

# ARTICLE

## COUNTERTERRORISM, THE CONSTITUTION, AND THE CIVIL-CRIMINAL DIVIDE: EVALUATING THE DESIGNATION OF U.S. PERSONS UNDER THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

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*The International Emergency Economic Powers Act empowers the executive branch to designate organizations and individuals “Specially Designated Global Terrorists.” Though IEEPA designation is used against both domestic and foreign entities, its consequences are most severe within the United States. The designee’s assets are frozen and transacting with the designee becomes a federal felony. For an American organization, IEEPA designation is a death sentence. For an American individual, it amounts to house arrest. This Article analyzes IEEPA using the Mendoza-Martinez test for determining whether a purportedly civil statute imposes criminal punishment and concludes that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments by imposing criminal punishment without providing the required procedural protections. This Article offers a new framework for evaluating preventive counterterrorism policies and provides clarity to a notoriously unclear area of constitutional law—the jurisprudence of the civil-criminal divide.*

### I. INTRODUCTION

In late 2001, the FBI raided the offices of the Illinois-based Global Relief Foundation, the second largest Islamic charity in the United States.<sup>1</sup> Less than a year later, Global Relief had entirely disappeared. The government froze its assets, made transacting with it in any way a federal felony, and labeled it a “Specially Designated Global Terrorist” (“SDGT”), all without a trial or even a hearing.<sup>2</sup> Under such circumstances, Global Relief was doomed. How could it survive, when employees accepting salaries, benefactors offering donations, and a landlord accepting rent all risked being prosecuted? Moreover, who wants to do business with a terrorist organization?

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<sup>1</sup> David B. Ottaway, *Groups, U.S. Battle Over ‘Global Terrorist’ Label*, WASH. POST, NOV. 14, 2004, at A1.

<sup>2</sup> *Id.*

The speed and efficiency with which the government destroyed Global Relief and several other American Islamic charities<sup>3</sup> is, depending on one's perspective, either extremely frightening or greatly comforting. Some may be disturbed by the executive branch deciding in secret to shut down a charity with no public legal process or judicial oversight. Others may be worried that terrorists are infiltrating charities like Global Relief, raising cash to fund deadly attacks against American troops and civilians around the world, and receiving the protection of generous American criminal procedures that make prosecution of complex financial crimes costly and difficult for the government.

Even more frightening or comforting, depending on one's perspective, is that the government is able to designate not just organizations but also individual Americans as SDGTs.<sup>4</sup> Once designated, a person cannot even purchase groceries without a waiver from the Treasury Department.<sup>5</sup> In fact, the designee cannot spend or receive any money unless the government allows it.<sup>6</sup> The designee is incapacitated with a targeted blockade, an ancient weapon of the state updated for the digital age. The International Emergency Economic Powers Act ("IEEPA")<sup>7</sup> authorizes the executive branch to use this awesome power against foreign persons and U.S. persons<sup>8</sup> alike.<sup>9</sup> The

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<sup>3</sup> See Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. TIMES, Dec. 12, 2006, at A24.

<sup>4</sup> See 50 U.S.C. § 1702 (2006 & Supp. 2008).

<sup>5</sup> For examples of the severity of the restrictions imposed by IEEPA designation, see 31 C.F.R. § 501.518 (2009) (allowing \$250 per month to be paid from a bank account blocked by OFAC for the living expenses of the account holder and his family unless the account holder is an IEEPA designee, in which case no spending on living expenses is allowed); 31 C.F.R. § 594.507 (2009) (allowing an SDGT to receive free emergency medical services but requiring that a license be obtained in advance from the Treasury Department before an SDGT can purchase emergency medical care). For the procedures used by the Treasury Department to license certain transactions that would otherwise be prohibited, see 31 C.F.R. §§ 501.801, 594.501 (2009).

<sup>6</sup> See 50 U.S.C. § 1702.

<sup>7</sup> 50 U.S.C. §§ 1701-1707 (Supp. 2008).

<sup>8</sup> This Article uses the same definition of "U.S. person" that the Treasury Department utilizes in administering IEEPA sanctions against SDGTs, namely "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States." 31 C.F.R. § 594.315 (2009). This Article assumes that U.S. persons enjoy the protections of the Fifth and Sixth Amendments' guarantee that criminal punishment shall not be imposed without criminal procedural protections. As a tentative, general matter, that proposition is accurate. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (ruling that a Mexican citizen living in Mexico was not protected by the Bill of Rights because he was not an American citizen and had not voluntarily associated with or entered the United States); Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1682-97 (2009) (listing the characteristics courts use to determine whether those outside the United States can claim constitutional criminal procedural protections). However, as Judge Cabranes explains, case law on the extraterritorial reach of the Constitution is uncertain, in flux, and context-dependent. *Id.* at 1709-11. Thus, it is possible that some entities or individuals who fall within the Treasury Department's definition of U.S. persons might nevertheless be unprotected by the Fifth and Sixth Amendments. This Article does not address such marginal cases, if any do in fact exist. Rather, this Article is concerned with whether or not individuals who are

vast majority of IEEPA designees are not U.S. persons; the executive branch usually targets foreign organizations and foreign individuals.<sup>10</sup> Nonetheless, a number of Americans have been designated.<sup>11</sup>

There is no question that the use of IEEPA power against non-U.S. persons, who generally cannot claim any of the protections in the Bill of Rights,<sup>12</sup> is constitutional. But the designation of U.S. persons has drawn some serious constitutional challenges. American designees have claimed that IEEPA designation deprived them of the right to free speech, the right to freedom of association, and the right to receive compensation in exchange for property taken by the government.<sup>13</sup> All such challenges thus far have failed.<sup>14</sup>

Although courts have rejected a variety of constitutional challenges to IEEPA designation, they have not yet considered the possibility that designation is a criminal punishment. Such a holding would render IEEPA unconstitutional on the grounds that it imposes a punitive deprivation of liberty without the government proving guilt beyond a reasonable doubt to a jury in a public trial, obtaining a grand jury indictment, giving the designee a chance to confront the government's witnesses, or providing the other rights guaranteed by the Fifth<sup>15</sup> and Sixth Amendments.<sup>16</sup> As this Article demonstrates, IEEPA designation of U.S. persons is unconstitutional for exactly that reason.

In order to judge whether a purportedly civil statute, such as IEEPA, imposes criminal punishment, courts undertake a totality of the circumstances inquiry known as the *Mendoza-Martinez* test.<sup>17</sup> The doctrine surrounding this test has been widely criticized as thoroughly incoherent.

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covered by the Fifth and Sixth Amendments may be constitutionally designated under the IEEPA.

<sup>9</sup> See Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons, U.S. DEP'T OF THE TREASURY (Oct. 27, 2010), <http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 n.16 (1987); *infra* note 46.

<sup>13</sup> See *infra* notes 41-44.

<sup>14</sup> See *infra* notes 41-44.

<sup>15</sup> U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .”).

<sup>16</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

<sup>17</sup> The test is named for the Supreme Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Some justices have occasionally referred to it as the *Kennedy-Ward* test. See, e.g., *Smith v. Doe*, 538 U.S. 84, 107 (2003) (Souter, J., concurring); *Hudson v. United*

Professor Aaron Fellmeth sums up the scholarly consensus when he asserts, “It is no exaggeration to rank the [civil-criminal] distinction among the least well-considered and principled in American legal theory.”<sup>18</sup>

Applying the *Mendoza-Martinez* test to IEEPA helps clarify this area of doctrine. Specifically, this Article identifies some of the holes in the Supreme Court’s reasoning regarding the civil-criminal divide. In particular, it identifies the Supreme Court’s refusal to articulate the purpose of punishment as the doctrine’s major problem, and lays out the three possible conceptions proposed by scholars and judges that the Court could adopt. However, the central claim of the Article is that no matter which conception of punishment the Court favors, IEEPA designation of U.S. persons is unconstitutional because it imposes criminal punishment without providing the elevated procedural protections required by the Bill of Rights.

Part II of the Article describes the history of IEEPA and its use against U.S. individuals and entities, noting that no court has yet considered whether such use violates the Fifth and Sixth Amendments by imposing criminal punishment without following the requisite constitutional procedures.

Part III introduces the seven-factor *Mendoza-Martinez* test that the Supreme Court uses to police the civil-criminal divide and determine whether constitutional rights guaranteed to criminal defendants must be provided. It also describes some contexts in which the test has been applied.

Parts IV and V evaluate IEEPA using the *Mendoza-Martinez* test and demonstrate that each of the seven factors suggests IEEPA designation imposes criminal punishment. Part V concludes that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments by imposing punishment without providing the required procedural protections.

Part VI briefly considers one potential counterargument to this conclusion, suggesting IEEPA designation of U.S. persons is constitutional in a few extremely rare cases. In particular, the Constitution may permit IEEPA designation of U.S. persons when an active war is being fought within the borders of the United States. The Article acknowledges the persuasiveness of this argument but suggests that it does not save the government’s use of IEEPA against U.S. persons for counterterrorism purposes in the absence of any indication that the legal community is prepared to accept the premise that the U.S. is engaged in an infinite global war—unbounded by space and time—that is being waged everywhere and anywhere, including on American soil. Part VII concludes the Article and identifies a few questions posed by the Article’s arguments.

This Article offers two unique contributions. First, it demonstrates that the Fifth and Sixth Amendments prohibit IEEPA designation of U.S. persons. Second, it helps clarify the doctrine of the civil-criminal divide, an area

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States, 522 U.S. 93, 112 (1997) (Souter, J., concurring); *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 806 (1994) (Scalia, J., dissenting).

<sup>18</sup> Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005).

of American constitutional law in desperate need of clarity. IEEPA is an obscure but sweeping statute that serves a number of different foreign policy functions with little judicial oversight. The doctrine of the civil-criminal divide is riddled with unsolved problems and confused inconsistencies. This Article recommends restraining the tactics authorized by IEEPA and refines the jurisprudence of the civil-criminal divide.

## II. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

Congress passed IEEPA in 1977 as part of the broad post-Watergate attempt to limit unilateral presidential power over foreign affairs.<sup>19</sup> In particular, IEEPA was Congress's attempt to reign in the steadily expanding executive discretion to declare and respond to national emergencies under the Trading with the Enemy Act ("TWEA").<sup>20</sup> Passed during World War I and significantly expanded by amendments during the Great Depression and World War II, TWEA gave the President broad authority to declare national emergencies and prohibit transactions with, or seize assets of, foreign states.<sup>21</sup> IEEPA was designed to ensure that the executive branch exercised that power in a responsible fashion.<sup>22</sup> Thus, it established a framework that formalized the executive decision-making process, provided for legislative input on the declaration of emergencies, and limited the extent to which the President could regulate wholly internal transactions with no foreign nexus.<sup>23</sup> Over the years, the executive branch has used the tactics authorized under IEEPA to confront unfriendly states like Iran,<sup>24</sup> North Korea,<sup>25</sup> and Libya,<sup>26</sup> and to address a number of foreign affairs challenges, from international drug trafficking<sup>27</sup> and nuclear proliferation<sup>28</sup> to the trade in conflict-zone diamonds.<sup>29</sup> In essence, IEEPA empowers the President to institute targeted blockades against specific individuals or groups. While the Act contemplates application mainly against foreign persons, it has been increasingly used against American individuals and organizations in recent years.<sup>30</sup>

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<sup>19</sup> See S. REP. NO. 95-466 (1977); Bethany Kohl Hipp, Comment, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, 17 EMORY INT'L L. REV. 1311, 1335-41 (2003).

<sup>20</sup> Trading with the Enemy Act, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2006 & Supp. 2008)).

<sup>21</sup> Hipp, *supra* note 19, at 1316-35.

<sup>22</sup> *Id.* at 1340-41.

<sup>23</sup> *Id.* at 1339-52.

<sup>24</sup> See, e.g., Exec. Order No. 12,170, Fed. Reg. 65,729 (Nov. 15, 1979).

<sup>25</sup> See, e.g., Exec. Order No. 13,466, Fed. Reg. 36,787 (June 27, 2008).

<sup>26</sup> See, e.g., Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986).

<sup>27</sup> See, e.g., Exec. Order No. 12,978, 3 C.F.R. 415 (1996).

<sup>28</sup> See, e.g., Exec. Order No. 12,938, 3 C.F.R. 951 (1995).

<sup>29</sup> Exec. Order No. 13,194, 3 C.F.R. 741 (2002).

<sup>30</sup> See Office of Foreign Assets Control, *supra* note 9; see also OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR (2006), available at [http://www.ombwatch.org/files/pdfs/muslim\\_charities.pdf](http://www.ombwatch.org/files/pdfs/muslim_charities.pdf); MacFarquhar, *supra* note 3; Ottaway, *supra* note 1.

Because it allows for the complete financial destruction of its target, IEEPA permits the executive branch to incapacitate suspected terrorists or terrorism financiers without having to build a criminal case against them.

The text of IEEPA authorizes the President to declare a national emergency with respect to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>31</sup> Once the President has declared a national emergency, he has the power to, *inter alia*, “prevent or prohibit” any “dealing in, or . . . transactions involving, any property in which any foreign country or a national thereof has any interest.”<sup>32</sup>

In practice, this authority is exercised in what can roughly be described as a three-step process. First, the President issues an executive order declaring a national emergency, describing the type of individuals who will be sanctioned, and delegating the task of implementing sanctions to the Secretary of State or the Secretary of the Treasury.<sup>33</sup> Second, the cabinet member charged with implementation designates particular individuals (people or entities) as fitting the description in the executive order.<sup>34</sup> Third, the Treasury’s Office of Foreign Assets Control (“OFAC”)—the executive entity charged with carrying out the sanctions—proceeds to block all property of and transactions involving the designated individuals.<sup>35</sup> In some instances, federal law enforcement agencies simultaneously proceed to investigate and prosecute U.S. persons who transact with designated individuals.<sup>36</sup>

Courts have interpreted IEEPA to confer upon the President power over a broad range of property and transactions. In particular, the federal courts of appeals are united in giving a broad construction to the words “any interest” in the phrase “any property in which any foreign country or national thereof has any interest.”<sup>37</sup> The Seventh Circuit has opined that because “[t]he statute is designed to give the President means to control assets that *could* be used by enemy aliens,” IEEPA encompasses property that might be used to benefit foreign interests “even if a U.S. citizen is the legal owner.”<sup>38</sup> Thus, a

<sup>31</sup> 50 U.S.C. § 1701 (Supp. 2008).

<sup>32</sup> 50 U.S.C. § 1702(a)(1)(B) (2006 & Supp. 2008).

<sup>33</sup> *See, e.g.*, Exec. Order No. 13,224, 3 C.F.R. 786 (2002); Exec. Order No. 12,947, 3 C.F.R. 319 (1996).

<sup>34</sup> The President will usually include in the executive order an initial list of individuals designated under it, to be expanded by the particular cabinet member. *See, e.g.*, sources cited *supra* notes 23-28.

<sup>35</sup> *See* 31 C.F.R. §§ 500-501 (2009); *see also* 31 C.F.R. §§ 505-598 (2009).

<sup>36</sup> *See* DEP’T OF JUSTICE, COUNTERTERRORISM SECTION, COUNTERTERRORISM WHITE PAPER UPDATE 14-16 (2007) (on file with the Harvard Journal on Legislation and the author).

<sup>37</sup> *See, e.g.*, *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O’Neil*, 315 F.3d 748, 753 (7th Cir. 2002); *cf.* *Centrifugal Casting Mach. Co. v. Am. Bank & Trust Co.*, 966 F.2d 1348, 1354 (5th Cir. 1992) (“[B]locked Iraqi property interests are to be broadly construed so as to effectuate the purposes underlying the blocking orders.”).

<sup>38</sup> *Global Relief Found.*, 315 F.3d at 753 (emphasis added).

U.S. individual or entity may be designated under an order targeting a foreign threat, and could have all of her or its property entirely blocked.

IEEPA designation is especially harmful to U.S. persons. When designated, a foreign entity like Hezbollah or a foreign individual like Osama Bin Laden may lose important American revenue streams, contacts, or allies. U.S. residents, however, are completely incapacitated—prohibited from working, banking, traveling, or buying groceries without the consent of OFAC.<sup>39</sup> Even more severe is the fate of American organizations: it is the rare charity or company that can survive a prohibition on collecting revenue, paying creditors, compensating employees, and making purchases. The IEEPA designation of an American person thus amounts to total incapacitation, while the designation of an American organization generally amounts to a death sentence.

Despite the dire consequences of the designation of an American person or entity, courts that have considered the definition of “any property in which any foreign country or national thereof has any interest” have good reasons for favoring the broader construction. It is hard to imagine Congress having intended any other meaning. As the Seventh Circuit explained,

[I]f al Qaeda incorporated a subsidiary in Delaware and transferred all of its funds to that corporation . . . [w]hat sense could it make to treat al Qaeda’s funds as open to seizure if administered by a German bank but not if administered by a Delaware corporation under terrorist control? Nothing in the text of the IEEPA suggests that the United States’ ability to respond to an external threat can be defeated so easily. Thus the focus must be on how assets could be controlled and used . . . .<sup>40</sup>

The constitutionality of IEEPA designation of U.S. persons has been challenged and upheld repeatedly. Courts have rejected claims that designation unconstitutionally abridges the freedom of speech or association,<sup>41</sup> impermissibly delegates legislative power to the executive,<sup>42</sup> takes private property for public use without just compensation,<sup>43</sup> and fails to provide the requisite notice or hearing.<sup>44</sup>

What IEEPA designees have yet to argue, and thus courts have yet to consider, is that designation unconstitutionally subjects U.S. persons to criminal punishment without providing the required procedural protections.<sup>45</sup>

<sup>39</sup> See *supra* note 5.

<sup>40</sup> *Global Relief Found.*, 315 F.3d at 753.

<sup>41</sup> *E.g.*, *Holy Land*, 333 F.3d at 166.

<sup>42</sup> *E.g.*, *United States v. Arch Trading Co.*, 987 F.2d 1087, 1092-94 (4th Cir. 1993); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>43</sup> See, e.g., *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 51 (D.D.C. 2005).

<sup>44</sup> *E.g.*, *Holy Land*, 333 F.3d at 163.

<sup>45</sup> For example, the Holy Land Foundation argued before the D.C. Circuit that designation unconstitutionally violated its rights to freedom of speech, association, and equal protection,

Clearly, that argument offers no chance of relief to prototypical IEEPA designees like Iran, al Qaeda, or Osama Bin Laden, who generally cannot claim the protection of the Bill of Rights.<sup>46</sup> Nonetheless, the theory's acceptance would prevent the government from designating U.S. persons under IEEPA and would therefore carry substantial consequences. On the one hand, it would shield American individuals from harsh sanctions and save American entities from certain destruction. On the other, it might severely compromise the U.S. government's fight against terrorism and other national security threats. Thus, the question of whether IEEPA designation can constitutionally be used against U.S. persons is quite significant.

The rest of this Article explores that question, taking as a test case the SDGT designation, the most publicly visible and immediately relevant of the IEEPA designations currently in use against U.S. persons. The SDGT designation was created in 2001, shortly after the September 11 attacks,<sup>47</sup> and drew a great deal of publicity following the government's 2001 designation of the Holy Land Foundation for Relief and Development,<sup>48</sup> 2002 designations of the Global Relief Foundation<sup>49</sup> and Benevolence International Foundation,<sup>50</sup> and 2004 designation of the al-Haramain Foundation.<sup>51</sup> The designation and ensuing destruction of these organizations, four of the larg-

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and denied its procedural due process right to notice and a hearing. It did not ask the Court of Appeals to invalidate the designation on the theory suggested here. See Brief of Appellant, *Holy Land*, 333 F.3d 156 (D.C. Cir. 2003) (No. 02-5307), 2003 WL 25586053.

<sup>46</sup> "Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights," *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908), and the Constitution governs the actions of the American government no matter where it acts, *Reid v. Covert*, 354 U.S. 1, 5-7 (1957). But the Constitution's procedural protections generally have not been extended to aliens outside territory over which America has sovereignty. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that the Constitution does not protect the civil liberties of non-resident enemy aliens); *Kukatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962) (denying Canadian corporation with no assets in the United States standing to sue the United States for the denial of constitutionally-guaranteed due process of law); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (denying a non-resident alien standing to sue U.S. military officials for harassment and intimidation); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 n.16 (1987). Of course, the recent counterterrorism effort has destabilized the law in this area. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the right to habeas corpus applies to Guantanamo detainees). For more on this subject, see Cabranes, *supra* note 8; Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762 (2009).

<sup>47</sup> Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

<sup>48</sup> Office of Foreign Assets Control, *Recent OFAC Action: 12/04/2001*, U.S. DEP'T OF THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac/actions/20011204.shtml> (last visited Oct. 27, 2010).

<sup>49</sup> Office of Foreign Assets Control, *U.S. Treasury—Recent OFAC Action: 10/18/2002*, U.S. DEP'T OF THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac/actions/20021018.shtml> (last visited Oct. 15, 2010).

<sup>50</sup> Office of Foreign Assets Control, *U.S. Treasury—Recent OFAC Action: 11/19/2002*, U.S. DEP'T OF THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac/actions/20021119.shtml> (last visited Oct. 27, 2010).

<sup>51</sup> Office of Foreign Assets Control, *U.S. Treasury—Recent OFAC Action: 09/09/2004*, U.S. DEP'T OF THE TREASURY, <http://www.treas.gov/offices/enforcement/ofac/actions/20040909.shtml> (last visited Oct. 27, 2010).

est and best-known Islamic charities in the United States, were covered extensively in the press.<sup>52</sup> The scrutiny of the government's efforts to shut down these charities only grew more intense as a result of two somewhat embarrassing incidents. First, prosecutors accidentally revealed to the al-Haramain Foundation that phone conversations between the charity's Saudi Arabia-based director and its American citizen lawyers in Washington, D.C. had been taped as part of the NSA's warrantless wiretapping program.<sup>53</sup> Second, the Department of Justice struggled to obtain a guilty verdict in a criminal case against the Holy Land Foundation, winning a conviction in a retrial only after the first prosecution ended with a hung jury and allegations of government misconduct.<sup>54</sup>

To be sure, the government has used IEEPA designation against U.S. persons rarely, and against U.S. individuals, as opposed to entities, even more rarely still.<sup>55</sup> Nonetheless, it has done so and is likely to do so more often in the future as domestic terrorists like Colleen LaRose,<sup>56</sup> Nidal Malik Hasan,<sup>57</sup> and Carlos Bledsoe<sup>58</sup> play an increasingly salient role in the United States' national security calculus. Much depends on whether the Constitution allows such use. IEEPA designation allows the government to economically incapacitate allegedly dangerous Americans without having to obtain admissible evidence that proves guilt beyond a reasonable doubt, and it prevents Americans accused of being dangerous from defending themselves against

<sup>52</sup> See, e.g., Julian Borger, *US Turns Against Hamas: Islamic Charity Closed and Bank's Accounts Frozen*, GUARDIAN (U.K.), Dec. 5, 2001, at 5; Alan Cooperman, *In U.S., Muslims Alter Their Giving*, WASH. POST, Dec. 7, 2002, at A1; Judith Miller, *U.S. to Block Assets it Says Help Finance Hamas Killers*, N.Y. TIMES, Dec. 3, 2001, at A9; John Mintz, *U.S. Labels Muslim Charity as Terrorist Group*, WASH. POST, Oct. 19, 2002, at A2; Hanna Rosin, *U.S. Raids Offices of 2 Muslim Charities*, WASH. POST, Dec. 16, 2001, at A28; Patrick Smyth, *US Freezes Assets of Organizations it Believes Fund Hamas*, IRISH TIMES, Dec. 5, 2001, at 11; Stephanie Strom, *Charity Seeks to Transfer Money Frozen by Treasury*, N.Y. TIMES, Apr. 15, 2004, at A18; Neely Tucker, *Muslim Charity's Lawsuit Raises 'Distressing' Issues, Judge Says*, WASH. POST, Apr. 23, 2002, at A4.

<sup>53</sup> Carol D. Leonnig & Mary Beth Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, Mar. 2, 2006, at A1.

<sup>54</sup> Laurie Goodstein, *U.S. Muslims Taken Aback by a Charity's Conviction*, N.Y. TIMES, Nov. 26, 2008, at A23; Carrie Johnson & Walter Pincus, *Terrorism Financing Case Gets 2nd Trial*, WASH. POST, Sept. 21, 2008, at A1; Greg Krikorian, *Charity's Lawyers Say Quotes Were Fabricated*, L.A. TIMES, Feb. 25, 2007, at A18.

<sup>55</sup> See Office of Foreign Assets Control, *supra* note 9. For several reasons, it is difficult to determine the exact number of U.S. persons designated under the IEEPA. OFAC often has multiple entries on its list for a single designee. OFAC uses pseudonyms, nicknames, past aliases, and spelling variations to ensure the list is sufficiently inclusive. See *id.* Moreover, the very nature of IEEPA designees—narcotics traffickers, terrorists, and human rights abusers—means they are difficult to identify with certainty. For example, listings that appear to refer to different businesses or charities may in fact be identifying one entity that has changed its name or that operates under multiple names.

<sup>56</sup> Charlie Savage, *American Woman Indicted on Terror Charges in Plot to Kill Swedish Cartoonist*, N.Y. TIMES, Mar. 10, 2010, at A14.

<sup>57</sup> Robert D. McFadden, *12 Killed, 31 Wounded in Rampage at Army Post, Officer Is Suspect*, N.Y. TIMES, Nov. 6, 2009, at A1.

<sup>58</sup> Steve Barnes & James Dao, *Gunman Kills Soldier Outside Recruiting Station*, N.Y. TIMES, June 2, 2009, at A16.

those accusations in a court of law. The liberty of individuals and the security of the United States hang in the balance.

### III. THE *MENDOZA-MARTINEZ* TEST

Evaluating the constitutionality of IEEPA designation requires applying the Supreme Court's doctrine for policing the civil-criminal divide, the *Mendoza-Martinez* test. In 1963, in *Kennedy v. Mendoza-Martinez*,<sup>59</sup> the Supreme Court was tasked with evaluating the constitutionality of a statute that revoked draft evaders' citizenship. Two confessed draft dodgers brought constitutional challenges to the statute. The first, Francisco Mendoza-Martinez, fled to Mexico in 1942 to avoid being drafted to fight in World War II.<sup>60</sup> The second, Joseph Henry Cort, took a more circuitous approach to draft dodging. A Yale-educated doctor with communist sympathies living and working in England, Cort attempted to return to the United States in 1952 to join the faculty of the Harvard Medical School.<sup>61</sup> When he learned that he would be drafted and required to serve in the military as soon as he arrived in the United States, he fled to communist Czechoslovakia. In 1959, when he tried to return to America, he discovered that he had been stripped of his citizenship.<sup>62</sup> Ultimately, the Supreme Court found that the statute's citizenship revocation was a form of punishment, and its imposition was unconstitutional because it was not accompanied by criminal procedural protections.<sup>63</sup>

Since *Mendoza-Martinez*, the Supreme Court has employed a seven-factor totality-of-the-circumstances test to determine whether a putatively civil statute in fact imposes criminal punishment. Over the years, the Court has applied the test in a variety of different contexts, from an Alaska online registry of sex-offenders<sup>64</sup> to a federal statute denying bail to members of organized crime groups<sup>65</sup> and a Montana state tax on marijuana.<sup>66</sup> Despite having used it in a great many recent cases,<sup>67</sup> however, the Court's application of the test remains deeply confused, and the doctrine that has grown up around it is thoroughly incoherent.

Scholars frequently comment on this incoherence. In 1998, Professor Wayne Logan observed that "[d]espite [the subject's] importance, the Court's numerous decisions in the area have amounted to an incoherent muddle. Indeed, one would be hard-pressed to identify an area of constitutional

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<sup>59</sup> 372 U.S. 144 (1963).

<sup>60</sup> *Id.* at 147-49.

<sup>61</sup> *Id.* at 150.

<sup>62</sup> *Id.* at 149-52.

<sup>63</sup> *Id.* at 165-66.

<sup>64</sup> *Smith v. Doe*, 538 U.S. 84, 89 (2003).

<sup>65</sup> *United States v. Salerno*, 481 U.S. 739, 747 (1987).

<sup>66</sup> *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 794, 805 (1994).

<sup>67</sup> In addition to *Doe*, *Kurth Ranch*, and *Salerno*, recent cases include *Kansas v. Crane*, 534 U.S. 407 (2002), *Hudson v. United States*, 522 U.S. 93 (1997), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

law that betrays a greater conceptual incoherence.”<sup>68</sup> Now, more than a decade later, despite a number of intervening Court decisions, Professor Thomas Colby regards Logan’s derisive assessment of the current doctrine as still-accurate.<sup>69</sup>

This incoherence stems not just from a fickle and unprincipled application of the test by the Court,<sup>70</sup> but also from the great degree of uncertainty inherent in the test itself.<sup>71</sup> To determine whether a statute imposes criminal punishment, the *Mendoza-Martinez* test considers:

- [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative pur-

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<sup>68</sup> Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998); see also *id.* at 1280 (“[T]he Supreme Court’s case law on the punishment question in recent times has been so inconsistent that it borders on the unintelligible, evidencing a decidedly circular, at times patently result-driven effort to distinguish whether a sanction is ‘civil’ or ‘criminal,’ ‘preventive’ or ‘punitive,’ ‘regulatory’ or ‘retributive.’”); Fellmeth, *supra* note 18, at 3.

<sup>69</sup> Thomas Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 447 (2008); cf. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 3 (1999) (“[B]y simply invoking historical precedent as a talismanic answer to today’s judicial riddles, the Court fails to provide any analysis of how that precedent might be justified.”).

<sup>70</sup> For example, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court approved and labeled as civil a Kansas statute requiring mandatory commitment of sex-offenders, when faced with a rather extreme record. The Court noted that the respondent-defendant, Hendricks, had “explained that when he ‘gets stressed out,’ he ‘can’t control the urge’ to molest children . . . [and] he stated that the only sure way he could keep from sexually abusing children in the future was ‘to die.’” *Id.* at 355. Justice Thomas’s opinion for the Court did not narrow the holding to those facts, however, ruling that the statute was constitutional even though it covered individuals with far more control over their behavior than Hendricks possessed. *Id.* at 368-69. But Justice Kennedy wrote a short concurrence, indicating that he joined the majority only because of the particular facts of the case. *Id.* at 371-72 (Kennedy, J., concurring). He explicitly left open the possibility that examining further application of the statute could lead him to conclude that it in fact imposed criminal punishment. *Id.* at 373. Sure enough, just five years later, in *Kansas v. Crane*, 534 U.S. 407 (2002), the same statute was once again before the Court. Justice Kennedy, along with Chief Justice Rehnquist and Justice O’Connor, combined with the four *Hendricks* dissenters to issue an opinion authored by Justice Breyer arguing that *Hendricks* had only approved the civil commitment of dangerous persons suffering from mental abnormalities who find it “difficult, if not impossible” to control their behavior, not the entire class of individuals with mental abnormalities or emotional disorders covered by the Kansas statute. *Id.* at 411-14. In short, *Crane* obscured any clarity that a careful observer might have been able to draw out of *Hendricks* about the Court’s theory of the Constitution’s criminal procedure regime.

<sup>71</sup> See *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting in part and concurring in part) (“No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that . . . [the sanctions] are not . . . punishment.”).

pose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>72</sup>

Yet, these factors “often point in differing directions”<sup>73</sup> and are regarded by the Court as “helpful” but “certainly neither exhaustive nor dispositive.”<sup>74</sup> Furthermore, although the Court stresses that “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,”<sup>75</sup> Justice Breyer has observed that “the limitation that the language suggests is not consistent with what the Court has actually done. Rather, in fact if not in theory, the Court has simply applied [the *Mendoza-Martinez*] factors . . . to the matter at hand,” which Justice Breyer believes is appropriate.<sup>76</sup> Accordingly, it is difficult to predict with any certainty what the Court will find persuasive when evaluating a new statute.

Thus, the task of applying the *Mendoza-Martinez* test to IEEPA designation must be approached with some trepidation. The test as currently articulated cannot offer a clear answer. Nonetheless, it is necessary to apply the test to IEEPA designation of U.S. persons in order to evaluate constitutionality under the Fifth and Sixth Amendments.

Undeniably, IEEPA designation is imposed without the sort of robust procedural protections that must accompany criminal punishment. The decision is made secretly and entirely within the executive branch, using classified evidence.<sup>77</sup> Guilt is not proven beyond a reasonable doubt<sup>78</sup> to a jury in a public trial.<sup>79</sup> No grand jury indictment is obtained.<sup>80</sup> No witnesses are confronted.<sup>81</sup> Thus, the question of IEEPA designation’s constitutionality comes down to whether it can properly be classified as a civil sanction under the

<sup>72</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

<sup>73</sup> *Id.* at 169.

<sup>74</sup> *United States v. Ward*, 448 U.S. 242, 249 (1980).

<sup>75</sup> *Hudson v. United States*, 522 U.S. 93, 100 (1997) (internal quotation marks omitted).

<sup>76</sup> *Id.* at 115 (Breyer, J., concurring in the judgment) (joined by Ginsburg, J.); *see also id.* at 112-14 (Souter, J., concurring). Other members of the Court have also questioned the utility of following the “clearest proof” approach in all cases. *See Doe*, 538 U.S. at 107, 110 (Souter, J., concurring in the judgment); *id.* at 114-15 (Ginsburg, J., dissenting) (joined by Breyer, J.).

<sup>77</sup> *See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163-64 (D.C. Cir. 2003).

<sup>78</sup> *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

<sup>79</sup> *See U.S. CONST. amend. VI* (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”).

<sup>80</sup> *See U.S. CONST. amend. V* (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .”).

<sup>81</sup> *See U.S. CONST. amend. VI* (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”).

*Mendoza-Martinez* test. If it can be, then it is constitutional. But if it fails the test, then it is criminal punishment, and imposition of such sanctions in their current form, without requisite criminal procedural protections, is unconstitutional.

Part IV of the Article applies the first five factors of the test to IEEPA. The last two factors are addressed separately in Part V because they are simultaneously the most crucial elements of the test and the source of the incoherence and inconsistency that plagues the test. Thus, it will be useful to consider the relatively simple, straightforward factors before turning to the more challenging ones. The analysis concludes that all of the factors point toward IEEPA designation being unconstitutional.

#### IV. THE TEST'S FIRST FIVE FACTORS

The first five factors of the *Mendoza-Martinez* test strongly suggest that IEEPA designation is criminal punishment. First, designation is an affirmative disability or restraint. The loss of the freedom to work, travel, enter into contracts, use a bank, or make purchases of any kind without specific government authorization is arguably as disabling or restraining as any sanction short of incarceration. The most severe sanction other than imprisonment to which the Court has applied this element of the *Mendoza-Martinez* test is the Alaska sex-offender registry upheld in *Smith v. Doe*.<sup>82</sup> In that case, the Court held the requirement that sex-offenders inform the government if they change addresses or alter their physical appearances did not constitute an affirmative disability or restraint.<sup>83</sup> The Court distinguished that requirement from the affirmative restraint imposed by probation on the grounds that the sex-offender registrants were “free to move where they wish to live and work as other citizens, with no supervision” while ex-convicts are subject to “a series of mandatory conditions,” which “allow the supervising officer to seek the revocation of probation or release in case of infraction.”<sup>84</sup> IEEPA designation, however, is even more restrictive than probation in precisely the same way. While probation prohibits certain specific work or travel choices, IEEPA designation prohibits all such choices. Thus, like probation, IEEPA designation constitutes an affirmative disability or restraint.

Second, historically, IEEPA designation’s constitutive elements have all been regarded as punishments—the state seizes all of the designee’s property,<sup>85</sup> publicly labels her a “terrorist,” and casts her out of the community

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<sup>82</sup> 538 U.S. 84 (2003).

<sup>83</sup> *Id.* at 99-102.

<sup>84</sup> *Id.* at 101.

<sup>85</sup> The dispossession of all property has long been imposed as a punishment in Anglo-American criminal law. *See, e.g.,* *Selective Service System v. Minn. Public Interest Research Group*, 468 U.S. 841, 852 (1984) (noting that the “punitive confiscation of property” is a traditional Anglo-American criminal punishment); *United States v. Saccoccia*, 823 F. Supp. 994, 1000-01 (D.R.I. 1993) (noting that forfeiture of all property held in the name of the defendant was a traditional common law punishment); LAWRENCE FRIEDMAN, *CRIME AND PUN-*

by forbidding all others from interacting with her.<sup>86</sup> Indeed, Justice Kennedy's opinion for the Court in *Smith v. Doe*<sup>87</sup> labels exactly these elements as paradigmatic historical punishments. In rejecting the argument that sex-offender registration would have been regarded as punishment at the time of America's founding, Justice Kennedy offered an account of historical punishment that reads like a description of IEEPA designation:

Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required to stand in public with signs cataloguing their offenses. . . . At times the labeling would be permanent: A murderer might be branded with an "M," and a thief with a "T." . . . The aim was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community. . . . The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one. . . . Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.<sup>88</sup>

IEEPA designation is an updated version of such forms of punishment: it publicly brands a designee with the letters of shame, "SDGT," discourages members of the community from interacting with the designee, and creates a direct confrontation between the designee and the public through press releases and office raids.<sup>89</sup>

Third, while the language of the Executive Order that creates the SDGT designation does not clearly include a scienter requirement,<sup>90</sup> it seems that in practice OFAC will only designate individuals after a finding of scienter. Certainly, the OFAC announcements of new designations suggest that designees are intentionally nefarious, and treat a guilty mind as an important com-

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ISHMENT IN AMERICAN HISTORY 65, 66, 487 n.39, 493 n.75 (1994) (providing examples of crimes punished by dispossession of property).

<sup>86</sup> See *supra* notes 30-40 and accompanying text.

<sup>87</sup> 538 U.S. 84 (2003).

<sup>88</sup> *Id.* at 97-98 (internal citations and quotation marks omitted).

<sup>89</sup> See Ottaway, *supra* note 1.

<sup>90</sup> Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2001) (authorizing the designation of "foreign persons determined . . . to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States [and] persons determined . . . to assist in, sponsor, or provide . . . support for . . . such acts of terrorism . . . or . . . to be otherwise associated with those persons").

ponent in the public explanation of a designation.<sup>91</sup> And for good reason: the intensive and costly process of designation would be a bizarrely inefficient solution to the problem of someone unknowingly or non-recklessly committing or supporting terrorist acts. Presumably, most Americans accidentally supporting terrorism would stop the behavior in question immediately when informed of its consequences. Accordingly, SDGT designation probably carries a scienter requirement in theory, and in any case certainly carries one in practice.

Fourth, designation will promote retribution and deterrence, the traditional aims of punishment.<sup>92</sup> Whether or not it is intended primarily to achieve those aims, it furthers them both. As a severe and publicly-inflicted deprivation of the liberty of accused terrorists, SDGT designation deters those who might consider participating in or supporting terrorism in the future and retributively imposes suffering upon those alleged to have sought the harm of the U.S. government or its nationals. In particular, by making felons out of everyone who transacts with an SDGT, IEEPA designation morally condemns designees. Indeed, the message is that they are moral outcasts, forbidden from participating in their normal community life.

Occasionally, the Court has offered an alternative account of the “promotes retribution and deterrence” factor of the test, effectively treating the word “promotes” as if it were “intends.”<sup>93</sup> Most notably, Justice Thomas’s opinion for the Court in *Kansas v. Hendricks* upholding a sex-offender civil commitment statute suggested that the proper inquiry was whether the legis-

<sup>91</sup> See, e.g., Press Release, Press Room, U.S. Dep’t of the Treasury, Treasury Designates Two Pakistani Individuals for Supporting Terrorist Activities (Apr. 15, 2010), available at <http://www.ustreas.gov/press/releases/tg643.htm> (“Mazhar is a long standing supporter of al-Qai’da and has collected and held . . . as much as \$1 million for al-Qai’da . . . . Mazhar has also personally given large donations to al-Qaida senior leader Usama bin Laden. . . . Mazhar was also once a member of Taliban combatant groups and has fought in Afghanistan.”); Press Release, Press Room, U.S. Dep’t of the Treasury, Treasury Designates Two Individuals for Supporting Terrorist Activities (Apr. 1, 2010), available at <http://www.ustreas.gov/press/releases/tg621.htm> (“As of mid-2007, al-Duyami was in charge of an al-Qai’da network in Europe . . . [and] is responsible for facilitating the training, equipping and movement of foreign fighters into Iraq by recruiting Muslims in Europe . . . . Atilla Selek traveled to Pakistan in July 2006, where he received military training, . . . helped supply . . . volunteers to engage in terrorist activities and took part in a plot to bomb U.S. military installations and other sites in Germany.”). See generally Press Room, U.S. Treasury—Press Releases—Enforcement, U.S. DEP’T OF THE TREASURY, <http://www.ustreas.gov/press/law-enforcement.html> (last visited Oct. 27, 2010).

<sup>92</sup> In fact, more often than not, affirmative disabilities or restraints (the first factor) serve both of these goals. Exceptions arise only in a minority of cases, such as when the targeted individual is incapable of being deterred, see, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997) (“Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.”), or when an imposed cost is spread throughout society rather than aimed at a particular individual, as is the case, for example, for required contributions to workers’ compensation funds.

<sup>93</sup> See, e.g., *Smith*, 538 U.S. at 115; *Hendricks*, 521 U.S. at 361-63; *Hudson v. United States*, 522 U.S. 93, 99 (1997).

lature “intended the Act to function as a deterrent”<sup>94</sup> or whether “the Act’s purpose [was] . . . retributive.”<sup>95</sup>

This alternative formulation, however, is entirely inconsistent with the test as a whole, which aims to determine whether a statute imposes criminal punishment regardless of whether Congress intended it to do so. Indeed, as *Hendricks* itself explained, the Court only turns to the *Mendoza-Martinez* test after deciding that the enacting legislature intended to establish civil proceedings<sup>96</sup> and employs the test to discover whether “‘the statutory scheme [is] so punitive either *in purpose or effect* as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>97</sup> Thus, the *Mendoza-Martinez* test must ask not just whether the legislature acted with the *aim* of deterring or of exacting retribution, but also whether the sanction’s *effect* was to deter or to exact retribution. Accordingly, the broader version of the “promotes retribution and deterrence” factor that the Court usually employs,<sup>98</sup> asking whether a sanction *has the effect* of promoting retribution and deterrence, should govern. In this case, there is little direct evidence of whether Congress and the President intended retribution and deterrence, but it is undeniable that both are in fact effected by IEEPA designation.

Fifth, Congress has already criminalized terrorism and the provision of material support to terrorists.<sup>99</sup> Notably, the U.S. government has had considerable difficulty attempting to prosecute SDGTs under these criminal statutes.<sup>100</sup> Moreover, some policymakers and scholars have expressed doubt that the United States should prosecute terrorism crimes in the usual manner because, they argue, the operation of the rules of evidence and criminal procedures mandated by the Bill of Rights will compromise other government priorities.<sup>101</sup> Specifically, they worry that public trials will reveal highly classified information, compromising intelligence sources and methods.<sup>102</sup> Accordingly, there is an elevated risk that the government will seek to impose criminal punishment without providing the required procedures. In *Mendoza-Martinez*, the Court highlighted this concern. In that case, the Court was especially persuaded by the draft-dodgers’ argument that Congress had

<sup>94</sup> *Hendricks*, 521 U.S. at 362.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 361.

<sup>97</sup> *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) (emphasis added).

<sup>98</sup> *See, e.g.*, *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 (1994); *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 144 (1963).

<sup>99</sup> *See, e.g.*, 18 U.S.C. § 2339(a)-(b) (2006).

<sup>100</sup> *See, e.g.*, *Johnson & Pincus*, *supra* note 54.

<sup>101</sup> *See, e.g.*, A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227 (2006); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SEC. L. & POL’Y 1 (2009); Neal Katyal & Jack Goldsmith, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19; Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15; George J. Terwilliger, III, “*Domestic Unlawful Combatants*”: *A Proposal to Adjudicate Constitutional Detentions*, ENGAGE, Oct. 2006, at 55.

<sup>102</sup> *See id.*

chosen to strip them of their citizenship in order to get around jurisdictional requirements that made the prosecution and sentencing of expatriates especially difficult.<sup>103</sup> This factor, therefore, seems especially important to the analysis.

#### V. THE TEST'S LAST TWO FACTORS AND THE UNREASONED TREATMENT OF ALTERNATIVE PURPOSE

The *Mendoza-Martinez* test's last two factors, alternative purpose and excessiveness in relation to that purpose, are always applied in tandem and are best treated together because of their necessary interdependence. Applying these final two factors to IEEPA designation also suggests that designation is criminal punishment. In contrast to the relatively straightforward examination of the first five factors, however, reaching this conclusion requires a great deal of analysis and a willingness to step beyond the current case law, precisely because the Court has failed to explain how to apply the last two factors. Indeed, the confusion that plagues the civil-criminal divide jurisprudence stems in large part from the Court's entirely unreasoned application of these two factors. The Court's confused treatment of these factors has an outsized effect on the incoherence of this area of doctrine because, in practice, the Court's final conclusion often hinges on whether the sanction is a non-excessive, rational means of achieving a sufficiently alternative purpose.<sup>104</sup>

##### A. *The Supreme Court's Under-Theorized View of the Purposes of Punishment*

When the Court looks for an "alternative purpose," it means one that is "nonpunitive."<sup>105</sup> In other words, if a statute serves a goal other than criminal punishment, that alternative purpose indicates that the statute does not impose criminal punishment. While the circularity of this claim is frustrating, the inquiry to which it alludes is somewhat sensible: if a statute furthers no goal other than imposing criminal punishment, it likely imposes criminal punishment. Examining IEEPA designation in search of such a goal, however, reveals that the Court has never satisfactorily explained what constitutes a punitive purpose, or how to tell when a purpose is not punitive.

The arguably nonpunitive purpose of IEEPA designation is to protect public safety by incapacitating the designee, thereby preventing her from committing or supporting future terrorist acts. On the surface, the case law seems to suggest that this is a nonpunitive purpose. The Court has stated on

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<sup>103</sup> See 372 U.S. at 180-85.

<sup>104</sup> See *Smith v. Doe*, 538 U.S. 84, 102 (2003) ("The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996))).

<sup>105</sup> *Doe*, 538 U.S. at 102-03.

several occasions that “preventing danger to the community is a legitimate [nonpunitive] regulatory goal.”<sup>106</sup> From this language, one might conclude that IEEPA designation has an alternative purpose besides inflicting punishment.

Yet further contemplation reveals the flaw in this logic. Nearly every criminal sanction seeks to prevent danger to the community. Indeed, many of the most paradigmatic criminal prohibitions—such as those against murder, rape, and burglary—seek to prevent the exact same dangers as the statutes the Court has upheld in some of its most prominent *Mendoza-Martinez* test cases. For example, in both *Hendricks*<sup>107</sup> and *Allen*,<sup>108</sup> the statutes that the Court found to serve the non-criminal, regulatory goal of protecting public safety were intended to prevent rape and other sex crimes by incarcerating individuals likely to commit them. Similarly, in *Salerno*, the public-safety-protecting Bail Reform Act that the Court accepted as non-criminal allowed for the incarceration of alleged members of organized crime groups in order to prevent them from committing violent crimes.<sup>109</sup>

In the few cases in which the Court has held preventing danger to be an alternative purpose, its ability to ignore this flaw has bordered on absurdity. For example, *Doe* describes the alternative purpose of the Alaska Sex Offender Registration Act as an exercise of “the State’s power to protect the health and safety of its citizens,”<sup>110</sup> a power which so obviously includes the imposition of criminal sanctions that it is often termed *the police power*.<sup>111</sup> *Salerno*, even more gratuitously, went so far as to hold explicitly that “crime prevention” is a regulatory, non-criminal goal.<sup>112</sup>

Unfortunately, the Court has failed to elaborate further. Clearly, some restrictions on liberty that seek to prevent future danger to the community, like the execution of convicted murderers,<sup>113</sup> further the goal of criminal punishment, while others, like a quarantine preventing healthy individuals from entering a diseased city<sup>114</sup> or civil commitment forcing dangerously insane individuals to accept treatment,<sup>115</sup> do not. Yet the Court has not ex-

<sup>106</sup> *United States v. Salerno*, 481 U.S. 739, 747 (1987); see also *Doe*, 538 U.S. at 102-03; *Schall v. Martin*, 467 U.S. 253, 265 (1984).

<sup>107</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>108</sup> *Allen v. Illinois*, 478 U.S. 364 (1986).

<sup>109</sup> See 481 U.S. at 742-43.

<sup>110</sup> 538 U.S. at 93 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

<sup>111</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“[T]he police power of a State must be held to embrace . . . protect[ion of] the public health and the public safety.”); *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877) (“[T]he police power of the State . . . is generally said to extend to making regulations promotive of domestic order, morals, health, and safety.”).

<sup>112</sup> 481 U.S. at 750.

<sup>113</sup> E.g., 18 U.S.C. § 1111(b) (2006).

<sup>114</sup> E.g., *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902).

<sup>115</sup> E.g., *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (“Here, by contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.”).

plained how to distinguish between the two. Indeed, the Court has tended to pronounce a particular statute's violence-prevention purpose as a non-criminal regulatory goal without providing justification or reasoning.

In *Salerno*, for example, the Court used only the following three sentences to decide the issue, even though it was the most important one in the case:

The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal.<sup>116</sup>

The only reasoning or support the Court provided was a general citation to *Schall*, a case upholding the constitutionality of a New York state statute that provided for pretrial detention of an accused juvenile delinquent if there was a serious risk that the juvenile would commit a crime when released.<sup>117</sup>

*Schall*, however, does not stand for the proposition that preventing danger is, in and of itself, a nonpunitive goal. To the contrary, the alternative purpose recognized in *Schall* was the state's interest in protecting both the community *and the juvenile herself* from the effects of juvenile crime, which the Court distinguished from criminal restrictions of liberty on the grounds that "the State must play its part as *parens patriae*" and "that juveniles, unlike adults, are always in some form of custody."<sup>118</sup> Whether or not that reasoning is persuasive, a quasi-parental interest in preventing juvenile delinquency is distinct from the goal of preventing danger to the community posed by violent crime.

Even if *Schall* can be stretched to hold that protecting the community from danger, regardless of a perpetrator's age, is itself an alternative purpose, it hardly clarifies the situation. There is no reasoning or explanation accompanying the dicta in *Schall* suggesting that danger prevention, in and of itself, might be an alternative purpose.<sup>119</sup> Even worse, the cases cited in *Schall* suggest that there is actually no support in the Court's precedents for such a holding. The Court cites to just three cases on this point, none of which support the proposition.<sup>120</sup> Two were *criminal prosecutions imposing criminal punishment* in which the defendant challenged the constitutionality of police investigatory actions meant to ascertain whether a crime was being committed.<sup>121</sup> The third held only that "the interest in combating local crime

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<sup>116</sup> 481 U.S. at 747 (internal citations omitted).

<sup>117</sup> *Schall v. Martin*, 467 U.S. 253, 255 (1984).

<sup>118</sup> *Id.* at 265.

<sup>119</sup> *Id.* at 264-65.

<sup>120</sup> *Id.* at 264 (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)).

<sup>121</sup> *See* *Brown v. Texas*, 442 U.S. 47 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968).

infesting a particular industry” is a “legitimate and compelling state interest” but was silent on the question of whether that interest is alternative and nonpunitive.<sup>122</sup>

Other instances in which the Court has held that a statute’s attempt at danger-prevention qualifies as an alternative purpose suffer from an equally vexing lack of reasoning or support. In *Doe*, for example, a convicted sex-offender—alleging that a purportedly civil registration requirement imposed criminal punishment—conceded that the goal of promoting community safety by informing the population of the location of convicted sex-offenders was a valid alternative purpose.<sup>123</sup> The goal of informing the public seems quite different from the purpose that criminal punishment is usually thought to serve, and conceding the point may well have been a wise strategic choice. Nonetheless, the concession allowed Justice Kennedy’s majority opinion to leave unexplained exactly what about the statute’s danger-prevention purpose distinguished it from criminal punishment aimed at danger prevention.<sup>124</sup>

Faced with an acute absence of reasoning from the Court, how should the *Mendoza-Martinez* test’s last two factors be applied? The first step is to disaggregate the various purposes encompassed in the vague idea of preventing future danger to the community. Some restrictions on liberty—such as

<sup>122</sup> See *De Veau v. Braisted*, 363 U.S. 144, 155 (1960). Interestingly, the *Schall* Court did not cite to a separate finding in *De Veau* that the New York state legislature that passed the statute (which prohibited waterfront labor organization from selecting convicted felons as officers) “sought not to punish ex-felons, but to devise . . . a much-needed scheme of regulation of the waterfront.” *Id.* at 160. Presumably, the *Schall* Court saw this finding as irrelevant because it was made pursuant to the now-discredited, pre-*Martinez-Mendoza* test approach of determining “whether the legislative aim was to punish that individual for past activity.” *Id.* For more on why this approach is nonsensical, see *supra* notes 93-98 and accompanying text.

<sup>123</sup> *Smith v. Doe*, 538 U.S. 84, 102-03 (2003) (“[T]he Act has a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their community.’ Respondents concede, in turn, that ‘this alternative purpose is valid, and rational.’” (internal citations omitted)).

<sup>124</sup> *Id.* Other *Mendoza-Martinez* test cases beyond those discussed above prove equally unhelpful. *Hendricks*, for example, disposes of the issue with a scant four sentences:

The State may take measures to restrict freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. The Court has, in fact, cited the confinement of “mentally unstable individuals who present a danger to the public” as one classic example of nonpunitive detention. If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

*Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (quoting *Salerno*, 481 U.S. at 748-49) (internal citations omitted). Thus, *Hendricks* states the proposition that “protecting the community from harm” can be a nonpunitive purpose, but provides little guidance on the process for deciding whether it is nonpunitive in any given instance. And, of course, the invocation of *Salerno* is not illuminating, given *Salerno*’s similar lack of analysis. See *supra* notes 116-117. The *Allen v. Illinois* Court found that a state civil commitment statute’s nonpunitive purpose was to provide the mentally ill with care and treatment, 487 U.S. 364, 369-70, 373 (1986), thus sidestepping altogether the question of how to treat incapacitation intended to prevent danger.

quarantines<sup>125</sup> or evacuation orders designed to protect evacuees from hurricanes<sup>126</sup>—prevent danger to the community caused not by individual wrongdoing but by natural or societal factors outside of the private citizen’s control. Others, such as sex-offender registration requirements,<sup>127</sup> restrict the liberties of a few individuals in order to prepare or educate members of the community to protect themselves against potential wrongdoing. Some restrictions of liberty enable the government to forcibly care for dangerous persons who are too young or too incompetent to take care of themselves, and, through such care, to prevent them from endangering themselves and others.<sup>128</sup> And of course, some restrictions of liberty prevent danger to the community by depriving wrongdoers of liberty and thereby accomplishing deterrence—frightening others who wish to avoid such sanctions—or retribution—affirming that the community condemns certain acts and so strengthening citizens’ anti-wrongdoing values.<sup>129</sup> Finally, some restrictions on liberty incapacitate dangerous individuals, making them unable to commit future violent acts and thereby preventing danger to the community.<sup>130</sup>

Thus, the list of specific danger-prevention purposes ranges from community education to incapacitation of dangerous individuals. The next step in applying the last two *Mendoza-Martinez* factors is to examine the exact outcomes a given policy produces instead of attempting to examine the broader and vaguer danger-prevention purpose.<sup>131</sup>

Some specific danger-prevention purposes, such as imprisoning individuals to exact retribution for past crimes, are punitive under any definition of punishment. Conversely, some specific purposes are nonpunitive under any definition: no reasonable definition of punishment encompasses removing people from harm’s way by requiring them to evacuate before a storm. But other danger-prevention purposes are not as easy to categorize. IEEPA

<sup>125</sup> See, e.g., *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902).

<sup>126</sup> See, e.g., LA. REV. STAT. ANN. § 29:727 (2008).

<sup>127</sup> See, e.g., *Doe*, 538 U.S. 84.

<sup>128</sup> This care may take the form of medical treatment for mental disorders, see *Allen v. Illinois*, 478 U.S. 364, 373 (1986), or detention of minors with the goal of “play[ing] the part of *parens patriae*” and “promoting the welfare of the child,” see *Schall v. Martin*, 467 U.S. 253, 265 (1984).

<sup>129</sup> See, e.g., 18 U.S.C. § 1111 (“Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life . . .”).

<sup>130</sup> See, e.g., 50 U.S.C. §§ 1701-07 (Supp. 2008).

<sup>131</sup> Such an inquiry was pursued by the Court in *Mendoza-Martinez* itself when it noted that the sanction at issue was aimed at the general purpose of supporting the state’s ability to protect national security, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963), but the Court focused its inquiry on the specific purpose of exacting retribution from draft evaders, *id.* at 180-84. Indeed, the Court used to explore the punitive/nonpunitive purpose question much more deeply. Cf. *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (offering an account of pre-*Mendoza-Martinez* cases determining whether statutes were civil or criminal with a careful attention to the specific alternative purpose identified in each case); *Cummings v. Missouri*, 71 U.S. 277, 319-20 (1866) (looking beyond the general purpose of maintaining rigorous employment qualifications and asking whether the provision at issue set qualifications in order to obtain effective employees or to disfavor certain groups of potential applicants).

designation's specific purpose is protecting public safety by incapacitating the designee and thereby preventing her from committing or supporting future terrorist acts. The categorization of that purpose as punitive or nonpunitive requires a nuanced, thorough account of punishment.

The case law has yet to exhibit such nuance. On the one hand, the Court has repeatedly asserted that incapacitation to prevent violence is a punitive purpose. For example, in the 1965 case *United States v. Brown*, the Court observed, "punishment serves several purposes: retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."<sup>132</sup> Just three years later, Justice Black observed in a concurrence that "isolation of the dangerous has always been considered an important function of the criminal law."<sup>133</sup>

More recently, in *Foucha v. Louisiana*, the Court struck down a civil commitment statute it described as "only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."<sup>134</sup> Justice Kennedy dissented in *Foucha* and would have upheld the statute, but he too observed that incapacitation to prevent violence is a common goal of criminal punishment,<sup>135</sup> a point he had made in a previous opinion.<sup>136</sup> Finally, in *Kansas v. Crane*, decided in 2002, Justice Breyer wrote for a seven-member majority that in any civil commitment scheme, "the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."<sup>137</sup> He went on to cite *Foucha* approvingly for the proposition that the Constitution does not "permit the indefinite confinement 'of any convicted criminal' after completion of a prison term."<sup>138</sup>

On the other hand, *Salerno* cuts very heavily in the opposite direction. There, the Court actually consciously and explicitly upheld a purportedly civil statute authorizing pretrial detention based on dangerousness.<sup>139</sup> However, the Court never sought a specific purpose and simply accepted

<sup>132</sup> *United States v. Brown*, 381 U.S. 437, 458 (1965).

<sup>133</sup> *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring).

<sup>134</sup> *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

<sup>135</sup> *See id.* at 99 (Kennedy, J., dissenting).

<sup>136</sup> *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in the judgment) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.")

<sup>137</sup> *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

<sup>138</sup> *Id.* (citing *Foucha*, 504 U.S. at 82-83).

<sup>139</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

“preventing danger to the community” as the detention’s alternative purpose.<sup>140</sup> As a result, *Salerno* does not actually hold that intending to incapacitate dangerous individuals to prevent them from committing violent acts and thereby protect the community is a nonpunitive purpose.<sup>141</sup>

In short, current jurisprudence offers decidedly mixed signals as to whether a deprivation of liberty serves a punitive or nonpunitive purpose when it is used to incapacitate those likely to commit future acts of violence. Moreover, two additional aspects of the Court’s civil-criminal divide jurisprudence further reveal the degree to which this question remains unanswered. First, the Court has never considered an incapacitating deprivation of liberty like IEEPA designation which, though stunningly severe, falls short of incarceration. It is quite possible that, outside of the imprisonment context, the Court might be more willing to consider incapacitation to prevent violence as a nonpunitive goal than *Brown*, *Foucha*, and *Crane* indicate. Second, the Court has never considered a deprivation of liberty justified purely on dangerousness grounds. In every *Mendoza-Martinez* test case where incapacitation to prevent violence was a central purpose of the statute under review, the detainee was already restrained for some additional reason beyond dangerousness. Most often, that reason has been the detainee’s mental illness,<sup>142</sup> though in *Schall* it was the detainee’s minor status<sup>143</sup> and in *Salerno* it was probable cause to believe the detainee had committed a crime.<sup>144</sup> Thus, it is possible that the Court is less amenable to the idea that incapacitation of the potentially violent purely for dangerousness might serve a nonpunitive purpose than *Salerno*, *Schall*, and some of the civil commitment cases indicate.

The overarching point is that a great deal of incoherence flows from the Court’s failure to adopt a reasonably specific definition of punishment. The Court discusses the concept of a punitive purpose at such a high degree of generality that it is impossible to determine whether a specific purpose—such as danger prevention by incapacitation of dangerous individuals—is punitive. Thus, determining whether IEEPA designation is criminal punishment requires stepping beyond the current jurisprudence and beginning to consider different possible conceptions of punishment.

### B. *Three Conceptions of Punishment*

In light of the Court’s failure to articulate a sufficiently thorough conception of the purposes of punishment, especially with regard to violence

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<sup>140</sup> *Id.* at 747.

<sup>141</sup> See *supra* notes 112-118 and accompanying text.

<sup>142</sup> See *Smith v. Doe*, 538 U.S. 84 (2003); *Crane*, 534 U.S. at 413; *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997); *Foucha*, 504 U.S. at 83; *Allen v. Illinois*, 478 U.S. 364, 373 (1986).

<sup>143</sup> *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>144</sup> *Salerno*, 481 U.S. at 744.

prevention, it is helpful to look to scholars, and in one case a dissenting Supreme Court justice, who have offered several theories of punishment.<sup>145</sup> Upon examination of this body of thought, three approaches to the relationship between incapacitation and punishment emerge.<sup>146</sup> These approaches differ from one another considerably, yet under each approach, IEEPA designation is unconstitutional.

### 1. *The Multipurpose View*

The first of the three theories argues that punishment has a great many purposes, including not just deterrence and retribution but also rehabilitation and prevention through incapacitation.<sup>147</sup> This multipurpose approach seeks to understand the lived experience of punishment. It is informed by precedent, history, and close attention to the actual outcomes produced by the past decisions that, taken together, comprise judicial tradition.<sup>148</sup>

This account stresses that the actual practice of Anglo-American criminal law has been marked by a heterogeneous conception of punishment that serves multiple goals.<sup>149</sup> Those who ascribe to this perspective are critical of accounts of punishment that identify only one legitimate punitive motivation, and may be especially wary of any special emphasis on retribution, warning that such emphasis indulges an unhealthy, inhumane urge for ven-

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<sup>145</sup> The last two decades have seen an increase in the amount of scholarship devoted to theories of punishment, following a sudden jump in the number of *Mendoza-Martinez* test cases decided by the Supreme Court and a provocative article by Kenneth Mann calling for the softening of the firm distinction between criminal and civil law. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795 (1992). Mann's perspective was subsequently echoed by other scholars, see, e.g., Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 *BUFF. CRIM. L. REV.* 679 (1999), and has recently been expanded upon by an even more radical call to abandon the distinction between the two forms of law altogether, see Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 *VA. L. REV.* 79, 134 (2008) (proposing to end the civil-criminal divide by providing procedural protection based on the power balance or imbalance between the litigants and the severity of potential sanctions).

<sup>146</sup> For brevity's sake, these theories are referred to as the prevailing conceptions of punishment. Of course, there are far more than three positions in the wide-ranging and long-running debate about the proper role of punishment in a liberal democracy. However, when it comes to understanding the relationship between incapacitation and the purpose of punishment, these three theories predominate.

<sup>147</sup> Examples of this perspective can be found in 4 *WILLIAM BLACKSTONE, COMMENTARIES* \*248-49; DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 9 (2001); O.W. HOLMES, JR., *THE COMMON LAW* 43-48 (1881); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1311 n.324 (1970); Fellmeth, *supra* note 18; and Christopher Slobogin, *The Civilization of the Criminal Law*, 58 *VAND. L. REV.* 121, 126 (2005).

<sup>148</sup> See, e.g., HOLMES, *supra* note 147, at 43-47 (arguing that it is improper that criminal punishment is primarily preventive and only secondarily retributive, "but even if it is wrong, our criminal law follows it, and the theory of our criminal law must be shaped accordingly").

<sup>149</sup> See, e.g., GARLAND, *supra* note 147, at 8-12 (arguing that punishment in the second half of the twentieth century has been increasingly motivated by both retribution and danger prevention, and decreasingly motivated by rehabilitation); Ely, *supra* note 147, at 1312 n.324 (listing multiple goals of punishment).

geance.<sup>150</sup> Thus, at the heart of this view is the contention that there is no single punitive purpose.

This perspective is no longer very popular with scholars, many of whom tend to favor a retribution-only view of punishment.<sup>151</sup> Indeed, one of the strongest contemporary advocates of the multipurpose approach, Christopher Slobogin, recognizes that he is very nearly alone in the legal academy.<sup>152</sup> It is telling that, just a few years ago, even Slobogin was one of the many scholars who believed retribution was the only permissible goal of criminal punishment.<sup>153</sup> But what it lacks in contemporary support, the multipurpose approach makes up for with its impressive pedigree.<sup>154</sup> The list of past commentators who have argued some version of this position includes Oliver Wendell Holmes, John Hart Ely, and Sir William Blackstone. Holmes expressed this view in *The Common Law*, writing:

[P]robably most English-speaking lawyers would accept the preventive theory without hesitation. . . .

. . . .

The considerations which answer the argument of equal rights also answer the objections to treating man as a thing, and the like. If a man lives in society, he is liable to find himself so treated. . . .

. . . .

. . . [T]he affirmative argument in favor of the theory of retribution . . . seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element, of punishment. . . .

. . . .

. . . [T]here can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. . . .

. . . .

. . . Public policy sacrifices the individual to the general good.<sup>155</sup>

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<sup>150</sup> See, e.g., BLACKSTONE, *supra* note 147, at \*251 (“[P]reventive justice is . . . preferable in all respects to *punishing* justice, the execution of which, though necessary, in [its] consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.”) (emphasis in original); HOLMES, *supra* note 147, at 42 (“[T]his [retributive] passion is not one we encourage, either as private individuals or as law-makers.”).

<sup>151</sup> Slobogin, *supra* note 147, at 126-27. For a description of the dominant view among leading contemporary scholars, see *infra* notes 167-168 and accompanying text.

<sup>152</sup> Slobogin, *supra* note 147, at 126-27.

<sup>153</sup> Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 5 (2003).

<sup>154</sup> See generally ALAN DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 29-58 (2006).

<sup>155</sup> HOLMES, *supra* note 147, at 43, 44, 45, 46, 48.

More than a century earlier, in his canonical *Commentaries*, Blackstone laid out almost exactly the same argument:

[P]reventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respect to punishing justice . . . . [I]ndeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past. . . . [A]ll punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example.<sup>156</sup>

John Hart Ely also shared this view. Writing considerably later, he had the opportunity to consider some of the Court's early insinuations that violence prevention was not a punitive purpose. He scoffed at such suggestions:

"It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." To add prevention to the list is obviously to say that *any* law imposing a deprivation counts for constitutional purposes as punitive.<sup>157</sup>

Beyond its impressive pedigree, the multipurpose approach has a second and more persuasive argument in its favor. The idea that the criminal law may serve multiple goals seems to have force in the actual day-to-day operation of the criminal justice system. Over the course of the twentieth century, especially after the 1960s, the criminal justice system became increasingly focused on preventing serious crime before it happened, in addition to ensuring violent offenders suffered retributive punishment.<sup>158</sup> Penal

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<sup>156</sup> BLACKSTONE, *supra* note 147, at \*248-49.

<sup>157</sup> Ely, *supra* note 147, at 1312 n.324 (quoting *United States v. Brown*, 381 U.S. 437, 458 (1965)) (citations omitted). Interestingly, this argument by Ely reveals the most problematic element of the multipurpose view. The proponent of this view eventually finds herself arguing that any law that effects a deprivation imposes criminal punishment, thereby including in the punishment category a host of measures that have never been considered punitive, such as taxation, remunerative civil fines, civil commitment, conscription, and public safety evacuation measures. Thus, the great challenge for the proponent of the multipurpose view is to find a principled, persuasive way of constraining the category of punishment to prevent it from expanding to include most government activity.

<sup>158</sup> See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 833-34 (2001); Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33, 33-39 (2003); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 121-29 (2005); Carol S. Steiker, *Foreword: Punishment and*

codes increasingly employed possession offenses and inchoate offenses to permit the arrest, conviction, and incapacitation of individuals who might be predisposed to commit violent crimes.<sup>159</sup> Courts developed search and seizure doctrines that encouraged investigatory police action targeted at preempting violence.<sup>160</sup> “Dangerousness” became a crucial factor in sentencing,<sup>161</sup> and “three strikes” laws and convicted sex-offender community notification statutes<sup>162</sup> reinforced the idea that defendants were prosecuted to prevent them from committing further crimes. The Model Penal Code formally embraced prevention as one of the basic aims of the criminal law in 1962.<sup>163</sup> The victims’ rights movement<sup>164</sup> and the so-called “War on Crime”<sup>165</sup> also helped to move the system’s focus from the moral culpability of individual wrongdoers onto the societal costs of crime.

In short, there is a strong argument that incapacitation of those likely to commit violence is not just a punitive purpose, but has increasingly become the *primary* punitive purpose. Most relevant for this Article’s investigation, this account concludes that preventing violence by incapacitating dangerous individuals is a paradigmatically punitive purpose.

Returning to the Article’s original field of inquiry, under the multipurpose approach, IEEPA designation clearly cannot claim a nonpunitive alternative purpose.<sup>166</sup> Incapacitating dangerous terrorists who are likely to commit or facilitate future acts of violence is exactly the sort of purpose that Holmes, Blackstone, and Ely saw as central to criminal punishment.

Accordingly, if one defines punishment with an eye toward tradition and experience, IEEPA designation fails the final two factors of the *Mendoza-Martinez* test, as it failed the first five. If prevention of violence through incapacitation is a punitive purpose, then IEEPA designation fails to satisfy the sixth factor, which demands an alternative, nonpunitive purpose. Therefore, IEEPA designation also necessarily fails to satisfy the seventh factor, which asks whether the sanction is excessive in relation to its alternative purpose and is thus dependent on the sixth factor.

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*Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 785 (1997).

<sup>159</sup> See Dubber, *supra* note 158, at 855-927; Robinson, *supra* note 158, at 1447-48.

<sup>160</sup> See Dubber, *supra* note 158, at 875-901, 908-10.

<sup>161</sup> See *id.* at 873; Slobogin, *supra* note 147, at 122.

<sup>162</sup> Robinson, *supra* note 158, at 1429-31.

<sup>163</sup> See Dubber, *supra* note 158, at 970-91; Robinson, *supra* note 158, at 1437, 1447-48, 1449.

<sup>164</sup> See Robinson, *supra* note 158, at 1429-31; Steiker, *supra* note 158, at 791-94. *But see* GARLAND, *supra* note 147, at 9, 11-12 (suggesting that the victim’s rights movements contributed to both the focus on prevention and the recent re-emphasizing of retribution, rather than just the former).

<sup>165</sup> Dubber, *supra* note 158, at 839-55, 991-94; Huigens, *supra* note 158, at 39-40.

<sup>166</sup> Adopting this view likely requires overturning *Salerno*, which upheld pretrial detention on dangerousness grounds, but would be consistent with some of the Court’s post-*Salerno* jurisprudence indicating that incapacitation to prevent violence is a punitive purpose. See *supra* notes 132-138 and accompanying text.

It is a rare thing when all seven factors of the test point in the same direction, but under a multipurpose conception of punishment, all the elements require the conclusion that IEEPA designation unconstitutionally imposes criminal punishment without the requisite procedural protections.

## 2. *The Retributivist View*

In contrast to the multipurpose approach, the retributivist model is highly popular among contemporary punishment scholars. Retributivists, such as Paul Robinson<sup>167</sup> and Carol Steiker,<sup>168</sup> argue that the process of imposing criminal punishment must be motivated *purely* by the goal of retribution. Thus, there is only one punitive purpose—imposition of a sanction in order to condemn or blame someone for a bad act that she, as an autonomous actor, chose to commit.<sup>169</sup> Under this view, the criminal law is to be used for the sole function of depriving someone of property or liberty in retaliation for a harmful act she has committed, and criminal sentences must be imposed in proportion to the degree of moral condemnation that such an act deserves.<sup>170</sup> Thus, the criminal law may not be tailored to the goal of preventing violence by incapacitating dangerous individuals. Nor may government impose moral condemnation on wrongful acts without the application of criminal procedural protections. Under this view, deprivations of liberty that impose moral condemnation for past misdeeds are considered punitive, and those that do not are understood to be nonpunitive.<sup>171</sup>

Retributivists reach this conclusion through different lines of reasoning. Some believe that the criminal process itself—with police, prosecutors, and the terminology of “crime”—constitutes a unique method for assigning blame and condemning immorality that is necessarily absent from action aimed at other purposes, such as incapacitation to prevent crime.<sup>172</sup> Others adopt the so-called “pathological perspective,” arguing that the criminal

<sup>167</sup> Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007); Robinson, *supra* note 158; Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996).

<sup>168</sup> Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998); Steiker, *supra* note 158.

<sup>169</sup> See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-68 (1997); Robinson, *supra* note 158, at 1443-44; Steiker, *supra* note 158, at 804.

<sup>170</sup> See, e.g., Robinson & Darley, *supra* note 167, at 66 (arguing that criminal sentencing ought “to punish according to this societally shared sense of the moral blameworthiness of the offender”).

<sup>171</sup> See, e.g., Robinson, *supra* note 158, at 1432 (“One can ‘restrain,’ ‘detain,’ or ‘incapacitate’ a dangerous person, but one cannot logically ‘punish’ dangerousness. . . . Punishment and prevention are fundamentally different . . . .”); Steiker, *supra* note 158, at 812 (“[A] scheme of ‘pure’ preventive incarceration . . . could not plausibly be characterized as ‘punishment’ . . . . Blame is beside the point; prevention is everything.”).

<sup>172</sup> See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1363 (1991).

procedures laid out by the Constitution are safeguards intended to protect the constitutional order from subversion.<sup>173</sup> These safeguards are needed, the argument goes, to prevent government officials from using moral condemnation to scapegoat vulnerable minority groups<sup>174</sup> and from destroying dissent by labeling innocent political opponents criminals.<sup>175</sup> Thus, deprivations of liberty that truly seek incapacitation and are not accompanied by moral condemnation are judged nonpunitive. Still others assert that the criminal justice system's "moral credibility" will be lost if individuals are subject to arrest, prosecution, and sentencing on the basis of anything other than retribution.<sup>176</sup> Without moral credibility, criminal statutes will no longer be respected or followed, and will lose their norm-shaping capacity.<sup>177</sup> Particular retributivist accounts may adopt one of these rationales<sup>178</sup> or many,<sup>179</sup> but all agree that criminal punishment may only be used to exact retribution, and that any statute that does not do so is nonpunitive.

Accordingly, retributivists maintain that danger-prevention by incapacitation of dangerous individuals is not a punitive purpose. As Steiker explains:

[C]onsider a scheme of "pure" preventive incarceration, based on predictions of future dangerousness but not predicated on the commission of particular bad acts in the past. Such a scheme could not plausibly be characterized as "punishment" because the state

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<sup>173</sup> See, e.g., Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 205-06 (1996).

<sup>174</sup> See, e.g., *id.* at 205-06 ("A government may have no fear of losing power and yet still desire the suffering of a scapegoat population. . . . [G]overnment will select members of unpopular groups as victims. Given a high demand that members of some unpopular group suffer, prevailing authority will be eager to find members of that group who may be characterized as criminals. I think of witch trials and, especially, of lynching. Southern lynching was . . . the ritual murder of victims to whom some *blameworthy* misconduct was attributed, whether deserving or not.").

<sup>175</sup> *Id.* at 204-05 ("The criminal justice system . . . connects the power of inflicting pain with the authority of moral judgment. . . . Restraining political opponents on purely political grounds is a sign of weakness. Punishing them for crimes enlists the community's moral sense in the cause of the incumbent government. . . . [D]ictators [have] found advantage in the accusation of criminality, an advantage that suggests the criminal law's special temptation to an oppressive government.").

<sup>176</sup> See, e.g., Robinson, *supra* note 158, at 1444 ("The strength of . . . criminal law is a function of the criminal law's moral credibility. . . . Requiring the criminal justice system to distribute punishment according to predictions of future dangerousness rather than blameworthiness for past crimes can only undercut the system's moral credibility.").

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., Dripps, *supra* note 173, at 201-02 (opining that the "pathological perspective" theory most successfully defends the idea of a purely retributive criminal law).

<sup>179</sup> See, e.g., Steiker, *supra* note 158, at 806-09 (arguing that "blaming implies the need for a special procedural regime within which punishment should be imposed, both to limit the state's ability to harness the power of blame" because the state may try to use blame to establish politically oppressive tyranny and because blame is so painful that it should not be imposed on innocents "and to preserve blaming as a social practice" because blaming is both useful for improving our lives and inherently valuable because "it is 'part of who we are'").

would not be imposing incarceration “for” a past offense nor acting “deliberately” in its infliction of unpleasantness. Blame is beside the point; prevention is everything.<sup>180</sup>

Returning again to the Article’s analysis of the *Mendoza-Martinez* test, under the retributivist conception of criminal punishment, incapacitation of dangerous individuals counts as a nonpunitive alternative purpose. Nonetheless, retributivism cannot save IEEPA designation. Note that what matters to a retributivist is retribution; a deprivation of liberty is punitive when it imposes moral condemnation for a past act and nonpunitive when it does not. Thus, adopting the retributivist theory of punishment negates the need for an alternative purpose inquiry entirely. The fourth *Mendoza-Martinez* factor—whether the statute’s operation will promote retribution—and the first factor—whether the sanction at issue imposes an affirmative disability or restraint—are together entirely determinative for a retributivist. The legislature’s primary and alternative purposes for enacting the statute are irrelevant; if it imposes moral condemnation and a restriction on liberty, it constitutes criminal punishment.

IEEPA designation, as noted above, is a deprivation of liberty and imposes moral condemnation for past acts.<sup>181</sup> Accordingly, regardless of its nonpunitive alternative purpose, IEEPA designation is criminal punishment under retributivism.<sup>182</sup>

### 3. Justice Marshall’s Modified Retributivism

IEEPA designation fares no better under the third and final theory of the purpose of criminal punishment. Like the multipurpose approach and the standard retributivist approach, the third conception of punishment, inspired by Justice Thurgood Marshall, leads to the conclusion that IEEPA designation unconstitutionally imposes criminal punishment without providing Fifth and Sixth Amendment protections.

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<sup>180</sup> Steiker, *supra* note 158, at 812; *see also* Robinson, *supra* note 158, at 1432; Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996). *But see* Cheh, *supra* note 172, at 1363 (arguing that incarceration, execution, and revocation of citizenship are always acts of blaming and thus always punishment, no matter what their intended or purported function).

<sup>181</sup> *See supra* note 92 and accompanying text. If punishment is understood as a largely expressive act, *see, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996), then special emphasis must be placed on IEEPA designation’s most communicative elements: its labeling of its targets as terrorists and its casting-out of designees from normal societal interaction. Both acts communicate moral condemnation above all.

<sup>182</sup> Certainly, it is not true that all statutes that incapacitate individuals impose criminal punishment under the retributivism theory of punishment. If a government incapacitates a person through means that do not impose moral condemnation, then a retributivist approach would not term the measure punitive.

Justice Marshall articulated his own take on retributivism in his *Salerno* dissent.<sup>183</sup> He described the statute the Court upheld, which authorized pre-trial detention on dangerousness grounds, as

a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.<sup>184</sup>

To Marshall, the case turned on the undeniable proposition that “society’s belief . . . that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is . . . established beyond legislative contravention in the Due Process Clause.”<sup>185</sup> In his view, under the statute at issue, “an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional.”<sup>186</sup> Thus, “the conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else.”<sup>187</sup>

Accordingly, Marshall concluded that the Fifth Amendment’s presumption of innocence and the proof-beyond-a-reasonable-doubt requirement together required the invalidation of the statute. The defendant could not be incarcerated before being convicted because, in the absence of a conviction, he was innocent. It was irrelevant that the government provided clear and convincing proof that the defendant would be dangerous in the immediate future. The government could imprison the defendant only after proving beyond a reasonable doubt that he had committed a crime in the past.

Extrapolating from Marshall’s dissent, a theory emerges that understands the Constitution’s structuring of the criminal law, from the prohibition on excessive bail to the defendant’s right to be informed of the accusations against her, as a procedural roadmap for exercising the power to target individuals with severe sanctions. The procedural protections guaranteed to criminal defendants would be empty promises, this theory holds, if the government could simply invoke a regulatory goal to incapacitate<sup>188</sup> U.S. per-

<sup>183</sup> *United States v. Salerno*, 481 U.S. 739, 758-67 (1987) (Marshall, J., dissenting).

<sup>184</sup> *Id.* at 755.

<sup>185</sup> *Id.* at 763.

<sup>186</sup> *Id.* at 764.

<sup>187</sup> *Id.*

<sup>188</sup> Note also that Marshall does not restrict his argument to imprisonment, but instead would invalidate any severe sanction aimed at incapacitating dangerous individuals not guilty of a crime. The example he uses that stretches beyond incarceration is a curfew for unemployed persons. *See id.* at 760.

sons without trial, counsel, or the ability to confront the government's witnesses.<sup>189</sup>

Thus, an approach modeled on Justice Marshall's dissent sees retribution as the sole punitive purpose, in accord with the mainstream retributivist position. However, this approach sees the retributive nature of punishment as placing some nonpunitive purposes off limits entirely in order to protect the integrity of, and prevent an end-run around, the criminal process. If the government is allowed to impose severe sanctions without proving past wrongdoing, this view suggests, the presumption of innocence will be undermined. If the presumption is understood only to promise a "right to be free from punishment before conviction," the government will "merely redefine any measure which is claimed to be punishment as 'regulation,' and, magi-

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<sup>189</sup> *Id.* ("The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition.").

For other perspectives that share a similar approach, see Henry M. Hart, Jr., *The Aims of the Criminal Law*, in CRIME, LAW, AND SOCIETY 61, 67 (Abraham S. Goldstein & Joseph Goldstein eds., 1971) ("The danger [of the curative-rehabilitative theory of criminal justice] to the individual is that he will be punished, or treated, for what he is or is believed to be, rather than for what he has done. . . . The danger to society is that the effectiveness of the general commands of the criminal law as instruments for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened."); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235 (2006); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 121-22 (1999) ("The lack of an effective limiting principle provided by the Court [in an opinion on sex-offender civil commitment] appears to invite states to enact wide-ranging detention laws. . . . In short, the net cast by a state's civil commitment statute may be wide enough to ensnare all recidivists . . . to the point where, for an individual who has committed one prior crime, even the allegation of a second one could send the person to a lifetime of involuntary detention, albeit one labeled 'civil.'"); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 465-66 (1998) ("The logic of incapacitation behind the Kansas Act suggests an even grimmer and more dehumanizing view of sex-offenders than does traditional punishment. Despite that, incapacitation showed up as unproblematic because Justice Thomas did not consider it punitive."). Interestingly, Justice Scalia has in one instance articulated a similar theory, based not on the Bill of Rights but the habeas corpus clause. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) (joined by Stevens, J.) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ [of habeas corpus] can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause . . . merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed."). However, that view is not a theory of punishment, and is instead simply a theory of incarceration. Thus, although Scalia rejects the idea that incapacitating imprisonment can ever be nonpunitive, his theory carries no significance for measures, like IEEPA designation, that fall short of incarceration. For the more general view that preemptive measures aimed at incapacitation undermine the rule of law, see DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* 33-34 (The New Press 2007); Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407 (2007); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 781 (2002).

cally, the Constitution no longer prohibits its imposition.”<sup>190</sup> But in fact, the presumption of innocence guarantees freedom from severe deprivations of liberty, no matter whether those deprivations are labeled “punishment” or “regulation.”

In sum, the presumption of innocence requires that the criminal procedural architecture of the Bill of Rights be the sole and exclusive method for imposing highly-restrictive sanctions, and that any such sanction be retributive in purpose. Retribution is the constitutionally mandated purpose of criminal punishment, and thus any severe deprivation of liberty with incapacitation as its purpose is unconstitutional, because the criminal process delineated in the Bill of Rights explicitly contemplates the imposition of sanctions only as castigation for past wrongdoing.

Under this view, IEEPA designation’s alternative purpose renders the sanction unconstitutional. Intended to incapacitate dangerous designees to prevent them from committing future acts of terrorism, IEEPA designation is exactly the kind of deprivation of liberty that a Marshall-inspired view reads the Bill of Rights to prohibit. Neither an acceptable punitive purpose nor an acceptable nonpunitive alternative purpose, incapacitation of dangerous individuals for danger-prevention purposes is simply forbidden.

In fact, under this view, IEEPA designation would be unconstitutional even if accompanied by criminal procedural protections, because prospective incapacitation for dangerousness is forbidden. The Bill of Rights requires that severe sanctions be imposed only in retrospective retribution for past wrongdoing, and proving beyond a reasonable doubt at a public, speedy jury trial that a defendant was likely to support terrorism in the future would not overcome that requirement.

### *C. IEEPA Designation of U.S. Persons: Unconstitutional Under Any Theory of Punishment*

Under existing jurisprudence, IEEPA designation of U.S. persons appears at least to be constitutionally questionable. Five of the seven *Mendoza-Martinez* test factors suggest that IEEPA designation violates the Fifth and Sixth Amendments by imposing criminal punishment without providing the requisite heightened procedural protections, while the last two factors of the test are indeterminate because courts have yet to sufficiently clarify their proper application. In particular, the Court’s failure to consider which specific purposes are punitive has resulted in a lack of guidance as to whether incapacitation to prevent future violence is a punitive or nonpunitive purpose.

Close examination reveals, however, that under each of the three major conceptions of criminal punishment, IEEPA designation thoroughly fails the *Mendoza-Martinez* test. Under the multipurpose approach, IEEPA designa-

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<sup>190</sup> *Salerno*, 481 U.S. at 760 (Marshall, J., dissenting).

tion has no nonpunitive alternative purpose because incapacitation is seen as one of several paradigmatically punitive purposes.

Under the standard retributivist view, IEEPA does have an acceptable alternative purpose because retributivism understands incapacitation, like all non-retributive purposes, to be nonpunitive. Nevertheless, retributivism treats the question of whether the sanction imposes moral condemnation as virtually determinative. IEEPA designation may not be primarily intended to impose moral condemnation, but it certainly does so. Thus, its imposition would be regarded as criminal punishment.

Finally, a modified retributivism inspired by Justice Marshall's dissent posits a constitutionally mandated view of criminal punishment that favors retribution insofar as it forbids the state from depriving individuals of liberty in order to prevent them from committing future misdeeds. The only exception is when the individual has been proven guilty of past wrongdoing pursuant to the constitutionally-outlined prosecution process. Accordingly, this alternative retributivist perspective also forbids the current form of IEEPA designation of U.S. persons.

Only by refusing to adopt a more coherent, more fully theorized conception of punishment can one close one's eyes to IEEPA designation's imposition of criminal punishment. Of course, it is possible to simply accept the notion that every deprivation of liberty that prevents danger to the community serves a nonpunitive purpose. But any honest reflection on that proposition's implications renders it unsustainable.<sup>191</sup> Assuming one is unwilling to accept a jurisprudence of incoherence and illogic, one must conclude that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments.

It seems that the multipurpose approach favored by Blackstone, Holmes, and Ely is most consistent with the current Court's self-professed adherence to history and tradition.<sup>192</sup> Yet under any of the three mainstream conceptions of the relationship between incapacitation and criminal punishment, IEEPA designation fails the *Mendoza-Martinez* test.

## VI. THE WAR POWERS ARGUMENT: IS SAVING IEEPA DESIGNATION OF U.S. PERSONS WORTH THE COST?

Before concluding, it is worth considering one potential counterargument that suggests IEEPA designation of U.S. persons is constitutional in a few, extremely rare cases. It is possible that the Constitution permits designation of U.S. persons when an active war is being fought within the borders of the United States. This argument may be persuasive, but it does not save

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<sup>191</sup> See *supra* notes 106-112 and accompanying text.

<sup>192</sup> See, e.g., *supra* notes 76-89 and accompanying text; see also *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. (2005); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 195-96 (2008).

the government's current use of IEEPA against U.S. persons for counterterrorism purposes.

Generally, the political branches are relatively free to use extrajudicial force against non-U.S. persons, and they are usually forbidden from targeting U.S. persons with the same type of force.<sup>193</sup> For example, both the Bush and the Obama administrations have favored the targeted killings of terrorists.<sup>194</sup> No constitutional issues arise from an individual rights perspective<sup>195</sup> when such killings are committed abroad and against foreign citizens,<sup>196</sup> even when used outside of a war zone and in a friendly country, such as Yemen.<sup>197</sup> But it is unthinkable to suggest that the Constitution allows President Obama to order the extrajudicial execution of someone in the

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<sup>193</sup> This is the ultimate implication of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and, more generally, the dominant approach to the question of extraterritorial application of the Constitution's protection of individual rights. See *supra* notes 8, 12, and 46 and accompanying text.

<sup>194</sup> See, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (Brookings Inst., Georgetown Univ. Law Ctr., and the Hoover Inst.'s Series on Counterterrorism and American Statutory Law, Working Paper No. 9, 2009), available at [http://www.brookings.edu/~media/Files/rc/papers/2009/0511\\_counterterrorism\\_anderson/0511\\_counterterrorism\\_anderson.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/0511_counterterrorism_anderson/0511_counterterrorism_anderson.pdf).

<sup>195</sup> Whether and to what extent the executive must obtain congressional authorization to conduct such killings is a distinct and contentious constitutional question. See Jack Goldsmith, *Is the Obama Administration Relying on Article II for Targeted Killing?* LAWFARE (Sept. 17, 2010, 1:12 PM), <http://www.lawfareblog.com/2010/09/is-the-obama-administration-relying-on-article-ii-for-targeted-killing/>.

<sup>196</sup> See Anderson, *supra* note 194, at 4 (“[T]he domestic legal authorities to conduct targeted killings and other ‘intelligence’ uses of force have existed in statutory form at least since the legislation that established the Central Intelligence Agency in 1947 and in other forms long pre-dating that.”); Goldsmith, *supra* note 195 (“The legality of targeted killing under domestic law is relatively straightforward for persons in the armed conflict initiated by the congressional AUMF, which authorized the President to use force against persons within the AUMF’s scope.”).

<sup>197</sup> The United States has been using targeted killings in Yemen since shortly after the September Eleventh attacks. See Greg Jaffe, Karen DeYoung & Greg Miller, *U.S. Drones on Hunt in Yemen*, WASH. POST, Nov. 7, 2010, at A1; Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, WASH. POST, Nov. 5, 2002, at A1. The debate over whether the Yemen killings are legal has centered on whether they have been (or need to be) congressionally authorized, whether they are illegal under international law or domestic anti-assassination law, and whether the Constitution or existing statutes prohibit their use against U.S. citizens in Yemen, but there have been no constitutional objections premised on the claim that foreign-citizen Yemeni targets have individual rights under the U.S. Constitution. See, e.g., Declaration of Professor Mary Ellen O’Connell, *Al-Aulaqi v. Obama*, No. 10-cv-01469 (D.D.C. Oct. 8, 2010); Reply Memorandum in Support of Plaintiff’s Motion for a Preliminary Injunction and in Opposition to Defendant’s Motion to Dismiss, *Al-Aulaqi v. Obama*, No. 10-cv-01469 (D.D.C. Oct. 8, 2010); Jeffrey Addicott, *The Yemen Attack: Illegal Assassination or Lawful Killing?*, JURIST (Nov. 7, 2002), <http://jurist.law.pitt.edu/forum/forumnew68.php>; Anderson, *supra* note 194; Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y (forthcoming 2010); Benjamin Wittes, *ACLU and CCR Brief in Al-Aulaqi*, LAWFARE (Oct. 8, 2010, 9:54 AM), <http://www.lawfareblog.com/2010/10/aclu-and-ccr-brief-in-al-aulaqi/>; Benjamin Wittes, *Is Barack Obama a Serial Killer?*, LAWFARE (Oct. 25, 2010, 3:00 PM), <http://www.lawfareblog.com/2010/10/is-barack-obama-a-serial-killer/>.

United States in such non-combat or non-public safety-emergency circumstances.<sup>198</sup>

There is, however, one situation in which, in order to prevent danger to the United States public,<sup>199</sup> the government may pursue a deliberate policy of capturing or killing U.S. persons outside of the criminal process. That situation is what the Constitution refers to as “Rebellion or Invasion.”<sup>200</sup> During a war on American soil, Congress can suspend habeas corpus.<sup>201</sup> The President may capture even non-uniformed invading enemy operatives, try them in military courts, and execute them, with little or no supervision from Article III judges.<sup>202</sup> And, of course, when facing an actual military attack, government troops may shoot and kill their adversaries.

Under such circumstances, the constitutional calculus changes with regard to the permissibility of extrajudicial execution, the denial of habeas corpus, and, presumably, IEEPA designation of U.S. persons. Indeed, when considering a wartime sanction somewhat similar to IEEPA, the Supreme Court upheld its constitutionality.

In *Miller v. United States*, the Court reviewed the constitutionality of an 1862 statute authorizing the confiscation of all property belonging to anyone who had joined the Confederate government, served in the Confederate armed forces, or assisted the cause of the Confederacy in any way.<sup>203</sup> In

<sup>198</sup> The heated debate over the legality of targeted killing in certain circumstances has not obscured the fact that non-combat, extrajudicial execution of individuals protected by the Bill of Rights is undeniably illegal unless absolutely necessary. See *Tennessee v. Garner*, 471 U.S. 1 (1985); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 160 (2010). Indeed, commentators who vehemently disagree about the legality of the Bush and Obama administrations' targeted killing programs invariably conclude that such killings would not be constitutional if carried out in the United States in the absence of absolute public safety necessity. Compare Kevin Jon Heller, *What if Al-Aulaqi Was in Phoenix?*, OPINIO JURIS (Sept. 16, 2010, 12:55 AM), <http://opiniojuris.org/2010/09/16/what-if-al-aulaqui-was-in-phoenix/>, and Kevin Jon Heller, *Ben Wittes' Unconvincing 'Hostage-Taking' Analogy*, OPINIO JURIS (Sept. 3, 2010, 11:05 PM), <http://opiniojuris.org/2010/09/03/ben-wittes-unconvincing-hostage-taking-analogy/>, with Benjamin Wittes, *What if Yemen Were Phoenix?*, LAWFARE (Sept. 17, 2010, 12:40 PM), <http://www.lawfareblog.com/2010/09/what-if-yemen-were-phoenix/>.

<sup>199</sup> One particular type of deprivation, which is outside the scope of this Article because it does not purport to prevent danger, is nonetheless worth mentioning. That deprivation is the deportation of immigrants alleged to be in the United States illegally. Recently, the Court has shown little interest in revisiting its century-old holding that deportation is nonpunitive, *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), and, perhaps unsurprisingly, has failed to offer a thorough reasoning supporting that holding, even though there are strong arguments that it may be worth reconsidering. See Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 298-307 (2008); see also *Fong Yue Ting*, 149 U.S. at 748-49 (Field, J., dissenting).

<sup>200</sup> U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>201</sup> *Id.*

<sup>202</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>203</sup> *Miller v. United States*, 78 U.S. 268, 308-14 (1871). The statute at issue in *Miller* was extremely similar to IEEPA, though there were four significant differences. First, its subject matter was limited to Confederate supporters, while IEEPA may be put to use against an infi-

1864, Samuel Miller, a Virginian who had served in the Confederate government and military, was labeled a rebel citizen under the act and had railroad company stock he owned in Michigan seized by a federal trial court judge in the Eastern District of Michigan at the request of the District's U.S. Attorney.<sup>204</sup> Miller argued that the seizure constituted criminal punishment, and as such, it was unconstitutional to impose the seizure without providing the requisite procedural protections.<sup>205</sup>

Only Justices Field and Clifford agreed with Miller, concluding in dissent that "the provisions of the act were . . . passed . . . in the exercise of the municipal power of the government to legislate for the punishment of offences against the United States. . . . [T]he forfeiture ordered was intended as a punishment for the offences . . . ."<sup>206</sup>

The Court, in contrast, found the statute in question to be a "legitimate exercise of the war power."<sup>207</sup> The six-member majority,<sup>208</sup> speaking through Justice Strong, reasoned that in wartime the political branches have the power not only to seize the property of "all public enemies," but also to decide who is a public enemy.<sup>209</sup> Certainly, the majority contended, the Fifth and Sixth Amendments did not require the commander-in-chief to prove the enemy status of every single rebel or soldier beyond a reasonable doubt to the satisfaction of a judge and jury.<sup>210</sup>

While the case turned primarily on whether Congress intended to exercise its power to create criminal law or its war power,<sup>211</sup> the majority and the dissent also disagreed about the scope of the power to seize property. The Court opined that Congress could target anyone whose property could aid the enemy, "an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property."<sup>212</sup> In contrast, Justice Field saw

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nite number of threats. *See id.* at 270, 208. Second, it required the executive branch to file a civil action in a federal trial court, while IEEPA leaves the decision of whether to designate an individual wholly within the executive branch. *See id.* at 271-72, 273-74. Third, rather than an indefinite and potentially unending asset freeze, the sanction took the form of a permanent seizure of property. *See id.* at 270-72. Fourth, and perhaps most significantly, it did not impose criminal liability on individuals who transacted with people labeled public enemies by the statute. *See id.* at 269-72. *See generally* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 51-57 (1996); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1010-16 (2008).

<sup>204</sup> 78 U.S. at 274-78.

<sup>205</sup> *Id.* at 284-85.

<sup>206</sup> *Id.* at 319-20 (Field, J., dissenting).

<sup>207</sup> *Id.* at 305 (majority opinion).

<sup>208</sup> The Court's ninth member, Justice Davis, agreed with the majority on the constitutional question and dissented for other reasons. *Id.* at 328 (Davis, J., dissenting).

<sup>209</sup> *Id.* at 305-06 (majority opinion).

<sup>210</sup> *Id.* at 304-06, 308-10.

<sup>211</sup> The majority held that if the act were not an exercise of the war power "there would be force in the objection that Congress had disregarded the restrictions of the fifth and sixth amendments of the Constitution." *Id.* at 304. As for the dissent, it seems likely that because Miller was in fact a "permanent inhabitant[ ] of the enemy's country," *id.* at 317 (Field, J., dissenting), if Field had been convinced that Congress intended to exercise its war power, he would have supported the majority's rejection of Miller's as-applied constitutional challenge.

<sup>212</sup> *Id.* at 305-06 (majority opinion).

the power to confiscate enemy property to be, by definition, the power to seize the property of “permanent inhabitants of the enemy’s country.”<sup>213</sup> “Their property is liable,” he contended, “not by reason of any hostile disposition manifested by them or hostile acts committed, or any violations of the laws of the United States, but solely from the fact that they are inhabitants of the hostile country, and thus in law are enemies.”<sup>214</sup>

Recent litigation over a similar set of questions has created a role for Article III courts in determining the relationship between enemy forces and specific U.S. persons.<sup>215</sup> But that litigation has generally affirmed Justice Strong’s assertion that courts will not impose substantive constitutional limits on the government’s ability to use war powers against U.S. persons who are enemy combatants located in a war zone, be they American citizens,<sup>216</sup> residents of the United States,<sup>217</sup> or both.<sup>218</sup>

Thus, a contemporary version of the Supreme Court’s reasoning in *Miller* may offer the best argument for defending the constitutionality of SDGT designation of U.S. persons under IEEPA. As this Article demonstrates, IEEPA designation fails the *Mendoza-Martinez* test and cannot be considered run-of-the-mill nonpunitive regulatory action. Those who would preserve it are left with only an appeal to the political branches’ war powers.

Defending IEEPA designation of U.S. persons on such grounds requires accepting the premise that an infinite global war—unbounded by space and time—is being waged everywhere and anywhere, including on American soil. John Yoo argues that the Supreme Court has implied approval of this dramatic conception of the relationship between the United States and al Qaeda.<sup>219</sup> Other scholars fiercely disagree.<sup>220</sup> What is certain is that Ameri-

<sup>213</sup> *Id.* at 317 (Field, J., dissenting).

<sup>214</sup> *Id.* at 317-18.

<sup>215</sup> *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *Al Odah v. United States*, 606 F. Supp. 2d 141 (D.D.C. 2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).

<sup>216</sup> *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding, inter alia, that an American citizen captured in Afghanistan could be deemed an enemy combatant); *cf. Ex parte Quirin*, 317 U.S. 1 (1942) (holding that an American citizen member of Nazi Germany’s armed forces captured on American soil after infiltrating the United States, abandoning his uniform, and operating as an illegal combatant could be held as an enemy combatant).

<sup>217</sup> *See al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). In *al-Marri*, a minority of the Fourth Circuit Court of Appeals believed an alleged al Qaeda member arrested in Illinois and then transferred to military custody would not have been an enemy combatant even if all of the allegations against him were true. Yet even they did not contend that the Constitution absolutely bars the capture and non-criminal detention of alleged enemy combatants within the United States. *Id.* at 228-31 (Motz, J., concurring in the judgment).

<sup>218</sup> *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing for lack of jurisdiction the habeas corpus petition of an American citizen captured in the United States who was being held as an enemy combatant, without reaching the legality of his detention).

<sup>219</sup> John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 576-77 (2006) (“America waged previous conflicts on foreign battlefields, while the home front remained safe behind the distances of two oceans. In the present conflict, the battlefield can exist anywhere, and there is no strict division between the front and home.”); *id.* at 580 (“If September 11, for example, merely constituted a criminal act rather than an act of war, then Hamdi’s detention was illegal under the Fifth and Sixth Amendments . . .”).

cans would pay a steep price in surrendered liberties if they asked the Court to conceptualize their homes as bunkers and their backyards as battlefields. It is difficult to imagine that the President's rarely-utilized power to designate U.S. persons as SDGTs is truly worth such a tradeoff.<sup>221</sup>

Most importantly, the argument that IEEPA designation could be used against Americans during an armed conflict in the United States is entirely hypothetical. As early as 2002, President Bush himself resisted calls from Vice President Cheney and others to treat domestic counterterrorism operations as combat missions, most notably by rejecting the Vice President's suggestion that military personnel be used to capture the "Lackawanna Six" terrorist cell in upstate New York.<sup>222</sup> As the years without an al Qaeda attack on the American homeland turn into a decade, and non-military federal prosecutors and FBI agents continue to disrupt terrorist plots,<sup>223</sup> the argument that the United States is fighting a war on its own soil becomes less and less persuasive. The continuing sacrifices of American soldiers in two foreign theaters of war only highlight the fact that the United States is not a war

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<sup>220</sup> For pieces casting doubt on the proposition that the United States is at war on its own soil, see Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002); Fiss, *supra* note 189, at 237 ("Padilla's habeas petition struck a note of urgency. The government held him as an enemy combatant, but the war that the government had in mind was not the kind that had been fought in Afghanistan and for which international law allows the belligerents to detain enemy combatants. Rather, it was the vast, ill-defined, and never ending 'War Against Terrorism.'"); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 776-77 (2002) ("The war against terrorism threatens to form a backdrop to an increasing garrison state authority evoking the shadowy war that forms the background to George Orwell's novel, *1984*. This new, low level, but always prevalent 'warm' war, has the potential to lead us back to the worst abuses of the Cold War." (footnote omitted)).

<sup>221</sup> Moreover, even subscribing to the infinite global war argument does not preserve IEEPA designation as it currently stands. Terrorism is unique. It is the only national emergency U.S. presidents have declared under IEEPA that can plausibly be termed a war. The other declared "national emergenc[ies]" that pose "unusual and extraordinary threat[s] . . . to the national security, foreign policy, or economy of the United States" do not create an immediate threat of catastrophic attack on the homeland, nor have they produced attacks on U.S. soil in the past. Thus, even if U.S. citizens can spare the liberties they would lose by accepting as law the claim that they are living in a war zone, IEEPA designation of U.S. persons would be available as a potential solution to a limited number of problems.

The one currently-declared national emergency beyond terrorism that might arguably rise to the level of a war occurring within American borders is "the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence, corruption, and harm that they cause in the United States and abroad," Exec. Order No. 12,978, 3 C.F.R. 415 (1996), given the incredible level of violence that plagues northern Mexico and the southwestern United States. See, e.g., Marc Lacey & Ginger Thompson, *Obama's Next Foreign Crisis Could Be Next Door*, N.Y. TIMES, Mar. 25, 2009, at A1.

<sup>222</sup> See Mark Mazzetti & David Johnston, *Bush Weighed Using Military in U.S. Arrests*, N.Y. TIMES, July 25, 2009, at A1. President Bush ultimately chose to use the FBI to apprehend the Lackawanna Six, following the advice of National Security Advisor Condoleezza Rice, Justice Department Criminal Division Assistant Attorney General Michael Chertoff, FBI Director Robert S. Mueller, and National Security Council Legal Adviser John B. Bellinger III. *Id.*

<sup>223</sup> See, e.g., Yoo, *supra* note 219, at 577 ("Law enforcement has uncovered al Qaeda cells in cities such as Buffalo, New York and Portland, Oregon.").

zone. In the absence of an increasingly unlikely judicial determination that the nation is fighting a war within its borders, IEEPA designation of U.S. persons as SDGTs is thoroughly unconstitutional.

## VII. CONCLUSION

IEEPA designation's failure of the *Mendoza-Martinez* test is a reminder that current constitutional law treats foreign entities and individuals much differently than it treats their U.S. counterparts.<sup>224</sup> Tactics that are unremarkable when employed abroad may be impermissible when used at home. Notably, the government's new focus on preempting terrorist acts has prompted a small step toward the destabilization of the strict boundary between the foreign and the domestic.<sup>225</sup> Now that the most fear-inducing existential threat to the state is as likely to materialize from within U.S. borders as from without, it may well be time to ask whether geographic and national distinctions still deserve their central place in constitutional law. Until the jurisprudence abandons such distinctions, however, the Bill of Rights continues to constrain the state's ability to deprive U.S. persons of liberty on U.S. soil in the name of national security.

Whether the unconstitutional IEEPA designation of U.S. persons is good or bad from a policy perspective is a different question entirely. Surely, IEEPA designation is an important tool in keeping Americans safe and furthering American interests. However, the vast majority of IEEPA designees are not U.S. persons, and perhaps the relative lack of U.S. designees indicates that IEEPA designation is not one of the President's most critical tools for apprehending home-grown terrorists.

With so much ink spilled in the preceding pages on what is wrong with IEEPA, it is important to recognize the great good IEEPA has been used to support. Beyond terrorism, designation is used to fight narcotics trafficking,<sup>226</sup> nuclear proliferation,<sup>227</sup> and human rights abuses from Burma<sup>228</sup> to Liberia<sup>229</sup> and the Sudan.<sup>230</sup> The Constitution leaves most executive branch

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<sup>224</sup> See *supra* note 46.

<sup>225</sup> See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that enemy combatants captured and held outside the borders of the United States have a right to habeas corpus review by Article III courts).

<sup>226</sup> See Office of Foreign Assets Control, *U.S. Treasury—Sanctions Program Summaries—Counter Narcotics*, U.S. DEP'T OF THE TREASURY, <http://www.ustreas.gov/offices/enforcement/ofac/programs/narco/narco.shtml> (last visited Oct. 27, 2010).

<sup>227</sup> See Office of Foreign Assets Control, *U.S. Treasury—Sanctions Program Summaries—WMD*, U.S. DEP'T OF THE TREASURY, <http://www.ustreas.gov/offices/enforcement/ofac/programs/wmd/wmd.shtml> (last visited Oct. 27, 2010).

<sup>228</sup> See Office of Foreign Assets Control, *U.S. Treasury—Sanctions Program Summaries—Burma*, U.S. DEP'T OF THE TREASURY, <http://www.ustreas.gov/offices/enforcement/ofac/programs/burma/burma.shtml> (last visited Oct. 27, 2010).

<sup>229</sup> See Office of Foreign Assets Control, *U.S. Treasury—Sanctions Program Summaries—Former Liberian Regime of Charles Taylor*, U.S. DEP'T OF THE TREASURY, <http://www.ustreas.gov/offices/enforcement/ofac/programs/liberia/liberia.shtml> (last visited Oct. 27, 2010).

actions taken pursuant to IEEPA untouched, and no matter the ultimate outcome of any future constitutional litigation, the Departments of Treasury, State, and Justice will continue to have the option of using IEEPA designation against non-U.S. persons.

That does not mean, however, that the development of a clearer *Mendoza-Martinez* test or a more coherent application of the current test for purposes of IEEPA is without broader implications for U.S. foreign policy and counterterrorism efforts. The natural question going forward is whether there are other preemptive counterterrorism measures currently in use that may skirt the edges of the civil-criminal divide. No-fly lists and terrorist watch lists come to mind. The recent enthusiasm among scholars and policymakers for creating a preventive detention regime outside of the criminal process<sup>231</sup> also ought to be considered with an eye toward review under the *Mendoza-Martinez* test. Of course, such measures differ from each other and IEEPA in substantial ways, but each would prove a fascinating and significant topic of study. Indeed, as courts and scholars work toward a clearer conception of punishment and a more coherent application of the *Mendoza-Martinez* test, the constitutionality of many of the government's efforts to keep Americans safe and free will also merit their consideration.

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<sup>230</sup> See Office of Foreign Assets Control, *U.S. Treasury—Sanctions Program Summaries—Sudan*, U.S. DEP'T OF THE TREASURY, <http://www.ustreas.gov/offices/enforcement/ofac/programs/sudan/sudan.shtml> (last visited Oct. 27, 2010).

<sup>231</sup> See, e.g., STEPHANIE COOPER BLUM, *THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION* (2008); DERSHOWITZ, *supra* note 154, at 121; Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *YALE J. INT'L L.* 369 (2008); Eric Posner, *Destructive Technologies Require Us to Re-Assess Civil Liberties*, *BOSTON REV.*, Dec. 10, 2008, available at <http://bostonreview.net/BR34.1/posner.php>; see also *supra* note 101.

