apply to everyone, everywhere, regardless of citizenship, any time the US government acts in any capacity.[143] The logic of this Universal Approach is simple: If the United States is a creation of the Constitution, and the United States is a government of enumerated powers, the US government is thus

139. *See id.*; U.S. CONST. amend. IV-V.

140. *See Verdugo Urquidez*, 494 U.S. at 259-60.

141. *See id.* (inferring this claim from the simple fact that the Court ruled on this issue of extraterritorial application of the Constitution to a non-US citizen).

142. *See id.*; U.S. CONST. amend. IV-V.

143. *See Verdugo Urquidez,* 494 U.S. at 281.

always subject to the limits the Constitution imposes.[144] In *Reid,* the Court ruled that "when the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."[145] While this facially supports only the Membership Theory, it also suggests that the Constitution does not simply cease to apply to the US government because of where the triggering event and subsequent proceeding takes place.

Justice Brennan's dissent in *Verdugo-Urquidez* applied this Universal Approach to the facts of the case. Justice Brennan argued that mutuality is essential for fundamental fairness.[146] Foreign nationals, just like US citizens, are vulnerable to oppressive actions by the US government and deserve protections designed to hold the US government accountable.[147] As such, constitutional safeguards must be employed whenever the US government exercises authority, because it derives said authority from its Constitution.[148] In *Verdugo-Urquidez,* the US government exercised clear power over Verdugo-Urquidez. In their unjustified seizure of Verdugo-Urquidez's belongings, the DEA agents should be confined to the constitutional safeguards present in the Constitution while they exercise said power.[149] In this way, the Universal Approach to the Constitution is simple; if the United States exercises its authority[150], abroad or domestically, it must act within the confines of its Constitution.

144. *See id.*
145. Reid v. Covert, 354, U.S. 1, 6 (1957).
146. *See Verdugo Urquidez*, 494 U.S. 259, 284 (1990).
147. *See id.* at 284-85.
148. *See id.*
149. *See id.* at 259, 284-85.
150. *See id.* Justice Brennan, in his dissent, argues that *Verdugo-Urquidez* highlights obvious exercises of US authority abroad. *See id. at* 284. He writes, "what the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of the United States law and may well spend the rest of his life in United States prison . . . . Fundamental fairness and the ideals underlying our bill of rights compel the conclusion that when [the United States] impose[s] societal obligations . . . we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment." *Id.* Thus, the dissent in *Verdugo-Urquidez* defines any US expectation of international compliance with its laws to have the correlative effect of extraterritorial application of the Constitution. *See id.*

C. Justice Kennedy's Concurrence Proposed a Balancing Test Which Would Create a Case-By-Case Approach to Whether the Constitution Applies to a non-US Claimant

In a concurring opinion in *Verdugo-Urquidez*, Justice Kennedy noted that the practical hardships of the Universal Approach called for a similar Balancing Test as the one he later authored in *Boumediene v. Bush*, discussed *infra*.[151] In short, Justice Kennedy wrote that the Court must "interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[152] Thus, the Court should weigh the US governmental interest against the claimant's alleged right infringement.[153] In *Verdugo-Urquidez,* Justice Kennedy found that the practical hardships of receiving a warrant in Mexico, "the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials," outweighed any of the claimant's potential Fourth Amendment rights.[154] Despite this, the concurring opinion expanded the majority's Membership-based textual reading of the Fourth Amendment, concluding that the Court "has not decided that persons in the position of the respondent have no constitutional protections," just not a Fourth Amendment protection in this particular circumstance.[155]

Justice Kennedy expanded this Balancing Test in a 2008 opinion over an international claimant's right to the writ of habeas corpus.[156] In *Boumedine*, the Court found that Boumediene, while not a US citizen, still had a habeas corpus right.[157] In deciding his claim, the Court determined as a threshold issue whether Boumedine had constitutional rights in Guantanamo Bay because it is technically outside the sovereignty of the United States.[158] Justice Kennedy identified three relevant factors to balance in consideration of habeas corpus claims: (1) citizenship and status of the detainee and the adequacy of the process through which that

151. *See id.* at 277.
152. *Id.*
153. *See id.*
154. *Id.* at 278.
155. *Id.*
156. *See* Boumediene v. Bush, 553 U.S. 723, 724 (2008).
157. *See id.*
158. *See id.* at 726.

status determination was made, (2) the nature of the sites where the apprehension and detention took place, and (3) the practical obstacles inherent in resolving a prisoner's entitlement to the writ.[159] Based upon the balancing of these factors that weigh the United States governmental interest against the claimant's, the Court found that the Constitution did apply extraterritoriality to Boumediene in relation to the writ of habeas corpus.[160]

Thus, *Boumediene* and *Verdugo-Urquidez* both stand as precedent for using a Balancing Test to determine the extraterritoriality of the Constitution for non-US citizens. Importantly, *Boumediene* shows that there are circumstances where the non-US claimant's interests do outweigh the government's interests. The notion that the Court should "interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad" allows the Court to weigh the governmental interest against the alleged infringement on a case-by-case basis.[161] As such, the Balancing Test provides a more nuanced way to determine cases like *Sale* and address the rights that non-US citizens abroad have under the Constitution when dealing with the US government.

D. A Procedural Due Process Violation exists in the Executive Order at Issue in Sale and All Three Tests for Extraterritorial Application of the Constitution Support Applying Constitutional Rights to Haitian Migrants in Sale

Under President H.W. Bush's Executive Order at issue in *Sale*, the United States and Haiti agreed to "prosecute 'illegal traffickers.'"[162] The US Coast Guard, acting on authority from the Executive, intercepted the Haitian vessels and repatriated all on board to Haiti without any type of hearing or proceeding.[163] Thus, the detention and repatriation used police powers that, were they to occur on US soil, would trigger rights under procedural due

159. *See id.* at 727.
160. *See id.* at 724.
161. United States. v. Verdugo Urquidez, 494 U.S. 259, 277 (1990).
162. Sale v. Haitian Centers Council, inc., 509 U.S. 155, 161 (1993).
163. *See id.*

process of law to determine the Haitian migrants' refugee status.[164] The opinion in *Sale* did not discuss the extraterritoriality of constitutional rights to asylum applicants, but instead focused on a congressional grant of authority to the Executive.[165] However, a retrospective analysis of *Sale* that applies the Membership Theory, Universal Approach, and Balancing Test for extraterritoriality of constitutional protections reveals that the US government violated the right of all Haitian migrants aboard these vessels to at least some procedural due process. As such, the Executive Order would be unconstitutional despite any interpretation of congressional language or assertion of unilateral Executive authority.

1. The Due Process Clause of the Fifth Amendment Requires Certain Procedural Elements for the Accused

The Fifth Amendment to the Constitution requires that those accused of a crime shall not "be deprived of life, liberty or property without due process of law."[166] In interpreting this language, the Court has determined that a right to procedural due process exists within this amendment.[167] Thus, if the procedural due process clause of the Fifth Amendment applies to a person, there are certain requirements for a fair hearing when said person is accused of a crime that may deprive them of their life, liberty, or property.[168] Judge Friendly in his law review article *Some Kind of Hearing* used US Supreme Court doctrine to create a list of procedures the due process clause of the Fifth Amendment requires.[169] Among other rights, this includes the right for an opportunity to present reasons why the proposed action should not be taken through access to counsel, presentation of evidence in favor of the witness, opportunity to know opposing evidence and to cross-examine adverse witnesses, and that the tribunal prepare written findings of fact and reasons for its decisions.[170] In *Sale*,

164. *See id.* at 172; U.S. CONST. amend. V.; Ross v. McIntyre, 140 U.S. 453, 464 (1891) (establishing territorial application of the Constitution to non-US citizens).

165. *See Sale*, 509 U.S. at 172.

166. U.S. CONST. amend. V.

167. *See generally* Henry J. Friendly, *Some Kind of Hearing,* 123 Univ. Pa. L. Rev. 1267 (1975) (discussing a survey of what must exist for a fair hearing if the confines of the Fifth Amendment procedural due process clause apply to the accused).

168. *See id.*

169. *See id.*

170. *See id.* at 1280-81, 1287.

President H.W. Bush's Executive Order deprived Haitian migrants who fled Haiti the right to present the evidence of their refugee status, therefore triggering the United States' domestic and international non-refoulement obligations through the kinds of procedural due process rights discussed *supra*.[171] If the Fifth Amendment were to apply to the Haitian migrants at issue in *Sale,* then the stark action of this Executive Order would clearly violate procedural due process as the United States sent all Haitian migrants aboard interdicted ships back to Haiti without the chance to defend themselves at an administrative hearing.[172]

2. Procedural Due Process Violations Apply to Haitian migrants in *Sale* Under Both the Membership Theory and Universal Approach

Under the Membership Theory, while Haitian migrants are not citizens of the United States, one may argue that *Reid* and *Verdugo-Urquidez* both re-asserted the necessity of upholding procedural due process rights despite location. While the women in *Reid* were two US citizens, *Verdugo-Urquidez* involved a Mexican national.[173] Thus, while *Reid* confirmed extraterritorial application of the Constitution to its citizens abroad, *Verdugo-Urquidez* opened the door for this extraterritorial application applying not just to US citizens abroad but to non-US citizens with whom the US government interacts. In *Verdugo-Urquidez,* despite Verdugo-Urquidez's status as a Mexican national, the majority took great care to differentiate the Fourth Amendment from the Fifth Amendment.[174] In particular, they stressed the Fourth Amendment's clear distinction from the Fifth and the Sixth.[175] Justice Rehnquist argued that "the people" in the Fourth Amendment refers to only US citizens, and it, thus, did not apply to Verdugo-Urquidez.[176] However, in making this distinction, the Court opened the door to the idea that the Fifth Amendment's due process rights, due to its use of "the accused" instead of the "the people," may function differently than the Fourth Amendment and

171. *See* Exec. Order No. 12807, 57 Fed. Reg. 23133 (1992).
172. *See* Sale v. Haitian Centers Council, inc., 509 U.S. 155, 160 (1993).
173. *See* United States v. Verdugo Urquidez, 494 U.S. 259, 262 (1990); Reid v. Covert, 354, U.S. 1, 4-5 (1957).
174. *See Verdugo Urquidez*, 494 U.S. at 264.
175. *See id.* at 259.
176. *See id.*

apply either universally or, at minimum, through a Balancing Test. In fact, Justice Kennedy wrote in his concurrence that "all would agree . . . that the dictates of the due process clause of the Fifth Amendment protect [Verdugo-Urquidez]," who is on trial in a US court.[177]

The Universal Approach would without question allow Haitian migrants to exercise procedural due process rights. As outlined in *Verdugo-Urquidez,* the test under the Universal Approach is simply whether the United States exercised its authority when it allegedly caused the violation.[178] Because of this, the United States is under an obligation to abide by the confines of the Constitution, specifically procedural due process, in exercising its authority to detain Haitian migrants while on the high seas.

3. A Balancing Test Also Supports Application of Procedural Due Process to Haitian migrants in *Sale* and is the Most Practical of the Tests for Extraterritorial Application

An evaluation of Haitian migrants' rights in *Sale* reveals obvious similarities to *Boumediene.* While neither Boumediene nor the Haitian migrants at issue in *Sale* are citizens of the United States, they had substantial contact with the US government.[179] As such, the factors that Justice Kennedy outlined in *Boumediene* should be repurposed to determine whether the migrants in *Sale*, and all extraterritorial asylum applicants, have procedural due process rights.

First, the Court should look to the citizenship and status of the detainee and the adequacy of the process through which that status determination was made.[180] In *Sale,* the immediate repatriation of Haitian migrants showed that the status determination of each Haitian detainee was not just inadequate, but nonexistent.[181] Second, the Court must analyze the nature of the sites where the apprehension and detention took place.[182] In *Sale,* the apprehension and detention took place on the high seas,

177. *Id.* at 278.

178. *See id.* at 285-86.

179. *See generally Sale v. Haitian Centers Council, inc.*, 509 U.S. 155, 155 (1993); *Boumediene v. Bush*, 553 U.S. 723, 727 (2008).

180. *See* Boumediene v. Bush, 553 U.S. 723, 727 (2008).

181. *See Sale,* 509 U.S. at 155.

182. *See Boumediene*, 553 U.S. at 727.

which is not under the control of the United States.[183] However, the Haitian migrants were forced to return to Haiti by the US Coast Guard.[184] This suggests that the United States was in complete control of both the apprehension and detention despite apprehension and detention occurring outside its sovereignty.

Finally, the court must look to the practical obstacles inherent in resolving the potential constitutional violations.[185] In looking to practical obstacles, the Court has, in the past, analyzed financial and administrative costs.[186] The Court in *Boumediene,* highlighted that "habeas corpus proceedings may require expenditure of funds by the government and may divert the attention of military personnel from other pressing tasks."[187] However, in *Boumediene* the Court found that "compliance with judicial process requires some incremental expenditure of resources."[188] In *Boumediene,* the Court ruled that without "credible arguments that the military mission in Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainee's claims" and "in light of the plenary control [of] the United States" in these circumstances, the practical obstacles do not outweigh the other two factors of this Balancing Test.[189]

In *Sale,* the practical obstacles present was perhaps the government's strongest argument because the influx of Haitian migrants created difficulties in providing the administrative proceedings originally set forth in the Executive Order.[190] However, based upon the balancing of the other two factors, it seems clear that the nonexistent status determination coupled with the United States' control over the apprehension outweighs the difficulty of the administrative proceedings. In particular, when looking to *Boumediene*, though it concerns a more militaristic

183. *See Sale*, 509 U.S. at 155.
184. *See id.* at 155.
185. *See Boumediene*, 553 U.S. at 727.
186. *See id.*
187. *Id.* at 769.
188. *Id.* at 769.
189. *Id.* at 769. The Court distinguished *Boumediene* from another seminal habeas corpus case *Johnson v. Eisentrager*. *See* 339 U.S. 763, 764 (1950). In *Eisentrager*, the "historical context and nature of the military's mission in post-War Germany," referring to the United States responsibility for "an occupation zone encompassing over 57,000 square miles with a population of 18 million" led the Court to determine that practical obstacles such as these could interfere with US military operation. *See id.*
190. *See Sale v. Haitian Centers Council, inc*., 509 U.S. 155, 163 (1993).

enterprise, the facts of *Sale* also feature a government that worried its military being used to provide cursory administrative proceedings as opposed to focusing on other endeavors, specifically border protection.[191] In particular, the government in *Sale* essentially argued that these screening processes may impact its mission of protecting its borders. However, this is not the same as a compromised mission as *Boumediene* featured similar concerns of administrative strain.[192] As such, if the Court were to apply a Balancing Test similar to the one that the Court applied in *Boumedine*, procedural due process rights would have to apply to these asylum seekers.

E. Procedural Due Process Violations are Likely Present Whenever Countries Assert Specific Interdiction Policies.

Specific interdiction policies will likely lead to government measures that will repeat the procedural due process violations discussed in Part III. As the United States still uses policies of interdiction into 2022,[193] it is worth walking through the steps of this Balancing Test in light of specific interdiction policies. When looking at the citizenship and status of the detainee and the adequacy of the process through which that status determination was made, one sees that, in interdiction policies, there is no determination of status.[194] Next, when looking to the nature of the sites where the apprehension takes place, countries following interdiction will likely argue that it is outside the control of their jurisdiction as the president did in *Sale.*[195] However, under interdiction policies, the government itself is the one returning those aboard these vessels to their home country, suggesting complete control by the country who enacted the interdiction policy.[196]

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191. *See generally id.* (inferring that the government does not make this argument due to its absence from the record.).

192. *See id.* at 163; *Boumediene*, 553 U.S. at 727.

193. *See* Muzaffar Chisti, *supra* note 36.

194. *See Boumediene*, 553 U.S. at 727; *Sale,* 509 U.S. at 155 (showing that findings of fact emphasize the lack of status determination in the interdiction policies following President H.W. Bush's Executive Order).

195. *See Boumediene*, 553 U.S. at 727; *Sale,* 509 U.S. at 155.

196. *See Sale*, 553 U.S. at 155.

Finally, in looking at the practical obstacles inherent in not using the potential domestic policies the country may have, while there may be many, the procedural issues will likely outweigh any benefit of interdiction.[197] This balancing result is primarily due to the reasoning the Court used in *Boumediene*. In *Boumediene*, the Court rejected the notion that administrative costs alone could lead to practical obstacles outweighing the other factors present.[198] In particular, the Court ruled that the government failed to show that practical obstacles outweigh the citizenship and status of the individual.[199] Thus, unless a country can point to the specific ways in which status determination may greatly impact their military (or other) missions abroad, then they are likely to fail at providing enough evidence under this side of the Balancing Test.

IV. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ASYLUM SEEKERS WILL LEAD TO THE UNITED STATES UPHOLDING ITS INTERNATIONAL OBLIGATIONS AND HUMANITARIAN IDEALS

Despite the thirty-year gap between *Sale* and the refugee issues today, the analysis above provides the footing for a more appropriate way to determine refugee policy in the United States. The need for this type of analysis is startling as "in the first seven months of 2022, the U.S. Coast Guard interdicted more Haitians at sea than during any previous full fiscal year since 1994."[200] Additionally, the policies seen in *Sale* remain mostly intact.[201] Asylum seekers intercepted on the high seas are "either repatriated or held at Guantanamo Bay," where "they are not always given asylum proceedings."[202] Thus, the need for clear safeguards for asylum applicants remains relevant.

This Author argues that all analyses in Part III lead to some constitutional safeguards for asylum applicants. However, in particular, the Balancing Test stands out as the best way to determine if the Constitution should apply in cases where US forces are prohibiting non-US citizens seeking asylum from even

197. *See Boumediene*, 553 U.S at 727.
198. *See id.* at 769.
199. *See id.* at 769-70.
200. Muzaffar Chisti, *supra* note 36, at 2.
201. See *id.*
202. *Id.*

initial entry into US territory. Additionally, requiring an analysis of certain constitutional protections better enables the United States to uphold its international duties and act in accordance with its allies. Specifically, Part IV will analyze a 2009 case from the European Court of Human Rights and emphasize the difference in the European Court of Human Rights' ruling and the United States ruling in *Sale*. These differences further stress the importance of extraterritorial application of constitutional protections for migrants. This part then analyzes the international law requirements that party-states to the Convention and protocol should adopt and abide by to better uphold their international commitments.

A. Hirsi Jamaa and Others v. Italy Specifically Answers the Question of Non-Refoulement Obligations on the High Seas

Hirsi Jamaa and Others v. Italy outlines similar issues as *Sale* but with a ruling in favor of Libyan refugees. The claimants in *Hirsi Jamaa* were part of a group of about two hundred individuals who left Libya in 2009 because they were in danger of human rights violations within Libya and their respective countries of origin.[203] Thus, they fled to Italy for refuge.[204] However, when the vessels were within the Maltese Search and Rescue Region of Responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard.[205] The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli.[206] The occupants were then handed over to Libyan authorities.[207] The European Court of Human Rights found that all occupants were within Italy's jurisdiction for the purposes of the European Convention on Human Rights.[208] As such, multiple violations of the Convention applied, and the repatriated Libyans received damages awards. Most notably, the

203. *See Hirsi Jamaa and Others v. It.*, No. 27765/09, ¶ 3 (Feb. 23 2012), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-102%22] [https://perma.cc/223E-6GMF].

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See generally id.* at conclusions.

Italian government was responsible for violations of non-refoulement.[209]

While the United States would not be subject to the same rulings as the European Court of Human Rights, the application of Italy's obligations to refugees beyond its borders sets a similar stage to *Sale.* First, it certainly hurts the initial argument the majority sets forth in *Sale* which argues that the Constitution's parameters did not extend extraterritoriality, and, therefore, the United States was not in violation of non-refoulement on the high seas.[210] Despite this, alternative arguments for unilateral Executive control of refugee policy and even concurrent powers with Congress still allow the courts to determine that the United States would not violate non-refoulement in a case like *Sale*. This uncertainty creates conflicting approaches that can be resolved by applying the Constitution to individuals that the United States intercepts and detains on the high seas. In particular, the Balancing Test outlined in *Boumediene* should apply beyond habeas corpus proceedings and to any person interacting with the US government outside the territory of the United States. If this were to apply, certain procedural due process protections of the Constitution would apply to Haitian migrants. Additionally, the Constitution would address any conflicting arguments in favor of unilateral Executive authority or the elasticity of concurrent powers and subsequent language interpretations of congressional acts by the courts. As such, applying constitutional protections to a case like *Sale* would place the United States on a similar path to upholding the same rights as the European Court of Human Rights.

B. International Perspectives on Proper Procedures in Refugee Asylum Proceedings Further Emphasize the Necessity for Constitutional Rights for Asylum Seekers

Stephen Legomsky's Georgetown Immigration Law Journal article, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, highlights the competing domestic and international obligations party-states to the Convention must weigh in determining the extent to which they uphold their obligations as refugee-receiving

209. *See generally id.* at conclusions.
210. *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 155 (1993).

countries.[211] While party-states to the Convention are bound by the obligations of non-refoulement, these states must still weigh those duties against their own domestic economic, cultural, environmental, ethnic, and wealth statistics.[212] Legomsky addresses the general attempt to limit refugee intake and notes that countries, in attempting to limit refugee intake, whether it be for political, economic or other reasons, "impose strict rules."[213] These rules are often procedural and may "eliminate procedural safeguards present in other adjudicative settings" which often results in "discourage[ing] applications, reduc[ing] approvals, or lower[ing] the administrative costs of adjudication."[214] Legomsky acknowledges these restraints and proposes that "fair access to the process and fair procedures for those who gain access" are practical guidelines for how refugee-receiving countries should treat those applying for refugee status.[215]

1. The United States Would Safeguard Fair Access to the Process Through Application of Any of the Three Tests for Extraterritoriality in *Sale*

Fair access to process would address the "modern trend . . . to bar, or at least discourage, access to the domestic asylum determination process for the increasing numbers of asylum applicants."[216] When denying asylum applicants access to process, countries will often argue that those denied access to proceedings are rarely refugees and mostly economic migrants.[217] In doing this, countries avoid the economic costs associated with administrative proceedings, the detention of potential refugees, and the political backlash that they may face from their constituents.[218] One of the ways that countries deny fair access to process is through the

211. *See* STEPHEN H. LEGOMSKY, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 Geo. Immigr. L. J. 619, 620 (2000).

212. *See id.*

213. *See id.*

214. *Id.*

215. *Id.*

216. *Id.* at 625.

217. *See id.* at 626. *But see generally Sale v. Haitian Centers Council, inc.*, 509 U.S. 155, 155 (1993) (noting that the influx of Haitian migrants at issue in this case were not just economic migrants, but also potential asylum applicants due to the regime change in Haiti).

218. *See* LEGOMSKY, *supra* note 211, at 625.

interdiction.[219] Interdiction is the act of intercepting "vessels suspected of carrying would-be entrants and turn[ing] them away before they reach the [country's] shores."[220] Interdiction is a basic theory that depends on the idea that if the passengers aboard the boat never reach the country in question, it will "effectively prevent[] the passengers from gaining access to that [country's] domestic asylum system and any associated procedural rights."[221] In particular, countries will choose this tactic "when the numbers are large" as it helps countries avoid "the practical dilemma of . . . building huge detention facilities."[222] However, by denying access through interdiction, countries "deter genuine refugees."[223]

Sale highlighted President H.W. Bush's choice to weigh domestic interests above international obligations and use interdiction as a tactic to shirk international responsibilities to provide proceedings and determine if asylum applications are legitimate refugees.[224] In light of theories of extraterritorial application of constitutional rights, interdiction relies implicitly on either a territorial or a strict Membership Theory, as seen in *Reid* as opposed to *Verdugo-Urquidez*, to extraterritorial application. These two theories rest on the notion that only US citizens or people within the borders of the United States have access to the

219. *See id.*

220. *Id.*; *see Sale* 509 U.S. 155 at 158. The point at issue in *Sale* was the act of intercepting boats from Haiti before they entered the United States, which, as discussed infra, was a political tactic meant to avoid international and domestic obligations of non-refoulement and Constitutional protections.

221. *See* LEGOMSKY, *supra* note 211, at 627.

222. *Id.* (noting that Legomsky also states that other incentives such as faster and cheaper processes, deterrence of boats of asylum seekers, and deterrence of asylum-seekers embarking on dangerous voyages also play into whether a country chooses to use interdiction policy)*; see Sale* 509 U.S. 155 at 163-64 (highlighting that the US government chose this policy in no small part because detention centers had become full).

223. *See* LEGOMSKY, *supra* note 211, at 627. Here, genuine refugees refers to those refugees that would receive asylum in the United States were the US government to properly process their claim based on the language of the INA: "[t]he Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988 ed., Supp. IV).

224. *See* Douglas Jehl, *Bush Orders U.S. Ships to Turn Back Haitians: Immigration: White House seeks to ease a 'dangerous situation.' A foe sees a violation of international law,* L.A. Times (May 25, 1992), https://www.latimes.com/archives/la-xpm-1992-05-25-mn-228-story.html [https://perma.cc/5Z7W-8KPD].

rights that the Constitution expressly protects.[225] However, it follows that, upon using either the Universal Approach or the Balancing Test, interdiction of people who flee a home country with persecutorial policies will likely deserve at least some procedural protections safeguards under the Constitution. Under the Universal Approach, when the United States acts, they are required to abide by the confines of their Constitution.[226] Thus, in using interdiction policies, the United States risks violation of the Fifth Amendment's Due Process Clause which requires procedural safeguards.[227] However, as discussed *supra*, the Universal Approach of extraterritorial application of the Constitution results in practical difficulties that may make it impossible to use as a general rule of thumb within US foreign policy.[228] In looking to a Balancing Test similar to the one Justice Kennedy uses in *Boumediene,* balancing US governmental interests with the individual circumstances can result in addressing US obligations of non-refoulement, provide flexibility to addressing extraterritorial application of the Constitution, and resolve conflicting approaches in precedent.

2. A *Mathews v. Eldridge* Assessment Finds that Interdiction Violates the United States' Fifth Amendment Due Process Clause and Does Not Give Applicants Access to Fair Procedural Processes

Legomsky next outlines what it means to give applicants access to fair procedural processes.[229] In assessing whether or not the procedures present provide adequate protection, one must look to whether there are "[four] principles: an adequate opportunity for advance preparation of one's case; suitable adjudicators; a fair opportunity to be heard; and a right of review."[230] Each principle contains a multitude of different protections that are ideally present during asylum procedures.[231] Legomsky proposes, and this Author agrees, that "it is difficult to

225. *See supra part III.*

226. *See* United States. v. Verdugo Urquidez, 494 U.S. 259, 285-86 (1990).

227. *See* U.S. CONST. amend. V.

228. *See Verdugo Urquidez*, 494 U.S. at 277.

229. *See* LEGOMSKY, *supra* note 211, at 634-35; *see generally Matthews v. Eldridge*, 424 U.S. 319 (1975).

230. *Id.* at 634-35.

231. *See id.* at 634-41.

separate fairness from efficiency."[232] However, the Court in *Mathews v. Eldridge* provided a test to determine exactly what types of processes should exist when weighing efficiency and fairness in light of the varying facts present in these sorts of cases.[233] Under, *Eldridge, "*the Court identified three factors to be weighed in determining whether the absence of a given procedural safeguard would violate the fundamental principles of fairness embodied in due process" under the Constitution's Fifth Amendment.[234]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail.[235]

When evaluating the *Mathews* test in reference to interdiction in general, it, like the proposed *Boumediene*-like Balancing Test discussed *supra*, leads this Author to conclude that interdiction violates due process rights. First, asylum seekers have a high level of private interest as they may face persecution in their home countries.[236] Second, the probable value of having at least some safeguards, such as a fair opportunity to be heard, ensure that those at risk of persecution are not sent back to a dangerous situation is high.[237] Finally, while there is some government interest in the cost of additional safeguards, the value of at least

232. LEGOMSKY, *supra* note 211, at 634.

233. *See id.* at 634; *see generally Eldridge*, 424 U.S. 319 (ruling on the question of whether the fifth amendment due process clause requires that a recipient of Social Security Disability benefit payments be afforded an opportunity for an evidentiary hearing prior to termination of his benefits. In answering this question, the Court found that the due process clause features three separate factors that the Court must weigh when determining whether the specific procedural safeguard is necessary to uphold the due process clause); U.S. CONST. amend. V.

234. *See* LEGOMSKY, *supra* note 211, at 634; U.S. CONST. amend. V; *Eldridge*, 424 U.S. 319, 335 (1976).

235. LEGOMSKY, *supra* note 211, at 623-24 (paraphrasing *Eldridge*, 424 U.S. 319 at 335).

236. *See* LEGOMSKY, *supra* note 211, at 623.

237. *See id.*

some safeguards outweighs those interests.[238] Therefore, under theories of application of the Constitution extraterritorially, asylum seekers who are not within the territory of the United States will have access to procedures that uphold not only international obligations, but also protect humanitarian and global ideals.

V. CONCLUSION

In foreign affairs, the president often asserts unilateral executive power. Throughout the United States' history and up until modern times, the Court abdicates to the Executive often when determining cases that have to do with foreign affairs. Additionally, depending on the makeup of the Supreme Court, concurrent Congressional powers do not find equal footing to the Executive's authority in determining foreign affairs policy. In particular, for asylum applicants, the Executive can strip the procedural safeguards one would expect based upon both domestic and international obligations of non-refoulement. Thus, interpreting the Constitution to apply to those the United States has significant interactions with allows for a safeguard against this type of authority.

In particular, methods of extraterritorial application should apply to all asylum applicants regardless of their location. While the Membership Theory and Universal Approach are clear contenders, the repurposed Balancing Test from *Boumediene* is likely the most practical approach for ensuring that procedural due process protections apply to these applicants. Additionally, when using the Balancing Test, the Court can still find circumstances where practical hardships outweigh the arguments above, likely leading to this being a more palatable solution than the full Universal Approach to application or the Membership Theory.

Instead of relying upon the Executive, Congress, and the Judiciary—three, ever-changing branches of government with distinct ideologies—asylum applicants can find protection in the same constitutional rights of US citizens. These rights not only provide better conditions for asylum applicants, but also will lead

238. *See id.*

to the United States upholding its international obligations in a manner on par with its allies.