

## Notes

# **IN SEARCH OF MONSTERS ABROAD: SERVING SUMMONSES ON FOREIGN ORGANIZATIONS UNDER RULE 4 AND FIFTH AMENDMENT DUE PROCESS**

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### ABSTRACT

*Recently, federal prosecutors' increased interest in criminally charging foreign organizational defendants has revealed a "jurisdictional gap" in Rule 4 of the Federal Rules of Criminal Procedure. Rule 4, which has operated largely unchanged since its adoption in 1944, requires that a copy of a compulsory summons be served on an organizational defendant by mailing it either to the defendant's "last known address" in the relevant district or to its "principal place of business elsewhere in the United States." The courts have divided over how to confront jurisdictional challenges brought by certain foreign corporations—those without domestic principal places of business and addresses—that appear to be legally incapable of receiving service. As it stands, the jurisdictional gap threatens to effectively immunize large swaths of illegality over which the United States would otherwise have jurisdiction. The Department of Justice and the Advisory Committee on Rules of Criminal Procedure have responded to this concern with dueling proposals to close Rule 4's jurisdictional gap.*

*This Note agrees that the jurisdictional gap should be closed, but in a narrowly fashioned manner. Relaxing the service regime for foreign*

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*organizational defendants too much may enable, for the first time, prosecutions of wholly extraterritorial conduct that would violate the Fifth Amendment's Due Process Clause. This Note sketches the contours of such a case, and concludes that any risk is best cabined by reasonably limited means of service under Rule 4 coupled with the responsible exercise of prosecutorial discretion.*

## INTRODUCTION

*America, in the assembly of nations, since her admission among them, has invariably, though often fruitlessly, held forth to them the hand of honest friendship, of equal freedom, of generous reciprocity. . . . But she goes not abroad, in search of monsters to destroy.*<sup>1</sup>

An ongoing contract dispute involving alleged violations of intellectual property and trade secrets against an American corporation by a Chinese state-owned enterprise has evolved into an extraterritorial federal criminal prosecution, garnering serious political attention. AMSC, formerly American Superconductor, has accused the Beijing-based Sinovel Wind Group (Sinovel) of offering an AMSC employee an employment contract worth more than \$1.5 million in exchange for illegally procuring protected source code for the operation of wind turbines.<sup>2</sup> The pirated software was then reimported for use in four wind turbines located mere miles from AMSC headquarters in Devens, Massachusetts, allegedly costing AMSC more than \$1 billion and forcing it to shrink its worldwide staff by five-hundred employees.<sup>3</sup>

Four civil suits based on this pirating were filed in China but stalled for years, and Chinese officials declined to prosecute.<sup>4</sup> The U.S. Department of Justice (DOJ) stepped in to indict Sinovel on charges of conspiracy, trade-secret violations, and wire fraud.<sup>5</sup> Secretary of State John Kerry, then the senior senator from

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1. John Quincy Adams, Sec'y of State, Speech to the U.S. House of Representatives on Foreign Policy (July 4, 1821) (transcript available at <http://millercenter.org/president/speeches/detail/3484>).

2. Press Release, AMSC, China's Sinovel Indicted in the United States for Stealing AMSC Trade Secrets (June 27, 2013), available at <http://ir.amsc.com/releasedetail.cfm?ReleaseID=774372>.

3. *Id.*

4. *Id.*

5. Indictment at 4, 10, United States v. Sinovel Wind Grp. Co., 3:13-cr-84 (W.D. Wis. filed June 27, 2013).

Massachusetts, characterized the controversy as “a mugging in broad daylight and a real test of China’s commitment to the rule of law.”<sup>6</sup> The Sinovel–AMSC incident, however, is not an isolated case. The U.S. International Trade Commission estimated that in 2009 alone, similar “muggings in broad daylight” by Chinese companies cost the U.S. economy \$50 billion and 900,000 jobs.<sup>7</sup>

Whatever the underlying merits of the DOJ’s charges in this case, an obscure procedural hurdle may prevent it and similar prosecutions from moving forward in federal court. Sinovel specially appeared to quash the government’s efforts to serve it process pursuant to Rule 4 of the Federal Rules of Criminal Procedure (Rule 4).<sup>8</sup> For organizational defendants, Rule 4 requires the government to personally serve an officer or agent and to mail a copy of the summons to the defendant’s “last known address within the district” or “its principal place of business elsewhere in the United States.”<sup>9</sup> In essence, Sinovel argued that its status as a foreign corporation, without a sufficient domestic footprint, immunized it from federal criminal proceedings because it was physically impossible for Sinovel to receive a copy of the summons pursuant to Rule 4’s current language.<sup>10</sup> After reviewing the “underdeveloped law” and “facts that point in both directions,” Magistrate Judge Crocker issued a ruling that will allow the case to move forward, but noted that the “court could justify a ruling in either direction.”<sup>11</sup> Highlighting its importance and complexity, Judge Crocker openly invited the appellate courts to provide guidance on this issue.<sup>12</sup> Similar arguments in recent cases have likewise troubled other courts and vexed prosecutors’ efforts to vindicate U.S. interests by bringing criminal actions against foreign

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6. Keith Johnson, *Chinese Wind Turbine Maker Indicted in U.S.: Sinovel Charged With Stealing Trade-Secrets From American Firm, Copyright Infringement*, WALL ST. J., June 28, 2013, at B2. Vice President Joe Biden, Senator Elizabeth Warren, former Secretary of State Hillary Clinton, former U.S. Trade Representative Ron Kirk, and former Acting Secretary of Commerce Rebecca Blank have also expressed their support for AMSC. Press Release, AMSC, *supra* note 2.

7. Johnson, *supra* note 6, at B2.

8. Brief for Defendant at 1, *Sinovel Wind Grp. Co.*, 3:13-cr-84.

9. FED. R. CRIM. P. 4(c)(3)(C).

10. *See* Brief for Defendant at 13–17, *Sinovel Wind Grp. Co.*, 3:13-cr-84 (arguing that Rule 4 precludes service on Sinovel).

11. *United States v. Sinovel Wind Grp. Co.*, 3:13-cr-84, at 1 (W.D. Wis. May 27, 2014) (order denying motion to quash service of process).

12. *See id.* (“Regardless which way this court rules on Sinovel China’s motion, the loser will appeal, perhaps generating some useful circuit case law on this point.”).

organizations.<sup>13</sup> In response to the DOJ's experiences, there are efforts currently pending to update Rule 4 to allow service to be made on foreign organizations whose conduct is subject to U.S. jurisdiction.<sup>14</sup>

This Note is the first piece of scholarship to address the jurisdictional gap in Rule 4 and to analyze the courts' mixed reactions to nonconforming attempts to effectuate service.<sup>15</sup> It is also the first work to evaluate the recent movement to revise Rule 4. Further, this Note contributes to a developing body of scholarship on Fifth Amendment due-process limits in criminal prosecutions of extraterritorial conduct<sup>16</sup> by assessing the unique challenges of prosecuting nonnatural persons. It also argues that potential due-process concerns are best framed as policy concerns of general prosecutorial overreach, which cannot be adequately cabined by Rule 4.

This Note proceeds in four parts. Part I provides an overview of the jurisdictional gap embodied in the language of Rule 4 and examines the courts' varied responses to defendants challenging the sufficiency of service of process. Part II details the DOJ's and the Advisory Committee on Rules of Criminal Procedure's (Advisory Committee's) proposed revisions to Rule 4 and analyzes their subtle, but critical, differences.<sup>17</sup> Part III explores the extraterritorial application of federal criminal law and its likely, but uncertain, limitations as a matter of Fifth Amendment due process. Part IV concludes that expanding service of process abroad will increase the likelihood that prosecutors will subject foreign organizational defendants to due-process violations; nevertheless, concerns about

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13. *See infra* Part I.B.

14. *See infra* Part II.

15. To this author's knowledge, no one has previously examined this aspect of Rule 4, which may be due to its recent provenance. *See infra* note 39. Other analyses of Rule 4's application to foreign defendants generally focus on its warrant provision for individuals. *See, e.g.*, Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT'L & COMP. L. REV. 227, 292 (1995).

16. *See infra* note 172.

17. As of this Note's publication, the Advisory Committee's proposed changes to Rule 4 have been submitted for public comment. *See Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendment to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 329 (2014), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>. Comments may be submitted until Tuesday, February 17, 2015. *Id.* at 1.

potential prosecutorial overreach should not prevent efforts to update Rule 4 and to eliminate its jurisdictional gap.

## I. RULE 4'S JURISDICTIONAL GAP

As courts have repeatedly reminded prosecutors attempting to serve summonses on foreign organizational<sup>18</sup> defendants like Sinovel, there is a jurisdictional gap between the substantive reach of federal criminal law and the procedural means used to enforce it. This Part examines the gap in Rule 4's language and provides an overview of the judicial responses to nonconforming efforts to effectuate service on foreign organizational defendants.

### A. *The Current Language of Rule 4*

Service of process in the U.S. legal tradition serves two primary functions: first, to provide notice of a pending action,<sup>19</sup> and second, to establish the court's jurisdiction over the defendant.<sup>20</sup> These dual functions are incorporated into Rule 4, which governs arrest warrants and summonses in all federal criminal proceedings.<sup>21</sup> Organizational defendants cannot be "arrested" in any meaningful sense,<sup>22</sup> but are subject to compulsory summonses.<sup>23</sup> Unlike the analogous provision governing civil proceedings,<sup>24</sup> the Federal Rules of Criminal

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18. Although this Note generally uses "organization" to refer to corporations, federal law defines the term broadly to encompass any "person other than an individual." 18 U.S.C. § 18 (2012).

19. *See, e.g.,* Milliken v. Meyer, 311 U.S. 457, 462–63 (1940) (holding that service must be "reasonably calculated to give [the party] actual notice of the proceedings and an opportunity to be heard" as a matter of due process).

20. *See, e.g.,* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("Service of process . . . is fundamental to any procedural imposition on a named defendant.").

21. FED. R. CRIM. P. 4. Similar issues may arise under state law, as well, because approximately half of the states have adopted similar or identical rules governing criminal procedure. Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 138 n.18 (1996) (identifying these states). However, state-law concerns may be less grave given the practical realities of prosecuting foreign organizations.

22. For a discussion of the fictive nature of corporate personhood encountered when serving foreign organizations and the associated policy concerns, see *infra* Part IV.A–B.

23. FED. R. CRIM. P. 4(c)(3)(C).

24. *See* FED. R. CIV. P. 4(h)(2) (enumerating several authorized methods of serving organizational parties outside a U.S. judicial district, including the use of an international agreement or court order).

Procedure do not specifically address defendants located abroad.<sup>25</sup> The relevant portion of Rule 4 is as follows:

A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to return service of process. A copy must also be mailed to the organization's *last known address within the district* or to its *principal place of business elsewhere in the United States*.<sup>26</sup>

Thus, Rule 4 imposes two distinct requirements for properly serving summonses on organizational defendants: the delivery requirement and the mailing requirement, which are discussed in turn.

1. *The Delivery Requirement.* The requirement that a copy of the summons be delivered to an “officer,” “managing or general agent,” or “another agent appointed or legally authorized”<sup>27</sup> is fairly straightforward and does not, on its own, create a jurisdictional gap. The delivery requirement does, however, raise the specter that prosecutors will be unable to serve an organizational defendant whose relevant agents are located abroad and where no federal statute authorizes an arrest to be made.<sup>28</sup>

The problem of criminal activity committed beyond the reach of authorized U.S. jurisdiction is not limited to organizational defendants.<sup>29</sup> What is unique to organizational defendants, however, is their ability to employ creative corporate structures as a shield against criminal liability for the parent company while maintaining a physical domestic presence. The most blatant version of such an attempted shield would be a foreign defendant incorporating a subsidiary in the United States for the sole purpose of engaging in

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25. See FED. R. CRIM. P. 4(c)(3)(C). Rule 4 also lacks a provision specifically addressing serving process on an individual abroad, but states that a summons may be served “within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.” FED. R. CRIM. P. 4(c)(2).

26. FED. R. CIV. P. 4(c)(3)(C) (emphasis added).

27. *Id.*

28. See FED. R. CIV. P. 4(c)(2) (limiting the scope of service to locations within U.S. jurisdiction and those where federal statutes have authorized service).

29. See, e.g., *United States v. Hijazi*, 845 F. Supp. 2d 874, 878–81, 895 (C.D. Ill. 2011) (finding that a Defense Cooperation Agreement between the United States and Kuwait effectively precluded prosecution of the defendant for inflating bids submitted as a subcontractor to the U.S. government, even though the United States had jurisdiction over his conduct).

domestic criminal activity and insulating its legitimate business interests abroad. Under such circumstances, courts would likely hold the shell company to be the defendant's "alter ego"<sup>30</sup> or a "mere conduit for the activities of its parent,"<sup>31</sup> and find service made on an agent of the shell company to be sufficient to establish jurisdiction over the defendant.<sup>32</sup> When the relationship between parent and subsidiary is less stark, however, prosecutors face an onerous and highly fact-dependent burden of proof.<sup>33</sup>

When the subsidiary's operations are determined to be sufficiently distinct from its parent's, service on the subsidiary will not be imputed to the parent.<sup>34</sup> Therefore, foreign organizational defendants that maintain domestic corporate enterprises with a degree of separation in their activities are unlikely to be subject to service. As a result, although the delivery requirement may exacerbate such evasive measures,<sup>35</sup> the service regime it creates for organizational defendants does not differ in kind from that faced by natural persons.

2. *The Mailing Requirement.* The requirement that a copy of the summons be mailed to an organizational defendant at its "last known address in the district" or "its principal place of business elsewhere in the United States"<sup>36</sup> clearly contemplates a *domestic* mailing. Therefore, a "jurisdictional gap" exists when the United States has jurisdiction over an organization's criminal conduct, but it is physically impossible to serve a summons on the defendant because the crime took place in a district where the defendant has no mailing address and the defendant maintains its principal place of business

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30. *United States v. The Pub. Warehousing Co. K.S.C.*, No. 1:09-cr-490, 2011 WL 1126333, at \*5 (N.D. Ga. Mar. 28, 2011).

31. *United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 305 (D. Mass. 2009).

32. This approach—effectively, to pierce the corporate veil so that service on the subsidiary will bind the parent as well—is consonant with courts' greater willingness to vindicate veil-piercing challenges in statutory contexts to further governmental purposes. *See* 1 JAMES D. COX & THOMAS LEE HAZEN, *COX & HAZEN ON THE LAW OF CORPORATIONS* § 7:17 (3d ed. 2010) (discussing courts' responses to veil-piercing arguments in contractual and statutory contexts).

33. *See United States v. Alfred L. Wolff GMBH*, No. 08-cr-417, 2011 WL 4471383, at \*4-8 (N.D. Ill. Sept. 26, 2011) (using a "totality of the circumstances" test to reject the government's argument to "pierce the corporate veil" for purposes of service).

34. *Id.*

35. For discussion of a case that highlights the incentives to adopt similar parent-subsidiary structures as a shield against criminal liability in the United States, see *infra* notes 40-45 and accompanying text.

36. FED. R. CRIM. P. 4(c)(3)(C).

abroad. The jurisdictional gap is especially pernicious for crimes committed remotely via the internet or through a domestic subsidiary,<sup>37</sup> as failure to comply with the mailing requirement may stall U.S. prosecutions or even preclude them altogether.<sup>38</sup>

Nor is this jurisdictional gap purely theoretical. Federal district courts have recently adjudicated several challenges from organizational defendants contesting the efficacy of service as a result of the government's failure to satisfy Rule 4's mailing requirement.<sup>39</sup> The DOJ's experience in the first of these challenges highlights the mailing requirement's potential threat as a procedural barrier to otherwise viable prosecutions. In *United States v. Johnson Matthey PLC*,<sup>40</sup> the government indicted but twice failed to properly serve the defendant, an organization incorporated under the laws of England and Wales and with its principal place of business in London.<sup>41</sup> Service was held to be improper despite the fact that the parties stipulated to an agent capable of receiving service.<sup>42</sup> Moreover, copies of the summonses had been sent to the company's main London office and to a subsidiary-owned refinery in Salt Lake City, Utah, via the subsidiary's headquarters in Wayne, Pennsylvania.<sup>43</sup> Despite having provided "ample notice," prosecutors had failed to mail a copy of the summons in strict adherence to the language of Rule 4.<sup>44</sup>

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37. See, e.g., Indictment at 4, 10, *United States v. Sinovel Wind Grp. Co.*, 3:13-cr-00084 (W.D. Wis. filed June 27, 2013) (alleging that a Chinese state-owned enterprise conspired with a Serbian national employed by an Austrian subsidiary to steal protected information from a Massachusetts corporation's internet server located in Middleton, Wisconsin).

38. Prosecutors could still pursue defendants in their individual capacities. However, specific consequences that flow from prosecutions of organizational defendants would be effectively barred by the text of Rule 4's mailing requirement. See *infra* Part IV.B.

39. To date, seven district courts have ruled on Rule 4's mailing requirement. *United States v. Kolon Indus., Inc.*, 926 F. Supp. 2d 794 (E.D. Va. 2013); *United States v. Dotcom*, No. 1:12-cr-3, 2012 WL 4788433 (E.D. Va. Oct. 5, 2012); *United States v. Pangang Grp. Co.*, 879 F. Supp. 2d 1052 (N.D. Cal. 2012); *United States v. Alfred L. Wolff GMBH*, No. 08-cr-417, 2011 WL 4471383 (N.D. Ill. Sept. 26, 2011); *United States v. The Pub. Warehousing Co. K.S.C.*, No. 1:09-cr-490, 2011 WL 1126333 (N.D. Ga. Mar. 28, 2011); *United States v. Chitron Elec. Co.*, 668 F. Supp. 2d 298 (D. Mass. 2009); *United States v. Johnson Matthey PLC*, No. 2:06-cr-169, 2007 WL 2254676 (D. Utah Aug. 2, 2007).

40. *Johnson Matthey PLC*, 2007 WL 2254676, at \*1.

41. *Id.* at \*1-2.

42. *Id.*

43. *Id.* at \*2. *Johnson Matthey PLC*, which was not alleged to have had a presence in Utah, was charged with conspiracy and twenty-eight counts of regulatory offenses concerning effluent discharge at a gold and silver refinery owned by its subsidiary, *Johnson Matthey, Inc.* *Id.* at \*1.

44. *Id.* at \*2.



The court did suggest, however, that the government could have effectuated proper service through the bilateral Mutual Legal Assistance Treaty to which the United Kingdom and the United States are both signatories.<sup>45</sup> Even if the court would have actually approved service pursuant to an international agreement—a method of service not apparent from a plain textual reading of Rule 4<sup>46</sup>—defendants located in countries not party to such an agreement would remain effectively immunized from prosecution. Thus, the court’s recognition of this jurisdictional gap would bar prosecution for at least a certain class of organizational defendants.

From the limited available evidence, it appears that Rule 4’s jurisdictional gap is an unintended consequence of efforts to ensure actual notice for organizational defendants. Nothing in the Advisory Committee Notes (ACN) suggests that the jurisdictional gap created by the mailing provision was consciously intended. The only mention of the mailing requirement states that “in all cases in which a summons is being served on an organization, a copy of the summons must be mailed to the organization.”<sup>47</sup> Although the ACN emphasize the importance of a mailing, they do not explain why the mailing must be a *domestic* one.<sup>48</sup> Bolstering the view that the jurisdictional gap emerged inadvertently, the ACN explicitly state that Rule 4’s summons provisions were modeled on their counterparts in the Federal Rules of Civil Procedure.<sup>49</sup> The analogous civil provision does not contain a domestic-mailing requirement and allows for service on organizations abroad in the same manner as for individuals.<sup>50</sup>

If the drafters of Rule 4 had consciously intended to further a policy goal by enacting a domestic-mailing requirement, such as limiting the number of prosecutions brought against foreign organizations, evidence to this effect would be expected. Moreover, it is hard to imagine what policy rationales might have animated Rule

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45. *Id.*

46. *Cf. DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287–90 (3d Cir. 1981) (finding service of process that occurred abroad pursuant to a multilateral treaty, but that was not independently authorized, to be insufficient).

47. FED. R. CRIM. P. 4 advisory committee’s note.

48. *Id.*

49. *See* FED. R. CRIM. P. 4(c)(1) (“Any person authorized to serve a summons in a federal civil action may serve a summons.”); *see also* FED. R. CRIM. P. 4 advisory committee’s note (“Service of summons under the rule is substantially the same as in civil actions.”).

50. *See* FED. R. CIV. P. 4(h) (failing to specify that required mailings be made domestically).

4's current mailing requirement. There is no compelling reason to believe that a domestic mailing could provide adequate notice, but an international one could not.<sup>51</sup> Nor is there good reason to believe that foreign organizations lacking a domestic address or principal place of business should be immune from service, while those with such a domestic footprint are not.<sup>52</sup> Therefore, the jurisdictional gap is most likely the unhappy oversight of a well-intentioned drafting effort.

*B. The Federal Courts' Responses to Nonconforming Attempts at Service*

Courts encounter the horns of dilemma in prosecutions where it is impossible to make a domestic mailing on organizational defendants. On the one hand, service is an integral step in ensuring that courts act only within their own jurisdictional authority<sup>53</sup>—a failure to properly effectuate service will usually preclude a court from exercising its power over that defendant.<sup>54</sup> On the other hand, courts should be concerned that the sensitive interests protected by federal criminal law may not be vindicated because of a provision that, in all likelihood, did not contemplate systematic underenforcement.<sup>55</sup>

To date, the federal courts have generally hewed closely to the text of Rule 4 by granting motions to quash summonses where a domestic mailing to an organizational defendant could not have been made. The approach taken in *United States v. Pangang Group, Co.*<sup>56</sup> is particularly instructive. The *Pangang Group* defendants, both foreign and domestic entities, consisted largely of state-owned enterprises of

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51. In the civil context, for example, service may be made abroad by “using any form of mail that the clerk addresses and sends . . . that requires a signed receipt,” FED. R. CRIM. P. 4(f)(2)(C)(ii), or pursuant to the Hague Convention, FED. R. CRIM. P. 4(f)(1).

52. Any possible rationale concerning the sufficiency of a U.S. nexus fails to explain why such a strong policy preference would be limited to the provision governing service of process. For a discussion of the due-process limits on U.S. prosecutions of noncitizens, see *infra* Part III.C. Moreover, the relevant portion of the ACN predates, by several years, the earliest case successfully challenging the validity of service as failing to satisfy the mailing requirement.

53. See *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1990) (“Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.”).

54. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.”).

55. See *supra* notes 47–52 and accompanying text.

56. *United States v. Pangang Grp. Co.*, 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

the People's Republic of China.<sup>57</sup> They were indicted on numerous charges, most prominently conspiracy to commit economic espionage and violation of trade secrets.<sup>58</sup> The principal defendant held ownership interests in many of its codefendants, including a 75 percent stake in Pan America, a New Jersey corporation.<sup>59</sup> Over the defendant's and its counsel's objections, the government personally served Pan America's general manager on behalf of the defendant and mailed copies of the summons to Pan America's office in East Brunswick, New Jersey.<sup>60</sup>

In response to the Pangang Group's motion to quash the summons as improperly served, the court began with the "plain language" of Rule 4.<sup>61</sup> The court differentiated Rule 4 from its civil counterpart, holding that a copy of the summons must be mailed to the organization directly—not to its general agent's address—because Rule 4's mailing requirement is "[un]ambiguous."<sup>62</sup> Next, the court noted that it was "relevant but not dispositive" that the Pangang Group had actual notice of the proceedings, and that effective service required "substantial compliance" with Rule 4's stated requirements.<sup>63</sup> Finally, the court concluded that a mailing to Pan America could properly effectuate service on the Pangang Group only if the government proved that Pan America was the "alter-ego" of the Pangang Group.<sup>64</sup> This approach categorically fails to provide any means to serve foreign organizations if they lack a domestic

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57. *Id.* at 1056.

58. *See id.* (describing the charges).

59. *Id.* The other 25 percent of Pan America was held by the Pangang Group's "financing arm." *Id.*

60. *Id.*

61. *Id.* at 1064.

62. *Id.* at 1065.

63. *Id.*

64. *Id.* at 1066. Although the court did not hold that Pan America was the Pangang Group's "alter-ego," *id.* at 1069, there is good reason to believe that service would have been improper even if it had. Unless Pan America had a last known address in the Northern District of California, Rule 4 would require the mailing be sent to the defendant's "principal place of business elsewhere in the United States." FED. R. CRIM. P. 4(c)(3)(C). Because the Pangang Group's principal place of business is in China—not "elsewhere in the United States"—the court would have to determine that the Pangang Group had *two* principal places of business to uphold the mailing to Pan America's New Jersey office, something of a metaphysical conundrum that runs counter to the logic of recent Supreme Court jurisprudence in civil diversity cases. *See Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) (adopting a "nerve center" test to determine citizenship under which a party's principal place of business must be located in "a single place").

subsidiary or if the subsidiary operates as a separate, independent entity.

Faced with the unfortunate results generated by strict adherence to the text of Rule 4, at least one court, the Eastern District of Virginia, has begun pushing back.<sup>65</sup> Ruling on a situation in which a domestic mailing was physically impossible, Judge Liam O’Grady held that compliance with Rule 4’s delivery requirement alone provided effective jurisdiction over a defendant.<sup>66</sup> The opinion noted that although the mailing requirement was “unambiguous[]” and “mandatory,” it was a statutory requirement, created wholly by Rule 4, which did not preclude jurisdiction.<sup>67</sup> In dictum, Judge O’Grady strongly suggested that courts could still hear cases where the mailing requirement had not been satisfied by imposing an “appropriate [but unspecified] penalty.”<sup>68</sup> Reflecting on Rule 4’s jurisdictional gap, Judge O’Grady captured the intractability of a pure textualist reading: “It is doubtful that Congress would stamp with approval a procedural rule permitting a foreign corporate defendant to intentionally violate the laws of this country, yet evade the jurisdiction of United States’ courts by purposefully failing to establish an address here.”<sup>69</sup> After failing to find to a “legal and factual certainty” that the government could not properly effectuate service, the court denied the defendant’s motion to dismiss.<sup>70</sup>

In *United States v. Kolon Industries, Inc.*,<sup>71</sup> the Eastern District of Virginia took the additional step of carving an exception out of Rule 4’s mailing requirement. The court noted that it was “clear” the

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65. It is unsurprising that the Eastern District of Virginia is pushing back, given that its efficiency in hearing complex commercial cases requires it to deal frequently with similar cases. Requiring prosecutors to comply with Rule 4 too strictly would conflict with the desire to dispose of cases in a timely manner and maintain the court’s “fabled rocket docket.” *Eastern District of Virginia: The Rocket Docket*, WILEY REIN LLP, <http://www.wileyrein.com/practices.cfm?sp=overview&id=57> (last visited Nov. 2, 2014). For example, one prominent law firm has dubbed the Eastern District of Virginia the “most efficient court” in the United States and maintains a specialized “Rocket Docket Team” because of the advantages offered by the court’s unique expertise. *Id.*

66. *United States v. Dotcom*, No. 1:12-cr-3, 2012 WL 4788433, at \*1 (E.D. Va. Oct. 5, 2012).

67. *Id.* at \*1 n.1.

68. *Id.* The court declined to “expound . . . the Rule’s syntax” to suggest what such a penalty might entail, but did hint that it may vary based on “the individual facts and circumstances.” *Id.*

69. *Id.* at \*1 (footnote omitted).

70. *Id.*

71. *United States v. Kolon Indus., Inc.*, 926 F. Supp. 2d 794 (E.D. Va. 2013).

prosecution “did not strictly comply with the mailing provision” and that doing so remained “impossible.”<sup>72</sup> After employing a strict “textual reading” to determine that the mailing requirement was not jurisdictional in nature, the court invoked the “absurd consequences” canon<sup>73</sup> to completely invalidate the mailing requirement in such circumstances.<sup>74</sup> The court “decline[d] to construe [a] procedural rule to thwart the purpose of the substantive criminal statutes themselves,”<sup>75</sup> denying that Congress could have intended to immunize wholly foreign corporate defendants from prosecution.<sup>76</sup> *Kolon Industries* remains the strongest indication of the federal courts’ uneasiness with Rule 4’s jurisdictional gap.<sup>77</sup>

The federal courts’ growing dissatisfaction with the jurisdictional gap created by the mailing requirement reflects Rule 4’s underlying drafting problems. Although the courts have expressed at least some willingness to moderate the mailing requirement’s harshest consequences, the responsibility of eliminating the jurisdictional gap ultimately rests with Congress.<sup>78</sup>

## II. THE DOJ’S ATTEMPT TO CLOSE THE JURISDICTIONAL GAP AND REVISE RULE 4

More than thirty years ago, V. Rock Grundman observed that “the United States has had three major exports: rock music, blue jeans, and United States law.”<sup>79</sup> The resonance of this observation has

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72. *Id.* at 800.

73. For an overview of how the “absurd consequences” doctrine functions in determining statutory meaning, see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

74. *Kolon Indus., Inc.*, 926 F. Supp. at 801.

75. *Id.* at 802.

76. *Id.*

77. In at least one other situation, a federal court has held that a summons may be delivered through an email to a foreign terrorist group’s website and through publication in several newspapers and magazines, considering such efforts to be “reasonably calculated to notify” the defendant. *United States v. Fuerzas Armadas Revolucionarias de Colombia*, No. 1:04-cr-232 (D.D.C. July 19, 2005). The court did not mention Rule 4’s mailing requirement, however. *See id.*

78. There are several reasons to think that prospective drafting efforts can more appropriately address the current jurisdictional gap, including the legislature’s institutionally superior fact-finding, the benefits of uniformity, and separation-of-powers principles. *See generally* J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 22–27 (2012).

79. V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT’L LAW. 257, 257 (1980).

only intensified in the intervening decades. The overseas application of white-collar criminal law has been a major development.<sup>80</sup> For example, between 1991 and 1999, the category of foreign firms prosecuted for antitrust violations ballooned from less than 1 percent to roughly 50 percent of all cases brought by the DOJ's Antitrust Division.<sup>81</sup> Tellingly, a defense lawyer, observing the effects on the U.S. Attorney's Manhattan Office, remarked: "It's no longer the Southern District of New York. It should be the Southern District of the World."<sup>82</sup> Resolving the jurisdictional gap created by Rule 4 will only become more urgent as globalization and economic development continue to extend the reach of foreign organizations.

This Part discusses the DOJ's proposal to reform Rule 4 and the Advisory Committee subcommittee's revised version of the original proposal. Assuming that the government will continue to prosecute foreign organizations engaged in criminal conduct, there are strong arguments for removing the current procedural barriers in Rule 4. Updating Rule 4 in an excessively broad manner may create its own risks, however. Thus, it is important to ensure that the DOJ's effort to eliminate the jurisdictional gap does not prove to be stronger medicine than the disease.

#### A. *The DOJ's Original Proposal*

On October 25, 2012, the DOJ sent the Advisory Committee a recommendation (the 2012 Recommendation) to revise Rule 4.<sup>83</sup> Motivated by the fear that foreign organizations could "avoid liability through the simple expedient[]" of creatively structuring their domestic operations to avoid maintaining a permanent U.S. address, the 2012 Recommendation suggested two specific changes: eliminating the mailing requirement and creating a new mechanism

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80. See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1777 (2011) ("In the past, domestic prosecutions of foreign corporations were not particularly noteworthy. . . . All of this has changed. Federal prosecutors now advertise how they target foreign corporations."); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 326 (1997) (discussing the "international flavor" of the increased growth in U.S. prosecutions for white-collar offenses).

81. Garrett, *supra* note 80, at 1819.

82. Benjamin Weiser, *For Prosecutor in New York, A Global Beat*, N.Y. TIMES, Mar. 28, 2011, at A1.

83. Memorandum from Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, to the Hon. Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Oct. 25, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2013-04.pdf>.

for serving summonses on organizations abroad.<sup>84</sup> As the 2012 Recommendation observed, “[t]he environment that influenced the original drafters of the [r]ules . . . no longer exists.”<sup>85</sup>

Increasing economic globalization and the prevalence of electronic communication create a daunting “new reality” for federal prosecutors: more than ever, foreign organizations may “conduct both real and virtual activities” in the United States without maintaining a physical presence there.<sup>86</sup> Thus, foreign organizations now maintain “an undue advantage” over the government when it attempts to initiate criminal proceedings.<sup>87</sup> The 2012 Recommendation concluded that as long as the “core objective” of providing “notice of pending criminal proceedings” is fulfilled, the mailing requirement could be safely eliminated.<sup>88</sup>

The 2012 Recommendation used the analogous civil provisions for serving process as a starting point.<sup>89</sup> The civil rules include separate provisions for service made domestically<sup>90</sup> and abroad.<sup>91</sup> These two civil provisions contemplate, but do not mandate, mailing copies of the summons to notify a defendant that legal proceedings have been initiated. The former provision requires mailing a copy of the summons when the statute authorizing an agent to receive service so provides.<sup>92</sup> The latter provision allows service to be made through qualifying mailings, but does not require that a copy of the summons be mailed as a matter of course.<sup>93</sup> Neither provision specifies a

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84. *Id.* at 1.

85. *Id.* at 2.

86. Memorandum from Sara Sun Beale and Nancy King, Reporters, to the Members, Criminal Rules Advisory Comm., at 1 (Mar. 25, 2013), available at <http://pdfserver.amlaw.com/ca/rules041113.pdf>.

87. *Id.*

88. *Id.*

89. *See id.* at 3 (“Because the original language of Criminal Rule 4 seems to have been based upon the parallel provision of the Federal Rules of Civil Procedure, it may be useful to compare the current civil and criminal provisions.”).

90. FED. R. CIV. P. 4(h)(1).

91. FED. R. CIV. P. 4(h)(2).

92. FED. R. CIV. P. 4(h)(1)(B).

93. Additionally, a copy of the summons may have to be mailed when service is made pursuant to an international agreement or foreign law that imposes a mailing requirement. *See* FED. R. CIV. P. 4(f), (h)(2) (allowing service to be made abroad on an organization in the same manner as an individual, which allows service to be made: (1) by international agreement “reasonably calculated to give notice”; (2) by a method prescribed by foreign law, by a foreign authority in response to a letter rogatory or letter of request, or by “using any form of mail that

particular address to which a mailing must be sent or restricts its destination to within U.S. borders.<sup>94</sup>

The 2012 Recommendation recognized that the “greater public aims of criminal process” may require a “higher burden on the government” for effectuating service.<sup>95</sup> It therefore rejected “direct incorporation” of the civil provisions.<sup>96</sup> In order to satisfy this “higher burden,” the DOJ proposed a new subsection<sup>97</sup> governing service on organizations abroad:

(D) A summons is served on an organization at a place not within a judicial district of the United States:

(i) by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process, in a manner authorized under the laws of the foreign jurisdiction where the officer or agent to be served is located, or

(ii) by other means reasonably calculated to give notice, including

(a) a stipulated means of service;

(b) a means that a foreign authority undertakes in response to a letter rogatory or letter of request;

(c) a means that a foreign authority undertakes in response to a request submitted under an applicable international agreement;

(d) a means otherwise permitted under an applicable international agreement;

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the clerk addresses and sends to the individual and that requires a signed receipt;” or (3) “by other means not prohibited by international agreement as the court orders”).

94. See FED. R. CIV. P. 4(h)(1)–(2) (failing to specify an address or restrict mailings to a domestic address).

95. Memorandum from Lanny A. Breuer, *supra* note 83, at 6.

96. *Id.* For example, the Hague Convention allows entry of judgments against parties that fail to appear after being served with a summons. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. Directly incorporating this provision (and others like it) into the criminal context would, needless to say, raise serious due-process concerns.

97. Memorandum from Lanny A. Breuer, *supra* note 83, at 6. The new subsection would be titled Rule 4(c)(3)(D). *Id.* at 8. The DOJ’s proposal also includes the following changes: adding “A summons may also be served at a place not within a judicial district of the United States” to Rule 4(c)(2), striking the mailing requirement in Rule 4(c)(3), and adding “at a place within a judicial district of the United States” to Rule 4(c)(3) to create distinct provisions for domestic and foreign service. *Id.* at 7.



(e) *other means upon request of an attorney for the government, as the court orders.*<sup>98</sup>

Proposed Rule (4)(c)(3)(D) creates two discrete mechanisms for serving process on a foreign organization. These methods hinge on whether personal service can be made on an agent of the defendant.

Subsection (D)(i), which allows personal service to be made on an agent of the defendant pursuant to the relevant foreign jurisdiction's law, generally tracks the language of the civil provision but differs in key respects. Most crucially, unlike the civil provision, Subsection (D)(i) contains no explicit requirement that service be made in a manner "reasonably calculated to give notice."<sup>99</sup> By omitting this requirement, the DOJ implicitly assumed that when personal service on an agent conforms to the laws of the relevant jurisdiction, proper notice is necessarily given. Although adherence to the foreign jurisdiction's law may generally satisfy the "reasonably calculated" standard, employing service mechanisms available solely under a foreign sovereign's law could raise serious concerns.<sup>100</sup> Most notably, prosecutors may undertake foreign-service mechanisms that could not effectuate service domestically and that fail to provide actual notice, such as a law authorizing service to be made on a low-level employee or a copy of the summons to be sent solely to a listed email address.<sup>101</sup>

In contrast, Subsection (D)(ii), which creates five alternatives to personal service on one of the defendant's agents, explicitly requires that these "other means" be "reasonably calculated to give notice."<sup>102</sup>

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98. *Id.* (emphasis added).

99. *Cf.* FED. R. CIV. P. (4)(f)(2). The "reasonably calculated" standard was enumerated in *Mullane v. Century Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *Mullane v. Cent. Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (emphasis added)).

100. Even absent legal barriers to using a service mechanism available only under the laws of a foreign sovereign, foreign-policy concerns may counsel against granting foreign citizens inferior procedural protections. For a discussion, see generally Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987).

101. *Cf.* Frederick S. Longer, *Service of Process in China*, ABA SECTION OF LITIGATION 2012 SECTION ANNUAL CONFERENCE (2012), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac\\_2012/19-1\\_service\\_of\\_process\\_in\\_china.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/19-1_service_of_process_in_china.pdf) (noting that requests to provide service on organizations in China must be submitted to the "Chinese Central Authority," which has wide discretion to authorize various service mechanisms).

102. Memorandum from Lanny A. Breuer, *supra* note 83, at 7.

Subsection (D)(ii)'s first four subparts are all premised on notions of consent. Subpart (D)(ii)(a), which allows service to be made by "a stipulated means of service,"<sup>103</sup> guarantees that the defendant itself has consented to a specified means of receiving service and, by implication, to U.S. jurisdiction. Subparts (D)(ii)(b)–(d), which cover various international-service arrangements,<sup>104</sup> require consensual agreements between the sovereigns with jurisdiction over the defendant and whose laws govern the defendant's conduct. These methods are largely uncontroversial because they directly fulfill the dual purposes of service: providing notice and asserting jurisdiction.<sup>105</sup>

Subpart (D)(ii)(e) creates a residual service provision that allows for any "other means . . . as the court orders," if made "upon request of an attorney for the government."<sup>106</sup> This subpart lacks any element of consent; the United States may invoke it unilaterally as long as the prosecution and court act in tandem. This residual provision introduces the serious policy concern that an overzealous prosecutor and a rogue judge will together concoct inappropriate, undemocratic, and ad hoc methods of effectuating service, thereby infringing on other sovereigns' jurisdiction and the defendant's rights.<sup>107</sup> This concern is somewhat less serious than it seems, however, because requests to invoke the residual service provision would likely be funneled through the DOJ's Office of International Affairs, which provides some systemic oversight by working in conjunction with the State Department on matters concerning foreign relations.<sup>108</sup> Still, such internal protections alone may be an insufficient check, and the

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103. *Id.*

104. *Id.* The 2012 Recommendation notes that personal service may be provided by foreign governments themselves and is "the Department's preferred method of service." *Id.* at 8.

105. *See supra* notes 19–20 and accompanying text.

106. Memorandum from Lanny A. Breuer, *supra* note 83, at 7.

107. In addition to the noteworthy diplomatic concerns, similar infringements of sovereignty may also violate international law. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306 (6th ed. 2003) ("Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.").

108. *Office of International Affairs*, THE UNITED STATES DEP'T OF JUSTICE, <http://www.justice.gov/criminal/about/oia.html> (last visited Nov. 2, 2014). The Office of International Affairs already has mandatory supervision over the process of making formal requests for international extradition and provisional arrests of fugitives. THE UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-15.210 (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/15mcrn.htm#9-15.210](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrn.htm#9-15.210).

residual service provision is the most contentious element of the 2012 Recommendation.

*B. The Subcommittee's Revised Version*

*Our age will be known as the age of committees.*<sup>109</sup>

A subcommittee was appointed by the Advisory Committee to address the DOJ's suggested changes to Rule 4.<sup>110</sup> After a series of meetings in which it examined the proposed revisions, the subcommittee unanimously recommended that Rule 4 be amended.<sup>111</sup> It also recommended three specific changes to the 2012 Recommendation.<sup>112</sup> First, the subcommittee suggested eliminating the mailing requirement for all service made on organizational defendants in the United States unless an authorizing statute so requires.<sup>113</sup> Second, the subcommittee proposed expanding the list of available methods to effectuate service on defendants outside a judicial district of the United States.<sup>114</sup> Finally, the subcommittee also addressed a question not posed by the 2012 Recommendation: What happens when an organizational defendant has been properly served but fails to appear?<sup>115</sup>

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109. M.P. SINGH, QUOTE UNQUOTE (A HANDBOOK OF QUOTATIONS) 85 (2005) (quoting the late British publisher Ernest Benn).

110. The subcommittee was comprised of prominent experts in the field, including law professors, judges, practitioners, and representatives from the DOJ. For a full list of the subcommittee's members, see Draft Minutes, Advisory Comm. on Rules of Criminal Procedure (Apr. 25, 2013), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2013-10.pdf>.

111. Memorandum from Sara Sun Beale & Nancy King, Reporters, Advisory Comm. on Rules of Criminal Procedure, to Members, Criminal Rules Advisory Comm. 1 (Sept. 24, 2013), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2013-10.pdf>.

112. The Subcommittee's revisions were ultimately incorporated in the Advisory Committee's proposal that is seeking public comment through February 17, 2015. *See supra* note 17.

113. *Id.* at 2.

114. *Id.*

115. The subcommittee's proposed answer to this question would allow a court to "take any action authorized by law if an organizational defendant fails to appear in response to a summons." *Id.* at 1. The problem of an absentee defendant is not unique to Rule 4, and setting forth a complete solution falls far outside this Note's scope. Courts possess several tools to deal with recalcitrant defendants, most notably the contempt power. *See* 18 U.S.C. § 401(3) (2012) (granting each federal court the "power to punish by fine or imprisonment, or both . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command"). Courts may even be empowered to appoint counsel for absent defendants. *See, e.g., United States v. Crosby*, 24 F.R.D. 15, 16 (S.D.N.Y. 1959) ("It would be idle to provide for summoning

The most significant difference between the subcommittee's proposed revision and the 2012 Recommendation is the list of options for making service outside a judicial district of the United States. Instead of five enumerated options under Rule 4(c)(3)(D)(ii), the subcommittee shortened the list to three.<sup>116</sup> In addition to the change in form, the subcommittee also proposed substantial alterations to Rule 4(c)(3)(D)(ii)'s operative language.

*Table 1. Possible Revisions to Rule 4*

The DOJ's 2012 Recommendation	The Subcommittee's Proposed Revisions
<p>(D) A summons is served on an organization at a place not within a judicial district of the United States:</p> <p>(i) by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process, in a manner authorized under the laws of the foreign jurisdiction where the officer or agent to be served is located, or</p> <p>(ii) by other means reasonably calculated to give notice, including</p> <p>(a) a stipulated means of service;</p> <p>(b) <u>a means that a foreign authority undertakes in response to a letter rogatory or letter of request;</u></p> <p>(c) <u>a means that a foreign authority undertakes in response to a request submitted under an applicable international agreement;</u></p> <p>(d) <u>a means otherwise permitted under an applicable international agreement;</u></p> <p>(e) <i>other means upon request of an attorney for the government, as the court orders.</i></p>	<p>(D) A summons is served on an organization not within a judicial district of the United States:</p> <p>(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process; or</p> <p>(ii) by any other means that gives notice, including one:</p> <p>(a) that the parties stipulate to;</p> <p>(b) <u>that a foreign authority undertakes in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement;</u> or</p> <p>(c) <i>that is not prohibited by an applicable international agreement.</i><sup>117</sup></p>

The subcommittee's first three methods of making service, detailed in Subparts 4(c)(3)(D)(i), (ii)(a), and (ii)(b), incorporate and

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a corporation if the court, after so doing, could not render judgment against it. The court must, therefore, have power to appoint one of its attorneys and officers to appear for the corporation.”).

116. Memorandum from Sara Sun Beale & Nancy King, *supra* note 111, at 130.

117. *Id.* (emphasis added). This version of the rule also includes purely stylistic changes. *Id.* at 9.

consolidate the provisions in the 2012 Recommendation premised on consent.<sup>118</sup> The subcommittee viewed these provisions as “uncontroversial” and unlikely to harm other rights under domestic or international law.<sup>119</sup>

The subcommittee’s final proposed revision, Rule 4(c)(3)(D)(ii)(c), could raise serious legal and policy issues. This catchall provision was included to “provide[] flexibility” when the other three provisions cannot be met, and operates similarly to the 2012 Recommendation’s residual service provision.<sup>120</sup> Notably, however, the subcommittee’s revision dropped the 2012 Recommendation’s requirement that a court approve the alternative method of service by issuing a prospective order.<sup>121</sup> Although the subcommittee’s revision generally tracked the language of the civil provision more closely than did the 2012 Recommendation,<sup>122</sup> its abandonment of ex ante judicial approval for an alternative service mechanism deviates from the civil rules.<sup>123</sup> Therefore, if adopted, this catchall provision allowing service to be made without court approval would seem to be unique in federal procedural law.

Detractors could hypothesize a troubling situation in which service of a summons is made in a foreign country in contravention of that country’s laws and without its participation or consent. Further exacerbating the problem, the catchall provision may be invoked even when the government fails to show that it has exhausted Rule 4’s other options.<sup>124</sup> As a result, prosecutors may freely elect to infringe on foreign sovereigns’ autonomy without prior judicial approval, whether or not less controversial means of effectuating service are available. According to the subcommittee’s survey of the civil

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118. *Id.* at 6. For a discussion of the analogous provisions in the 2012 Recommendation, see *supra* notes 99–104 and accompanying text.

119. Memorandum from Sara Sun Beale & Nancy King, *supra* note 111, at 6.

120. *Id.* Compare *id.* at 130 (allowing service to be made “by any other means that gives notice, including one . . . that is not prohibited by an applicable international agreement”), with Memorandum from Lanny A. Breuer, *supra* note 83, at 7 (allowing service to be made “by other means reasonably calculated to give notice, including . . . other means upon request of an attorney for the government, as the court orders”).

121. Memorandum from Sara Sun Beale & Nancy King, *supra* note 111, at 7.

122. See FED. R. CIV. P. 4(f)(3) (allowing service to be made “by other means not prohibited by international agreement, as the court orders”).

123. *Id.*

124. See Memorandum from Sara Sun Beale & Nancy King, *supra* note 111, at 6 n.8 (“The Subcommittee considered and rejected a[n exhaustion] requirement.”).

analogue, this potential consequence “appeared to have generated significant concern.”<sup>125</sup>

The subcommittee omitted an ex ante-approval requirement for use of the catchall provision because it felt that courts should not impinge on the executive branch’s constitutional primacy in foreign relations.<sup>126</sup> Under a service regime that does not require prior court approval, judges need not condone a violation of international or foreign law to establish U.S. jurisdiction over a given case.<sup>127</sup> Instead, the “executive alone” will be responsible for determining whether the “public interest” warrants violating international or foreign law in a particular case.<sup>128</sup> Although the subcommittee believed such cases would arise only “rare[ly],” the catchall provision affords the executive branch “the necessary flexibility” to act “in an efficient and effective manner”<sup>129</sup>—unilaterally, if need be. In contrast to the 2012 Recommendation, the subcommittee placed the responsibility for invoking the catchall provision squarely on the executive’s shoulders.<sup>130</sup>

Although the current jurisdictional gap in Rule 4 was likely created inadvertently,<sup>131</sup> it may have conveniently excused the courts from grappling with the implications of the vast overseas expansion of federal criminal law in hard cases. Revising Rule 4 may force the courts to resolve several difficult questions obviated by the current jurisdictional gap.

### III. THE LIMITS OF EXTRATERRITORIAL APPLICATION OF U.S. LAW

Service of process is only one requirement for properly commencing a prosecution against a foreign organization in the United States. Congress must have first passed a law criminalizing the defendant’s conduct pursuant to one of its enumerated powers. A court must also interpret that law to be fairly susceptible of

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125. *Id.* at 7.

126. *Id.* at 8.

127. *Id.* at 7.

128. *Id.* at 8.

129. *Id.*

130. Entrusting this power to the executive’s discretion created its own tension. Several members “expressed support” for requiring individual prosecutors to receive prior approval from the Attorney General or the Deputy Attorney General in order to invoke the catchall provision. *Id.* at 9. Although such a requirement “might be desirable,” the Advisory Committee customarily declines to “dictate” internal DOJ policy. *Id.*

131. *See supra* notes 47–52 and accompanying text.

extraterritorial application. Finally, the prosecution may not violate the defendant's due-process rights.<sup>132</sup> Part III provides an overview of the legal environment upon which a revised Rule 4 would be superimposed. It then highlights potential Fifth Amendment concerns raised by Rule 4's revision.

#### A. *The Constitution's Structural Limits*

As a matter of first principle, Congress may create federal crimes only if the Constitution expressly or impliedly empowers it to do so and if doing so would not violate another constitutional provision.<sup>133</sup> The Constitution does not categorically bar Congress from proscribing criminal conduct outside U.S. geographical boundaries, and several enumerated Article I powers specifically contemplate extraterritorial legislation.<sup>134</sup> These powers include: the power to "regulate Commerce with foreign Nations,"<sup>135</sup> the power to "coin Money, regulate the Value thereof, and of foreign Coin,"<sup>136</sup> and the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>137</sup> When coupled with the Necessary and Proper Clause,<sup>138</sup> courts have been willing to construe Congress's authority to enact extraterritorial legislation very broadly.<sup>139</sup> For example, the Foreign Commerce Clause, although distinct from its domestic counterparts,<sup>140</sup> has been given a similarly expansive breadth.<sup>141</sup> In short, the Constitution's structure constrains

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132. U.S. CONST. amend. V. This Note expresses no view on what differences, if any, similar state prosecutions would face under a Fourteenth Amendment due-process analysis.

133. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.1 at 238 (4th ed. 2011).

134. CHARLES DOYLE, CONG. RESEARCH SERV., No. 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1 (2012).

135. U.S. CONST. art. I, § 8, cl. 3.

136. U.S. CONST. art. I, § 8, cl. 5.

137. U.S. CONST. art. I, § 8, cl. 10.

138. U.S. CONST. art. I, § 8, cl. 18.

139. *See, e.g.*, *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (upholding application of the Torture Act to the defendant's use of torture in Liberia as a valid exercise of the treaty power and the Necessary and Proper Clause).

140. U.S. CONST. art. I, § 8, cl. 3.

141. *See, e.g.*, *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006) ("Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause."). *But see* *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988) ("[Congress] is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states,

the extraterritorial activity Congress may proscribe, but this constraint's exact limits remain nebulous.<sup>142</sup> Thus, rather than claiming that Congress lacks the power to proscribe extraterritorial conduct, defendants challenging a prosecution will more likely succeed by arguing that their particular actions were not covered as a matter of statutory construction.

*B. The Role of International Law in Statutory Construction*

The judicial practice of statutory construction limits the reach of U.S. law over foreign defendants by creating a set of interpretive default rules. As a matter of domestic constitutional law, Congress is not bound by international law when it proscribes extraterritorial conduct.<sup>143</sup> Whether or not international law itself is binding under U.S. law,<sup>144</sup> it does play an important interpretive role. Congress may legislate to “supersede[]” a principle of international law when its intent is “clear” and the resulting conflict cannot be “fairly reconciled.”<sup>145</sup> Congress can demonstrate its intent to proscribe extraterritorial conduct in a number of ways, such as by enacting laws specifically targeting foreign conduct or drafting extraterritoriality provisions that expressly delimit the scope of its legislation.<sup>146</sup> Absent an explicit statement of a statute's geographic scope, courts rely on

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foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.”).

142. See Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 337 (2001) (“[T]he scope of the Define and Punish Clause is unclear, the Foreign Commerce Clause is not limitless, . . . and . . . treaties may not extend to . . . citizens of non-party countries.”).

143. See, e.g., *Barrera-Echavarría v. Rison*, 44 F.3d 1441, 1450–51 (9th Cir. 1995).

144. International law in this context refers to customary international law. Agreements with other nations have the full force of federal law, as long as Congress has properly given them effect. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987). The extent to which customary international law is part of the law of the United States, and in what fashion, is a subject of much scholarly debate that this Note does not attempt to address. For a discussion, see generally T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

145. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987).

146. Podgor, *supra* note 80, at 329–35.



other techniques to resolve this “haziest” situation.<sup>147</sup> Two canons of statutory construction function as default rules to address this potential uncertainty: the presumption against extraterritorial application and the *Charming Betsy* canon.<sup>148</sup>

1. *The Presumption Against Extraterritorial Application.* The first relevant canon of statutory construction that limits the reach of U.S. law over foreign defendants is the presumption against extraterritorial application. The Supreme Court has recently restated the presumption: “[W]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>149</sup> The presumption “serves to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord.”<sup>150</sup> Foreign defendants accused of criminal conduct abroad may be able to invoke the presumption successfully when Congress has failed to address the governing statute’s scope.<sup>151</sup>

Regardless of other expressions of Congressional intent, the very decision to proscribe certain categories of behavior will overcome the presumption against extraterritorial application because of the inherent nature of that conduct.<sup>152</sup> In *United States v. Bowman*,<sup>153</sup> the Supreme Court first announced its two-part test to determine whether particular conduct is of such a nature as to overcome the presumption against extraterritorial application. As Chief Justice Taft explained, “The necessary locus, when not specifically defined, depends on the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the

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147. *Id.* at 335.

148. For a discussion of the inconsistent ways in which these canons have been applied, see generally John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2001).

149. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

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

151. For a discussion of the likely, but yet uncertain, application of the presumption against extraterritorial application in the criminal context, see generally S. Nathan Williams, Note, *The Sometimes “Craven Watchdog”: The Disparate Criminal–Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381 (2014).

152. The range of proscribed conduct exempt from the presumption against extraterritorial application has led some commentators to advocate its revision or complete abolition. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INT’L BUS. 1, 1 (1992) (arguing that the presumption is “obsolete” and “should be abandoned”); Knox, *supra* note 148, at 353 (arguing for a “clarified” version).

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

power and jurisdiction of a government to punish crime under the law of nations.”<sup>154</sup> Crimes such as espionage,<sup>155</sup> theft of government property,<sup>156</sup> and treason<sup>157</sup>—which are not “logically dependent on their locality for the Government’s jurisdiction”<sup>158</sup>—are considered so critical to national security that Congress is presumed to have proscribed qualifying conduct wherever it may occur.

Under the *Bowman* framework, courts must attempt to distill the essential nature of a range of criminal offenses to determine whether the presumption against extraterritorial application is animated. As Professor Ellen Podgor observes, “Since Congress has often failed to focus on extraterritoriality in drafting statutes, courts are frequently left to consider the international ramifications of an extraterritorial application.”<sup>159</sup> The cabining effects of the presumption against extraterritorial application will thus vary from case to case,<sup>160</sup> but the presumption remains a viable shield for foreign defendants seeking to ward off uncertain U.S. jurisdiction.

2. *The Charming Betsy Canon.* The second canon of statutory construction that limits the scope of Congressional jurisdiction over foreign conduct is the *Charming Betsy* canon. This historically well-rooted canon originates from Chief Justice Marshall’s opinion in

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154. *Id.* at 97–98 (emphasis omitted). The modern restatement of the *Bowman* test requires that courts (1) “look to the text of the statute for an indication that Congress intended it to apply extraterritorially,” and (2) examine whether “extraterritorial jurisdiction comports with principles of international law.” *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002). Under international law, states possess the jurisdiction to prescribe, adjudicate, and enforce, all of which are subject to various substantive and procedural limits. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

155. *See United States v. Zehe*, 601 F. Supp. 196, 197–98 (D. Mass. 1985) (“Because espionage is an offense threatening the national security of the United States, regardless of where it occurs, the Court readily concludes [its proscription] was meant to apply extraterritorially to citizens.”).

156. *See United States v. Cotton*, 471 F.2d 744, 750 (9th Cir. 1973) (“It is inconceivable that Congress . . . would proscribe only the theft of government property located within the territorial boundaries of the nation.”).

157. *See Chandler v. United States*, 171 F.2d 921, 930 (1st Cir. 1948) (“The nature of treason, therefore, is such that there is no a priori reason for supposing that the Congress would naturally be inclined to restrict [its] definition . . . within the territorial limits of the United States.”).

158. *Bowman*, 260 U.S. at 98.

159. Podgor, *supra* note 80, at 340.

160. At least one court has suggested that *Bowman* is distinguishable when the defendant is not a citizen of the United States. *United States v. Pizzarusso*, 388 F.2d 8, 9 n.2 (2d Cir. 1968).

*Murray v. Schooner Charming Betsy*,<sup>161</sup> in which the court announced: “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”<sup>162</sup> The *Charming Betsy* canon counsels that, absent clear evidence to the contrary, Congress does not intend to disrupt the international legal order through domestic legislation.<sup>163</sup> The canon operates primarily as a “braking mechanism” to limit the scope of federal law, but as with the presumption against extraterritorial application, its precise interpretative force remains “somewhat uncertain.”<sup>164</sup>

The *Charming Betsy* canon may prove an effective shield for defendants whose prosecution would violate norms of customary international law, even when Congress clearly intended to grant extraterritorial application. In *United States v. Ali*,<sup>165</sup> for example, the D.C. Circuit relied on the *Charming Betsy* canon to “check the exercise of U.S. criminal jurisdiction.”<sup>166</sup> The court dismissed the relevant charge after finding that conspiracy to commit piracy was not a cognizable offense under international law.<sup>167</sup> It specifically rejected the government’s argument that the general federal conspiracy statute<sup>168</sup> evinced a sufficiently clear intent to overcome the canon’s protection.<sup>169</sup> As *Ali* demonstrates, the *Charming Betsy* canon imbues U.S. law with the force of international law in the process of statutory interpretation that, like the presumption against extraterritorial application, constrains Congress’s power to proscribe conduct abroad.

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161. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

162. *Id.* at 118. The Supreme Court had actually articulated a similar version of the *Charming Betsy* canon several years earlier. *See Talbot v. Seeman*, 5 U.S. (1 Cranch) 43 (1801) (“[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”).

163. With slight alteration in language, the *Charming Betsy* canon has been codified in the influential *Restatement (Third) of the Foreign Relations Law of the United States*. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1987).

164. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998); *see id.* at 490 (arguing that the *Charming Betsy* canon’s main thrust is interpretive, and that the canon “is best thought of today as a device to preserve the proper separation of powers between the three branches of the government”).

165. *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013).

166. *Id.* at 935.

167. *Id.* at 936–42. The court did find, however, that aiding and abetting piracy was an offense recognized under international law and so upheld those charges. *Id.*

168. 18 U.S.C. § 371 (2012).

169. *Ali*, 718 F.3d at 942.

### C. *Fifth Amendment Due Process*

Even when Congress possesses the enumerated power to proscribe extraterritorial conduct and displaces the interpretive default rules discussed above, defendants' individually enforceable due-process rights may preclude U.S. prosecution. In their seminal article *Federal Extraterritoriality and Fifth Amendment Due Process*, Professors Lea Brilmayer and Charles Norchi set out the first comprehensive treatment of the Constitution's individual-rights protections against federal prosecutions of conduct occurring abroad.<sup>170</sup> Brilmayer and Norchi argued that the "increasingly unilateral and aggressive character" of applying U.S. law extraterritorially could give rise to due-process challenges.<sup>171</sup> While acknowledging that this trend raises sensitive policy concerns, they suggested that if courts "are to become involved, they must do so in a manner consistent with the Constitution."<sup>172</sup> Following the publication of their article, foreign defendants have continued to raise due-process challenges frequently,<sup>173</sup> even though no federal court has yet invalidated a prosecution on due-process grounds.<sup>174</sup> The Supreme Court has not yet definitively ruled on this issue, and the circuits remain split over how to analyze due-process challenges between two divergent frameworks: the sufficient-nexus test and the fundamental-fairness test.

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170. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1261–62 (1992).

171. *Id.* at 1223.

172. *Id.* Brilmayer's and Norchi's work has generated extensive commentary offering competing conceptions of the Fifth Amendment's protections for foreign defendants. See Anthony J. Coangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 124 (2007) (arguing for a due-process test that incorporates principles of international law); Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 381 (1997) (arguing that the Fifth Amendment, unlike the Fourteenth Amendment, places no territorial limits on Congressional legislative authority); see also Bradley, *supra* note 142, at 338 (observing that "it may be logically awkward for a defendant to rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law"); Stephan, *supra* note 100, at 833 ("Although the Supreme Court has not definitively resolved the matter, it generally has indicated that overseas aliens enjoy no constitutional protection.").

173. See, e.g., *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1223 (D.N.M. 2008) (citing Brilmayer & Norchi, *supra* note 170, at 1221 n.12).

174. *United States v. Ali*, 718 F.3d 929, 944 n.7 (D.C. Cir. 2013); *Reumayr*, 530 F. Supp. 2d at 1223. One district court has found a violation of due process for an "arbitrary and fundamentally unfair" drug-conspiracy prosecution, but its ruling was reversed on appeal. *United States v. Caicedo*, 47 F.3d 370, 371 (9th Cir. 1995).

1. *The Sufficient-Nexus Test.* The sufficient-nexus test requires that there be a *minimum amount of contact* between the defendant and the United States so that application of U.S. law is not “arbitrary or fundamentally unfair.”<sup>175</sup> In applying this test, courts weigh “a wide range of factors” to determine whether a prosecution comports with due process.<sup>176</sup> A sufficient-nexus requirement “serves the same purpose as the minimum contacts test in personal jurisdiction” by guaranteeing the court’s jurisdiction over “a defendant who should reasonably anticipate being haled into court in this country.”<sup>177</sup> Courts have construed this notice requirement very broadly by upholding prosecutions for conduct that put the defendant on notice of prosecution “*somewhere*” in the world, even if the defendant could not reasonably have anticipated being prosecuted in the *United States*.<sup>178</sup> Three circuits have adopted the sufficient-nexus test: the Second,<sup>179</sup> Fourth,<sup>180</sup> and Ninth Circuits.<sup>181</sup>

The best exposition of the sufficient-nexus test appears in *United States v. Davis*,<sup>182</sup> which involved a prosecution under the Maritime Drug Law Enforcement Act (MDLEA). The defendant, the captain of a ship ostensibly traveling from Hong Kong to the Caribbean via Mexico, was indicted after the Coast Guard discovered seven thousand pounds of marijuana during a maritime raid thirty-five miles from Point Reyes, California.<sup>183</sup> Davis challenged U.S. jurisdiction

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175. *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990).

176. *See United States v. Brehm*, No. 1:11-cr-11, 2011 WL 1226088, at \*4 (E.D. Va. Mar. 30, 2011) (noting that these 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”), *aff’d*, 691 F.3d 547 (4th Cir. 2012).

177. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quotation marks omitted). *But see United States v. Perez Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002) (finding the use of civil personal-jurisdiction precedents in criminal cases to be “inapposite”).

178. *United States v. Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011) (emphasis added) (finding that arms trafficking to terrorists in Spain and Central America created sufficient notice); *see also United States v. Brehm*, 691 F.3d 547, 554 (4th Cir. 2012) (finding that the stabbing of a fellow contractor at a military base in Afghanistan created sufficient notice).

179. *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003).

180. *United States v. Mohammad-Omar*, 323 F. App’x 259, 261 (4th Cir. 2009) (per curiam).

181. *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). The Ninth Circuit has abandoned its nexus requirement for prosecutions involving stateless vessels, however, relying instead on principles of international law. *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995).

182. *Davis*, 905 F.2d at 245.

183. *Id.* at 247.

over his conduct as a matter of due process.<sup>184</sup> The Ninth Circuit rejected his claim, finding that the evidence presented to the district court was sufficient to establish jurisdiction under the sufficient-nexus approach.<sup>185</sup> International law played a critical role in the court's due-process analysis.<sup>186</sup> The court cautioned, however, that this inquiry into international law should not cause it to "lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?"<sup>187</sup> Although the court failed to incorporate international law as the test for due process, it did note that international-law principles "may be useful as a rough guide" to determine whether a sufficient nexus exists between the defendant and the United States.<sup>188</sup>

International law provides five distinct bases of jurisdiction. The most significant source of jurisdiction is the "territorial principle," which grants a state jurisdiction over its own territory.<sup>189</sup> The territorial principle extends to conduct that has, or is intended to have, substantial domestic effects.<sup>190</sup> Second, the "nationality principle" grants jurisdiction over a state's citizens who commit offenses outside that state's territory.<sup>191</sup> Third, the "passive personality" principle grants jurisdiction over extraterritorial actions that affect a state's nationals abroad.<sup>192</sup> Fourth, the "protective principle" grants jurisdiction over conduct that threatens a state's own security or the integrity of its governmental functioning, such as espionage or counterfeiting.<sup>193</sup> Finally, a narrow band of crimes may be so widely condemned among the community of nations as to warrant "universal jurisdiction," under which any state has the jurisdiction to prosecute perpetrators of these offenses.<sup>194</sup> Offenses conferring universal jurisdiction include piracy; genocide; war crimes;

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184. *Id.*

185. *Id.* at 249.

186. In a footnote, the court mentioned that its previous decisions had discussed constitutional requirements "simultaneously" with principles of international law. *Id.* at 249 n.2.

187. *Id.*

188. *Id.*

189. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) cmt. c (1987).

190. *Id.* § 402(1)(c) cmt. b.

191. *Id.* § 402(2) cmt. e.

192. *Id.* § 402(2) cmt. g.

193. *Id.* § 402(3) cmt. f.

194. *Id.* § 404.

and, in certain instances, terrorism.<sup>195</sup> These five bases of jurisdiction under international law implicate most potential U.S. interests in prosecuting extraterritorial conduct. Courts employing the “rough guide” of international law to define the limits of due process under the sufficient-nexus test will therefore find that the vast majority of factual scenarios fit under one or more of these jurisdictional bases (and thus satisfy due process).<sup>196</sup>

2. *The Fundamental-Fairness Test.* Some courts have adopted another standard to assess due-process challenges to prosecutions of extraterritorial conduct: the fundamental-fairness test. The fundamental-fairness test turns entirely on the “ultimate question” of the sufficient-nexus test—whether “application of the statute to the defendant [would] be arbitrary or fundamentally unfair.”<sup>197</sup> The fundamental-fairness test’s rationale resembles the principle that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”<sup>198</sup> Courts have construed this notice principle quite loosely, suggesting that some criminal conduct may be so self-evidently illegal that its commission provides sufficient notice for defendants to be tried in the United States, no matter where the underlying conduct occurred.<sup>199</sup> As with the sufficient-nexus test, courts often invoke principles of international law for guidance in assessing the fairness of a particular prosecution.<sup>200</sup> Given the similarity of these two standards, perhaps the “difference [between them] is less real than apparent.”<sup>201</sup> So far,

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195. *Id.* § 404 cmt. b; *id.* § 404 Reporters’ Note 1.

196. *See* Brilmayer & Norchi, *supra* note 170, at 1263 (predicting that “Fifth Amendment due process problems of federal extraterritoriality will be rare”).

197. *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013) (quoting *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990)).

198. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

199. *See United States v. Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011) (terrorism); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1052 (3d Cir. 1993) (drug trafficking).

200. *See, e.g., United States v. Suerte*, 291 F.3d 366, 375–76 (5th Cir. 2002) (relying on the “law of the flag” to uphold jurisdiction over a Maltese ship stopped in Venezuela); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (upholding U.S. jurisdiction of drug-trafficking offense under the “protective principle” because “all drug trafficking aboard vessels threatens our nation’s security”).

201. *See United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 728–29 n.9 (E.D. Va. 2003) (“[T]he existence of a nexus is what makes the prosecution neither arbitrary nor fundamentally unfair.”).

five circuits have, at least implicitly, adopted the fundamental-fairness approach: the First,<sup>202</sup> Third,<sup>203</sup> Fifth,<sup>204</sup> Eleventh,<sup>205</sup> and D.C. Circuits.<sup>206</sup>

Like the sufficient-nexus approach, the fundamental-fairness test is unlikely to give rise to successful due-process challenges, as exemplified by the *Ali* case discussed above.<sup>207</sup> *Ali* involved a Somali national who acted as a negotiator and interpreter in a hostage-taking incident in the Gulf of Aden.<sup>208</sup> The victim of the hostage plot, the *CEC Future*, was a Danish-owned ship flying a Bahamian flag, carrying the cargo of a U.S. company.<sup>209</sup> Only a “brief period of ‘minutes’” occurred on the “high seas,” as the great bulk of the incident occurred in foreign territorial water.<sup>210</sup> The defendant, also the “Director General of the Ministry of Education for the Republic of Somaliland” (a semiautonomous region of Somali), was indicted after flying into Washington, D.C., to attend an education conference in Raleigh, North Carolina, set up as a “ruse” by the government.<sup>211</sup> *Ali*’s extraordinary factual record underscores the occasionally tenuous connection between prosecutors’ charges and defendants’ connection to the United States.<sup>212</sup>

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202. *Cardales*, 168 F.3d at 553. Judge Torruella, dissenting from a decision to not readdress the appropriate due-process standard en banc, found the lack of a sufficient-nexus requirement “suspect” because a federal prosecution lacking such a nexus would exceed the scope of Congress’s enumerated powers. *United States v. Angulo-Hernandez*, 576 F.3d 59, 60–62 (1st Cir. 2009) (Torruella, J., dissenting). Judge Torruella would have found “compliance with international law [to be] necessary but not sufficient” to satisfy due process. *Id.*

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

204. *United States v. Alvarez-Mena*, 765 F.2d 1259, 1266–67 (5th Cir. 1985).

205. *United States v. Ibarquen-Mosquera*, 634 F.3d 1370, 1376 (11th Cir. 2011).

206. *See United States v. Ali*, 718 F.3d 929, 943–46 (D.C. Cir. 2013) (considering any nexus requirement to be a proxy for determining whether a prosecution would be “arbitrary or fundamentally unfair,” though not explicitly adopting the fundamental-fairness approach).

207. *See supra* notes 165–69 and accompanying text.

208. *Ali*, 718 F.3d at 933.

209. *Id.*

210. *Id.*

211. *Id.* *Ali* was originally arrested by Somaliland security forces after appearing in a documentary, *STOLEN SEAS: TALES OF SOMALI PIRACY* (Brainstorm Media 2012), before his invitation to and subsequent arrest in the United States. Shashank Bengali, *U.S. ‘Overreaching’ in Piracy Case Against Somali, Judge Says*, L.A. TIMES, Nov. 6, 2013, <http://www.latimes.com/nation/la-na-pirate-negotiator-20131106,0,3540136.story#axzz2ju6RC8r2>. The *Ali* prosecution was not the first time federal prosecutors have generated serious due-process concerns by luring defendants to the United States. *See United States v. Ayes*, 702 F.3d 162, 165 (4th Cir. 2012) (describing how prosecutors used the “pretext of attending a training seminar” to ensnare a Jordanian citizen suspected of stealing funds from the U.S. Embassy in Baghdad).

212. In similar cases in which a defendant is only in the country “transitorily,” the *Restatement* suggests that courts would lack jurisdiction to adjudicate earlier conduct occurring



Despite this uncommonly weak connection to the United States, the *Ali* court ruled that the prosecution did not violate due process.<sup>213</sup> The court found that the International Convention Against the Taking of Hostages,<sup>214</sup> whose implementing legislation formed the basis of the charges against the defendant, provided “global notice” sufficient to satisfy the demands of the Fifth Amendment, even though Somalia is not a signatory to the Convention.<sup>215</sup> The court strongly suggested that, as long as the law is determined to apply extraterritorially as a matter of statutory construction, the Fifth Amendment does not impose additional limits on the extraterritorial application of federal criminal law.<sup>216</sup> Under the *Ali* court’s logic, it is hard to imagine a prosecution of a natural person that would violate due process under either the sufficient-nexus test or the fundamental-fairness test. If the relevant conduct fails to create jurisdiction, prosecutors are unlikely to spend their limited time and resources pursuing wholly foreign conduct that would not confer a jurisdictional basis under the “rough guide”<sup>217</sup> of international law.<sup>218</sup>

In contrast to prosecutions of natural persons, the aggressive pursuit of foreign organizational defendants may be more likely to run afoul of due process because the proscribed conduct will likely be limited to large-scale market offenses—*mala prohibita* rather than

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abroad. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(a) (1987). Federal courts’ jurisdiction to adjudicate may actually be broader than the *Restatement* suggests, however, given developments since the publication of its latest edition in 1987. In a plurality opinion authored by Justice Scalia, the Supreme Court held transient jurisdiction to be permissible, regardless of its reasonableness, because it was in line with “traditional notions of fair play and substantial justice” as understood (perhaps mistakenly) at the time of the Fourteenth Amendment’s adoption. See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 610–22 (1991).

At least one circuit has extended *Burnham* to apply to foreign persons in the same fashion as to U.S. nationals. *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20–21 (2d Cir. 1998). *But see Connecticut v. Zakharov*, 667 F.3d 705, 715–16 (6th Cir. 2012) (declining to extend *Burnham* to foreign defendants); Peter Hay, Comment, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 602–03 (1990) (“In an international context, an unqualified, unremitting rule of transient jurisdiction seems quite intolerable and is unfitting.”).

213. *Ali*, 718 F.3d at 946.

214. International Convention Against the Taking of Hostages, *opened for signature* 17 Dec. 1979, 1316 U.N.T.S. 205.

215. *Id.* at 944–45.

216. *Id.* at 946.

217. *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990).

218. See *supra* notes 189–96 and accompanying text.

*mala in se*<sup>219</sup>—which may fail to satisfy the notice requirement at the heart of Fifth Amendment due process.<sup>220</sup> Part IV considers this possibility and its importance in the ongoing effort to revise Rule 4 to allow greater flexibility in serving summonses on foreign organizational defendants.

#### IV. ASSESSING THE IMPACT OF REVISING RULE 4

Revising Rule 4 to eliminate its jurisdictional gap may give rise to new Fifth Amendment challenges, as cases that would have stalled or would have been dismissed for failure to properly effectuate service<sup>221</sup> will come squarely before the federal courts. In addition to eliminating Rule 4's jurisdictional gap, the 2012 Recommendation and the subcommittee's proposed changes afford the government expanded powers to serve foreign organizational defendants. This expanded power itself may raise due-process concerns, in addition to facilitating prosecutorial overreach and threatening international comity. The efforts to revise Rule 4 also strike a new equilibrium between the judicial and executive branches in foreign affairs.

This Note argues that, despite these concerns, the jurisdictional gap should be eliminated and Rule 4 revised accordingly because the application of federal criminal law should not turn on whether a domestic mailing could be made to organizational defendants. Although expanding the United States' reach over foreign organizational defendants may increase the likelihood of due-process violations, the revision also implicates a logically prior concern—prosecutorial overreach—that must be confronted directly in order to avoid potential abuses.

##### A. *The Exacerbation of Due-Process Concerns*

No court has yet addressed a foreign organizational defendant's Fifth Amendment challenge to prosecution in the United States. The prospects for such a challenge remain unclear. The unique treatment

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219. See Michael L. Tavers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1321 (1995) (“Unlike sanctions for violations of *mala in se* statutes, punishment for a *malum prohibitum* crime cannot be justified on the grounds that the defendant's failure to know the law is in itself blameworthy.”).

220. Cf. *Ratzlaf v. United States*, 410 U.S. 135, 144, 149 (1994) (imposing an actual-knowledge requirement because currency structuring is not “inevitably nefarious” (footnote omitted)).

221. *United States v. Johnson Matthey PLC*, No. 2:06-cr-169, 2007 WL 2254676, at \*1 (D. Utah, Aug. 2, 2007).

of organizational entities under U.S. law may render the above due-process analysis<sup>222</sup> entirely inapposite. In the civil context, the Supreme Court has failed to generate a majority approach for determining the proper test for personal jurisdiction over organizational parties that enter the stream of international commerce.<sup>223</sup> The Court has remained deadlocked, unable to strike a majority position that balances the sovereign “authority” over foreign organizations against the due-process protections parties enjoy as “a matter of individual liberty.”<sup>224</sup> Given the sensitive public interests implicated in the criminal context, organizational defendants may simply lack many, if not all, due-process protections.<sup>225</sup>

There is good reason to believe, however, that nonnatural defendants will be granted some level of due-process rights in this context, even if such rights are not coterminous with those of natural persons. In the wake of *Citizens United v. FEC*,<sup>226</sup> the continued expansion of organizational entities’ constitutional rights beyond political spending seems likely.<sup>227</sup> Prosecutions of organizational defendants can be analyzed similarly to those of natural defendants for purposes of jurisdiction and fairness because the question is ultimately one of federal authority vis-à-vis the defendant, not of the defendant’s organizational nature.<sup>228</sup> Thus, these prosecutions do not raise many of the theoretical difficulties faced in other areas.

Assuming that the courts will adopt organizational due-process standards similar to those for natural persons, this Note argues that aggressive extraterritorial application of federal criminal law to foreign organizational defendants could violate the Fifth Amendment under certain circumstances. At the outset, it is important to highlight

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222. See *supra* Part III.C.

223. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (failing to garner a majority approach); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 580 U.S. 102 (1987) (same).

224. *Nicastro*, 131 S. Ct. at 2789 (Kennedy, J., plurality opinion).

225. Moreover, whether and to what extent foreign defendants are permitted to exercise these constitutional rights remains an open question. For a discussion, see generally Stephan, *supra* note 100.

226. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

227. See, e.g., Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 243 (2010) (“Although much of the immediate reaction to *Citizens United* focused on the decision’s short-term impact on political spending, the doctrinal impact of the decision is likely to be more significant.”).

228. See *Nicastro*, 131 S. Ct. at 2789 (“This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”).

these circumstances in order to understand the vision of U.S. law enforcement they imply. Regularly undertaking aggressive prosecutions that do not implicate substantial domestic interests would threaten to transform the U.S. Attorneys into the world's beat cops. This vision of U.S. law enforcement is best imagined by slightly altering the facts of *United States v. Nippon Paper Industries*.<sup>229</sup> In *Nippon Paper*, the First Circuit held that § 1 of the Sherman Act applied to a Japanese fax-paper manufacturer's conspiracy with trading houses to artificially inflate the price of paper shipped to North America because of this extraterritorial trading scheme's substantial and intended anticompetitive effects on U.S. markets.<sup>230</sup>

Now imagine, instead, a prosecution in which the paper had remained exclusively in Japanese markets. Prosecuting this hypothetical antitrust violation, one consisting of wholly foreign conduct, would likely violate the manufacturer's due-process rights under the framework for analyzing the extraterritorial application of federal criminal law.<sup>231</sup> First, under conventional readings of the Foreign Commerce Clause,<sup>232</sup> Congress has broad power to proscribe conduct that may affect global markets.<sup>233</sup> Given the current realities of a globalized and interconnected world economy, inflated prices for fax paper purchased by Japanese companies could add to the costs of business in sundry international markets. Second, as a matter of statutory construction,<sup>234</sup> the Sherman Act's criminal provisions may overcome the presumption against extraterritorial application because they might not be "logically dependent on their locality" under the *Bowman* framework.<sup>235</sup> Indeed, this is the result the First Circuit reached in *Nippon Paper*.<sup>236</sup> Unless prosecuting the anticompetitive behavior would run afoul of international-law principles, the *Charming Betsy* canon would not be implicated.

Under a sufficient-nexus analysis,<sup>237</sup> prosecuting a foreign defendant whose only connection to the United States is an

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229. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997).

230. *Id.* at 2–3, 9.

231. *See supra* Part III.

232. *See supra* Part III.A.

233. *See supra* notes 140–41 and accompanying text.

234. *See supra* Part III.B.

235. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

236. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997).

237. *See supra* Part III.C.1.

attenuated chain of economic effects<sup>238</sup> would likely violate due process unless there is a relevant jurisdictional basis under the “rough guide” of international law.<sup>239</sup> The best candidate is the territoriality principle, which would apply if the potential Sherman Act violations had or were intended to have “substantial” domestic effects.<sup>240</sup> However, in the case of solely domestic activity with limited international impact, the United States would lack jurisdiction under the theory of “substantial effects.”<sup>241</sup> The United States would lack universal jurisdiction<sup>242</sup> and jurisdiction under the protective principle<sup>243</sup> for a pure market offense. Without more evidence linking the putative criminal conduct to the United States, the prosecution would also lack a sufficient nexus. Moreover, the highly fact-dependent and context-specific nature of a Sherman Act violation is insufficient to grant the “global notice” that acts of terrorism<sup>244</sup> or large-scale drug smuggling<sup>245</sup> inherently do. Notice would be particularly problematic if the foreign sovereign’s law lacked American-style antitrust prohibitions or if foreign regulators had previously approved the conduct in question.<sup>246</sup> With this lack of meaningful notice, it would likely be “arbitrary” and “fundamentally

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238. In this hypothetical prosecution, the costs of inflated paper purchases in Japan would only indirectly affect the United States through an aggregation of the steps of multiple international transactions originating from wholly foreign conduct. *Cf.* *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting that the Court would be “hard pressed to posit any activity . . . that Congress is without power to regulate” under a chain of inferences that would grant regulatory power over any behavior that would have cascading economic effects when all instances of that behavior are considered).

239. *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990).

240. *See supra* notes 189–90 and accompanying text.

241. The *Nippon Paper* court’s reliance on the involvement of North American markets suggests that a higher quantum of conduct specifically targeting the United States is required to confer territorial jurisdiction over conduct occurring abroad. *See Nippon Paper*, 109 F.3d at 3–9 (recognizing that although “civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One’s jurisdictional reach,” there may be reason to interpret the applicable language uniformly in criminal cases).

242. *See supra* notes 194–95 and accompanying text.

243. *See supra* note 193 and accompanying text.

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

245. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

246. In reality, the conduct in *Nippon Paper* violated both Japanese and U.S. law. *Nippon Paper*, 109 F.3d at 8. The specter that prosecutors may seek to apply criminal laws unique to the United States against foreign defendants engaged in conduct abroad that does not directly implicate U.S. interests is a stark reminder of the need to directly address the limits of prosecutorial discretion in the first instance, regardless of the potential due-process concerns.

unfair” to subject the company to prosecution. Accordingly, this prosecution would also fail a fundamental-fairness analysis.<sup>247</sup>

Eliminating the jurisdictional gap to allow summonses to be served in situations where prosecutions would likely run afoul of foreign defendants’ due-process rights would exacerbate these concerns. This possibility should not stand in the way of revising Rule 4, however. As a general matter, federal prosecutors can be expected to act judiciously when deciding to prosecute defendants who lack a physical domestic footprint.<sup>248</sup> They are unlikely to expend valuable time and resources pursuing cases within the bailiwick of federal criminal law that do not substantially threaten domestic interests or may be better addressed by foreign sovereigns. It is possible that expanding prosecutors’ power would further enable, and perhaps even incent, the use of innovative tactics against foreign defendants.<sup>249</sup> To the extent that these due-process violations may occur, it is not the manner of service that is worrisome, but the underlying prosecution’s merits. The adoption of policies to rein in potential abuses of prosecutorial overreach should be engaged directly, not enforced furtively through procedural rules.

### B. *Prosecutorial Overreach and International Comity*

The unique role that entity liability plays in the U.S. legal system provides prosecutors with powerful tools for dealing with foreign organizations. Although commentators have debated the merits of entity liability for decades,<sup>250</sup> the modern practice of prosecuting

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247. See *supra* Part III.C.2.

248. Although prosecutors have wide discretion to initiate or decline a prosecution, they should not bring charges if “no substantial Federal interest” would be served. THE UNITED STATES DEP’T OF JUSTICE, *supra* note 108, 9-27.220, 9-27.230. The *United States Attorneys’ Manual* makes clear that federal law-enforcement priorities are designed to be “effective nationwide” (not worldwide) and that these priorities are “national” (not global). *Id.* 9-27.230 cmt. 1.

249. A powerful example is the so-called “Al Capone strategy,” whereby prosecutors successfully target savvy defendants by charging offenses that are easier to prove but do not fully vindicate the government’s underlying interests. Al Capone was eventually convicted on tax-evasion and Prohibition charges, not for the violent crimes (such as the St. Valentine’s Day Massacre) widely attributed to him. *Famous Cases & Criminals: Al Capone*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/al-capone> (last visited Nov. 2, 2014).

250. There is a voluminous scholarly debate about the purposes of corporate criminal liability; this Note does not advocate any particular resolution. See, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1532 (1996) (“[T]he circumstances in which substantially all of the traits of corporate criminal liability are socially

nonnatural persons has remained firmly rooted in the legal landscape for more than a century.<sup>251</sup> The threat of criminal action will continue to remain a staple of the federal prosecutor's playbook because of the many advantages it offers over the remedies available in civil suits, such as the threat of debarment from government contracting,<sup>252</sup> and because of its uniquely expressive blaming function.<sup>253</sup> In short, entity criminal liability offers a major stick for the United States to carry in its relations abroad. As the importance of post-Westphalian state borders continues to wane, the adoption of more aggressive enforcement strategies to harmonize international economic policy seems inevitable.<sup>254</sup> The United States may have legitimate interests in using its criminal law as an element of foreign policy, rather than passively abiding future "mugging[s] in broad daylight."<sup>255</sup> One particularly fruitful strategy for prosecutors is the use of deferred prosecution agreements and non-prosecution agreements as de facto regulations of extraterritorial conduct.<sup>256</sup> Yet, the use of these agreements may be susceptible to serious abuse. This concern is particularly acute when the targeted defendants are state-owned

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desirable are nearly nonexistent."); see generally, e.g., John C. Coffee, Jr., "No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1980) (describing the theoretical and practical difficulties with subjecting nonnatural persons to criminal liability).

251. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 486 (1909) (affirming Congress's power to "enact laws which subject corporations to criminal prosecution and punishment").

252. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1500–03 (2009) (arguing that the "critical real world importance" of collateral consequences "should not play a central role in debates concerning the proper scope of criminal liability").

253. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 514 (2006) (describing the unique costs and "social meaning" of criminal sanctions).

254. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 37 (1990) ("Law enforcement, traditionally a domestic function of government, has become more internationalized. . . . These developments do not mark a passing phenomenon but rather the emergence of new and important dimensions to criminal justice, United States foreign policy, and international politics.").

255. See Johnson, *supra* note 6, at B2.

256. See generally Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863 (2005); F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121 (2007), available at <http://www.virginialawreview.org/sites/virginialawreview.org/files/warin.pdf>. But see Garrett, *supra* note 80, at 1778–79 (demonstrating that foreign corporations are more likely than their domestic counterparts to plead guilty rather than enter into pre-indictment agreements with U.S. prosecutors).

enterprises. Subjecting organizations that are essentially extensions of foreign sovereigns to prosecution in U.S. courts is a heavy-handed approach, akin to a war power.<sup>257</sup>

To the extent prosecutions of organizational defendants remain a practical reality, the fate of these prosecutions should not turn on the defendants' nationality. Eliminating criminal liability for all foreign organizations would be a dramatic and unwarranted response to potential prosecutorial overreach, no less extreme than eliminating liability for all foreign natural persons. A regime maintaining criminal liability for domestic organizations, but not for their foreign counterparts, "would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect."<sup>258</sup> Rather, prosecutors must temper their reach abroad.

The inherently fictive nature of nonnatural defendants poses several additional challenges in this context. Organizational defendants cannot be "arrested" in any meaningful sense, nor can they be "extradited."<sup>259</sup> Moreover, there is no criminal analogue to the Hague Convention, and extant bilateral and multilateral agreements do not specify mechanisms to compel a foreign organization's presence in the United States in order to be prosecuted.<sup>260</sup> Without the cooperation of a foreign sovereign, it remains unclear how prosecutors might outmaneuver recalcitrant defendants.<sup>261</sup> Such unassisted prosecutions of foreign organizations may therefore prove unavailing.

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257. In an analogous situation during the Founding period, the nascent U.S. government decided to deal with the Barbary pirates' threats to global trade routes through military action, specifically rejecting an alternative crime bill. FREDERICK C. LEINER, *THE END OF BARBARY TERROR: AMERICA'S 1815 WAR AGAINST THE PIRATES OF NORTH AFRICA* 50-51 (2006).

258. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997).

259. Although individual officials may be arrested or extradited, doing so would not necessarily allow an organization to be prosecuted domestically. One barrier is the inability of an individual official to plead to the indictment at arraignment. *See* FED. R. CRIM. P. 10(a)(3) advisory committee's note ("Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment.").

260. *See generally* Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available To Address Them*, 11 WM. & MARY BILL RTS. J. 209 (2002) (describing the limited and uneven procedural mechanisms used in international agreements to facilitate the prosecution of foreign defendants).

261. *But see supra* note 115 and accompanying text.



This practical need for international cooperation bolsters the importance of tempered prosecutorial behavior underlying the doctrine of international comity. This doctrine suggests circumstances in which the laws of foreign sovereigns should be given deference, “having due regard both to international duty and convenience, and to the rights of [their] own citizens or of other persons who are under the protection of [their] laws.”<sup>262</sup> In the sensitive realm of foreign relations, international comity may “counsel[] voluntary forbearance” when another sovereign has a “legitimate claim to jurisdiction” over the conduct.<sup>263</sup> International comity is a nebulous doctrine whose legal force cannot cabin concerns of prosecutorial overreach on its own.<sup>264</sup> However, it remains a forceful reminder that the United States should sometimes defer to the autonomy of foreign sovereigns and the international legal order, in accordance with the concept of tempered prosecutorial discretion detailed above.

### C. *Revision of Rule 4 and the Role of the Courts*

Rule 4 should be revised to eliminate the jurisdictional gap, but not all potential revisions are equally advisable. Successful efforts at revision must carefully balance the capacities and interests of the judicial and executive branches. The subcommittee’s proposed means of achieving this balance is its major point of departure from the 2012 Recommendation.<sup>265</sup> The 2012 Recommendation would require judicial authorization of an alternative means of service under the residual service provision,<sup>266</sup> whereas the subcommittee’s version would not.<sup>267</sup> At first blush, requiring court approval appears to serve as an *ex ante* check on unilateral prosecutorial actions dangerous to defendants’ due-process rights.

This Note argues, however, that a regime of *ex post* review would better serve the institutional capacities of both prosecutors and courts, as well as decrease the likelihood of violating due process. There are four reasons to believe this is the case. First, a regime that

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262. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

263. *Nippon Paper*, 109 F.3d at 8.

264. *See id.* (“Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation.”); *see also* Michael D. Ramsey, *Escaping “International Comity”*, 83 IOWA L. REV. 893, 896–97 (1998) (“[T]he phrase ‘comity’ leads not only to confusion but to disguise . . .”).

265. *See supra* Part II.A–B.

266. *See supra* notes 106–08 and accompanying text.

267. *See supra* notes 120–23 and accompanying text.

does not require prior court approval discourages the strategic behavior of locating an outlier judge who may be more amenable to expansive service proposals.<sup>268</sup> Second, without judicial preapproval, prosecutors must internalize the full costs of deciding to bring suit in the first place, knowing that their actions will be subject to judicial review. Prosecutors would have to evaluate for themselves the likelihood of violating defendants' due-process rights, rather than rely on a court's preliminary, insufficiently informed decision to order service.<sup>269</sup> A third benefit of granting prosecutors the exclusive power to select their preferred means of service as an initial matter is the method's regard for the separation of powers—affording the executive flexibility when it engages in foreign relations, while retaining judicial oversight. Finally, organizational defendants may prefer *ex post* review because a judge would handle service as “a question of first impression,” rather than be forced to overrule her earlier decision.<sup>270</sup> The subcommittee's proposed revisions, which embrace these advantages of *ex post* judicial review,<sup>271</sup> are therefore superior to the 2012 Recommendation.

#### CONCLUSION

There is no compelling theoretical or practical reason to allow the United States to serve summonses on foreign organizational defendants in criminal cases only if they maintain a domestic mailing address or principal place of business. Rule 4 should be revised to eliminate this jurisdictional gap. Revising Rule 4, however, may spawn potential due-process violations. Moreover, expanding the government's ability to make service abroad may itself exacerbate due-process violations.

This Note concludes that such concerns, while valid, are properly levied against the underlying decisions to bring extraterritorial

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268. This would help curb our “national legal pastime” of forum-shopping in a category of prosecutions that, given the foreign defendants, could see its fair share of strategic behavior. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

269. This benefit is lessened to some degree by the fact that prosecutors may strategically serve defendants in an effort to induce settlements or other arrangements, regardless of any due-process concerns in later stages of a prosecution. *See supra* note 256 and accompanying text.

270. Memorandum from Sara Sun Beale & Nancy King, Reporters, Advisory Comm. on Rules of Criminal Procedure, to Members, Criminal Rules Advisory Comm., *supra* note 111, at 9.

271. *See supra* notes 120–23 and accompanying text.

prosecutions in the first place, not at the procedural mechanisms that govern them. As the United States continues to expand the application of its criminal laws abroad, it is critical for the DOJ to adopt a procedural framework that forces prosecutors to bear the full costs of their decisions when pursuing foreign organizational defendants. Undoubtedly, foreign organizational defendants will continue to act extraterritorially in ways that substantially affect domestic interests; such offending conduct may often justify a criminal response. But this class of offenses must be prudently culled to conserve American institutional legitimacy. Like their country, U.S. prosecutors must not go abroad “in search of monsters to destroy.”<sup>272</sup>

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272. Adams, *supra* note 1.