LEGAL IMPERIALISM BY OTHER MEANS: THE SELECTIVE EXTRATERRITORIAL APPLICATION OF U.S. LAW AND THE DENIAL OF HUMAN RIGHTS PROTECTION

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INTRODUCTION

This article addresses whether the extraterritorial application of a State's domestic law represents a form of "legal imperialism."[1] However, it approaches the subject not by examining when the law is

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1. *See generally* Dalia Palombo, *Transnational Business and Human Rights Litigation: An Imperial Project?*, 22 HUM. RTS. L. REV. 1 (2022).

applied, but when it is not. The focus here is on the United States ("U.S."), which applies more of its domestic law extraterritorially than any other country.[2] Moreover, there is little question that the extraterritorial application of U.S. law is nearly always intended to serve the country's national interests. An excellent example of this is the Helm-Burton Act.[3]

Yet, as will be argued here, there are times when "legal imperialism" arises not so much from the extraterritorial application of U.S. law but from the intentional refusal to provide certain legal protections beyond the country's territorial borders. To use a concrete example: is it more imperialist to hold U.S.-based multinational corporations ("MNCs") to domestic workplace and environmental and health standards, especially when these MNCs operate in States with few protections? Or is it more imperialistic to purposely avoid doing so, thereby leaving foreign nationals with few human rights protections? This article comes out squarely in favor of the second proposition.

No attempt will be made here to catalog the full scope of the extraterritorial application of U.S. law. Thus, there is virtually no discussion of such things as the extraterritorial extension of (U.S.) patent law, (U.S.) securities law, and so on. Instead, the primary interest is in the protection of human rights, and the argument presented here is that the United States has failed to meet its international human rights obligations in the way that it applies (or does not apply) its domestic law extraterritorially.

Human rights are universal, yet the extraterritorial application of U.S. law shows how there is a serious misunderstanding of this term.[4]

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2. David H. Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 L. & CONTEMPORARY PROBLEMS 283, 284 ("While the United States is not alone in asserting extraterritorial jurisdiction, it is the most prolific source of extraterritorial law, regulation, and enforcement action.").

3. Sara Seck, *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?*, 46 OSGOODE HALL L. J. 565, 568 (2008) ("Although the goal of the HBA was ostensibly to promote democracy in Cuba, it sought to achieve this goal by penalizing foreign companies while simultaneously providing a benefit to many US domestic firms.").

4. Sigrun Skogly, *Regulatory Obligations in a Complex World: States' Extraterritorial Obligations Related to Business and Human Rights*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS 334 (Surya Deva & David Bichitz eds., 2017).

While the United States does not contest that it has human rights obligations within its domestic borders (although what these obligations are, and how well the government protects these rights, is a completely different matter), it repeatedly has taken the position that its human rights obligations are limited to the country's national borders.[5] For one thing, this "territorial" understanding of human rights is evident in the government's interpretation of various international human rights treaties – e.g., the Refugee Convention,[6] the Torture Convention,[7] and the International Covenant on Civil and Political Rights.[8] Yet, as will be shown here, this "territorial" reading of international human rights is also evident in the way that federal law, including the U.S. Constitution, has been interpreted.

The term "legal imperialism" is used often in this context, so establishing how "legal imperialism" will be used herein is imperative. Any meaningful discussion of this term must begin with the nature of the legal order established under colonial rule – law that was proclaimed

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> "[H]uman rights recognize that torture, censorship, and lack of access to potable drinking water and basic health care affect all human beings equally no matter where they live. This is the fundamental understanding of universal human rights. However, the universal concept has only been recognized in half – and this is what possibly fuels the argument of neo-colonialism. If universal human rights mean that all individuals are supposed to be able to enjoy human rights no matter where they live, but only the domestic state has obligations, then human right protection becomes limited to what the home state is able or willing to do,"

5. *See generally* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009).

6. United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. In *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993), the U.S. Supreme Court ruled that the Refugee Convention's prohibition against sending a refugee to a country where his/her life or freedom would be threatened (*nonrefoulement*) only arose if the individual was within the territory of the United States or at its national borders. In that way, the Court ruled that the U.S. Coast Guard's practice of halting rafts filled with Haitian refugees and returning the occupants back to the Haitian dictatorship was consonant with international law. *Id*.

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

8. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. *See generally* Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014).

to be universal was in fact anything but. Instead, one of the defining features of colonial law was the way the colonizer maintained one set of legal standards for itself, and a completely different set of standards was applied to its colonial "subjects." Bonny Ibhawoh describes the "colonial difference" in the following way:

> Maintaining colonial difference in the realm of law-making and administration of justice was essential to maintaining [the] Empire. A uniform rule of law would have profoundly threatened the power dynamic that distinguished colonizer from the colonized and abrogated the very foundations of the imperial project.[9]

To bring this forward to the present discussion, "legal imperialism" occurs when a dominant state (in this case the United States) applies one set of legal standards to itself, but a much different (and invariably stricter) set of standards for all others, but particularly for those in the Global South.[10]

For context, the pesticide industry in the United States provides an excellent example of the kind of "legal imperialism" discussed here.[11]

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9. BONNY IBHAWOH, IMPERIAL JUSTICE: AFRICANS IN EMPIRE'S COURT 9 (2013).

10. One means of achieving this was through the use of "capitulation" courts. European citizens were tried in one of its own judicial institutions operating in another country. Antony Anghie describes the role of these courts:

> For the European states, the local systems of justice were completely inadequate, and there was no question of submitting one of their citizens to these systems. Non-European states were thus forced to sign treaties of capitulation, which gave European powers extra-territorial jurisdiction over the activities of their own citizens in these non-European states.

ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 85 (2005).

11. Another example involves the H.B. Fuller company based in St. Paul, Minnesota. H.B. Fuller produces Resistol, a glue that thousands of Central American children are addicted to. In 1992, the company's board of directors passed a resolution in favor of adding a noxious ingredient to its product as its competitors had done as a way of discouraging glue sniffing. However, for undisclosed reasons, the corporation never did change its products and Resistol continues to be the glue of choice. There is even a name for these young addicts: resistoleros. Diana B. Henriques, *Black Mark for a 'Good Citizen,'* N.Y. TIMES, Nov. 26, 1995 (§ 3). In 2007, a federal district court judge in Minnesota dismissed on jurisdictional grounds a case brought by the family of a young boy in Guatemala who died from sniffing Resistol. Susan E. Peterson, *Wrongful-Death Suit Against H.B. Fuller Dismissed*, STAR TRIBUNE (Nov. 12, 2007,

By way of some background, there are a number of dangerous pesticides that have been banned from domestic use in the United States, yet these same pesticides continue to be produced in the United States and shipped overseas.[12] Perhaps it should be no surprise that these (domestically) banned pesticides are invariably sent to states in the Global South where pesticide use – accompanied by cancer rates, especially among farmworkers – has increased exponentially.[13]

One of these pesticides is dibromo chloropropane ("DBCP"), which was commonly used in the United States until 1977.[14] At that time, the pesticide was found to cause sterility in men working at an Occidental Petroleum plant in Lathrop, California.[15] This prompted an immediate ban on the product in California and its curtailment in other parts of the United States.[16] Two years later, the Environmental Protection Agency issued a complete ban on the domestic use of DBCP.[17] However, the production of DBCP for use in other countries continued.[18] Although U.S.-based multinational corporations such as Del Monte, Chiquita Brands, and Dole Food have been subject to numerous lawsuits brought by *afectados* – those who have been poisoned – the plaintiffs have seldom achieved any meaningful success,

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7:26 PM), https://www.startribune.com/wrongful-death-suit-against-h-b-fuller-dismissed/11212591/.

12. *See generally* Michael Holley, *The EPA's Pesticide Export Policy: Why the United States Should Restrict the Export of Unregistered Pesticides to Developing Countries*, 9 N.Y.U. ENV'T L.J. 340 (2001); James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J. ENV'T L. & POL'Y 167 (1994).

13. From 1990 to the most recent data available in 2007-2012, Brazil has seen a near 300% increase in pesticide use and since 2008 it has taken over as the world's largest consumer of pesticides. In 2016 alone, there were 4,208 cases of intoxication due to pesticide exposure, although what is even more dangerous is the constant and repeated exposure to "dangerous" chemicals. *See generally* Anna Goldstein, *Dirty Business: Accountability for Harmful Pesticide Use in Brazil*, 3 CARDOZO INT'L & COMPAR. L. REV. 1265 (2020).

14. SUSANNA RANKIN BOHME, TOXIC INJUSTICE: A TRANSNATIONAL HISTORY OF EXPOSURE AND STRUGGLE 12 (2015).

15. *Id*. at 73.

16. *Id*. at 12.

17. *Id*. at 99.

18. *Id*. at 12.

nor sufficient remedy.[19] In her study of the legal and political fights that began in the early 1990s and continue to this day, Susanna Rankin Bohme describes what she refers to as "informal" imperialism:

> Just as work by and about the environmental justice movement in the United States has taught much about the effects and critiques of racism, looking at scientific struggle over DBCP in a transnational context helps us understand and critique the workings of the "informal" imperialism that has long structured relations between the United States and Central America. During the decades of DBCP use, corporate and state determinations of what constituted acceptable DBCP use in Central America diverged from protections required at home: while regulators declined to require U.S.-based corporations to protect their workers abroad, corporations largely failed to extend even basic protections from DBCP to their workers, even after human health risks were publicly confirmed.[20]

The question generally asked is whether the extraterritorial application of law – in this instance, U.S. law – is imperialistic.[21] If so, would it be a form of "legal imperialism" if the domestic ban of DBCP and other dangerous chemicals were to be extended worldwide? Or would a worldwide prohibition on the production and sale of DBCP violate the sovereign integrity of Central American countries where the pesticide is still being used? However, this article addresses a different question: whether the purposeful *refusal* to geographically extend the domestic ban constitutes the real "legal imperialism."[22]

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19. *Id*. at 1, 15.

20. *Id*. at 7-8. SUSANNA RANKIN BOHME, TOXIC INJUSTICE: A TRANSNATIONAL HISTORY OF EXPOSURE AND STRUGGLE 7-8 (2015).

21. *See* Palombo, *supra* note 1.

22. Michael Fakhri, the U.N. Special Rapporteur on the Right to Food, has highlighted the strong connection between human rights and ever-increasing levels of pesticide use, especially in the Global South.

> Few people are untouched by pesticide exposure. They may be exposed through food, water, air, or direct contact with pesticides or residues. However, given that most diseases are multi-causal, and bearing in mind that individuals tend to be exposed to a complex mixture of chemicals in their daily lives, establishing a direct causal link between exposure to pesticides and their effects can be a challenge for accountability and for victims seeking access to an effective remedy. Even so, persistent use of pesticides, in particular agrochemicals used in industrial farming, have been connected to a range of adverse health impacts, both at high and low exposure levels.

Part I provides an overview of how the extraterritorial application of U.S. law has developed over the course of the past century, with a focus on workplace and environmental protections. Part II examines the ever-increasing reach of U.S. criminal law,[23] while constitutional protections have, for the most part, been contained within the U.S. border. Further, Part III focuses on how the United States relied on the principle of "territory" as a way of avoiding legal responsibility in the conduct of the "war on terror." United States law that could provide human rights protection to foreign nationals has repeatedly been interpreted in a territorial fashion.[24] The one exception to this is the Alien Tort Statute ("ATS").[25] For decades the ATS served as an important vehicle allowing foreign nationals who were victims of human rights violations to present a claim against their perpetrators in United States federal courts.[26] However, when ATS lawsuits began to be brought against federal (U.S.) officials and multinational corporations that carry out business in the United States, the Supreme Court rather quickly closed federal courthouse doors, and at the present time, it is not clear if the ATS has any viability.[27] Part IV examines the life, and the apparent death, of this form of extraterritorial human rights protection. Like all states, the United States has human rights obligations within its domestic realm, but it also has certain human rights obligations that extend beyond its territorial borders.[28] The extraterritorial application of U.S. law

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Hum. Rts. Council, Rep. of the Special Rapporteur on the Right to Food, A/HRC/34 /48, at 4 (Jan. 24, 2017).

23. Julie Rose O'Sullivan has argued that the "presumption of territoriality" should be considerably stronger in the context of U.S. criminal law than in civil law. *See* Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021 (2018).

24. *See* Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993).

25. Alien Tort Statute, 28 U.S.C. § 1350.

26. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

27. *See infra* Part IV.

28. ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights*, https://www.fidh.org /IMG/pdf/maastricht-eto-principles-uk_web.pdf.

should serve as an important vehicle for protecting such "universal" rights. However, there appears to be an intentional refusal to do so.[29]

I. AN OVERVIEW OF THE EXTRATERRITORIAL APPLICATION OF U.S. LAW

Although it is now readily assumed that the U.S. government could apply the entirety of its domestic law outside the territorial borders of the United States,[30] the U.S. Supreme Court initially questioned the whole notion that federal law could be applied outside the country's national borders. This issue was first raised in the case of *American Banana Co. v. United Fruit Co*.[31] According to Justice Holmes' majority opinion:

> It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as it appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress…. The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[32]

Yet, despite this absolute language in *American Banana*, within a fairly short period of time, the Court began to read a host of federal statutes in an extraterritorial fashion. In that way, monopolistic practices that occurred outside the country's borders – the same issue raised in *American Banana* – were held to be within the purview of American

29. *See supra* notes 6-8.

30. It should be noted that a few scholars have questioned this proposition. *See, e.g.*, Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (arguing that the Fifth Amendment limits federal extraterritoriality in the same manner the Fourteenth Amendment limits state extraterritoriality); *see also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 84 AM. J. INT'L L. 444 (1990) (arguing that extraterritorial criminal statutes that go beyond the provisions of international law violate the Due Process provisions of the Constitution).

31. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

32. *Id*. at 355-56.

law, as were violations of trademark[33] and securities regulation.[34] In the area of criminal law, the erosion of the presumption against the extraterritorial application of U.S. law was even more rapid and complete. In *United States v. Bowman*, the Court refused to give a territorial interpretation to a federal fraud statute, upholding the criminal conviction of three U.S. citizens and a British national for actions that all occurred outside of the United States. [35] In fact, the Court even questioned whether the traditional territorial presumption should be applied in this realm in the first place.[36]

Over the past century, there have been periods when the "territorial" interpretation of federal law was ascendant and other periods of time where the "extraterritorial" reading of the law has been dominant.[37] The present period offers more of a mixed bag. Although there is a wealth of domestic law, particularly criminal law, that has been given an extraterritorial reading, there are also some indications that the presumption against the extraterritorial application of U.S. law will once again increasingly serve as an obstacle.[38] In order to overcome this presumption, the Supreme Court demands "clear evidence" of Congress' extraterritorial intent.[39]

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33. *See* Steele v. Bulova, 344 U.S. 280 (1952) (applying the Lanham Act extraterritorially against an American citizen manufacturing counterfeit Bulova watches in Mexico). *But see, e.g.*, Abitron Austria GmbH v. Hetronic Int'l Inc., 600 U.S. 412 (2023) (holding that the "presumption against extraterritoriality" had not been overcome).

34. The Securities Exchange Act, Pub. L. No. 73-291 (codified as amended at 15 U.S.C. §§ 78a-11).

35. *See* United States v. Bowman, 260 U.S. 94 (1922).

36. "But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents," *id*. at 98.

37. *See generally* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMPAR. L.J. 123 (1996).

38. *See generally* CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2010).

39. *See, e.g.*, Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247 (2010) (rejecting the "conduct and effects" test in favor of "clear statement" of congressional intent); RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325 (2016) (while the Racketeer

A. Workplace Conditions

Shockingly, under U.S. law, child labor is possibly legal outside the territorial borders of the United States; U.S.-based multinational corporations and the U.S. government can employ foreign children or even children who are U.S. citizens in its overseas operations.[40] This is possible because nearly all workplace protections that employees, citizens and non-citizens alike, enjoy domestically – i.e., the Fair Labor Standards Act ("FLSA"),[41] the Occupation Health and Safety Act ("OSHA"),[42] the Family and Medical Leave Act ("FMLA"),[43] and the Eight Hour Day Act[44] – have been interpreted as only applying within the territorial borders of the United States.[45]

Some workplace protections have been applied extraterritorially – at least with respect to American citizens working for an "American" corporation.[46] However, one of the more interesting things is how and why other workplace protections have not also been extended. The Supreme Court explored this issue directly in two late 1940s cases, relying on disturbingly racist rationales.[47]

The first of these cases is *Vermilya-Brown Co., v. Connell*.[48] The question before the Court was whether the FLSA applied to employees on a Bermuda military base that the United States had leased from Great Britain.[49] The FLSA covered commerce "among the several States or from any State to any place outside thereof." State is defined as "any

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Influenced Corrupt Organizations ("RICO") statute could be applied extraterritorially, the foreign enterprise must affect "commerce" within the United States).

40. *See generally* Gibney & Emerick, *supra* note 37.

41. 29 U.S.C. § 203. The FLSA is unique in the sense that it specifically excludes itself from applying to employees in a workplace "within a foreign Country." These sections refer to maximum hours, minimum wage, child labor, and essential labor practices. *Id*. at § 213(f).

42. 29 U.S.C. §§ 651-78.

43. 5 U.S.C. §§ 6381-87.

44. 40 U.S.C. §§ 324-25 (1940). *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949).

45. *See Foley*, 366 U.S. at 281.

46. *Id*. *See also infra* notes 66-78 and accompanying text.

47. EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

48. Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377 (1948).

49. *Id*. at 380.

State of the United States or any Territory or possession of the United States."[50] One of the more noteworthy aspects of the Act is that it did not distinguish between employees who are U.S. citizens and those who are not. Thus, if a military base in question was deemed to be a "possession" of the United States, the provisions of the FLSA would be applied to all employees on the base – including those who were not American citizens.[51]

The Court in *Vermilya-Brown* had no problem giving the FLSA an extraterritorial reading.[52] In a dissenting opinion, Justice Jackson showed discomfort at the prospect of U.S. law regulating the working conditions of foreign employees, including those working directly for the United States government.[53] The problem for Jackson was that although the two groups of workers – U.S. citizens and non-citizens – might well be doing the same or similar work, the general life conditions of these two groups was vastly different.[54] Jackson pointed out what would be "apparent to anyone even casually traveled in those islands was the great disparity of social, economic and labor conditions between the islands and our Continent."[55] Jackson continued by noting the "different customs and institutions prevailing there, particularly [the race relations and assimilation difficulties]."[56] Jackson concludes: "Thus it was settled American policy . . . that . . . we should acquire no such responsibilities as would require us to import to those islands our laws, institutions, and social conditions beyond the necessities of controlling a military base and its garrisons, dependents and incidental personnel."[57]

A year after *Vermilya-Brown*, in *Foley Bros. Inc. v. Filardo*, the Court reversed course and essentially adopted Justice Jackson's dissenting position in *Vermilya-Brown*.[58] The plaintiff in this case was

50. *Id*. at 379.
51. *Id*. at 390.
52. *Id*.
53. *Id*.
54. *Id*. at 394.
55. *Id*. at 393-94.
56. *Id*. at 394.
57. *Vermilya-Brown*, *supra* note 48 at 394.
58.

> There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage

an American citizen employed as a cook at U.S. public works projects in Iran and Iraq. The statute in question was the Eight Hour Law.[59] Notwithstanding the statute's broad jurisdictional language, the Court denied that there was any Congressional intent to apply the Eight Hour Law extraterritorially.[60] Like *Vermilya-Brown*, one of the central issues in *Foley* was that the statute made no distinction between United States citizens and foreign nationals. In this case, the Court refused to apply the Eight Hour Law outside the territorial borders of the United States.[61] More telling was Justice Frankfurter's concurring opinion, which balked at the prospect that foreign workers would receive any form of minimum wage or overtime pay.[62]

In 1991, the Court returned to the issue of extraterritorial workplace protection in *EEOC*. *v*. *Arabian American Oil Co*., where it considered whether the 1964 Civil Rights Act applied extraterritorially. [63] Ali Boureslan, originally from Lebanon, was a naturalized U.S. citizen.[64] The respondents were two Delaware corporations, Arabian American Oil Co. ("Aramco") and its subsidiary, Aramco Service Co. ("ASC").[65]

> beyond places over which the United States has sovereignty or has some measure of legislative control. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq. We were on their territory by their leave, but without the transfer of any property rights to us.

Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

59. The Eight Hour Law provided:

> Every contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work.

id. at 282. 40 U.S.C. §§ 321-26, *repealed by* Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 3701-08.

60. *Foley*, 336 U.S. at 290.

61. *Id*.

62. *See id*. at 295 (Frankfurter, J., concurring) ("The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages and overtime to native workmen in the face of militant opposition by foreign governments.").

63. *EEOC* v. Arabian American OIL Co., 499 U.S. 244 (1991).

64. *Id*. at 247.

65. *Id*.

In 1979, Boureslan was hired as an engineer in Houston, but a year later he was transferred to work for Aramco in Saudi Arabia.[66] In 1984, Boureslan was discharged from the company and he initiated a lawsuit in the United States District Court for the Southern District of Texas seeking relief under, *inter alia*, Title VII of the Civil Rights Act of 1964 on the grounds that he was harassed and ultimately discharged by respondents on account of his race, religion, and national origin.[67]

Both the district court and the court of appeals ruled against Boureslan, and the Supreme Court affirmed.[68] In his majority opinion, Chief Justice Rehnquist made reference to what seems to be boilerplate language that the Court assumes Congress "legislates around the backdrop of the presumption against extraterritoriality,"[69] and that in order to overcome this presumption, there must be "the affirmative intention of Congress clearly expressed."[70] In the Court's view, the presumption had not been overcome.

However, what is unique about this case is that, partly in response to this ruling, Congress passed the Civil Rights Act of 1991.[71] Title I contains the heading *Protection of Extraterritorial Employment*, and subsection (109) (a) redefines the term "employee" as including an individual who is a citizen of the United States.[72] A short time after this, Congress extended two other workplace protections – the Americans With Disability Act ("ADA")[73] and the Age Discrimination in Employment Act ("ADEA")[74] – to protect U.S. citizens outside the territorial borders of the U.S. who work for a U.S. corporation or one controlled by an American interest. [75] Foreign nationals and even U.S.

66. *Id*.

67. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6).

68. *Arabian Am. Oil Co*., 499 U.S. at 248.

69. *Id*.

70. *Id*.

71. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified as amended at 42 U.S.C.§ 1981).

72. 42 U.S.C. § 109(a).

73. 42 U.S.C. §§ 12101-213.

74. 29 U.S.C. § 621-34.

75. *See generally* Alina Veneziano, *The Extraterritoriality of U.S. Employment Laws: A Story of Illusory Borders and the Indeterminate Applications of U.S. Employment Laws Abroad*, 41 BERKELEY J. EMP. & LAB. L. 121 (2020) [hereinafter

permanent residents do not receive any workplace protection, even if they are working for a U.S.-based corporation, or even if they are working for the United States government itself.[76]

In sum, U.S. citizens working for a U.S-based corporation (or the United States government) in a foreign land receive only some protection under U.S. law. However, one reason why American citizens do not receive additional forms of workplace protections – most notably, protections under the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination Act – is because these statutes make no distinction between U.S. citizens and foreign nationals. One solution is for Congress to extend the full panoply of workplace protections but limit this to American citizens, as it did by amending the ADA, the ADEA, and the Civil Rights Act of 1991. Alternatively, Congress could seek to protect *all* employees – U.S. citizens and non-citizens alike – working for a U.S.-based corporation.[77] Yet, this would deprive American multinational corporations of cheap labor,[78] one of the primary reasons for locating in the Global South in the first place.[79]

B. Environmental Harms

Limited protections offered by U.S. labor law are intended for extraterritorial application. The law is implemented essentially to

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Veneziano, *Extraterritoriality of U.S. Employment Laws*]; *see also* Alina Veneziano, *Advancing a Feasible Solution to Cross-Border Employment Enforcement Mechanisms: Promoting Uniformity and Consistency in the Administration of U.S. Labor Laws Extraterritoriality*, 22 MARQUETTE BENEFITS & SOC. WELFARE L. REV. 85 (2020).

76. Veneziano, *Extraterritoriality of U.S. Employment Laws*, *supra* note 75, at 121.

77. Kathy Roberts, *Correcting Culture: Extraterritoriality and U.S. Employment Discrimination Law*, 24 HOFSTRA LAB. & EMP. L. 295, 298 (2007) (asking whether this would allow a U.S. firm to send one of its employees who is a permanent resident alien overseas as a way of avoiding the protections of the Civil Rights Act).

78. *See, e.g.*, Bob Herbert, *Children of the Dark Ages*, N.Y. TIMES, July 21, 1995 (summarizing a story where Orion Apparel, clothing producer for Gitano and subsidiary of Fruit of the Loom, would force its employees to work twenty-two and a half hour shifts on Saturday nights rather than the regular fifteen-hour shift).

79. *See supra* notes 14-19 and accompanying text.

protect employees of U.S. multinational corporations who are United States citizens.[80] However, there have not been similar attempts to regulate the health, safety, and environmental practices of these same corporations when they operate outside the country's territorial borders.[81] If a host state does not provide such protection, U.S. corporations are able to operate in whatever fashion they choose.

Consider Southern Peru Copper, an American corporation doing business in Ilo, Peru.[82] The corporation operated a plant that annually emitted two thousand tons of sulfur dioxide into the air – fifteen to twenty times the limit for a similar plant in the United States.[83] To be clear, Southern Peru Copper complies with Peru's very weak environmental laws, but only because the statute does not limit emission rates.[84] A *New York Times* report describes the levels of pollution, "[T]he smoke from the smelter is so thick that it hovers over the city like a heavy fog, forcing motorists to turn on their headlights during the day and sending residents to hospitals and clinics coughing, wheezing and vomiting. On those days, children are told to play indoors."[85]

Perhaps an even more unsettling situation involved the sale of a nuclear power plant to the Philippines by the Westinghouse Corporation.[86] The plant was to be situated above an earthquake fault line and below an active volcano.[87] In addition to the logistical considerations, the technical design of the plant did not meet domestic (U.S.) standards.[88] Despite the grave safety flaws, the Nuclear Regulatory Commission ("NRC") voted to issue the plant's license.[89]

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80. Veneziano, *Extraterritoriality of U.S. Employment Laws*, *supra* note 75, at 121.

81. *Id*.

82. *See generally* Calvin Sims, *In Peru, a Fight for Fresh Air*, N.Y. TIMES, Dec. 12, 1995, https://www.nytimes.com/1995/12/12/business/in-peru-a-fight-for-fresh-air.html.

83. *Id*.

84. *Id*.

85. *Id*.

86. *See generally* Anthony D'Amato & Kirsten Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011, 1018. (1988).

87. *Id*. at 1020.

88. *Id*. at 1022.

89. *Id*. at 1023.

The Commission reasoned that it had insufficient jurisdiction under domestic statutes to consider the health, safety, and environmental impacts on citizens of the recipient nation, or even to consider the effects of an exported reactor on U.S. interests and U.S. citizens abroad.[90] The District of Columbia Circuit Court affirmed the NRC licensing decision, holding that the agency had properly approved the exported reactor without evaluating the health, safety, and environmental impacts.[91]

II. THE EXTRATERRITORIAL APPLICATION OF U.S. CRIMINAL LAW

The extraterritorial application of U.S. law occurs sporadically. At times courts have read vague statutory language as applying extraterritorially, and other times they have read equally vague legislation in a territorial fashion.[92] However, the one area where U.S. law has nearly always been interpreted as applying extraterritorially is in cases involving federal criminal law.[93] The vigor in which U.S. criminal law is now applied extraterritorially is synonymous to U.S. "legal imperialism."[94] States have been persuaded, if not coerced, to

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90. *Id*. at 1026.

91. *Id*. at 1026; *see* Nat. Res. Def. Council, Inc. v. Nuclear Regul. Comm'n, 647 F. 2d 1345 (D.C. Cir. 1981).

92. There are, of course, some exceptions, either the "territorial" or the "extraterritorial" intent of Congress is made clear in the legislation itself. One of the clearest examples of the former is the Fair Labor Standards Act, which excludes certain sections of itself from applying to employees in a workplace "within a foreign country." 29 U.S.C. § 213(f). These sections refer to maximum hours, minimum wages, child labor, and essential labor practices. *See id*. at §§ 213(a)-(j).

93. Whether the turn to "territoriality" in other areas of U.S. law remains to be seen, although some legal commentators are of the belief that you cannot have a "territorial" interpretation of American law in some areas, but an extraterritorial reading in terms of criminal law. DOYLE, *supra* note 38, at 16.

94. As described by Peter Andreas and Ethan Nadelmann:

> Although the European Union plays an activist role in creating regional and international law enforcement institutions, it would not be too much of an exaggeration to say that much of the internationalization of crime control has in practice meant Americanization. The global reach of U.S. criminal law enforcement is likely to extend further in the immediate years ahead. Other countries' law enforcement systems may therefore increasingly reflect U.S. examples and norms, thereby enhancing the vicarious enforcement of U.S. laws, representing, in essence, a continued outsourcing

follow both American law and practice.[95] The main concern with this has less to do with the geographic extension of American criminal law and more to do with the way in which the protections of the law – most notably constitutional protections – have been confined inside the U.S. borders.

When the Court first considered whether U.S. criminal law would be applied outside the territorial borders of the U.S., the Court concluded that the Constitution had no application outside the country's national borders, even with respect to American citizens.[96] However, this interpretation of the Constitution changed in the 1950s with two cases involving American service personnel stationed overseas (who were murdered by their wives while overseas).[97] The U.S. Supreme Court extended constitutional rights to these U.S. citizens who were being tried by American officials in American courts.[98] Accordingly, there is little question that the U.S. Constitution (or at least most of it) follows American citizens all over the world when their own government is acting against them. In contrast to this, foreign nationals do not possess any constitutional rights when they are outside the country's territorial borders.[99] It remains unclear whether U.S. citizens

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> of crime control. Although far more often overlooked than U.S. military power, in the realm of policing power the United States very much retains the title of global hegemon.

PETER ANDREAS & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS, 243 (2006).

95. U.S. law (and western law generally) have succeeded in setting the standard for legal procedures and have gone as far as dictating what "crime" is in the first instance. *Id*. at 228.

96. *See, e.g*., In re Ross, 140 U.S. 453 (1891); Downes v. Bidwell (*The Insular Cases*), 182 U.S. 244 (1901).

97. Reid v. Covert, 351 U.S. 487 (1956).

98. *Id*. at 490-91; at 490-91; *see also* Reid v. Covert, 354 U.S. 1, 5-6 n. 3 & 4:

> At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. 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.

99. RAUSTIALA, *supra* note 5, at 243.

beyond the country's borders enjoy the full panoply of constitutional protection, and whether there are certain areas of the globe where American citizens would possess more constitutional rights than others.[100]

The leading case in this area is *United States v. Verdugo-Urquidez*.[101] The defendant, Rene Martin Verdugo-Urquidez, was a Mexican citizen believed to be one of the leaders of a drug cartel.[102] After his arrest by Mexican officials, he was turned over to American authorities.[103] The (U.S.) Drug Enforcement Agency ("DEA"), working in tandem with Mexican Federal Judicial Police, searched his residence in Mexico, where they found incriminating evidence.[104] Verdugo-Urquidez, awaiting trial in an American prison, sought to have this evidence suppressed on the basis that DEA agents had failed to obtain a search warrant.[105] The district court granted Verdugo-Urquidez's motion to suppress, and a divided Ninth Circuit of Appeals affirmed this decision.[106] However, the U.S. Supreme Court overturned this ruling.[107]

The question in this case was whether the Fourth Amendment[108] applied outside the territorial borders of the United States. The Court

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100. Kal Raustiala points to the inconsistent and even absurd results that have followed from this:

> Constitutional rights generally apply extraterritorially to Americans. Yet only "fundamental" constitutional rights apply in Puerto Rico and some other insular possessions of the United States. (The bizarre result is that the rights of Americans are, as a matter of legal doctrine, more secure when the government acts in Japan than in Puerto Rico.) Aliens abroad can and often are subject to American statutes and regulations, even if they fully comply with their local law. Yet these aliens have no "cognizable constitutional rights."

Id.

101. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

102. *Id*. at 262.

103. *Id*.

104. *Id*.

105. *Id*. at 263.

106. United States v. Verdugo-Urquidez, 856 F. 2d 1214 (9th Cir. 1988).

107. United States v. Verdugo-Urquidez, 494 U.S. 259, 263-69 (1990).

108. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

acknowledged that the term "the people" was intended to offer protection beyond those who were U.S. citizens.[109] In its view, certain "aliens" are also protected, but only when "they have come within the territory of the United States and developed substantial connections with this country."[110] In the Court's view, Verdugo-Urquidez had not developed sufficient "substantial connections" with the United States at the time his home was searched by American officials.[111]

> When the search of his house in Mexico took place, he had been present in the United States for only a matter of days. We do not think the applicability of the Fourth Amendment to the search of his premises in Mexico should turn on the fortuitous circumstances of whether the custodian or its nonresident alien owner had or had not transported him to the United States at the time the search was made.[112]

In buttressing its ruling, the Court also pointed out the close connection between federal criminal law enforcement, overseas military operations, and what it perceived as the negative foreign policy consequences from an opposite ruling:

> Some who violate our laws may live outside our borders under a regime quite different from that which one obtains in this country. Situations threatening to important interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.[113]

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

109. Verdugo-Urquidez, 494 U.S. at 269.

110. *Id*. at 271

111. *Id*. at 271-72.

112. *Id*. at 272.

113. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

Justice Kennedy concurred in the judgment, writing separately to explain his position that the extraterritorial reach of the Fourth Amendment should be limited to situations involving American citizens. He writes: "The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any judicial relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."[114]

Justice Kennedy goes on to state:

> If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply. But that is not the case. The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country. . . . The rights of a citizen, as to whom the United States has continuing obligations, are not presented in this case.[115]

Before turning to Justice Brennan's powerful dissent, one of the odd features of Kennedy's approach is that he seems to think that had Verdugo-Urquidez been an American citizen, DEA agents would have been required to obtain a warrant before searching his home in Mexico.[116] Yet, had that been the case, wouldn't the same logistical problems he mentioned be present?

Justice Brennan based his dissent on three related arguments. The first is that if the United States applies its criminal law against foreign nationals, then U.S. officials should also abide by the same law that they would be bound by domestically.[117] Taking up the majority's notion of the need to establish a "substantial connection" to the United States, Brennan posits that the "substantial connection" is provided by the U.S. government itself through its application of U.S. criminal law against

114. *Id*. at 277. (Kennedy, J., concurring).
115. *Id*. at 278.
116. *Id*.
117. *Id*. at 281 (Brennan, J., dissenting).

Verdugo-Urquidez.[118] The second basis offers a much different interpretation of the Fourth Amendment. In Brennan's view, the Fourth Amendment's focus is "on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these activities may be taken."[119] According to his interpretation, the basis of the Fourth Amendment is to prohibit government lawlessness no matter where it occurs and no matter who is affected.[120] Finally, Brennan addressed the majority's concern that foreign arrests would implicate national security concerns, calling this argument "fanciful."[121] In addition, he pointed out that the Executive branch could not have things both ways. That is, since the Executive branch initiates extraterritorial law enforcement, it cannot then argue that applying constitutional protections would interfere with the Executive's authority.[122]

Verdugo-Urquidez stands for the proposition that foreign nationals outside the territorial boundaries of the United States do not have Fourth Amendment protection. What remains doubtful is whether foreign nationals have any constitutional protection at all.[123] Because of this, foreign nationals arrested by officials of the United States have been subjected to what could only be described as inhumane treatment.[124] Since the terrorist attacks on the Twin Towers in New York City on September 11, 2001, the ongoing "war on terror" has

118. *Id*. at 282.

119. United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990).

120. *Id*. at 280.

121. *Id*. at 291 (Brennan, J., dissenting).

122. *Id*. at 291-92.

123. For a powerful argument that the framers of the Constitution were of the belief that due process was required any time the U.S. government acted, either domestically or when it operated outside the nation's territorial borders, *see* Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377 (2017).

124. In 1986, Congress passed the Maritime Drug Law Enforcement Act that defined drug smuggling in international waters as a crime against the United States, even when there was no proof that the drugs on board foreign vessels were destined for the United States. What has ensued is a situation where the U.S. Coast Guard stops boats on the high seas and following arrests crew members are shackled to the Coast Guard ship, in some cases for months on end until they are taken to an American port – usually on the East Coast because the 9th Circuit Court of Appeals (West Coast) has demanded proof that the drug contraband was heading to the United States. *See* Seth F. Wessler, *Prisoners at Sea*, N.Y. Times, Nov. 26, 2017, at 39, for a harrowing account of what the "floating Guantanamos" are like.

provided ample evidence not only of widespread constitutional violations but violations of international human rights law and the laws of war.[125]

III. THE "WAR ON TERROR"

The majority in *Verdugo-Urquidez* did not apply the U.S. Constitution outside of the United States' territorial borders, at least with respect to foreign nationals, relying on the concern that the U.S. Constitution's extraterritorial application would interfere with U.S. foreign policy.[126] Certainly, this proposition has been severely tested in the post 9/11 period. Considering the ways in which territorial considerations have played a central role in denying human rights protection to foreign nationals, there are three aspects where this is evident in the so called "war on terror":

(1) extraordinary rendition,
(2) international surveillance, and
(3) the fight for legal rights.

A. Extraordinary Rendition

An extraordinary rendition generally involves kidnapping a suspected terrorist in one state (usually by agents of that state) and then transporting them to another country like Egypt or Syria.[127] These individuals are then interrogated and, in some instances, killed.[128] In nearly every instance the suspected terrorist would never be permitted to set foot on U.S. territory.[129] U.S. government officials feared that

125. *See generally* CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, "TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO 'EXTRAORDINARY RENDITIONS'" (2004). *See generally*, EXTRAORDINARY RENDITION: ADDRESSING THE CHALLENGES OF ACCOUNTABILITY (Elspeth Guild, Didier Bigo & Mark Gibney eds., 2018).

126. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

127. Ass'n of the Bar of the City of N.Y & Center for Hum. Rts. and Glob. Just., *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 8 (N.Y.U. 2004).

128. *Id*. at 9-13.

129. Perhaps the only exception to this involved Maher Arar, a dual Syrian-Canadian citizen who was flying back to his home in Canada when he was stopped by American authorities in New York. *Id*. at 11. U.S. officials interrogated Arar for

being placed on American soil would thereby provide these individuals with both constitutional protection as well as protection under international human rights law.[130]

This, of course, is not to suggest that American officials were not intimately involved in each one of these extraordinary renditions. The kidnappings, torture, and killings were committed outside United States' territorial borders, and nearly always at the hands of foreign state actors.[131] The United States operated under the premise that they had not committed an internationally wrongful act – and in this regard that might have been correct.[132]

B. Surveillance

The U.S. Government responded to the September 11, 2001, terrorist attacks by instituting two intelligence gathering programs. The first, under Section 702 of the Foreign Intelligence Surveillance Act ("FISA"),[133] involves wiretapping and allows the U.S. government to target communications of non-U.S. persons reasonably believed to be outside of the United States.[134] The second was a bulk collection of

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several days. *Id*. Then, U.S. officials flew Arar to Jordan and then drove him to Syria where he was tortured for months. *Id*. at 11-12. Following his release, the Canadian government gave Arar an official state apology and awarded him $10 million in restitution. *Id*. at 12. However, his suit against several federal (U.S.) officials alleging that he suffered mistreatment while he was in the United States was dismissed by a three-judge panel of the Second Circuit Court of Appeals. *Id*. Without comment, the U.S. Supreme Court declined to hear Arar's appeal. *Id*. To this day, the United States has denied Maher Arar any form of restitution and he remains on the government's terrorist watch list. *Id*.

130. *Id*. at 13-14.

131. *Id*. at 9-13

132. The International Court of Justice has limited a state's responsibility for violations of international law that occur in another state to situations where the state has acted directly in another state, or else it has exercised a form of "effective control" over those it is providing aid and assistance. The point is that it is extraordinarily difficult to establish legal responsibility in situations where one state provides aid and assistance to another state or to non-state foreign actors that violate international human rights standards. *See generally* Mark Gibney et al., Transnational State Responsibility for Violations of Human Rights, 12 HARV. HUM. RTS. J. 267 (1999).

133. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62, 1871.

134. *See generally* Mark Gibney, *NSA Surveillance and Its Meaning for International Human Rights Law*, *in* HUMAN RIGHTS AND THE DARK SIDE OF

telephone metadata, which the government grounded in Section 215 of the USA Patriot Act of 2001, but which was terminated in late 2015.[135]

The wiretapping program is particularly notable to this article's thesis. Specifically, how U.S. citizens' privacy rights were protected (for the most part), while the same rights of foreign nationals – including foreign leaders like German Chancellor Angela Merkel – were left unprotected.[136] Prior to 2001, all wiretapping – both domestic and international – required a warrant from a judge.[137] In the wake of the September 11th attacks, the Bush administration, through a private executive order, instituted the Terrorist Surveillance Program ("TSP").[138] Under TSP, the warrant requirement was limited to communications that were solely domestic or those involving U.S. nationals in foreign lands.[139] This creates a double standard that is a hallmark of imperialism: foreign nationals are not afforded the same level of legal protection as U.S. citizens.

C. The Fight for Legal Rights

A remarkable episode in the "war on terror" was the extended battle between the federal judiciary and the political branches of the U.S. government. They debated whether the "enemy combatants" held at Guantanamo Bay, Cuba, could access federal courts.[140] In a trilogy of cases – *Rasul* [141] *Hamdan*,[142] and *Boumediene*[143] – the Supreme Court

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GLOBALIZATION: TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL 99-114 (Thomas Gammeltoft & Jens Vedsted-Hansen eds., 2017).

135. *See generally ODNI Announces Transition to New Telephone Metadata Program*, OFF. OF THE DIR. OF NAT'L INTEL. (Nov. 27, 2015), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2015/1292-odni-announces-transition-to-new-telephone-metadata-program.

136. *See generally* Owen Fiss, *Even in Time of Terror*, 31 YALE L. & POL'Y REV. 1 (2012).

137. *Id*. at 2.

138. The Terrorist Surveillance Program remained a secret until December 2005 when the *New York Times* broke a story on its existence. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

139. *Id*.

140. *See, e.g*., Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

141. *Rasul*, 542 U.S. at 466.

142. *Hamdan*, 548 U.S. at 557.

143. *Boumediene*, 553 U.S. at 723.

was repeatedly at odds with the political branches, thereby allowing a group of foreign nationals to file habeas corpus petitions in federal court. Moreover, in *Boumediene* the Court found such a right in the Constitution, which is the first (and only) time that foreign nationals located outside the territorial borders of the United States have been granted constitutional rights.[144] However, it remains unclear whether the foreign nationals held at Guantanamo Bay might have won the legal battle before the Supreme Court, but lost the larger war.[145] Of particular note is the D.C. Circuit Court of Appeals decision in *Al-Adahi v*. *Obama*, which dealt with the inferences that could be drawn from events occurring halfway around the globe.[146] The district court considered the intelligence reports and interrogations from when Al-Adahi was at Guantanamo and found "no reliable evidence in the record that Petitioner was a member of al-Qaida"—the court ordered him released.[147] The Court of Appeals argued that the reports were sufficient proof that Al-Adahi was in league with Al Qaeda and reversed the district court's ruling.[148] Before *Al-Adahi*, detainees were successful in nearly sixty percent of the habeas cases filed.[149] Following this ruling, they were unsuccessful in every case but one, resulting in a 92% rejection rate.[150]

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144. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004). The Court was faced with the question of the due process rights of a U.S. citizen who had been captured in Afghanistan and held at a military brig in Charleston, South Carolina. *Id*. Although the U.S. government designated Hamdi as an "enemy combatant," it detained him in the United States and the Court afforded him due process rights – certainly more rights than the other "enemy combatants" at Guantanamo Bay and elsewhere. *Id*.

145. In April 2003, the full Court of Appeals for the District of Columbia issued a ruling (not yet made public) that allows Abdul-salam al-Hela to continue being held without charge or trial at Guantanamo, where he has been detained since 2004. It was thought that this case would answer what process is "due" to these "enemy combatants," including whether they possessed any constitutional rights. The headline summarizes the case well. *See* Charlie Savage & Carol Rosenberg, *Appeals Court Punts on Question of Due Process at Guantanamo*, N.Y. TIMES, Apr. 6, 2023, at A20.

146. Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

147. *Id*. at 1103.

148. *Id*. at 1111.

149. *See generally* Mark Denbeaux et al., *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review* (Seton Hall Pub. L. Rsch. Paper, Paper No. 2145554, 2012), https://ssrn.com/abstract=2145554 (describing how the practice of careful judicial fact-finding was replaced by judicial deference to the government's actions after *Al-Adahi*.)

150. *Id*. at 1.

IV. THE LIFE AND DEATH OF THE ALIEN TORT STATUTE

Although the United States applies its law extraterritorially more than any other country, some aspects of U.S. law have been purposely confined to application solely within U.S. borders. As a result of this selective application of domestic law, the United States has repeatedly failed to meet its obligations under international human rights law.[151] The one notable exception to this has been the Alien Tort Statute, a federal law from 1789 which reads in its entirety: "The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[152]

The ATS was essentially moribund until the case of *Filartiga v. Pena-Irala* in 1980.[153] The background for the case involved the torture and death of Joelito Filartiga, the son of a Paraguayan dissident.[154] The Filartiga family attempted to prosecute the agents responsible for Joelito's killing but were unsuccessful.[155] However, Dolly Filartiga, Joelito's sister, who at the time was living in the United States, later learned that Pena-Irala, the police chief of Asuncion, Paraguay, where the torture and murder took place, was also in the United States.[156] She filed a civil suit in federal court in New York under the ATS.[157]

All of the parties involved were Paraguayan, and the torture and murder also took place in Paraguay.[158] The federal district court dismissed the case on this basis, but the Second Circuit Court of Appeals reversed the decision.[159] In its landmark ruling, the court held that the "law of nations" provided a clear and unambiguous prohibition against official torture.[160] Furthermore, the court held that federal courts

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151. *See generally* Skogly, *supra* note 4; MARK GIBNEY, INTERNATIONAL HUMAN RIGHTS LAW: RETURNING TO UNIVERSAL PRINCIPLES (2d ed. 2016). *See also supra* notes 6-8.

152. Alien Tort Statute, 28 U.S.C. § 1350.

153. Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).

154. *Id*. at 878.

155. *Id*.

156. *Id*.

157. *Id*. at 879.

158. *Id*. at 878.

159. *Id*. at 876.

160. *Id*. at 880.

in the United States have jurisdiction to try cases against alleged torturers when "an alleged torturer is found and served with process by an alien within our borders."[161]

Following the *Filartiga* ruling, a host of cases were brought under the ATS where plaintiffs were repeatedly granted default judgments. [162] Notably during this first phase of ATS litigation, plaintiffs brought cases against individual foreign defendants.[163] However, plaintiffs then began to sue U.S. government officials as well as multinational corporations that had substantial assets in the United States and the judicial reception to these cases was decidedly different.[164] Judicial support for the ATS began to significantly decline after *Kiobel v. Royal Dutch Petroleum,* wherein the Supreme Court ruled that the ATS cause of action did not apply extraterritorially.[165] Then, in *Jesner v. Arab Bank, PLC,* the Court held that the ATS cause of action did not apply to foreign corporations.[166] More recently, in *Nestle USA, Inc. v. Doe* and *Cargill, Inc. v. Doe*, formerly enslaved children filed a claim after they were trafficked from Mali to Cote d'Ivoire to work on cocoa plantations.[167] The Court held that the plaintiffs sought inappropriately to apply the ATS extraterritorially.[168]

Currently, it is unclear whether any part of the ATS remains active. More importantly, what once served as the single most useful vehicle

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161. *Id*. at 878.

162. *See generally* Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205 (2022).

163. *Id*. at 1217.

164. *See generally* William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L L. & COM. L. REV. 351 (2001) (placing ATS cases into different "waves").

165. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

166. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

167. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

168. *Id*. at 1936-37 ("Even if we resolved all these disputes in respondents' favor, their complaint would impermissibly seek extraterritorial application of the ATS. Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast. The Ninth Circuit nonetheless let this suit proceed because respondents pleaded as a general matter that "every major operational decision by both companies is made in or approved in the U. S." But allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.").

for protecting the human rights of foreign nationals has been essentially eliminated.[169] Congress may amend the ATS in the wake of these Supreme Court rulings, but there is no evidence of any movement in that direction.[170] Instead, as similar litigation has begun to emerge in other states,[171] the American judiciary, relying once again on the presumption of territoriality, has failed to recognize the human rights obligations it has to foreign nationals.

CONCLUSION

The forty-five square miles that Guantanamo Bay covers is often described as a "legal black hole."[172] Yet the reality is that with respect to how American law is applied to non-nationals, the entire globe could be described this way. Unless you are a U.S. citizen, the Constitution stays at home, and the United States has no obligations under international human rights law to offer any protection to foreign nationals living in other countries. This article has repeatedly shown that extending this protection to foreign nationals is not particularly difficult for the U.S. Government to do. In most cases, this result could be achieved by extending already existing domestic standards to overseas operations. Some may argue that this would interfere with the "sovereignty" of other states, however, U.S.-based multinational corporations are already subjected to a plethora of American laws, therefore that argument is weak. It is puzzling—if not hypocritical—to say that workplace protections and the extraterritorial application of environmental, health and safety standards would violate the sovereignty of foreign states but the extraterritorial application of U.S. patent law, securities law, bribery law, tax law, and so on, do not.

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169. *See generally* Allison Merkel, *The Fall of the Alien Tort Statute: Why the Supreme Court is Moving Away from Prosecuting Human Rights Abuses Abroad*, *in* YALE REV. INT'L STDS. (2020).

170. Ewell, *supra* note 162, at 1279.

171. *See generally* Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct*, 14 UTRECHT L. REV. 22 (2018).

172. *See, e.g.*, Johan Steyn, *Guantanamo Bay: The Legal Black Hole,* 53 INT'L & COMPAR. L.Q. 1 (2004).

As analyzed above, there are many reasons why the extraterritorial application of U.S. law could be considered a form of "legal imperialism." However, what is truly "imperialistic" is how large portions of the law that could protect foreign nationals (and to some extent American citizens as well) have been limited within the confines of the territorial United States. This demonstrates a misunderstanding or willful disregard of human rights itself. Until this changes, a situation will continue to exist wherein the United States and its interests operate all over the world with virtual impunity. The human rights protections that the law should provide will remain almost exclusively within the territorial borders of the United States – and only for American citizens. This, of course, is the very definition of "imperialism."


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