

# Worldwide Reliance: Is it Enough? The Importance of Personal Jurisdiction and a Push for "Minimum Contacts" in Prosecuting Foreign Defendants for Financial Crimes

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# WORLDWIDE RELIANCE: IS IT ENOUGH? THE IMPORTANCE OF PERSONAL JURISDICTION AND A PUSH FOR “MINIMUM CONTACTS” IN PROSECUTING FOREIGN DEFENDANTS FOR FINANCIAL CRIMES

## INTRODUCTION

Advancements in technology allow people and companies to do business in places they have never physically been. The evolution of personal jurisdiction as a constitutional limitation on federal courts has tracked these advancements in technology.<sup>1</sup> Courts must balance an individual state’s ability to assert jurisdiction against the due process rights of defendants.<sup>2</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments are among the most debated constitutional amendments.<sup>3</sup> International white collar cases prosecuted by the federal government are subject to many constitutional limitations, most notably the Due Process Clause.<sup>4</sup>

Due process of law is a fundamental, constitutional guarantee that all legal proceedings will be fair, and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one’s life, liberty, or property.<sup>5</sup> The Constitution also guarantees that a law shall not be unreasonable, arbitrary, or capricious, and that the legal means shall have a real and substantial

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1. Lief Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 341 (1997).

2. *Id.* at 342.

3. Ryan C. Williams, *The One and Only Substantive Due Process*, 120 YALE L.J. 408, 408 (2011).

4. Robert G. Morvillo & Robert J. Anello, *Prosecutorial Limitations in Cross-Border Investigations*, N.Y. L.J., Apr. 5, 2005, [http://www.maglaw.com/publications/articles/00075/\\_res/id=Attachments/index=0/](http://www.maglaw.com/publications/articles/00075/_res/id=Attachments/index=0/)

5. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense 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.

*Id.*

relation to the object sought to be obtained.<sup>6</sup> Due process in the civil context also requires that a defendant not present within the territory of the forum have certain “minimum contacts” with the forum state so that the suit does not offend “traditional notions of fair play and substantial justice.”<sup>7</sup>

The Due Process Clause is the sole limitation on a state’s power to subject an out-of-state defendant to the personal jurisdiction of its courts,<sup>8</sup> and applies to both domestic and foreign defendants.<sup>9</sup> However, foreign defendants are not always protected by due process in United States courts. Despite the usual presumption against extraterritorial application of United States laws, federal courts often assert jurisdiction over foreign defendants.<sup>10</sup> As a result of the recent increase in the number of suits against nonresident alien defendants, federal prosecutors have begun to apply domestic criminal statutes to foreign defendants to combat corruption overseas.<sup>11</sup> For example, commentators have noted that the “United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have asserted jurisdiction over foreign defendants in a manner that seems to greatly expand the reach of the law.”<sup>12</sup> Despite the fact that the Supreme Court has never addressed the issue of whether the protections of the Due Process Clause extend to foreign nationals in extraterritorial prosecutions, some legal scholars have.<sup>13</sup> Countries around

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6. R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330, 347 (1935).

7. Int’l Shoe v. Washington, 326 U.S. 310, 316 (1945).

8. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 5 (2006).

9. *Id.* at 1.

10. *Id.* at 4–5. See also Trek C. Doyle & Roberto Calvo Ponton, *The Renaissance of the Foreign Action and a Practical Response*, 33 Tex. Tech L. Rev. 293, 294 (2002); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 799–800 (1988) (describing the increase in transnational litigation).

11. See generally Cara Chomski, *Campbell’s Soup: Due Process Concerns in Applying the Federal Anti-Bribery Statute to Noncitizen Government Contractors Overseas*, 2012 U. CHI. LEGAL F. 429, 429–33 (2012) (discussing the circuit split over which due process standards should apply to noncitizens prosecuted under the Federal Anti-Bribery Statute for criminal acts committed extraterritorially, mainly, whether the Due Process Clause requires a “sufficient nexus” standard, or only that the prosecution be “neither arbitrary nor fundamentally unfair”).

12. J. Scott Maberry et al., *FCPA Overreach? Courts Address Personal Jurisdiction in Cases Against Foreign Defendants*, METROPOLITAN CORPORATE COUNS., MAY 2013, at 26, <http://www.metrocorpocounsel.com/pdf/2013/May/26.pdf>.

13. Brian M. Kelly, *Due Process, Choice of Law, and the Prosecution of Foreign Nationals for Providing Material Support to Terrorist Organizations in Conflicts Abroad* (Harvard Law School Addison Brown Student Writing Prize, May 2015) at 2. Compare Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (arguing that the Fifth Amendment limits extraterritorial application of substantive federal law similar to how the Fourteenth Amendment Due Process Clause limits state power),

the world are beginning to aggressively regulate activities such as bribery, money laundering, and securities violations, across national boundaries.<sup>14</sup> Today, the DOJ defines white collar crime as:

[T]hose illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.<sup>15</sup>

Transnational white collar crime raises thorny jurisdictional issues regarding a country's power to impose its rules on others and its role in the international community.<sup>16</sup> The proliferation of transnational activity and globalization ensures this trend will continue.<sup>17</sup> The growth of the internet has contributed to transnational litigation, as aliens increasingly interact with the United States even when the alien has no physical contact with the United States.<sup>18</sup>

In light of these developments, courts have struggled to find a consistent approach in applying the Due Process Clause and remain divided on what requirements must be met in order to assert jurisdiction over foreign defendants. The Second, Fourth, and Ninth Circuits hold that a "sufficient nexus" between the foreign defendant and the United States is required before a noncitizen may be brought into federal court for acts committed abroad.<sup>19</sup> However, the First, Third, Fifth, and Eleventh Circuits hold that due process requires prosecution of foreign defendants not be "arbitrary nor fundamentally un-

with A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 383 (1997) (arguing that extending the protections of the Fifth Amendment's Due Process Clause to alien defendants in extraterritorial prosecutions would "den[y] to the United States a degree of authority recognized and asserted by most of the other nations of the world").

14. *White Collar/Investigations*, WHITE & CASE LLP, <https://www.whitecase.com/law/practices/white-collar-investigations> (last visited Jan. 21, 2017).

15. Megan Graham, *White Collar Crime and the United States' Economy*, UNIVERSITY OF NEW HAMPSHIRE SCHOLAR'S REPOSITORY, 1, 10 (2012); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 1, 11 (2004).

16. Gregory K. Matson, *Restricting the Jurisdiction of American Courts Over Transnational Securities Fraud*, 79 GEOG. L.J. 141 (1990).

17. See Degnan & Kane, *supra* note 10, at 799 (describing the increase in transnational litigation); Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 110 (1993) (discussing global integration and the "rapidly expanding system of transnational activity").

18. See Parrish, *supra* note 8, at 5.

19. See, e.g., *United States v. Mohammad-Omar*, 323 Fed. App'x. 261 (4th Cir. 2009); *United States v. Klimavicius-Vilorina*, 144 F.3d 1249, 1256 (9th Cir. 1998).

fair.”<sup>20</sup> Recently, the Southern District of New York decided *United States v. Hayes*.<sup>21</sup> In *Hayes*, the court expanded the scope of the Due Process Clause and found that it is sufficient to allege a foreign defendant aimed his conduct at the world in general.<sup>22</sup>

In the civil context, the Due Process Clause does not permit a state to make a binding judgment against a person with whom the State has no contacts, ties, or relations.<sup>23</sup> If a defendant possesses certain minimum contacts with the state, so that it is reasonable and just to assert jurisdiction, the state can compel the defendant to defend herself in the forum state.<sup>24</sup> The “minimum contacts” test set forth in *International Shoe v. Washington* was established to protect defendants from having to defend in a distant forum, unless the defendants have sufficient contacts and could reasonably have anticipated being subjected to the law of the forum.<sup>25</sup> This is very similar to the “sufficient nexus” and “neither unfair nor arbitrary” tests implemented by the circuit courts. The importance of these tests is critical to an understanding when foreign defendants can be prosecuted. Further, understanding the due process elements required to prosecute foreign defendants is important in today’s financially focused world. Technological advancements have provided individuals with the tools to commit financial crimes on a global scale.<sup>26</sup> As a result, these crimes are increasing at an alarming rate.<sup>27</sup> With this comes the challenge of how to effectively prosecute these crimes without violating the due process rights of foreign nationals, assuming they have such rights.<sup>28</sup>

This Comment argues that a stricter standard of due process should be applied when determining whether courts have jurisdiction over foreign defendants whose criminal activities are not directed at the United States. Financial crimes can lead to long prison sentences and thus greater due process protections must be guaranteed.<sup>29</sup> The “min-

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20. See, e.g., *United States v. Ibarquen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011); *United States v. Cardales*, 168 F.3d 548, 552–53 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

21. 99 F. Supp. 3d 409 (S.D.N.Y. 2015).

22. *Id.* at 422 (The court based its conclusion on the reasonable inference drawn from defendant’s complaint that he was aware of the worldwide implications of his actions, and thus it was not arbitrary or fundamentally unfair to subject him to prosecution in the United States.).

23. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

24. *Id.* at 317.

25. *Id.*

26. Gerald Cliff & Christian Desilets, *White Collar Crime: What it is and Where It’s Going*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 481, 523 (2014).

27. *Id.*

28. See Kelly, *supra* note 13, at 3.

29. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 52 (2006).

imum contacts” test should be applied in the criminal context as well, where it is even more important that the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.”<sup>30</sup>

The worldwide reliance theory was first introduced in the civil context in 1972, and is now utilized in the criminal context.<sup>31</sup> This theory suggests the United States can prosecute foreign defendants for financial crimes not directed at the United States. This does not satisfy due process. This Comment explains that the consequences of the United States’ prosecutorial overreach can be detrimental to the rights provided by the Due Process Clause.

Part II provides background information concerning personal jurisdiction and international law. It then examines “minimum contacts” in the civil context. It also discusses the circuit split regarding personal jurisdiction over foreign defendants, focusing on *United States v. Hayes* and the worldwide reliance theory. Part III analyzes the “sufficient nexus” test, and the “neither arbitrary nor fundamentally unfair” test, arguing the circuit split is merely illusory. Part III further discusses the theory presented by *United States v. Hayes* and analyzes it in light of relevant civil personal jurisdiction principles. It concludes by arguing that *Hayes* illustrates why the “minimum contacts” test must be extended to financial crimes. Ultimately, Part III proposes the United States should implement a “minimum contacts” standard to assert personal jurisdiction over foreign defendants and argues that applying any lesser standard violates the Fifth Amendment. Part IV discusses the legal implications of the worldwide reliance theory and its impact on due process rights in the context of transnational financial crimes, highlighting the consequences if a stricter standard is not adopted. Part V concludes that the stricter standard of “minimum contacts” for prosecution against foreign defendants is necessary to comport with due process.

## II. BACKGROUND: THE CIRCUIT SPLIT AND RELEVANT PERSONAL JURISDICTION PRINCIPLES

This Part discusses the circuit split regarding due process rights for foreign criminal defendants. It begins with a brief overview of personal jurisdiction principles in the international context and then describes the “minimum contacts” analysis used in civil cases. This Part will then discuss both the “sufficient nexus” and the “neither arbitrary nor fundamentally unfair” tests used to determine whether United

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30. *Int’l Shoe*, 326 U.S. at 316.

31. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1342 (2d Cir. 1972).

States prosecution comported with the Due Process Clause. It will conclude with a discussion of the Due Process Clause and its role in white collar crimes.

The concept that no country should force its laws upon the world is premised on principles of equity, comity, judicial power, and basic human rights.<sup>32</sup> Personal jurisdiction is of utmost importance to ensure that constitutional rights are not violated.<sup>33</sup> The Second, Fourth, and Ninth Circuits hold the extraterritorial prosecution of foreign nationals under United States criminal law requires the existence of a “sufficient nexus” between the defendant and the United States to satisfy the Due Process Clause.<sup>34</sup> The First, Third, Fifth, and Eleventh Circuits all hold that to satisfy due process, prosecution “must not be arbitrary nor fundamentally unfair.”<sup>35</sup> Both standards reflect an effort to preserve due process rights under the Fifth Amendment.<sup>36</sup> However, in the criminal context these standards do not ensure the due process rights of foreign defendants to sufficiently protect them from prosecutorial overreach.

#### A. *Personal Jurisdiction and International Law: A Brief Overview*

For a valid exercise of extraterritorial jurisdiction, a United States court must have both subject matter jurisdiction over the controversy and personal jurisdiction over the defendant.<sup>37</sup> The requirement of personal jurisdiction stems from the Fifth Amendment’s Due Process Clause and applies to foreign defendants brought before a United States court under extraterritorial federal legislation.<sup>38</sup> Congress has the authority to enact laws that have effect beyond the territorial borders of the United States.<sup>39</sup> The constitutional limitations on Congress’ ability to legislate extraterritorially are still unclear. Recently, courts and commentators have begun to “engage more foundational questions about the existence and contours of constitutional limits on Congress’s power to legislate extraterritorially in the first place and the potential for individual rights violations under the Due Process

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32. See generally Restatement (Third) of The Foreign Relations Law of the United States (Am. Law Inst. 1987).

33. *Magna Carta: Muse and Mentor*, LIBR. OF CONGRESS, <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited Jan. 17, 2017).

34. Chomski, *supra* note 11, at 439.

35. See, e.g., *Ibarguen-Mosquera*, 634 F.3d at 1378; *Cardales*, 168 F.3d at 553.

36. Chomski, *supra* note 11, at 444.

37. Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L.R. 907, 922–32 (1997).

38. *Id.* at 922–24.

39. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

Clause resulting from the arbitrary or unfair applications of United States law abroad.”<sup>40</sup>

Every day throughout the world national courts operate locally, exercising jurisdiction over their citizens and defendants that commit crimes within their territory.<sup>41</sup> But many of these courts are also authorized to exercise jurisdiction over serious crimes subject to international law—genocide, crimes against humanity, and war crimes.<sup>42</sup> White collar crimes have only recently been subjected to cross-border prosecution because they can now more easily span multiple continents and include foreign nationals and corporations.<sup>43</sup> Globalization requires countries to aggressively police investment activities because the ease of making international transactions has resulted in increased white collar crime.<sup>44</sup> When a foreign defendant’s criminal conduct did not occur in the United States, the question arises as to whether those activities are extensive enough to allow a United States federal court to exercise jurisdiction.<sup>45</sup>

Where a defendant subjects herself to the laws of one nation, punishing her under United States law for a crime committed on foreign soil is an intrusion into that nation’s sovereignty.<sup>46</sup> As such, principles of comity and fairness dictate that nations refrain from intruding absent a nexus between the defendant’s criminal conduct and the United States.<sup>47</sup>

Thus, an intrusion across borders should not be undertaken absent proof that there is a connection between the criminal conduct and the United States, sufficient to justify the United States’ pursuit of its interests.<sup>48</sup> Under the “protective principle of international law a nation

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40. Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1022 (2011).

41. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 13 (2002).

42. *Id.* at 13–14.

43. Michael J. Calhoun, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 LOY. U. CHI. L.J. 679–80 (1999).

44. *Id.* at 679.

45. *Id.* at 680.

46. See Chomski, *supra* note 11, at 445.

47. *Id.* See also *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (describing comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its law.”); Restatement (Third) of The Foreign Relations Law of the United States §115 (Am. Law Inst. 1987) (referencing principles of equity, in the sense of what is fair and just in major legal systems, as applicable to the delineation of boundaries between countries and between the exclusive economic zones of states).

48. Chomski, *supra* note 11, at 445.

is permitted to assert jurisdiction over a person whose conduct outside the nation's territory threatens that nation's security."<sup>49</sup> Similarly, "under the territorial principle of international law a state has jurisdiction to prescribe and enforce a rule of law in the territory of another state to the extent provided by international agreement with the other state."<sup>50</sup>

Extraterritorial prosecution and principals of international law frame the question of how and under what circumstances federal criminal laws should be applied against foreign defendants to comport with the Due Process Clause.<sup>51</sup> When noncitizens are tried for crimes in the United States, they are entitled to all the rights that attach to the criminal process, without any distinction based on their nationality or citizenship.<sup>52</sup> Seven circuits have considered what the due process standard should be when prosecuting noncitizens for criminal acts.<sup>53</sup> These circuits have held that the Fifth Amendment's Due Process Clause constrains the prosecutions of foreign defendants even if that conduct occurs entirely abroad.<sup>54</sup>

### B. "Minimum Contacts" in the Civil Context

In the civil context, for decades the main theory was that in personam jurisdiction could only be obtained over a corporation in the state of its incorporation.<sup>55</sup> However, in the mid-nineteenth century two alternative theories began to emerge, which allowed states to assert jurisdiction over foreign corporations.<sup>56</sup> Under one theory, a court could exercise jurisdiction over the corporation if it consented to the jurisdiction.<sup>57</sup> Under an alternative theory, jurisdiction could be

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

50. *Id.* at 4.

51. *Id.* at 437.

52. *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.").

53. Chomski, *supra* note 11, at 430–31.

54. See *United States v. Rojas*, 812 F.3d 382, 393 (5th Cir. 2016); *United States v. Ali*, 718 F.3d 929, 943–44 (D.C. Cir. 2013) (assuming without deciding that the Due Process Clause constrains extraterritorial prosecutions); *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *Ibarguen-Mosquera*, 634 F.3d at 1378–79.

55. Westerberg, *Foreign Corporations – Minimum Contacts – Due Process*, 36 J. AIR L. & COM. 346, 347 (1970).

56. *Id.*

57. *Id.*

based upon the corporation's presence within the state.<sup>58</sup> This all changed when the Supreme Court decided *International Shoe v. Washington*.<sup>59</sup>

In *International Shoe* the defendant was a Delaware corporation with its principal place of business in St. Louis, Missouri, and was engaged in the manufacture and sale of footwear.<sup>60</sup> Defendant employed salesmen in Washington to sell shoes in the state.<sup>61</sup> The state of Washington sued the defendant after they failed to make contributions to an unemployment compensation fund exacted by state statutes.<sup>62</sup> The defendant argued it was not "doing business" in the state, and that there was no agent upon which the service could be made.<sup>63</sup>

In this landmark decision, the Supreme Court held that due process requires a foreign defendant have certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>64</sup> The "minimum contacts" test was a significant departure from the earlier consent and presence theories and allowed states to more easily secure jurisdiction over non-residents.<sup>65</sup> However, the "minimum contacts" standard presented no rule to determine what constituted a "contact" or how many "contacts" were necessary to satisfy the test.<sup>66</sup>

Many lower courts implemented a three-part test to determine whether minimum contacts exist to establish jurisdiction, considering whether: (1) the defendant purposely availed herself of the privilege of acting in the forum state or causing a consequence in the forum state, (2) the cause of action arises out of the defendant's conduct with the forum state, and (3) the defendant has a sufficiently substantial connection to the forum state so exercise of jurisdiction is not unreasonable.<sup>67</sup> Indeed, "courts have applied the 'minimum contacts' test of *International Shoe v. Washington* and its progeny very conserva-

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58. *Id.* Under this theory, to be deemed present within a state, the corporation must conduct sufficient activities to be considered "doing business" within that state. *Id.* However, no definitive rule was established to determine what activity constituted "doing business." *Id.* Factors considered by the courts included the amount and continuity of the activity, whether or not the corporation had a local agent or office within the forum state, and the convenience of the forum and availability of other forums.

59. See generally *Int'l Shoe v. Washington*, 326 U.S. at 310–22.

60. *Id.* at 313.

61. *Id.*

62. *Id.* at 311–13.

63. *Id.* at 312–13.

64. *Int'l Shoe v. Washington*, 326 U.S. at 316.

65. Westerberg, *supra* note 55, at 348

66. Gary W. Melsher, *Civil Personal-Jurisdiction-Minimum Contacts*, 14 CASE W. RES. L. REV. 610, 611 (1963).

67. *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987).

tively when the defendant is a foreign state or corporation acting in a commercial capacity.”<sup>68</sup> Courts have held that the test requires a defendant avail herself to the benefits and protections of the forum’s laws before she will be subject to suit in that forum.<sup>69</sup> “This restrictive approach discourages a United States citizen who wants to take advantage of international business transactions and trade but who is hesitant to enter into such arrangement without the assurance of a forum in the event of a dispute.”<sup>70</sup>

The decision in *International Shoe* represented a major shift from a pure territorial analysis to a more expansive approach. It has been hypothesized that this shift occurred because people do not pay attention to state boundaries; thus, the assumption that they did often resulted in the unwitting destruction of their own rights.<sup>71</sup> The jurisprudence developed as a result of this has been aptly described as a “maze of rules with no clear and distinct reasons.”<sup>72</sup>

This general confusion over due process limitations has spilled over into the criminal context where the lack of a clear cut Supreme Court standard has resulted in the circuits applying varying tests.<sup>73</sup> Thus, a circuit split exists over what due process standards should apply to noncitizens prosecuted for criminal acts committed entirely outside of the United States.<sup>74</sup>

### C. “Sufficient Nexus” Standard of Due Process

The Second, Fourth, and Ninth Circuits utilize the “sufficient nexus” test. This test allows for extraterritorial prosecution of foreign nationals under United States criminal law when “there is a sufficient nexus between the defendant and the United States to satisfy the Due Process Clause.”<sup>75</sup> Courts applying this test typically rely on four factors: “(1) the defendant’s actual contacts with the United States . . . ; (2) the location of the acts allegedly giving rise to the alleged offense; (3) the intended effect a defendant’s conduct has on or within the

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68. Eric Johnson & Chrisanne Worthington, *Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT’L & COMP. L. 209, 209 (1982).

69. *Id.*

70. *Id.*

71. Joelle Lee A. Nicol, Note, *Given an Opportunity to Redefine the Gray Area of “Minimum Contacts,” the Court in Prince v. Urban Chose to Remain in the Dark*, 25 W. ST. U. L. REV. 313, 354–55 (1998).

72. *Id.*

73. Kelly, *supra* note 13, at 2.

74. Chomski, *supra* note 11, at 430–31.

75. *Id.* at 439.

United States; and (4) the impact on significant United States interests.”<sup>76</sup>

The Ninth Circuit was the first court to articulate the “sufficient nexus” test.<sup>77</sup> Eight years later in *Klimavicius-Violaria*,<sup>78</sup> the Ninth Circuit equated the “sufficient nexus” standard to the “minimum contacts” test for personal jurisdiction established in *Worldwide Volkswagen v. Woodson*.<sup>79</sup> Accordingly, the court held that the United States “will assert jurisdiction over a defendant who should reasonably anticipate being brought into court in this country.”<sup>80</sup> Therefore, the circuit courts that require a sufficient nexus “look for real effects or consequences accruing in the United States.”<sup>81</sup>

In *United States v. Klimavicius-Violaria*,<sup>82</sup> the defendants were convicted for possession of cocaine with intent to distribute on board a vessel.<sup>83</sup> The defendants argued that the government did not establish a “sufficient nexus.”<sup>84</sup> The Ninth Circuit clarified that a “sufficient nexus” exists “where an attempted transaction is aimed at causing criminal acts within the United States.”<sup>85</sup> It agreed with the district court’s factual findings that:

(1) markings on the cocaine matched the markings on cocaine that had been seized in the United States, (2) the United States was the most likely destination for such a large load of cocaine, and (3) the location of the ship and the kind of navigational maps on board were consistent with the cocaine being bound for the United States.<sup>86</sup>

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76. *Brehm*, 2011 WL 1226088, at \*4 (collecting cases). The “sufficient nexus” test can be satisfied when a foreign defendant “aim[s] . . . to cause harm inside the United States or to U.S. citizens or interests.” *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011). It can also be satisfied when the foreign defendant’s conduct occurs outside the United States and has certain effects within the United States. *In re Hijazi*, 589 F.3d 401, 412 (7th Cir. 2009).

77. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 162 (2007) (“In the case that seems to have spawned the recent Fifth Amendment due process jurisprudence in this area, *United States v. Davis*, [905 F.2d 245, (9th Cir. 1990),] the Ninth Circuit held that . . . ‘there must be a sufficient nexus between the defendant and the United States . . . .’”).

78. *United States v. Klimavicius-Violaria*, 144 F.3d 1249 (9th Cir. 1998).

79. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

80. *Klimavicius-Viloria*, 144 F.3d at 1257 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

81. *United States v. Campbell*, 798 F. Supp. 2d 293, 306 (D.D.C. 2011).

82. 144 F.3d 1249 (9th Cir. 1998).

83. *Id.* at 1256.

84. *Id.*

85. *Id.* at 1257.

86. *Id.*

The court held this evidence provided a “sufficient nexus” between the defendant’s activities and the United States to satisfy due process.<sup>87</sup>

More recently, the “sufficient nexus” test has been invoked in civil cases involving a suit seeking damages resulting from a financial fraud. In *Leasco Data Processing Equipment v. Maxwell*, the defendants allegedly conspired to purchase stock in a British publisher at inflated prices.<sup>88</sup> The plaintiffs argued personal jurisdiction existed over the defendant accounting firm because it must have known its reports on the publisher would be relied on by purchasers.<sup>89</sup> The court disagreed, explaining that under that line of reasoning, “accountants operating solely in London would be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited.”<sup>90</sup> The court found that “[a]lthough such worldwide reliance may be, in a sense, foreseeable, it is not sufficiently so to constitute a basis of personal jurisdiction consonant with due process.”<sup>91</sup>

The lack of sufficient judicial guidance concerning financial crime and due process standards as opposed to terrorism and drug cases has resulted in confusion for lower courts. Terrorism and drug trafficking cases provide for a simple analysis of due process issues and yield predictable results. A foreign defendant directs his conduct by selling drugs to the United States and this will result in the United States’ ability to prosecute that defendant. Directly analogous to this example is a foreign defendant selling a security in a foreign country to someone in the United States. Yet, the due process analysis is easily applied in the first case and loosely applied in the latter because the lack of sufficient judicial guidance concerning financial crimes occurring outside of the United States.

#### *D. Prosecution Must Not Be “Arbitrary nor Fundamentally Unfair”*

The standard applied in the First, Third, Fifth, and Eleventh Circuits is that the prosecution “must not be arbitrary nor fundamentally unfair” to satisfy due process.<sup>92</sup> These courts find that due process does

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87. *Klimavicius-Viloria*, 144 F.3d at 1259.

88. 468 F.2d 1326, 1330 (2d Cir. 1972), *abrogated on other grounds* by *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266–67 (2010) (stating that the Securities & Exchange Act does not focus “upon the place where the deception originated, but upon purchases and sales of securities in the United States” and, accordingly, Section 10(b) of the Act only applies to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities”).

89. *Id.* at 1342.

90. *Id.*

91. *Id.*

92. *See generally Ibarquen-Mosquera*, 634 F.3d 1370; *Cardales*, 168 F.3d 548.

not require the government to establish a nexus between a defendant's criminal conduct and the United States.<sup>93</sup> Instead, these courts focus on: (1) the offender's contacts with the United States; (2) the impact of the alleged conduct with the United States, its interests, and its citizens; and (3) whether the host nation consents to the exercise of jurisdiction over its citizens.<sup>94</sup>

In *United States v. Cardales*, the defendants were convicted of possession with intent to distribute drugs aboard a vessel 150 miles south of Puerto Rico.<sup>95</sup> The defendants argued the court did not have jurisdiction because the government did not prove a nexus between the criminal conduct and the United States.<sup>96</sup> The First Circuit held the Fifth Amendment does not require a nexus between the defendant and the United States.<sup>97</sup> Instead, the court held that to satisfy due process, extraterritorial application of the criminal statute simply "must not be arbitrary nor fundamentally unfair."<sup>98</sup> The court, like the Third Circuit, expressly declined to adopt a nexus requirement.<sup>99</sup> The court held that since the vessel was registered by a country that consented to the application of United States law, the action was not arbitrary nor fundamentally unfair.<sup>100</sup> The flag nation's consent eliminates any concern that U.S. prosecution will be arbitrary or fundamentally unfair.<sup>101</sup> Accordingly, personal jurisdiction was established.

In *U.S. v. Martinez-Hidalgo*,<sup>102</sup> the defendant was charged with possession of cocaine on the high seas with intent to distribute in violation of Maritime Drug Law Enforcement Act.<sup>103</sup> The defendant alleged the statute did not apply to him because he was a nonresident alien on a foreign vessel located outside United States waters.<sup>104</sup> Specifically, he argued there was an insufficient nexus between his activi-

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93. Chomski, *supra* note 11, at 442–43.

94. *Id.* at 449–50. *See also Ibarguen-Mosquera*, 634 F.3d at 1378–79 n.4 (discussing the "objective" principle where Congress may criminalize behavior that has a "nexus" to the United States, citing Section 18 of the Restatement (Second) of Foreign Relations in support).

95. 168 F.3d 548, 551 (1st Cir. 1999).

96. *Id.* at 552.

97. *Id.* at 553.

98. *Id.*

99. *Cardales*, 168 F.3d at 553 ("We decide today that due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants.").

100. *Id.*

101. *Id.* at 552.

102. 993 F.2d 1052 (3d Cir. 1993).

103. 46 U.S.C. § 70503(a) (2016) (formerly cited as 46 U.S.C. §1903(a) (Supp. 1992)); *Martinez-Hidalgo*, 993 F.2d at 1053.

104. *Martinez-Hidalgo*, 993 F.2d at 1053.

ties and the United States to sustain the district court's jurisdiction.<sup>105</sup> The Third Circuit found that punishing persons apprehended with narcotics on the high seas was not "fundamentally unfair."<sup>106</sup> However, the court was not suggesting that Congress yields unlimited power to subject conduct on the high seas to United States prosecutions.<sup>107</sup> Rather, the court acknowledged "there might be a due process problem if Congress provided for the extraterritorial application of United States law to conduct on the high seas without regard for a domestic nexus if that conduct were generally lawful throughout the world."<sup>108</sup>

The Third Circuit has made clear that by rejecting the "sufficient nexus" due process approach, it is also rejecting the relevance of civil personal jurisdiction principles.<sup>109</sup> However, the Supreme Court has derived the relevant personal jurisdiction principles from both civil and criminal cases and has never suggested that criminal defendants are entitled to less due process.<sup>110</sup> These circuits do not require a nexus to be established to comport with Due Process, but instead focus on fairness grounded in principles of international law.<sup>111</sup>

#### *E. Confronting a New Due Process Test: Worldwide Reliance and United States v. Hayes*

Established "minimum contacts" principles have traditionally been utilized in the civil context as opposed to criminal. Recently in *United States v. Hayes*, the court used the "sufficient nexus" test in a financial crime case.<sup>112</sup> The codefendants allegedly conspired to commit wire fraud by manipulating the London Interbank Offered Rate (LIBOR) by presenting false and misleading submissions to the British Banker's Association. The codefendants allegedly attempted to increase the profitability of their trading positions to the detriment of other institu-

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105. *Id.*

106. *Id.* at 1056.

107. *Id.*

108. *Id.*

109. See *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) ("Perez-Oviedo's reference to cases such as *International Shoe Co. v. Washington* and *Asahi Metal Industry Co., Ltd. v. Superior Court of California* is unavailing, for those cases, which deal with non-resident corporations subject to liability for placing goods in the steam of commerce of another state, are inapposite.").

110. Petition for Writ of Certiorari at 15, *Darin v. United States*, 137 S. Ct. 1223 (2017) (No. 16-564), 2002 WL 6276644.

111. See generally Chomski, *supra* note 11, at 432-43.

112. 99 F. Supp. 3d 409 (S.D.N.Y. 2015).

tions, at least one of which was located in New York.<sup>113</sup> The resulting rate was widely published.<sup>114</sup>

One of the codefendants, Darin, was a Swiss citizen living in Japan at the time of the alleged offense.<sup>115</sup> He sought to dismiss the complaint because it violated his Fifth Amendment right to due process.<sup>116</sup> Darin argued that, “as a foreign national charged with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country, he lack[ed] a sufficient nexus to the United States and did not have constitutionally adequate notice that his alleged conduct was criminal.”<sup>117</sup> Darin further argued the guarantee of due process is absent because “the aim of his activity was not to cause harm inside the United States or to any U.S. citizens or interests.”<sup>118</sup>

The court disagreed and found the codefendants conspired to manipulate the LIBOR for Yen and were aware that it would be published in the United States.<sup>119</sup> Based on a worldwide reliance theory the court held the defendant “was aware that such trades would likely have counterparties in the United States and particularly in a center of international finance like New York.”<sup>120</sup> The court noted that whether he intended to harm the United States was not dispositive.<sup>121</sup> Disregarding minimum contacts jurisprudence, the court concluded a sufficient nexus existed between Darin and the United States to satisfy due process because Darin’s conduct affected the overall Yen LIBOR fixings.<sup>122</sup>

#### *F. Financial Crimes and their Relation to Fifth Amendment Due Process*

A clear standard regarding the scope of Fifth Amendment protection in criminal cases against foreign defendants is necessary to guide prosecutors in combating the growth of financial crimes.<sup>123</sup> The DOJ

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113. *Id.* at 412.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Hayes*, 99 F. Supp. 3d at 412 (quoting Def. Memo. at 1–2.)

118. *Id.* at 422–23.

119. *Id.* at 422.

120. *Id.*

121. *Id.* (“[A] substantial intended effect in or on the United States is sufficient but not necessary’ to satisfy the Fifth Amendment.”) (quoting *United States v. Yousef*, No. S3 08 Cr. 1213(JFK), 2010 WL 3377499, at \*4 (S.D.N.Y. Aug. 23, 2010)).

122. Petition for Writ of Certiorari, *supra* note 110, at 11.

123. Christina Jackson, *Combating the New Generation of Money Laundering: Regulations and Agencies in the Battle of Compliance, Avoidance, and Prosecution in a Post-September 11*

has become increasingly interested in white collar cases against foreign defendants<sup>124</sup> due to the proliferation of financial crimes in recent years.<sup>125</sup> The FBI's Financial Crimes Section experienced a thirty-seven percent increase in corporate crimes cases from 2007 to 2011, a fifty-one percent increase in securities and commodities fraud cases, and a 124% increase in mortgage fraud cases.<sup>126</sup>

U.S. citizens are expected to comply with thousands of laws and regulations.<sup>127</sup> As a result of the increasing breadth of U.S. jurisdiction, foreign defendants too must now consider whether they are complying with these laws and regulations.<sup>128</sup> The prosecution of white collar crimes is at the top of the DOJ's Criminal Division's priority list.<sup>129</sup> As white collar investigations expand across the globe the DOJ increasingly locates and prosecutes foreign defendants.<sup>130</sup> The DOJ's

*World*, 4 J. HIGH TECH. L. 139, 139 (2004) ("Increasing globalization, the opening of markets, and the proliferation of both officially sanctioned and underground financial networks have contributed to an exponential growth" of financial crimes, including a variety of white collar crimes.).

124. Hogan Lovells, *When do White Collar Criminal Statutes Apply to Extraterritorial Conduct?*, LEXOLOGY (Apr. 7, 2015), <http://www.lexology.com/library/detail.aspx?g=de76eaf9-3f09-4d12-be20-67f48a3c37fc>. This is evidenced by an increase in enforcement of the Foreign Corrupt Practices Act (FCPA) and more frequent investigations into high profile criminal cases in the automotive and banking industries. *Id.*

125. *Id.*; Leslie R. Caldwell, Assistant Attorney Gen., Criminal Div., Dep't of Justice, Remarks at the Securities Enforcement Forum West Conference (May 12, 2016), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-securities-enforcement>; *White Collar Crime Statistics*, ONLINE LAWYER SOURCE, <http://www.onlinelawyersource.com/white-collar/statistics/> (last visited Nov. 25, 2016).

126. *Financial Crimes Report 2010-2011*, FED. BUREAU OF INVESTIGATION, (the fiscal years 2010-2011 represent calendar dates Oct. 1, 2009 through Sept. 30, 2011), <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011>. For a discussion on white collar crimes, see generally Cliff, *supra* note 26. For a discussion on the financial effects on white-collar crimes, see Graham, *supra* note 15, at 11, 16 (The amount of money the U.S. government pays out to prosecute white collar crime is about \$252 million each year. Businesses worldwide lose approximately \$221 billion a year in fraud. The rough estimate of money that is stolen, embezzled or misrepresented is about \$300 billion.).

127. Radley Balko, *The Power of the Prosecutor*, THE HUFFINGTON POST (March 18, 2013) [http://www.huffingtonpost.com/2013/01/16/the-power-of-the-prosecut\\_n\\_2488653.html](http://www.huffingtonpost.com/2013/01/16/the-power-of-the-prosecut_n_2488653.html).

That isn't possible of course. It would probably take you most of the year to understand them all, at which point you'd have the next year's batch of new laws to learn . . . . Worse, while we citizens can go to prison for unwittingly breaking laws of which we weren't aware, prosecutors and law enforcement officers who wrongly arrest, charge, and try citizens based on a misunderstanding of the law generally face no sanction or repercussions.

*Id.*

128. *See id.*

129. Lauren Briggerman, *DOJ is Losing the Battle to Prosecute Foreign Executives*, LAW 360 (Mar. 3, 2015, 10:40AM), <http://www.law360.com/articles/626482/doj-is-losing-the-battle-to-prosecute-foreign-executives>.

130. *Id.*

Antitrust Division has stated its goal is to ensure culpable foreign nationals, just like United States coconspirators, serve sentences for violating United States laws.<sup>131</sup> DOJ investigations have led to the conviction of American, Swiss, German, Canadian, and Japanese firms—including a number of top executives who have served jail sentences.<sup>132</sup> While prosecution of white collar crime may be increasing, this should not result in the destruction of fundamental constitutional guarantees of due process.

### III. ANALYSIS: CONSTITUTIONAL DUE PROCESS GUARANTEES IN THE PROSECUTIONS OF FOREIGN DEFENDANTS

This Part discusses the differences between the circuit courts' jurisdictional analysis involving foreign defendants. First, this Part analyzes the "sufficient nexus" test in light of its similarities to the "fundamentally unfair" test, and argues the circuit court split is illusory. Second, this Part discusses the emerging worldwide reliance theory from *United States v. Hayes* and analyzes it in relation to relevant civil personal jurisdiction principles. Third, this Part argues a stricter standard is necessary in criminal cases, specifically in the context of financial crimes. Ultimately, this Part proposes that U.S. Courts implement a "minimum contacts" standard in order to assert personal jurisdiction over foreign criminal defendants and argues applying anything less is a violation of the Fifth Amendment.

#### A. *An Analysis of the Current Due Process Standard*

The seven Federal Appellate Courts that have considered the issue of the appropriate due process standard for noncitizens prosecuted for criminal acts committed entirely outside of the United States are split into two camps.<sup>133</sup> The circuits all agree that the extraterritorial application of United States law to foreign nationals cannot be arbitrary or fundamentally unfair.<sup>134</sup> However, the circuits disagree on what is "arbitrary or unfair."<sup>135</sup> The Second, Fourth, and Ninth Circuits evaluate fundamental fairness by looking to connections between the United States and the defendant's conduct and the U.S. interests that

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131. *Id.* See also *Criminal Program Update 2015*, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, <https://www.justice.gov/atr/division-update/2015/criminal-program-update> ("Last year, the Division secured the first ever extradition on an antitrust charge.").

132. *Antitrust Enforcement and the Consumer*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/file/800691/download>.

133. Chomski, *supra* note 11, at 430.

134. Kelly, *supra* note 13, at 25.

135. *Id.*

arise from those contacts.<sup>136</sup> The First, Third, Fifth, and Eleventh Circuits evaluate fundamental fairness by focusing on notice. Accordingly, these circuits look to whether international law provided the defendant with a fair warning that he could be compelled to defend himself in a United States court.<sup>137</sup> The *Brehm* factors illustrate how courts on both sides of the circuit split analyze whether the Due Process Clause can be satisfied.<sup>138</sup> The *Brehm* factors include:

- (1) the defendant's actual contacts with the United States, including his citizenship or residency; (2) the location of the acts allegedly giving rise to the alleged offense; (3) the intended effect a defendant's conduct has on or within the United States; and (4) the impact on significant United States interests.<sup>139</sup>

Courts often fail to provide a clear statement of the test used to determine whether jurisdiction is consistent with due process and the opinions often lack the clarity necessary to provide guidance for lower courts.<sup>140</sup> The fourth *Brehm* factor seems to be all encompassing, the upshot being that all foreign conduct can at some point affect U.S. interests. However, U.S. interests should not dictate a foreign defendant's procedural rights.<sup>141</sup> If this were so, due process would be satisfied in virtually every case because the United States can always assert an interest in federal prosecution.<sup>142</sup> This can result in overzealous prosecutions and the United States "turning federal courts into international law enforcement arenas."<sup>143</sup>

It is apparent that a foreign national who directs, or intends to direct, his conduct towards the United States should reasonably foresee the possibility of being prosecuted by the U.S. government. However, it is far less apparent that every foreign national should be reasonably aware that his conduct threatens United States interests.<sup>144</sup> This is because the United States has "complex and cross-cutting strategic interests in every corner of the globe."<sup>145</sup> The entanglement of U.S.

136. *Id.*

137. *Id.*

138. Chomski, *supra* note 11, at 444. See also Edward F. Roche, *Due Process by Proxy: United States v. Brehm and the Problem of Extraterritorial Jurisdiction over Foreign Nationals*, 91 N.C. L. REV. 1463, 1473-76 (2013).

139. *Id.* at 444 (citing *Brehm*, 2011 WL 1226088, at \*4). See also Roche, *supra* note 138, at 1474, 1477.

140. Roche, *supra* note 138, at 1474.

141. *Id.* at 1481.

142. *Id.*

143. *Id.* For example, in terrorism prosecutions, "United States courts are trying people who were not targeting the United States, are not from the United States, and before their court cases, had never set foot in the United States." *Id.*

144. Kelly, *supra* note 13, at 30.

145. *Id.*

interests and global finance is complex and the current jurisdictional tests provide little guidance for U.S. prosecutors attempting to determine whether U.S. interests are sufficiently affected as to satisfy the fourth factor in *Brehm*. Accordingly, if U.S. prosecutors can reasonably struggle to infer whether the U.S. will exercise jurisdiction, how can a foreign defendant be expected to make this determination? Thus, the concept of fair warning can be elusive.

Despite the existence of a long-standing circuit split, the difference in the approaches is marginal. Accordingly, the application of the “sufficient nexus” and “neither arbitrary nor fundamentally unfair” standards often differ very little.<sup>146</sup> Courts have taken note, stating that the difference between the two standards is “less real than apparent; the existence of a nexus is what makes the prosecution neither arbitrary nor fundamentally unfair.”<sup>147</sup> Both sides of the split use similar reasoning when determining whether extraterritorial application of a statute is consistent with due process.<sup>148</sup> Commentators have even argued that:

[T]he nexus test is actually a variation of the notice test because, in looking to whether a foreign national voluntarily affiliated himself with the United States by committing an extraterritorial act that did, does, or will have some impact on the United States, the nexus test ensures that the alien defendant had fair warning that the United States could prosecute him for his conduct.<sup>149</sup>

In *United States v. Klimavicius-Violaria*, the district court found the requirements for due process were satisfied because the defendant intended to affect the United States and its interests abroad.<sup>150</sup> Similarly, in *United States v. Cardales*, the court found prosecution was “neither arbitrary nor fundamentally unfair” because American interests abroad were compromised.<sup>151</sup> The 20-year-old circuit court split is illusory because courts apply the same criteria to determine whether a “sufficient nexus” exists or whether the prosecution is neither “arbitrary nor fundamentally unfair.”<sup>152</sup>

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146. Chomski, *supra* note 11, at 444.

147. *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 728–29 n.9 (E.D. Va. 2003) (comparing the “nexus” standard utilized in the Ninth Circuit against the “neither arbitrary nor fundamentally unfair” standard utilized in the First, Third, and Fifth Circuits).

148. Chomski, *supra* note 11, at 444–48.

149. Kelly, *supra* note 13, at 26. See also *Al Kassar*, 660 F.3d at 119 (“The idea of fair warning is that ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’”) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)); Colangelo, *supra* note 77, at 166 (arguing that “[t]he nexus requirement merely functions to ensure that the criteria [of the notice requirement] are met”).

150. *Klimavicius-Violaria*, 144 F.3d at 125.

151. *Cardales*, 168 F.3d at 553.

152. Chomski, *supra* note 11, at 429–31.

Further, the criteria these courts use for due process analysis is equivalent to the determination that “minimum contacts” exist in a civil context.<sup>153</sup> In civil cases, jurisdiction is proper if the defendant purposely took advantage of the forum state, if the cause of action arises out of the defendant’s contacts with the forum state, and there is a substantial connection to the forum state ensuring jurisdiction will not be unreasonable.<sup>154</sup> The question for purposes of both the criminal “sufficient nexus” test and for civil personal jurisdiction is whether a defendant should reasonably anticipate being haled into court in this country. When the Supreme Court first articulated the “minimum contacts” test in *International Shoe*, it relied on a criminal case that considered whether a U.S. citizen who resided abroad could be haled into a U.S. court.<sup>155</sup>

If the plaintiff in *International Shoe* had argued the defendant’s actions in another state, not the forum state, merely had some minor effect on the economy, surely that would not be sufficient to establish jurisdiction over defendant. In the civil context, this reliance interest would not be available to establish jurisdiction over defendants who did not aim any conduct at that state because there was no real or actual effects occurring in that state. The Plaintiff would fail to satisfy the “minimum contacts” test in civil context because the defendant would have no “ties, contacts or relations” to that state.”<sup>156</sup> Thus, it should not be enough in the criminal context as well, where greater due process protection is required.

### B. *The Worldwide Reliance Theory and the Need for “Minimum Contacts”*

Historically, for both civil and criminal cases, courts exercised jurisdiction over those parties who were physically before the court.<sup>157</sup> Courts have relaxed this requirement in the civil context, asserting jurisdiction over persons with certain connections with the forum state.<sup>158</sup> The jurisdiction problem in the criminal context is most serious.<sup>159</sup> The power of criminal courts is strictly localized, lacking the flexibility afforded to civil courts by the doctrine of personal jurisdic-

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153. *Id.* at 457–58.

154. *Id.* at 458 (citing *Schneider v. Hardesty*, 669 F.3d 693, 701–04 (6th Cir. 2012)).

155. *Blackmer v. United States*, 284 U.S. 421, 436–38 (1932).

156. *Int’l Shoe*, 326 U.S. at 316.

157. Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 10 (1996).

158. *Id.* (“[P]ersonal jurisdiction originally derived from physical control or custody over the defendant.”).

159. *Id.* at 4.

tion premised on “minimum contacts.”<sup>160</sup> In the criminal context, personal jurisdiction is still based on physical presence in the forum state, which is traditionally obtained through an arrest.<sup>161</sup> Furthermore, numerous countries, including the United States, guarantee defendants a right to be present.<sup>162</sup>

The issue of whether the United States can assert jurisdiction over a foreign defendant should begin with the question of “whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”<sup>163</sup> Respect for these principles is essential to avoid unreasonable interference with the sovereign authority of nations.<sup>164</sup> Under established due process principles governing personal jurisdiction, foreign defendants should not be haled into federal court based on a theory of “worldwide reliance”—the view that a defendant’s conduct was not aimed at the United States, but rather at the world generally.<sup>165</sup> The “sufficient nexus” and “fundamentally unfair” tests require at a minimum, that the domestic effect occurs as a direct and foreseeable result of the conduct outside the territory.<sup>166</sup> Under established “minimum contacts” principles governing personal jurisdiction, foreign defendants cannot be subjected to U.S. federal courts for foreign conduct aimed generally at world financial markets.<sup>167</sup>

In *United States v. Hayes*, the district court identified two allegations that established a sufficient nexus between the defendant, Darin,

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160. *Id.*

161. *Id.* at 35.

162. FED. R. CRIM. P. 43(a) (for the United States). The rule states: “[T]he defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impaneling and the return of the verdict; and (3) sentencing.” *Id.* See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235, 279–80 (1993) (noting that after surveying a non-exhaustive list of international instruments, the right to be tried in one’s own presence is guaranteed only by the International Covenant on Civil and Political Rights, and further noting that while nearly twenty five countries have this right enshrined in their national constitution, these constitutions also provide exceptions, such as when the accused flees the jurisdiction).

163. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

164. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). See also *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (“Punishing crimes committed on . . . foreign soil . . . is an intrusion into the sovereign territory of another nation.”).

165. Memorandum of Law in Support of Defendant Roger Darin’s Motion to Dismiss the Criminal Complaint at Part III.A.1–2, *United States v. Hayes*, 99 F. Supp. 3d 409 (S.D.N.Y. 2015 (No. 12 MJ 3229)), 2014 WL 10542903.

166. *Leasco Data*, 468 F.2d at 1341.

167. See Memorandum of Law in Support of Defendant Roger Darin’s Motion, *supra* note 165, at Part III.A.3.

and the United States: (1) Darin used United States wires to cause the publication of manipulated interest rate information in New York, and (2) Darin's coconspirator, Hayes, had ample connections to the United States including trades with a counterparty based in New York.<sup>168</sup> Neither of these two allegations begins to establish "minimum contacts" sufficient to assert jurisdiction between Darin and the United States.<sup>169</sup> The first allegation implies that Darin could be subjected to personal jurisdiction in *any* country whose citizen had purchased Libor-related products.<sup>170</sup> This worldwide reliance is foreseeable but does not constitute a basis of personal jurisdiction in agreement with due process. The second allegation fails to state a "sufficient nexus" because it relies on contacts of a co-conspirator.<sup>171</sup> However, due process is a threshold standard that demands fairness to each individual defendant—each defendant's contacts must be assessed individually.<sup>172</sup> Due process should depend on the contacts Darin himself created with the forum state.<sup>173</sup> The court failed to recognize that in the criminal context, the "sufficient nexus" requirement is parallel to the "minimum contacts" requirement in the civil context. Both protect defendants due process interests and, if anything, the "sufficient nexus" requirement should be more protective than its civil counterpart.

Additionally, the District Court brushed aside the similarities to *Leasco Data* and "minimum contacts."<sup>174</sup> The facts in *Hayes* are virtually identical to *Leasco*: both defendants were alleged to have manipulated a piece of financial information outside the United States that was then published worldwide, including in the United States.<sup>175</sup> The court in *Hayes*, like the plaintiffs in *Leasco Data*, reasoned that the defendant

was aware that the Yen LIBOR was published in the United States, and it is a reasonable inference from the Complaint that, as a trader in short-term interest rates, he was aware that such trades would

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168. *Hayes*, 99 F. Supp. 3d at 422.

169. Memorandum of Law in Support of Defendant Roger Darin's Motion, *supra* note 165, at Part III.A.3.

170. *Id.* at III.B.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Hayes*, 99 F. Supp. 3d at 424 n.4.

175. *Leasco Data*, 468 F.2d at 1330–33; *Hayes*, 99 F. Supp. 3d at 411–12.

likely have counterparties in the United States and particularly in a center of international finance like New York.<sup>176</sup>

But this reasoning means Darin could be subjected to personal jurisdiction in any country where a citizen purchased Libor-related products.<sup>177</sup> If true, anyone in the world dealing with financial transactions must assume they can be subjected to the laws of the United States, and conversely, anyone in the United States then must assume they could be subjected to the laws of any other country.<sup>178</sup> This contradicts the fundamental guarantee that all criminal proceedings will be fair and the defendant will be given notice, and an opportunity to be heard, before the government acts to take away one's liberty.<sup>179</sup>

Accordingly, due process is violated if a court exercises jurisdiction over a defendant, unless the defendant's conduct is directed at the United States, as opposed to the world at large.<sup>180</sup> The crime must arise out of the defendant's contacts with the United States, or the United States financial market, and the defendant must have a sufficiently substantial connection to the United States so that asserting jurisdiction is reasonable.<sup>181</sup> A foreign actor trading Yen in Japan does not have a substantial connection to the United States. It cannot be said that a foreign actor's crime, not aimed at the United States but rather aimed at the global financial market, is sufficient to constitute "minimum contacts" with the U.S. If a court applies the reasoning from *Hayes*, a foreign actor could be haled into a United States court for manipulating finances that affect the world at large, but that had minimal or no effect on the United States.

Throughout *Hayes*, the court resisted any comparison of the criminal "sufficient nexus" test and civil "minimum contacts" principles, yet many cases recognize the relationship between the two stan-

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176. *Hayes*, 99 F. Supp. 3d at 422. In *Leasco Data*, the court reasoned that that defendant "must have known that its reports on Pergamon would be relied on by anyone interested in buying Pergamon shares," including in the United States. 468 F.2d at 1342.

177. Memorandum of Law in Support of Defendant Roger Darin's Motion, *supra* note 165, at Part III.A.3. (quoting *Leasco Data*, 468 F.2d at 1342).

178. *Id.*

179. U.S. CONST. amend. XIV § 1 provides:

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 offense 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.

180. Petition for Writ of Certiorari, *supra* note 110, at 1.

181. *See generally Int'l Shoe*, 326 U.S. at 316–17.

dards.<sup>182</sup> Both standards address the same basic question: when may a person in one country be subject to the laws of another? The major flaw in *Hayes* is the court's refusal to recognize the similarities of the due process principles in the civil and criminal context.<sup>183</sup> Criminal defendants are not entitled to any lesser standard of due process than civil defendants. To the contrary, the Supreme Court has expressly stated that "due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation."<sup>184</sup> Rejecting the relevance of the "minimum contacts" test, the court concluded Darin's prosecution did not violate due process.<sup>185</sup> The only allegation against Darin was that he conspired to alter USB's Yen Libor submission, which in turn affected the overall Yen Libor fixings.<sup>186</sup> As a trader in Japan, he did not intend to harm the United States. Further, as a foreign citizen, Darin did not have ties, contacts or relations with the United States. If the court applied civil personal jurisdiction principles it would have been compelled to dismiss the case because the complaint failed to allege "minimum contacts" between Darin and the United States.<sup>187</sup> Courts have already applied this standard in the civil cases and should have no apprehensions with extending it to the criminal context.

Understanding the importance of "minimum contacts" and due process is the key to resolving the circuit court split regarding the appropriate due process standard for foreign defendants charged with financial crimes. Due process is a threshold standard that demands fairness to the defendant and depends on "contacts the defendant *himself* creates with the forum State."<sup>188</sup> The question—both for the criminal "sufficient nexus" test and for the civil "minimum contacts" test—is whether the defendant should reasonably anticipate being

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182. For cases relying on minimum contacts principles, see, *Mohammad-Omar*, 323 F. App'x at 261; *United States v. Zakharov*, 468 F.3d 1171, 1177 (9th Cir. 2006); *United States v. Perlaza*, 439 F.3d 1149, 1168 (9th Cir. 2006); *United States v. Moreno-Morillo*, 334 F.3d 819, 829 n.8 (9th Cir. 2003); *Yousef*, 327 F.3d at 111–12; *Klimavicius-Viloria*, 144 F.3d at 1257; *Davis*, 905 F.2d at 249 n.2 (relying on international law jurisdictional principles "as a rough guide of whether a sufficient nexus exists"); *United States v. Sidorenko*, 102 F. Supp. 3d 1124, 1133 (N.D. Cal. 2015); *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010).

183. *Hayes*, 99 F. Supp. 3d at 424 n.4.

184. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

185. *Hayes*, 99 F. Supp. 3d at 422 n.4.

186. *Id.* at 412.

187. Petition for Writ of Certiorari, *supra* note 110, at 19–20. The complaint failed to allege "minimum contacts" between him[self] and the United States, and this failure "is underscored by the fate of civil complaints that have involved essentially the same allegations. *Id.*"

188. *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis in original) (internal quotations omitted).

haled into court.<sup>189</sup> When the connection between a defendant's actions and the United States is merely "worldwide reliance," a U.S. court should not have jurisdiction. Jurisdiction should be reserved for countries that have a sufficient nexus with the defendant.

A stricter standard that provides more protection for the due process rights of foreign defendants charged with financial crimes is necessary. A "minimum contacts" test that focuses "on the conduct, connections, knowledge, and intent of the offender" will ensure foreign prosecutions comport with due process and fundamental fairness.<sup>190</sup> Federal courts should not exercise jurisdiction over a foreign defendant until it is established that the defendant had sufficient "minimum contacts" with the United States.

### C. A Stricter Due Process Standard in the Global Financial Market

Bringing criminals to justice ensures the world is safe, orderly, and fair. However, in this pursuit of justice certain fundamental guarantees must be protected, especially due process. Therefore, courts should consider whether a foreign defendant facing criminal charges has sufficient "minimum contacts," such that it is reasonable and fair to hale a defendant into a foreign court when the conduct was not intentionally aimed at that forum.

A foreign national should anticipate prosecution in the United States if he provides support to a terrorist organization that threatens U.S. interests.<sup>191</sup> Similarly, a foreign national should reasonably anticipate being prosecuted by the U.S. government if he distributes arms or drugs that end up in the United States or affect United States' interests.<sup>192</sup> The protection of United States national security interests is a sound justification for asserting jurisdiction over foreign defendants. In these instances, "convenience and the defendant's burden should play little to no role in the jurisdictional analysis . . . while state interests must play a greater role."<sup>193</sup> Thus, in many cases, "it cannot be argued seriously that the defendant's conduct was so unrelated to American interests as to render their prosecution in the United States [unreasonable or] arbitrary."<sup>194</sup> Defendants should be on notice and reasonably foresee the application of U.S. law when their conduct di-

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189. Memorandum of Law in Support of Defendant Roger Darin's Motion, *supra* note 165, at Part III.A.1.

190. Chomski, *supra* note 11, at 460.

191. Kelly, *supra* note 13, at 30.

192. *See id.*

193. Parrish, *supra* note 8, at 55.

194. Roche, *supra* note 138, at 1491 (quoting *Yousef*, 327 F.3d at 112).

rectly threatens the United States.<sup>195</sup> However, there must be constraints.

An individual who participates in a financial conspiracy should not face criminal charges from a nation that was not significantly impacted by the conduct. Otherwise, globalization and financial interdependence would destroy the due process rights of foreign defendants that have committed crimes affecting global finance. For financial crimes defendants should be required to have sufficient contacts with the forum to make haling them into a U.S. court reasonable. A “minimum contacts” analysis would provide guidance for federal prosecutors and, conversely, prevent overzealous prosecutions.<sup>196</sup>

The aforementioned circuit split creates confusion and provides minimal guidance to prosecutors. This lack of guidance allows, or perhaps encourages, prosecutors to continue to aggressively pursue the prosecution of international financial crimes.<sup>197</sup> The Supreme Court has asserted the government’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>198</sup> This has provided prosecutors with great power. Thus, even if investigations do not lead to formal charges, the investigations can still ruin the defendant’s life and reputation.<sup>199</sup>

White collar investigations now span the globe and as a result the DOJ continues to work aggressively to investigate and prosecute criminal fraud in the financial market, at home and abroad.<sup>200</sup> Thus, it is not surprising that the DOJ’s Antitrust Division has stated it is committed to ensuring culpable foreign nationals face the consequences for violating United States laws.<sup>201</sup> Additionally, the imposition of unprecedented fines against foreign firms and jail sentences against foreign nationals sends a powerful message to potential violators that the United States is committed to vigorous antitrust enforcement, regardless of where the participants are located.<sup>202</sup>

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195. *Id.*

196. Chomski, *supra* note 11, at 460.

197. Lovells, *supra* note 124.

198. *Berger v. United States*, 295 U.S. 78, 88 (1935).

199. Balko, *supra* note 127.

200. U.S. DEP’T OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, JUSTICE NEWS (2016), <https://www.justice.gov/opa/pr/global-head-hsbc-s-foreign-exchange-cash-trading-desks-arrested-orchestrating-multimillion>

201. *Criminal Program Update 2015*, *supra* note 131 (“Last year, the Division secured the first ever extradition on an antitrust charge.”). DOJ investigations have led to the conviction of American, Swiss, German, Canadian, and Japanese firms—including a number of top executives who have served jail sentences. *Id.*

202. Briggerman, *supra* note 136; *Criminal Program Update 2015*, *supra* note 131.

The DOJ has prioritized forming strong alliances with its international enforcement partners to combat cross-border financial crime.<sup>203</sup> The alliances are prioritized because “[t]here are huge ripple effects that stem from a white collar crime, such as job loss, stock price drops, consumer price increases, court costs, and jail time after conviction, never mind the actual cost of the crime itself.”<sup>204</sup> The unclear due process standard “presents a concerning jurisprudential gap—especially as the [DOJ] increases the number and scope” of white collar prosecutions across borders.<sup>205</sup> The United States is pushing for legislation to protect our nation and its markets—but at what cost?<sup>206</sup>

While adopting the “minimum contacts” standard would not be a sizeable change, it would require courts to consider well-developed Supreme Court precedent to clear up any inconsistencies.<sup>207</sup> A “minimum contacts” test for extraterritorial conduct would introduce a flexible standard that comports with due process.<sup>208</sup> Prosecution of foreign defendants without substantial connection and sufficient contacts to the United States should be viewed as a violation of the Fifth Amendment Due Process Clause.

#### IV. IMPACT: THE COST OF WHITE COLLAR CRIME AND THE CONSEQUENCES OF DIMINISHING DUE PROCESS PRINCIPLES

Our society is constantly changing and the standards courts use to safeguard constitutional principles should change as well. Advancements in technology continue to shrink the world, which has drastically changed how we think about personal jurisdiction.<sup>209</sup> Just as interstate travel and communications between corporations forged the way for the “minimum contacts” test in *International Shoe*, the increase of global financial markets can provide an opportunity to clarify what is sufficient to exercise jurisdiction over white-collar foreign defendants. Equally important is the need to put defendants on notice before they can be prosecuted. This Part discusses the effects of prosecuting foreign defendants who have little or no connections to the United States and the impact this can have on firmly established constitutional rights.

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203. Caldwell, *supra* note 125.

204. Graham, *supra* note 15, at 2–3.

205. Chomski, *supra* note 11, at 451.

206. *Policing the Net*, CBS NEWS (Nov. 22, 2001, 9:46 AM), <http://www.cbsnews.com/news/policing-the-net/>

207. Chomski, *supra* note 11, at 459.

208. *Id.*

209. Swedlow, *supra* note 1, at 347.

Foreign nationals are entitled to the same safeguards of the Constitution as U.S. citizens including the guarantee not to be deprived of their “rights of person and of property.”<sup>210</sup> Accordingly, “the overriding factor in determining whether jurisdiction attaches should be fairness to the defendant.”<sup>211</sup> The more the defendant is aware that criminal conduct will reach the United States, the greater the argument that personal jurisdiction is reasonable.<sup>212</sup> The concept of personal jurisdiction is static; it must be examined against a backdrop of changing societal and technological advances.<sup>213</sup> “Any court not recognizing or responding to the imperatively evolutionary nature of . . . personal jurisdiction” in an increasingly-connected world “runs the risk of applying outdated standards and imposing injustice.”<sup>214</sup> In civil cases, it is settled law that foreign defendants may appear through counsel and contest personal jurisdiction.<sup>215</sup> However, according to decisions from the seven circuits that have considered the issue, “the only way a foreign defendant can assert their the Fifth Amendment rights is by voluntarily traveling to the United States and submitting themselves to the jurisdiction of a federal court.”<sup>216</sup> The result is that foreign actors are often wrongfully subjected to the jurisdiction of the United States.<sup>217</sup>

This injustice is at its pinnacle when foreign defendants are prosecuted for financial crimes that have no connection to the United States. As shown in *Hayes*, a defendant’s only option is to travel to the United States and subject himself to United States federal jurisdiction.<sup>218</sup> This outcome is undeniably unfair because the defendant’s argument is that the Fifth Amendment prohibits the government from forcing him to appear in court.<sup>219</sup> When foreign defendants are deemed fugitives and courts are unwilling to apply appropriate due process standards, there is no check on the government’s decision to extend United States criminal law into the international field.<sup>220</sup> This result undermines the protections afforded by the Due Process

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210. *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893).

211. Nicol, *supra* note 71, at 359 (quoting David C. Tunick, *Up Close and Personal: A Close-Up at Personal Jurisdiction*, 29 CREIGHTON L. REV. 1157, 1232 (1996)).

212. *Id.*

213. *Id.* at 313.

214. *Id.*

215. *Petition for Writ of Certiorari*, *supra* note 110, at 22 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412, 418–19 (1984)).

216. *Id.* at 23.

217. *See id.* at 9.

218. *Id.* at 4–5.

219. *Id.*

220. *Id.* (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987)).

Clause.<sup>221</sup> The diminishment of these due process principles means both citizens and noncitizens will lose important constitutional rights. If the government can charge a certain defendant with only tangential ties to the United States, it can “sweep up foreign nationals anywhere in the world based on nothing more than a claim that the U.S. is among the nations affected.”<sup>222</sup> Plainly, the Constitution does not permit this extension of United States law to financial activity that occurs overseas.<sup>223</sup>

Although it is impossible to calculate the total cost of white collar crimes and its effects, their impact on business and society warrant a more proportional resource allocation in the future.<sup>224</sup> When a company closes due to white collar prosecution, employees lose jobs, investors lose money, and customers are penalized.<sup>225</sup> However, securities crimes are an international problem and the DOJ is attempting to solve this problem by “prosecuting complex, international cases with difficult legal issues.”<sup>226</sup> But the DOJ’s focus on securities crime has resulted in it taking on the role as the world’s police force.<sup>227</sup> In this context, the risk of prosecutorial overreach is too great. Prosecutors often prosecute crimes involving minimal domestic conduct or effect.<sup>228</sup> While it is important to combat the disastrous effects of international white collar crime, the United States government must do so while obeying the constitution.

This circuit split erodes the fundamental procedural fairness derived from the Due Process Clause. Prosecutors should not be allowed to rely on a theory of worldwide reliance for establishing jurisdiction over foreign defendants, especially in the financial context. Worldwide reliance is an insufficient connection to the United States and cannot provide the basis for personal jurisdiction. Foreign defendants must have “minimum contacts” with the United States before they can be brought into a U.S. court.

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221. Petition for Writ of Certiorari, *supra* note 110, at 34.

222. Memorandum of Law in Support of Defendant Roger Darin’s Motion, *supra* note 165, at Part IV.

223. *Id.*

224. Graham *supra* note 15, at 3.

225. *Id.* at 2. The U.S. government has a hard time measuring the total cost of white collar crime, thus, the numbers measuring white collar crime fall all over the map, from \$44 billion per year to \$600 billion. *Id.* at 11.

226. Caldwell, *supra* note 125.

227. *Id.* (quoting Karen J. Greenberg, Director, Ctr. on Nat’l Security, Fordham University School of Law).

228. Lovells, *supra* note 124.

## V. CONCLUSION

The prosecution of foreign defendants that lack sufficient contacts with the United States directly conflicts with the protections afforded by the Due Process Clause. These constitutional rights are fundamental entitlements that cannot be jeopardized no matter where the defendant resides. Circuit courts have disagreed on the appropriate due process standard to apply to foreign defendants in the criminal context. Neither the “sufficient nexus” standard nor the “neither arbitrary nor fundamentally unfair” standard should be sufficient to prosecute a foreign defendant when his conduct was not aimed at the United States. Because greater due process protection is required in the criminal context, U.S. prosecutors should not be able to rely on worldwide reliance to compel a foreign defendant to defend himself in a U.S. court for committing a financial crime. To comport with due process the defendant must aim or intend to aim his conduct at the United States in order to justify an assertion of personal jurisdiction.<sup>229</sup> Uncertainty within lower courts will continue to result in foreign defendants being unjustly compelled to defend themselves in U.S. courts.

To comport with fair play and substantial justice, a foreign defendant cannot be subjected to United States court’s jurisdiction solely because his conduct was aimed at the world in general. The potential for prosecutorial overreach is severe when there is no check on the United States government’s decision to overextend criminal laws. A “minimum contacts” test should be applied in the criminal context for foreign defendants to comply with the Fifth Amendment’s Due Process Clause.

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229. Memorandum of Law in Support of Defendant Roger Darin’s Motion, *supra* note 165.