LEGALIZED BOUNTY HUNTING: EXTRATERRITORIALITY OF PRECLEARANCE CURRENCY FORFEITURE

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ABSTRACT

The Customs and Border Protection preclearance program ("CBP Preclearance") has rapidly expanded over the last seventy years. An ambitious security operation extending the U.S. territorial border as well as legal obligations, CBP Preclearance affords vast extraterritorial enforcement powers to hundreds of airport customs agents stationed outside of the continental United States. Over the course of sixteen years, thirteen preclearance facilities spanning five countries and one U.S. territory have effected hundreds of currency seizures—in mere violation of reporting requirements and without accompanying arrests—totaling eight million dollars flowed into the government coffers. Continental U.S.-bound air travelers stand to lose their life savings to the government for unknowing paperwork violations absent proof or suspicion of criminal activity, judicial oversight and constitutional safeguards of due process and proportionality, or any nexus between forfeiture and crime prevention—or even existing metrics to evaluate such program's effectiveness. In both domestic and extraterritorial contexts, airport currency forfeiture has been marked by government overreach, perverse incentives, procedural and constitutional pitfalls.

Yet despite the expansive reach and growing scale of CBP Preclearance's prevalent seizure and civil forfeiture practices, we knew little about them and lacked adequate means to monitor them

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for possible abuses—until now. Thanks to the Seized Assets and Case Tracking System ("SEACATS") forfeiture data that newly came to light in the summer of 2020, CBP Preclearance's extraterritorial activities will no longer be shielded from public scrutiny, but rather examined and challenged in legal, academic, and political arenas. This Note draws on the wealth of information available through the government database, judicial cases, and international bilateral agreements, in order to address the myriad of problems with airport preclearance forfeitures, and more broadly, the civil forfeiture system. Ultimately, this Note proposes an extraterritoriality approach that extends the applicability of constitutional guarantees to preclearance facilities, in order to better match the assertion of government authority and to promote the integrity of constitutional interpretation as well as adherence to separation of powers.

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INTRODUCTION

Anthonia Nwaorie, a Nigerian-American nurse, was a flight away from realizing her dream of building a permanent free medical clinic in her native country.[1] Having saved up over $30,000, Anthonia hoped to provide much needed health care to the vulnerable women and children in Imo State, Nigeria, beyond a series of temporary clinics she had previously operated.[2] All of Anthonia's efforts ended in vain, however, when she was suddenly stopped and confronted by United States Customs and Border Protection ("CBP") agents on the jetway in Houston, Texas.[3] Unbeknownst to her, travelers must file a form when traveling out of or into the country with over $10,000 in cash or its equivalent, the reporting standard of which is quite convoluted.[4] But Anthonia did not receive any notice of this reporting requirement or advisement from CBP agents prior to mistakenly declaring only the amount of cash in her handbag but not her checked luggage.[5] Subsequently, she was detained, searched, her luggage was sliced open, and all her savings for the clinic were seized, along with the remittance for her family.[6] Though law enforcement neither charged Anthonia with any crime, nor pursued a timely forfeiture proceeding against her money—and thus was legally bound to promptly return her property—CBP nevertheless conditioned the return of her money on her signing away her rights to recover interest and attorney's fees, to seek compensation for her missed flight or destroyed luggage, and to pursue any claims against government agents related to the seizure.[7]

Unfortunately, Anthonia's experience is by no means uncommon. The forfeiture system is stacked against innocent travelers like her, who stand to lose their life savings to the

1. JENNIFER MCDONALD, INST. FOR JUST., JETWAY ROBBERY?: HOMELAND SECURITY AND CASH SEIZURES AT AIRPORTS 12 (2020) [hereinafter IJ Report].

2. Nick Sibilla, *Customs Agents Seize Cash Nurse Saved to Build Medical Clinic, But Never Charged Her with a Crime*, FORBES (May 15, 2018) [hereinafter Sibilla, FORBES], https://www.forbes.com/sites/instituteforjustice/2018/05/15/customs-agents-seize-cash-nurse-had-saved-to-build-medical-clinic-never-charged-her-with-a-crime [https://perma.cc/WH3T-588X].

3. *Id.*

4. *See infra* notes 168–171 and accompanying text.

5. *Houston Forfeiture*, INST. FOR JUST., https://ij.org/case/houston-forfeiture/ [https://perma.cc/CF7E-U52W].

6. Sibilla, FORBES, *supra* note 2.

7. *Houston Forfeiture*, *supra* note 5.

government for mere paperwork violations or unfounded suspicion of criminal activity.[8] Claimants must navigate the labyrinthine world of civil forfeiture to fight for the return of their rightful property, and face a host of obstacles such as tight filing deadlines, a heavy burden of proof, and the lack of right to counsel or a neutral arbiter.[9] Anthonia's story had a happy ending, in which a public interest law firm fought for the return of her money,[10] and she resumed her clinic work, albeit after a year's delay.[11]

The public interest firm in this case, Institute for Justice ("IJ"), published a first-of-its-kind report ("IJ Report") in the summer of 2020 after obtaining access to the government forfeiture database, Seized Assets and Case Tracking System ("SEACATS").[12] The report brought to light the multibillion-dollar industry of *domestic* airport forfeiture, and perhaps more shockingly, the large portion of victims like Anthonia who merely violated paperwork requirements without

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8. *See, e.g.*, First Amended Complaint – Class Action, Brown v. Transp. Sec. Admin., No. 20-64, 2021 WL 1221498 (W.D. Pa. July 17, 2020) (challenging TSA and DEA's airport cash seizure and forfeiture practices in contravention of both statutory authority and the Fourth Amendment); Complaint, Kazazi v. U.S. Customs & Border Prot., 376 F. Supp. 3d 781 (N.D. Ohio May 31, 2018) (challenging CBP's ongoing seizure of cash in violation of statutory guidelines). The named plaintiffs in *Brown* and the plaintiff in *Kazazi* ultimately had their seized money returned after filing the lawsuits.

9. *See infra* Parts I.A.1, I.A.3.

10. Despite getting her money back, Anthonia continued to pursue various constitutional claims against the government's practice of pressuring property owners to sign Hold Harmless Agreements. This matter is currently pending at the Fifth Circuit and the oral arguments took place on Sept. 2, 2020. *See* Opening Brief for Plaintiff–Appellant, Nwaorie v. United States, No. 19-20706, 2020 WL 1171670 (5th Cir. Dec. 2, 2019).

11. Justin Jouvenal, *Homeland Security Seized $2 Billion from Travelers, But Most Were Never Charged with a Crime, Report Says*, WASH. POST (July 30, 2020), https://www.washingtonpost.com/local/trafficandcommuting/homeland-security-seized-2-billion-from-travelers-but-most-were-never-charged-with-a-crime-report-says/2020/07/30/001c3f90-cd05-11ea-bc6a-6841b28d9093_story.html [https://perma.cc/U4Z7-FDLU].

12. IJ Report, *supra* note 1, at 2; *see also* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1516 n.386 (2019) (mentioning the public inaccessibility of CBP forfeiture databases as well as the lawsuit filed by IJ over the denial of its FOIA request). Though the data contained in the report only touches upon domestic airports and U.S. territories, I have obtained from IJ the relevant data on thirteen preclearance facilities for the purpose of this Note as well as the firm's permission to use them. *See infra* Part I.B.2.

any apparent criminal activities.[13] The government commonly employs the rhetoric and rationale of combating criminal enterprises to justify currency seizures,[14] whereas the newly available data tells the exact opposite story: there lacks a nexus between airport forfeiture and crime prevention.[15]

While the IJ Report examined domestic airport forfeiture, comparable practice outside of U.S. soil has existed for decades but has remained under the radar. The CBP Preclearance program encompasses facilities located in foreign countries as well as U.S. territories, where customs officers inspect travelers boarding a continental U.S.-bound aircraft for compliance with U.S. laws, including customs regulations.[16] The subject of CBP Preclearance has attracted little scholarly attention or systematic analysis,[17] and has largely been confined to governmental reports.[18] Given its ambitious scope and mission, CBP Preclearance plays an essential role in the

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13. *See infra* Part I.A.2.

14. *See infra* notes 93–94 and accompanying text.

15. *See infra* note 86 and accompanying text.

16. Susan Holliday, *Cleared for Landing*, U.S. CUSTOMS & BORDER PROT. FRONTLINE (July 29, 2015), https://www.cbp.gov/frontline/frontline-preclearance [https://perma.cc/YMU5-2YRD]; *see also infra* Parts I.B.1, II.B.2.

17. *See, e.g.*, Ayelet Shachar, *Bordering Migration/Migrating Borders*, 37 BERKELEY J. INT'L L. 93, 108–09 (2019) [hereinafter Shachar, *Bordering Migration*] (examining preclearance as a minor aspect of theorizing borders and territorial boundaries); Ran Hirschl & Ayelet Shachar, *Spatial Statism*, 17 INT'L J. CONST. L. 387, 398–400 (2019) (same); Karine Côté-Boucher, *Risky Business?: Border Preclearance and the Securing of Economic Life in North America*, *in* NEOLIBERALISM & EVERYDAY LIFE 37, 45–63 (Susan Braedley & Meg Luxton eds., 2010) (same, while additionally theorizing identities and mobility); *see also* Stephen Thomson, *The New Constitutional Disorder: The Unlawful Application of Mainland Chinese Law to Hong Kong*, 54 TEX. INT'L L.J. 115, 127–29 (2018) (merely mentioning preclearance briefly without significant analysis); A. James Vazquez-Azpiri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 545–47 (2005) (same); Sergio R. Karas, *Preclearance of Travellers from Canada to the US: Bilateral Cooperation or Intrusion on Sovereignty?*, INT'L LEGAL PRAC. 144, 144 (2000) (focusing on the preclearance facilities in Canada).

18. For a few non-governmental sources that discuss and analyze preclearance facilities, see Ron Nixon, *Preclearance at Foreign Airports Seen as a Necessity to Fight Terrorism*, N.Y. TIMES (July 24, 2016), https://www.nytimes.com/2016/07/25/us/politics/preclearance-at-foreign-airports-seen-as-a-necessity-to-fight-terrorism.html [https://perma.cc/WMF4-5Y5E]; *US Immigration Pre-clearance Controversial in More Ways than One*, 29 AIRLINE LEADER 54 (July–Aug. 2015) [hereinafter AIRLINE LEADER].

agency's "extended border strategy."[19] CBP agents' expansive enforcement powers at airports outside of the continental United States warrant scrutiny of their forfeiture practices as well as the level of rights protections afforded to travelers.

Imagine Anthonia's counterpart, a U.S.-bound traveler (either a non-citizen or a citizen[20]), who is in a foreign airport for her first international flight to the United States. Unaware of the reporting requirement, she fails to declare the $10,000 cash in her luggage. Upon passing through a preclearance facility at that airport, she is stopped and questioned by a U.S. agent who subsequently seizes and forfeits all of her money. How often does such an incident occur? Would such a preclearance traveler be protected against unjust punishment absent the requisite knowledge and notice of the requirement? Would such a traveler be protected against excessive punishment disproportionate to the resulting harm? The answers remain unknown. CBP has never made its forfeiture data on preclearance operations publicly available, and the IJ Report excluded such data as well; further, the contested scope of constitutional applicability compounds the myriad of problems in civil forfeiture with government overreach and procedural hurdles.[21]

To fill the gaps in literature of currency forfeiture conducted by CBP Preclearance,[22] this Note analyzes seizure incidents at thirteen preclearance facilities between 2000 and 2016 recorded in

19. Melissa Copeland, *Vital Preclearance Operations Continue During COVID-19 Pandemic*, U.S. CUSTOMS & BORDER PROT. FRONTLINE (Aug. 4, 2020), https://www.cbp.gov/frontline/vital-preclearance-operations-continue-during-covid-19-pandemic [https://perma.cc/Y6EX-UHMM] (describing preclearance as "[a] key component to CBP's extended border strategy").

20. This Note does not distinguish protections for citizens and non-citizens. For a brief description of the membership approach to extraterritoriality based on such a distinction, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 6–7 (1996) [hereinafter NEUMAN, STRANGERS].

21. *See infra* Parts I.A.1, I.A.3.

22. Though there is no existing scholarship or caselaw on the specific phenomenon of CBP Preclearance forfeiture, it is a live issue from both a theoretical perspective, based on the grant of the relevant enforcement powers, and a realistic perspective, based on the forfeiture databases. *See infra* Parts I.B.2, II.B.2.

the SEACATS forfeiture database,[23] which contains comprehensive information on the "arrest, seizure, penalty, or liquidated damages of persons or goods entering the United States *or enforcement actions abroad*."[24] All seizure incidents were sorted based on their associated date, port codes, and type (e.g., seizure only and seizure with arrest or penalty)[25]; property type (currency), value, custodian, and physical status (e.g., deposited to various funds and turned over pre-forfeiture)[26]; and U.S. Code provisions underlying the violations.[27] This Note then examines the constitutional implications of a particular category of preclearance currency forfeiture—incidents involving otherwise innocent travelers like Anthonia in mere violation of the reporting requirement[28]—and proposes the extension

23. SEACATS includes both domestic and preclearance data, but the IJ Report only analyzed the former. I sorted through the preclearance incidents in the database documents. *See infra* notes 146–149 and accompanying text.

24. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE SEIZED ASSETS AND CASE TRACKING SYSTEM (SEACATS) 12 (2017) [hereinafter SEACATS Privacy Impact Assessment] (emphasis added).

25. In "incident type," "seizure & arrest" ("SA") is filtered out, while retaining "seizure only" ("SZ") and "seizure with penalty issued on site" ("SP") to approximate travelers' innocence. *See infra* note 86 and accompanying text.

26. In "physical status," the following categories are filtered out: "assist only" ("AS"), "remitted" ("RE"), "released – remission amount paid" ("RR"), "returned – mitigation of seized currency" ("RM"), and "remitted – humanitarian release" ("RH"), while retaining: "deposited seized currency to forfeiture fund" ("DF"), "deposited to budget clearing account" ("DP"), and "turned over to another agency pre-forfeiture" ("TO") to approximate forfeiture. *See infra* note 83 and accompanying text.

27. In "primary, secondary violation code," §§ 5316, 5317 are primarily retained. *See infra* note 162. A few incidents retained cited 19 U.S.C. § 1497 instead (subjecting undeclared article to forfeiture and the traveler to a penalty in the amount of "the value of the article" if it is not a controlled substance), along with 18 U.S.C. § 981(d) (applying customs laws not inconsistent with this general provision on civil forfeiture to seizures and forfeitures incurred), 19 U.S.C. § 1436(d) (subjecting any merchandise imported onboard the improperly reported conveyance to seizure and forfeiture, and the owner to a civil penalty in the amount of "the value of the merchandise"), 31 U.S.C. § 5317, or 31 U.S.C. § 5321(a)(2) (imposing "additional civil penalty on a person not filing a report" in the amount no more than the value of the monetary instrument and reduced by the forfeited amount).

28. *See infra* Parts II.A.1–2. Among the various potentially relevant constitutional rights, this Note focuses on Fifth Amendment Due Process and Eighth Amendment Excessive Fines. Other constitutional provisions such as the Fourth and Fourteenth Amendments and statutory provisions such as CAFRA are beyond the scope of this Note.

of fundamental constitutional protections, available in the domestic context, to those on whom the United States imposes legal obligations at preclearance facilities.

In Part I, this Note will overview the civil forfeiture system to set up the backdrop against which the newly exposed multibillion-dollar industry of domestic airport currency forfeiture plays out. Next, Part I will highlight the statistical findings on currency forfeitures conducted by CBP Preclearance at thirteen facilities as a result of mere reporting violations. In Part II, this Note will address the constitutional issues related to extraterritorial enforcement of the reporting requirement, including the Due Process and Excessive Fines Clauses. Next, Part II will raise concerns about the potential mismatch between assertions of governmental authority and extensions of constitutional protections, as exemplified by the extensive preclearance enforcement powers granted by various bilateral agreements. In Part III, this Note will argue for extending the scope of extraterritorial constitutional protections afforded to travelers subject to preclearance forfeiture beyond what the long-standing functional test provides.[29] Finally, Part III will draw on insights from the incorporation doctrine to offer a modified extraterritoriality approach, promoting integrity of constitutional interpretation and adherence to separation of powers.

I. Investigating Preclearance Forfeiture Practices

Can law enforcement take property from individuals who have not been charged with a crime? In civil forfeiture, the surprising answer is yes, due to the underlying premise that property alone is guilty.[30] Despite modest reforms, forfeiture practices are mired in a

29. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 756–60 (2008) (adopting the "impracticable and anomalous," or functional, test, while tracing the test to a series of earlier cases, especially Reid v. Covert, 354 U.S. 1 (1957) and the *Insular Cases* during 1901–22); *see also* MICHAEL J. GARCIA, CONG. RSCH. SERV., RL34536, *BOUMEDIENE V. BUSH*: GUANTANAMO DETAINEES' RIGHT TO HABEAS CORPUS 4, 10 (2008) (arguing that the *Boumediene* Court followed the prior cases in its functional approach); *cf.* Christina Duffy Ponsa-Kraus, *A Convenient Constitution?: Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 979 (2009) [hereinafter Ponsa-Kraus, *A Convenient Constitution*] (arguing that the cases cited and relied on by the *Boumediene* Court did not adopt a functional approach *per se* but rather took into account, among others, practical considerations).

30. *See infra* notes 38–39 and accompanying text.

multitude of criticisms and problems, especially the perverse financial incentives of law enforcement, which retains and benefits from the proceeds.[31] Part I.A.1 explores the recurring themes of governmental overreach and procedural shortcomings, which leap out in both airport and non-airport contexts.

Next, Part I.A.2 delves into the shocking extent to which customs agents seize and forfeit innocent travelers' currency at airports. After years of legal battle over the forfeiture database, the multibillion-dollar industry of domestic airport forfeiture—and its glaring problems—finally saw the light of day.[32] A recent report revealed that violations of the currency reporting requirement, which accounted for half of total currency seizures, almost *never* resulted in arrests and arguably lacked any criminal nexus.[33] Absent any variables of criminal charges or convictions in the database essential to measure the effectiveness of forfeitures in crime prevention, significant oversight concerns arise.[34] Furthermore, Part I.A.3 examines the procedural shortcomings and the improper practices that significantly undermine property owners' chances of recovery.

Airport currency forfeiture is by no means confined to U.S. soil. Part I.B.1 provides a primer of the rapidly expanding CBP Preclearance operations, as an essential component of the security imperative, spanning fifteen airports in six foreign countries and one U.S. territory.[35] This Part culminates in the statistical findings in Part I.B.2—left out of the aforementioned IJ report—on currency forfeitures between 2000 and 2016 at thirteen preclearance facilities. Similar to their domestic counterparts, preclearance currency seizure incidents largely occurred without accompanying arrests.[36] Over *eight million dollars* were seized from preclearance travelers as a result of mere paperwork violations[37]—the specific category of forfeiture relevant to this Note.

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31. *See infra* notes 44–45, 53–58 and accompanying text.
32. *See infra* notes 79–81 and accompanying text.
33. *See infra* notes 84–86 and accompanying text.
34. *See infra* notes 94–96 and accompanying text.
35. *See infra* notes 134–135 and accompanying text.
36. *See infra* note 147 and accompanying text.
37. *See infra* notes 149–150 and accompanying text.

A. Airport Currency Forfeiture

1. Civil Forfeiture: History and Continuing Criticisms

While criminal forfeiture requires criminal convictions of the property owner to seize and keep the property, civil forfeiture allows law enforcement to take property from innocent individuals who have not been charged, let alone convicted, of any crime,[38] based on a legal fiction that the property allegedly connected to a crime is "guilty."[39] Since its founding, the United States has adopted forfeiture laws[40] which gradually expanded over time.[41] In 1984, however, Congress drastically revised the regime [42] and envisaged forfeiture as a "powerful weapon in the fight against drug trafficking and racketeering."[43] The creation of the Assets Forfeiture Fund allows law enforcement to retain seizure proceeds for its own purposes, rather than directing them to the U.S. Treasury for general use.[44] Civil forfeiture has thus been aptly characterized as "legalized bounty hunting," highlighting its troublesome feature that law enforcement directly obtains financial benefits.[45]

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38. DICK M. CARPENTER II ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 8 (2d ed. 2015).

39. JENNIFER MCDONALD, INST. FOR JUST., CIVIL FORFEITURE, CRIME FIGHTING AND SAFEGUARDS FOR THE INNOCENT: AN ANALYSIS OF DEPARTMENT OF JUSTICE FORFEITURE DATA 1–2 (2018) [hereinafter MCDONALD, CIVIL FORFEITURE].

40. Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799) (adopting civil forfeiture to aid in customs revenue collection); Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117, *repealed by* Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987 (1984) (abolishing criminal forfeiture).

41. Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 96–102 (1996) (discussing the expansions during Civil War and Prohibition).

42. H.R.J. Res. 648, 98th Cong., tit. II, ch. III, pt. C, § 310, 98 Stat. 1837 (1984) (laying out the implementation details for the Assets Forfeiture Fund encompassing criminal, civil judicial, and civil administrative proceedings).

43. S. REP. NO. 98-225, at 194 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3377.

44. CARPENTER II ET AL., *supra* note 38, at 10.

45. HERITAGE FOUND., ARRESTING YOUR PROPERTY: HOW CIVIL A$$ET FORFEITURE TURNS POLICE INTO PROFITEERS 4 (2015).

Modern civil forfeiture—unmoored from the historical enforcement necessities[46]—has been subject to criticisms of "serious moral defects" [47] and "injustices inherent in the procedure." [48] Legislators have long attempted to bring "modern principles of due process and fair play"[49] and even "a modicum of sanity"[50] to the civil forfeiture laws. Unfortunately, both state and federal level reforms fell short.[51] The 2000 Civil Asset Forfeiture Reform Act ("CAFRA")—though offering modest reforms[52]—left in place law enforcement

46. The concept of civil forfeiture originated from the seventeenth century English maritime law out of practical necessities, namely, to obtain jurisdiction over property in *in rem* proceedings whose owners, such as pirates, were outside of the jurisdiction. MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 1–2.

47. George Rainbolt & Alison F. Reif, *Crime, Property, and Justice: The Ethics of Civil Forfeiture*, 11 PUB. AFFS. Q. 39, 39 (1997).

48. David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 3 (2012) [hereinafter Pimentel, *Forfeitures Revisited*].

49. *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the S. Subcomm. on Criminal Justice Oversight of the Comm. on the Judiciary*, 106th Cong. 6 (1999) (statement of Sen. Patrick J. Leahy) (urging that deprivation of property and due process "have to go hand in hand," so that what was meant to be a "good crime-fighting tool" would not "get way out of control").

50. Henry Hyde, *Forfeiture Reform: Now, or Never?*, CATO INST. (May 3, 1999), https://www.aclu.org/other/statement-rep-henry-hyde-forfeiture-reform-now-or-never [https://perma.cc/EAH4-BBRP] (proposing eight "common-sense" reforms in CAFRA—including the requirement that the government prove by "clear and convincing evidence" that property is subject to seizure—to civil forfeiture laws, which "impact civil liberties and property rights," and "work at total cross purposes with the professed public policy goals of our government").

51. David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 GEO. MASON L. REV. 173, 186–219 (2017) (detailing the various states' approaches to stemming civil forfeiture abuses that fell short without removing the financial incentives perpetuating the problem); Pimentel, *Forfeitures Revisited*, *supra* note 48, at 25–31 (criticizing the injustices inherent in the forfeiture procedures that CAFRA failed to solve).

52. H.R. 1658, 106th Cong. § 983(a)(2)(E), (b), (c)(1), (d), 114 Stat. 202 (2000) (eliminating the bond requirement for claimants to contest a civil forfeiture in court, providing representation for indigent claimants under limited circumstances, requiring the government to prove by a preponderance of the evidence that the property is connected to a crime, and providing an innocent owner defense); Radley Balko, *The Forfeiture Racket*, REASON (Feb. 2010), https://reason.com/2010/01/26/the-forfeiture-racket/ [https://perma.cc/LD99-GY2Z] (explaining that the bill's author, Rep. Hyde, wanted a heavier burden of proof for the government of "beyond a reasonable doubt" used in criminal cases, which did not pass).

agencies' pecuniary interest in the forfeiture proceeds, enabled by the overwhelming majority of state and federal forfeiture laws.[53] In the following fourteen years, federal forfeiture funds exploded by 1,000%, and abuses abound.[54] The strong financial incentives arguably warp law enforcement's priorities by "encourag[ing] the pursuit of property instead of the pursuit of justice."[55] Some of the most shocking anecdotes betraying the ethics of law enforcement include government officials' references to civil forfeiture as a "gold mine" and "pennies from heaven,"[56] purchases of high-performance cars and margarita machine with forfeiture proceeds,[57] and a proposed inscription of "Always Think Forfeiture" for the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").[58]

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53. Only seven states and D.C. block law enforcement's access to forfeiture proceeds, while the federal government and half the states allow 100% of the property value to be directed to law enforcement use. CARPENTER II ET AL., *supra* note 38, at 14.

54. *Id.* at 10. Funds include both the Department of Justice ("DOJ") Assets Forfeiture Fund and the Treasury Forfeiture Fund.

55. *Id.* at 8; Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56–83 (1998) (describing the substantial financial windfalls generated by asset forfeiture and arguing that such economic incentives distort criminal justice policies); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 509–10 (2000) (same); *see, e.g.*, Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES 1 (1993) (quoting DOJ's Asset Forfeiture Office Former Director Zeldin whose "marching orders" include "[f]orfeit, forfeit, forfeit. Get money, get money, get money"); United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 n.2 (1993) (quoting an Attorney General's memorandum urging prosecutors to make "[e]very effort" to increase forfeiture income in the remaining months of the fiscal year to "reach [their] budget target").

56. CARPENTER II ET AL., *supra* note 38, at 15; LastWeekTonight 9:00–11:00, *Civil Forfeiture: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Oct. 6, 2014), https://www.youtube.com/watch?v=3kEpZWGgJks (on file with the *Columbia Human Rights Law Review*) (mentioning various anecdotes, including one police chief's reference of forfeiture proceeds on tape as "pennies from heavens" due to the lack of limitations on their usage, and two District Attorney's offices' purchases of Zamboni and margarita machines).

57. Balko, *supra* note 52.

58. *Id.*

Such perverse incentives unfortunately result in significant government overreach and risks to civil liberties.[59] Forfeitures of property that is neither contraband nor proceeds of a crime, including currency—the subject of this Note—present a unique moral hazard of law enforcement overreach.[60] Such seizures fail to serve the professed policy objective against unjust enrichment,[61] and are often excessively and arbitrarily punitive.[62]

Civil forfeiture also provides inadequate procedural protections.[63] Because the proceedings are technically against properties rather than people, property owners facing civil forfeiture lack the rights afforded the criminally accused, including the right to counsel, which is essential to traverse the complex legal landscape.[64]

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59. Pimentel, *Forfeitures Revisited*, *supra* note 48, at 31 (arguing that law enforcement agencies' financial incentives "exert constant pressure on law enforcement to overreach when pursuing a lucrative forfeiture opportunity"); OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., REVIEW OF THE DEPARTMENT'S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 26–27 (2007) (warning against the risks to civil liberties and the troubling appearance of being more interested in seizing and forfeiting cash than advancing investigations, especially when warrantless seizures lead to subsequent administrative forfeitures without investigations or prosecutions); *see, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., CRIMINAL INVESTIGATION ENFORCED STRUCTURING LAWS PRIMARILY AGAINST LEGAL SOURCE FUNDS AND COMPROMISED THE RIGHTS OF SOME INDIVIDUALS AND BUSINESSES 9–10 (2017) (discussing a standard operating procedure of "quick hit" structuring seizures, resulting in majority cases involving legal source funds absent evidence of illegal activities).

60. Pimentel, *Forfeitures Revisited*, *supra* note 48, at 53 & n.301 (characterizing forfeitures of facilitating property, such as currency, as self-serving and overreaching, because the government faces little downside if its overreaching is challenged or exposed and directly profits from such forfeitures).

61. *Id.* at 52 n.299 (citing legislative history in support of the policy objective of eliminating unjust enrichment underlying proceeds forfeiture).

62. *Id.* at 42–46 (criticizing problems of disproportionality between the offense and punishment, and wide judicial discretion resulting in unpredictability in certain forfeiture cases).

63. Boudreaux & Pritchard, *supra* note 41, at 81 (criticizing the Court's deference on which Congress relied to enact provisions well beyond the traditional domain of civil forfeiture). For a detailed analysis of the difference between judicial and administrative forfeiture proceedings, see *infra* Part I.A.3.

64. CARPENTER II ET AL., *supra* note 38, at 12; Am. C.L. Union, FAIR Act Endorsement Letter 2 (Mar. 16, 2017), https://www.aclu.org/sites/default/files/field_document/2017-3-16_aclu_letter_ fair_act_endorsement.pdf [https://perma.cc/X3L6-7V8B] (stating that "[v]ery few people have the resources to take on the government, especially when the deck is stacked against property owners as it is in civil forfeiture cases").

The majority of the states and the federal government also employ a lower evidentiary threshold—the preponderance of evidence—than criminal convictions.[65] Furthermore, property owners must prove their innocence to prevent forfeiture, rather than enjoying the presumption of innocence as in criminal trials.[66] The 2015 Fifth Amendment Integrity Restoration ("FAIR") Act intended to redress these procedural problems by ensuring legal representation in all civil forfeitures, requiring a higher evidentiary standard, and restoring the presumption of innocence until proven guilty.[67] Unfortunately, the FAIR Act never passed.[68]

Other governmental branches have also criticized the system of civil forfeiture. Several Supreme Court Justices lamented the potential abuses surrounding the civil forfeiture practice and the Court's deferential approach.[69] Justice Thomas, among the most high-profile critics, has for decades voiced concerns over the increasing scale and various defects of civil forfeiture.[70] Growing

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65. CARPENTER II ET AL., *supra* note 38, at 16.

66. *Id.* at 18, 20.

67. FAIR Act, H.R. 540, 114th Cong. (2015); FAIR Act, S. 255, 114th Cong. (2015).

68. The Act was reintroduced in Congress in 2020. FAIR Act, S. 4074, 116th Cong. (2020).

69. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 686 (2019) (unanimously holding that the excessive fines protection is fundamental in safeguarding against "abuses of government's punitive or criminal-law-enforcement authority," such as civilly forfeiting the defendant's car); Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2017) (Gorsuch, J., concurring) (criticizing the "extravagant punishments" imposed by today's civil laws that are "routinely graver" than misdemeanor penalties and even "often harsher" than felony punishments); United States v. James Daniel Good Real Prop., 510 U.S. 43, 82 & n.2 (1993) (Thomas, J., concurring) (contemplating the reevaluation of the Court's "generally deferential approach to legislative judgments" in civil forfeiture, such as in the excessive fines context).

70. Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring in denial of certiorari) (identifying civil forfeiture's glaring defects of inadequate procedural protections, such as the right to a jury trial and a heightened standard of proof, limited judicial oversight, and frequent operations targeting groups least able to defend themselves in the forfeiture proceedings); Bennis v. Michigan, 516 U.S. 442, 456 (1996) (Thomas, J., concurring) (cautioning against improperly used civil forfeiture that is "more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . than a component of a system of justice"); *James Daniel Good Real Prop.*, 510 U.S. at 81 (Thomas, J., concurring) (stating that he was "disturbed by the breadth of new civil forfeiture statutes").

bipartisan efforts have been calling for reforms.[71] For example, both 2016 presidential election platforms denounced the current regime, highlighting the "perverse incentives . . . to 'police for a profit'"[72] of "unscrupulous law enforcement officials, acting without due process," using "abusive asset forfeiture tactics," and "destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken."[73]

2. Exposing Modern Airport Forfeiture

CBP's currency seizure practices at airports have long remained a mystery. On its official website, CBP only publishes its program overview and general data points, such as the seizure of "$290,411 in undeclared or illicit currency" on a "typical day" in the fiscal year of 2018.[74] Seized currency, as non-prohibited property, becomes governmental assets through forfeiture, the details of which are not published or otherwise publicly accessible.[75] Various organizations have fought lengthy legal battles with CBP,[76] as it

71. National and state groups across the political spectrum joined as *amici* in *Timbs*, 139 S. Ct. 682, including the American Civil Liberties Union, Pacific Legal Foundation, and Foundation for Moral Law, to call for restraining governmental overreach and civil forfeiture abuses. *See* Timbs v. Indiana, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/timbs-v-indiana/ [https://perma.cc/T26H-889X].

72. 2016 DEMOCRATIC PARTY PLATFORM 14 (2016).

73. REPUBLICAN PLATFORM 2016, at 15 (2016).

74. *On a Typical Day in Fiscal Year 2018, CBP…*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/typical-day-fy2018 [https://perma.cc/3VDE-SACP].

75. U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT 106, § K (2016) [hereinafter CBP Performance and Accountability Report] (stating in the Notes to Financial Statements that "monetary instruments . . . in the actual or constructive possession of CBP is transferred to the Treasury Forfeiture Fund and is not presented in the accompanying CBP Consolidated Balance Sheets or Note 8, Seized and Forfeited Property").

76. *See* Memorandum Opinion at 5, 8, Am. Immigr. Laws. Ass'n v. U.S. Dep't of Homeland Sec., 485 F. Supp. 3d 100, 107–08 (D.D.C. 2020) (resolving the few remaining disputed withholdings after four years of litigation, which were subject to valid exemptions based on potential increase of legal violations as a result of disclosure); Complaint at 2–3, Am. Immigr. Laws. Ass'n v. U.S. Dep't of Homeland Sec., 485 F. Supp. 3d 100 (D.D.C. Dec. 19, 2016) (seeking the Officer's Reference Tool ("ORT") which phased out and replaced its previous version, the Inspector's Field Manual ("IFM"), and which CBP failed to produce three years after the initial FOIA request).

repeatedly denied Freedom of Information Act ("FOIA") requests and withheld even the most basic information, such as its seizure procedures.[77]

In July 2020, IJ exposed the multibillion-dollar industry of domestic airport civil forfeiture through its newly published report.[78] It was only after four years of lawsuits and negotiations that IJ was able to access the seizure database, which CBP had never made available prior.[79] The report revealed shocking data points that Department of Homeland Security ("DHS") agencies, including CBP, conducted 46,151 currency seizures[80] at domestic airports between 2000 and 2016,[81] with an explosive 178% increase in cases and totaling *two billion dollars* during that time period.[82] Over three-quarters of the seizures were of cash, which could "quickly and easily" flow into government agencies' coffers.[83]

Of particular concern is the further finding that the most common reason for currency seizures is *not* money laundering or drug

77. *CBP Releases Officer's Reference Tool Documents*, AM. IMMIGR. LAWS. ASS'N (Oct. 21, 2019), https://www.aila.org/infonet/gr-foia-cbp-table [https://perma.cc/34ZK-NBTL] (explaining that the new ORT requested through FOIA is not yet available, and posting hundreds of documents as CBP release them); U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR'S FIELD MANUAL, at ii (Charles Miller ed. 2008) (explaining that CBP initially denied the FOIA request for the IFM as relating to "trivial administrative matters of no genuine public interest" until eventually releasing it two years later).

78. IJ Report, *supra* note 1, at 2 (analyzing the newly obtained CBP forfeiture data and reporting two billion dollars of airport seizure were seized between 2000 and 2016).

79. *See id.* at 5 (explaining that IJ obtained most of the seizure data requested through FOIA—initially denied by CBP as relating to "technique and procedure"—after four years of litigation); Complaint at 2, Inst. for Just. v. U.S. Customs & Border Prot., No. 16-cv-02408 (D.D.C. filed Dec. 8, 2016) (seeking civil forfeiture data in SEACATS whose FOIA request was denied by CBP, although similar data has been produced by DOJ and IRS).

80. For an explanation of the difference between seizures and seizure cases, see IJ Report, *supra* note 1, at 12 n.30.

81. *Id.* at 12. Although SEACATS includes all U.S. customs ports at both domestic and extraterritorial airports with preclearance facilities, all figures in this Part encompass only domestic seizures and do not differentiate in- from outbound flights. *Id.* at 11 n.20. Meanwhile, preclearance seizures would only occur before inbound flights.

82. *Id.* at 6–7 figs.1 & 3.

83. *Id.* at 6. Information on who received the property—sometimes available only in the receiving agencies' database—is not in SEACATS and makes it "impossible to track the assets to their final disposition." *Id.* at 15.

smuggling, but the bureaucratic offense of failing to report.[84] Reporting violations account for *half* of all domestic seizures, or 23,262 incidents, totaling over half a billion dollars.[85] Of those incidents, 90% involved mere paperwork violations without any link to criminal activity—just like in Anthonia's case—and these travelers were never arrested, charged, or convicted for any crimes associated with their seized cash.[86]

The key governing provision of the reporting requirement is 31 U.S.C. § 5316,[87] which requires that travelers who "knowingly" transport[88] over $10,000 (formerly $5,000)[89] into or out of the country must file the currency reporting form FinCEN 105 (formerly CF 4790)[90] and the customs declaration form CF 6059B.[91] Though a criminal nexus is not a statutory element, the reality of CBP's prevalent seizures and forfeitures from innocent travelers—often

84. *See id.* at 11 tbl.3.

85. *Id.* at 11–12.

86. *Id.* at 15. Information on criminal charges and convictions related to the seizures—required to evaluate the effectiveness of airport forfeitures in crime prevention—is not in SEACATS. Admittedly, the lack of arrests in the report is not a perfect proxy for innocence, and thus the 90% figure is based on imperfect data. *Id.* at 15 & n.35 (examining the arrest data in its analysis but noting that arrest is an imperfect proxy for criminality).

87. 31 U.S.C. § 5316(a)(1) (effective 1982), *recodifying and modifying* 31 U.S.C. § 1101(a)(1); H.R. 6128, 97th Cong., 96 Stat. 877 (1982) (enacted). Later cases refer to both statutes depending on the relevant year at issue.

88. There is a distinction between the failure-to-report cases in violation of § 5316(a) containing the knowledge element, and the material-misstatement cases in violation of § 5317(a), which does not specify whether the error must be intentional or advertent in order to be subject to forfeiture. *See* United States v. $173,081.04 in U.S. Currency, 835 F.2d 1141, 1143 (5th Cir. 1988). The reporting violation relevant to this Note is the former failure-to-report case governed by § 5316(a), but §§ 5317(a), (c) govern the forfeiture of currency in such case.

89. H.R.J. Res. 648, 98th Cong., tit. II, ch. IX, § 901(c)(2), 98 Stat. 1837 (1984). Later cases refer to both currency amounts depending on the relevant year at issue.

90. *FinCEN Form 105 (Rev. 7-2003)*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/sites/default/files/shared/fin105_cmir.pdf [https://perma.cc/CCW5-DD2L]; *CBP Form 4790*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-prior/f4790—2002.pdf [https://perma.cc/95L8-BKV4]. Later cases refer to both forms depending on the relevant year at issue.

91. *CBP Form 6059B English*, U.S. CUSTOMS & BORDER PROT. (June 6, 2016), https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP%20Form%206059B_English.pdf [https://perma.cc/KZM5-6SLU].

unaware of the requirement[92]—is in stark contrast with its justification for such practices in the first place. CBP employs the rhetoric of curtailing serious crimes when defending its currency seizures,[93] and one official report cites combating criminal enterprises as the rationale for asset forfeiture.[94] However, none of the government's main forfeiture databases contain the essential metrics to track the effectiveness of forfeitures,[95] raising oversight concerns, as noted in the 2020 report by the DHS Office of Inspector General ("OIG").[96] Where data *is* available from a few isolated seizure and forfeiture programs, statistical analyses show that their effectiveness in fighting crime is minimal.[97]

3. Fighting the Uphill Battle of Administrative Forfeiture

Between 2000 and 2016, a whopping 91% of all airport currency forfeiture cases were subject to civil forfeiture, as opposed to

92. *See infra* Part II.A.1.

93. Jouvenal, *supra* note 11 (citing a CBP spokesperson justifying currency seizures with crimes of bulk cash smuggling, counterfeiting, and narcotics trafficking).

94. TREASURY DEP'T, TREASURY FORFEITURE FUND STRATEGIC PLAN FY 2007–2012, at 2 (2007) (stating in its mission statement that the "consistent and strategic use of asset forfeiture" is aimed at "disrupt[ing] and dismantl[ing] criminal enterprises").

95. LISA KNEPPER ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 51 n.218 (3d ed. 2020) (noting that three databases employed by DOJ, Treasury, DHS, and IRS do not contain any variable indicating criminal charges or convictions).

96. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., DHS INCONSISTENTLY IMPLEMENTED ADMINISTRATIVE FORFEITURE AUTHORITIES UNDER CAFRA 6 (2020).

97. BRIAN D. KELLY, INST. FOR JUST., FIGHTING CRIME OR RAISING REVENUE?: TESTING OPPOSING VIEWS OF FORFEITURE 17 (2019) (analyzing over a decade's data on DOJ's equitable sharing, the largest U.S. forfeiture program, and concluding that "even criminal and civil forfeiture *combined* does not have a meaningful effect on crime fighting"); TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 59, at 8 (analyzing a sample of structuring seizures intended to prevent money laundering, and finding that over 250 cases involved legal source funds while only 26 involved illegal ones); OFF. OF THE INSPECTOR GEN., *supra note* 59, at 20 (analyzing a sample of DEA's warrantless cash seizures without the presence of drugs, and suggesting that DEA's seizure operations may not benefit or even relate to criminal investigations).

criminal forfeiture.[98] As examined in Part I.A.1, protections in criminal proceedings are unavailable in civil forfeiture cases, while significant burdens fall on the claimants to challenge the seizure by accurately and timely filing their claims. The "seize first, ask questions later" mentality thus encapsulates the typical civil forfeiture system and its procedural pitfalls.[99] Unfortunately, "ask questions later" might even be an optimistic characterization, as 93% of the currency civil forfeitures are subject to administrative forfeiture commenced by federal agencies without any judicial involvement.[100] Though often understood to apply where claims for return of seized property are not filed,[101] administrative forfeiture was used, curiously, in over 9,000 *contested* cases of cash forfeiture between 1997 and 2015, despite the supposed availability of judicial forfeiture.[102] The OIG report highlighted various improper practices, including circumvention of the U.S. Attorney's Office ("USAO") via settlements, inappropriate use of waivers, and inconsistent response times.[103]

The government generally instructs that administrative forfeiture "should be pursued wherever possible/practical."[104] The antithesis of adequate judicial oversight, administrative forfeiture allows the seizing agency itself—which stands to gain from the proceeds—to review cases, resulting in, perhaps unsurprisingly,

98. IJ Report, *supra* note 1, at 16–17 fig.4.

99. Andrew Wilmer, *The Simple Trick the Government Uses to Take Hundreds of Millions of Dollars from Travelers*, FORBES (Aug. 3, 2020), https://www.forbes.com/sites/instituteforjustice/2020/08/03/the-simple-trick-the-government-uses-to-take-hundreds-of-millions-from-travelers [https;//perma.cc/H4EB-UMXP] (criticizing the airport forfeiture system as one in which the government "makes [travelers] jump through legal hoops to prove their innocence" who fail to fill out the requisite forms without important information regarding reporting requirements hidden by the government).

100. *Id.* at 16–17 fig.5; Andrew Wilmer, *New Report: CBP, Other DHS Agencies Seized $500 Million from Air Travelers over Missing Paperwork*, INST. FOR JUST. (July 30, 2020) [hereinafter Wilmer, *New Report*], https://ij.org/press-release/new-report-cbp-other-dhs-agencies-seized-500-million-from-air-travelers-over-missing-paperwork/ [https://perma.cc/Z4VB-9P3B].

101. CARPENTER II ET AL., *supra* note 38, at 13; MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 10.

102. MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 10 n.34.

103. OFF. OF INSPECTOR GEN., *supra* note 96, at 5.

104. U.S. DEP'T OF JUST., ASSET FORFEITURE POLICY MANUAL 82 (2019).

frequent determinations of deficient claims.[105] Between 1997 and 2015, less than 2% of cash seizures under administrative forfeiture resulted in returns of money, in contrast with around 40% of seizures under judicial forfeiture, proving that neutral arbiters in the latter context do make a difference in forfeiture outcomes.[106] Furthermore, the results of administrative forfeiture are nearly impossible to contest due to the strict filing requirements and the narrow scope of judicial review that borders on judicial abdication.[107] Limited to reviewing the notice of forfeiture rather than its merits, courts cannot adjudicate substantial violations,[108] nor mitigate unjust forfeitures,[109] the authority of which also rests with the seizing agency.[110]

In the airport forfeiture context, currency of any amount in violation of the customs reporting requirement—in contrast with other types of property—can be administratively forfeited.[111] A host of obstacles might deter property owners from filing claims, such as

105. MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 9 fig.3 (finding that 35% of all claims for return of seized cash between 1997 and 2015 were deemed deficient); CARPENTER II ET AL., *supra* note 38, at 12–13.

106. MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 11, 13 tbl.3 (listing the return rates separately for cash seizures below and above $5,000).

107. Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Partie*s, 27 J. LEGIS. 97, 124 (2001) (explaining that claimants must contest administrative forfeiture actions within a short time period to avoid the agency's "declaration of forfeiture by default" with the full force of final judicial judgment, and that the courts' jurisdiction is limited to reviewing the agency's adequacy of forfeiture notice rather than the merits of the claims).

108. *See, e.g.*, United States v. Eubanks, 169 F.3d 672, 674 (11th Cir. 1999) (describing judicial review as "highly discretionary" and only applicable to "prevent manifest injustice" related to forfeiture notice); Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994) (limiting jurisdiction to "procedurally deficient" administrative forfeiture and rejecting a notice challenge despite the claimant's lack of ability to read or translate English while imprisoned).

109. 31 U.S.C. § 5321(c); S. REP. NO. 91-1139, at 7 (1970) (granting the Secretary of the Treasury discretion to remit any part of a forfeiture "to prevent ordinary citizens or businessmen from being unduly penalized for an inadvertent violation"); United States v. $173,081.04 in U.S. Currency, 835 F.2d 1141, 1144 (5th Cir. 1988) (stating that courts do not have the power to ameliorate forfeitures or impose partial forfeitures).

110. ASSET FORFEITURE POLICY MANUAL, *supra* note 104, at 171.

111. 19 U.S.C. § 1607(a)(4); *see* Mark K. Neville, Jr., *Customs Seizure and Forfeitures*, 26 J. INT'L TAX'N 25, 26 (2015); *cf.* 19 U.S.C. § 1607(a)(1) (limiting administrative forfeiture to property whose value does not exceed $500,000).

economic costs and legal risks[112] outweighing the value of property.[113] Between paying thousands of dollars to retain a defense attorney and navigating the daunting legal processes alone, many property owners without Anthonia's luck are forced to walk away and cut their losses.[114] Furthermore, the OIG report concluded that sometimes settlements, instead of referrals to USAO "as required by policy," resulted in CBP "taking a portion of property from innocent property owners."[115]

Claimants who do opt to fight the battle must navigate a maze of procedures to successfully initiate judicial proceedings: months, if not years, of delay,[116] and various filings and fees according to a strict timetable.[117] Any untimely filing renders the property forfeitable, even absent actual notice of seizure or government's complaint.[118] Claimants who seek mitigation of § 5316 reporting violations, even "with no nexus to illegal activity," are subject to the standard remission of 5% of seized amounts, and upon the presence of mitigating factors, such as inexperience with international travels, and language barriers inhibiting the understanding of the requirement, a 10% to 30% increase in

112. Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y. L. SCH. L. REV. 311, 314 (1994) (discussing claimants' practical hurdles in waging a costly legal battle against the government facing potential criminal charges, however trivial or baseless); *see, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 59, at 10 (finding only one of 252 *legal* funds owners who took structuring seizure cases far enough to be adjudicated by a judge).

113. CARPENTER II ET AL., *supra* note 38, at 12.

114. MCDONALD, CIVIL FORFEITURE, *supra* note 39, at 7; IJ Report, *supra* note 1, at 18.

115. OFF. OF INSPECTOR GEN., *supra* note 96, at 5.

116. Wilmer, *New Report*, *supra* note 100 (stating that "[o]n average, it takes 193 days for currency to be forfeited after it is seized, leaving property owners in legal limbo for more than six months," and "[i]n one case, 15 years elapsed between seizure and forfeiture"); *see, e.g.*, United States v. $8,850 in U.S. Currency, 461 U.S. 555 (1983) (upholding the 18-month-delay in the government's forfeiture filing); Witten v. Pitman, 613 F. Supp. 63 (S.D. Fla. 1985) (upholding the 5.5-month delay in the government's forfeiture filing).

117. CARPENTER II ET AL., *supra* note 38, at 12; HERITAGE FOUND., *supra* note 45, at 10–11 (explaining that a property owner must file a claim opposing forfeiture and post a cost bond within twenty days after the government website publishes a notice of seizure, submit a petition for remission or mitigation and a statement of interest within thirty days after a notice of a complaint against the property, and file an answer to the complaint within twenty-one days).

118. HERITAGE FOUND., *supra* note 45, at 10–11.

remission.[119] In short, the prospects for challenging currency seizures are bleak.

CBP's powerful tools to increase revenue and avoid legal liabilities further undermine property owners' chances of recovery. First, the Hold Harmless Agreement[120] uses sweeping language that waives any conceivable claim related to the seizure, creates new liabilities, and even bars record requests under FOIA.[121] The government often requires claimants to trade one constitutional right for another—due process for the right to one's own property.[122] Such an "abusive pattern of behavior" plausibly has been CBP's longstanding "policy and practice."[123] Second, the Property Abandonment Form,[124] increasingly surfacing in highway and airport contexts, contributes to improper law enforcement tactics infringing on due process rights.[125] Travelers are often pressured into

119. U.S. CUSTOMS & BORDER PROT., MITIGATION GUIDELINES: FINES, PENALTIES, FORFEITURES AND LIQUIDATED DAMAGES 50 (Feb. 2004); 19 C.F.R. § 170 app. A – Guidelines for Disposition of Violations of 19 U.S.C. 1497; *see also* 19 U.S.C. § 1618 (providing that the Secretary of the Treasury may remit or mitigate forfeitures upon petition).

120. 19 C.F.R. § 162.75(d)(ii) (requiring a signed waiver as a condition for returning the seized money).

121. Complaint at 18–21, Nwaorie v. U.S. Customs & Border Prot., 395 F. Supp. 3d 821 (S.D. Tex. May 3, 2018).

122. *Id.* at 25 (stating that unconstitutional condition cases occur when the government fails to timely file its forfeiture complaint but refuses to restore the property rights already vested in the owner under CAFRA).

123. *Id.* at 24. A forfeiture expert believes that CBP—even when required to "promptly return" the seized property—"regularly demands" that property owners sign such agreements "since at least January 2012." *Id.* at 28.

124. Form CF 4607 generally cites 19 C.F.R. § 162, though nothing related to property abandonment was mentioned in these provisions. SEACATS Privacy Impact Assessment, *supra* note 24, at 6 (stating the full name of the form as "Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise," which is among the forms "for internal use" and thus not publicly-available).

125. *See Seizures of Cash at Airports in Florida: The Notice of Seizure after Money is Seized at the Airport by DEA or ICE Agents*, SAMMIS L. FIRM (Aug. 7, 2020), https://criminaldefenseattorneytampa.com/asset-seizure-asset-forfeiture/airport/ [https://perma.cc/4K7T-W7PA] (stating that upon signing the abandonment form, the traveler might not be sent a notice of seizure at all); *Seizure of Cash at the Orlando Airport: What Happens During a Seizure of Cash at the Orlando Airport?*, SAMMIS L. FIRM (June 16, 2020), https://criminal defenseattorneytampa.com/asset-seizure-asset-forfeiture/airport/orlando/ [https://perma.cc/T6EC-4FH8] (criticizing that the agents, knowing it improper to

relinquishing property and legal rights via the form, and subsequently might not receive notice of the forfeiture proceeding.[126] Several states passed legislation banning such forms.[127] Despite recent challenges to both forms unearthing their problems,[128] the official practices vary widely and largely remain in the dark.

B. CBP Preclearance Operations

1. Ambitious Scope and Mission

CBP Preclearance was established pursuant to Section 235 of the Immigration and Nationality Act ("INA"),[129] and gained prominence after the 9/11 terrorist attacks.[130] CBP officers at airports both in foreign countries and U.S. territories "inspect travelers for compliance with U.S. immigration, customs and agriculture laws before the travelers board a U.S.-bound aircraft."[131] In the fiscal year of 2019, preclearance officers processed twenty-two million travelers, or 16% of all U.S.-bound commercial air travelers.[132] Beginning in Toronto, Canada in 1952, CBP Preclearance had three expansion open seasons, when foreign airports submitted letters expressing

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ask travelers to sign this form, "do it anyway because it discourages people from hiring an attorney or contesting the seizure").

126. *Wyoming Forfeiture*, INST. FOR JUST., https://ij.org/case/wyoming-forfeiture/ [https://perma.cc/5794-YMB3].

127. Nick Sibilla, *Wyoming Bans Roadside Waivers Used to Seize Cash on Highways*, INST. FOR JUST. (Mar. 19, 2018), https://ij.org/press-release/wyoming-bans-roadside-waivers-used-seize-cash-highways/ [https://perma.cc/N2GP-NFA4].

128. *See* Complaint, Nwaorie v. U.S. Customs & Border Prot., 395 F. Supp. 3d 821 (S.D. Tex. May 3, 2018) (bringing a due process challenge to the use of waiver when CAFRA demanded the automatic release of property at issue); Anoushiravani v. Fishel, No. 04-212, 2004 WL 1630240 (D. Or. 2004) (bringing a due process challenge to the use of waiver when the properties at issue were exempt from seizure).

129. 8 U.S.C. § 1225; Vazquez-Azpiri & Horne, *supra* note 17, at 545 (tracing to 1996 when the INA allowed for "pre-inspection"—the precursor of the current preclearance programs—whereby "foreign nationals wishing to enter the United States are inspected before ever departing").

130. Holliday, *supra* note 16.

131. *Id.*

132. *Preclearance*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/border-security/ports-entry/operations/preclearance [https://perma.cc/62ZG-4D4A].

interests in hosting preclearance operations for U.S. agencies' review and selection.[133]

Currently, fifteen airports have CBP Preclearance stationed by 600 customs agents in six foreign countries: eight in Canada, two in Ireland, two in the Bahamas, one in Aruba, one in Bermuda, and one in the United Arab Emirates ("UAE").[134] There are also two such facilities in the Virgin Islands due to special legislation that creates an internal customs border between the territory and the continental United States paralleling an international border.[135] Across the globe, significant expansions of preclearance facilities into new regions are continuously underway,[136] towards the ambitious goal of preclearing 33% of all U.S.-bound air travelers by 2024.[137] Existing facilities also witnessed major operational expansions of services[138] and screening methods.[139]

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133. *CBP Announces Preclearance Expansion*, U.S. CUSTOMS & BORDER PROT. (Sept. 29, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-announces-preclearance-expansion [https://perma.cc/62ZG-4D4A]; *CBP Announces 2016 Preclearance Expansion Open Season*, U.S. CUSTOMS & BORDER PROT. (May 16, 2016), https://www.cbp.gov/newsroom/national-media-release/cbp-announces-2016-preclearance-expansion-open-season [https://perma.cc/9QHK-EP24].

134. *Preclearance*, *supra* note 132. Fifteen preclearance offices have been in place since 2014. 19 C.F.R. § 101.5 (2014).

135. *See* 19 U.S.C. § 1467; 19 C.F.R. § 122.144(b); *see also* United States v. Hyde, 37 F.3d 116 (3d Cir. 1994) (reversing United States v. Douglas, 854 F. Supp. 383 (D.V.I. 1994), which entitled citizens and lawful persons in the Virgin Islands full panoply of rights enjoyed by those traveling within the United States); United States v. Barconey, No. CR 2017-0011, 2019 WL 137579, at *8 (D.V.I. Jan. 8, 2019) (holding that *Hyde* and § 1467 authorize customs inspection of travelers entering the United States from the Virgin Islands in the same manner as international travelers).

136. *DHS Announces 11 New Airports Selected for Possible Preclearance Expansion Following Second Open*, U.S. DEP'T OF HOMELAND SEC. (Nov. 4, 2016) [hereinafter *DHS Announces 11 New Airports*], https://www.dhs.gov/news/2016/11/04/dhs-announces-11-new-airports-selected-possible-preclearance-expansion-following [https://perma.cc/8NJJ-YB6Q].

137. U.S. CUSTOMS & BORDER PROT., PRECLEARANCE EXPANSION: FISCAL YEAR 2015 GUIDANCE FOR PROSPECTIVE APPLICANTS 4 (2014) [hereinafter CBP Preclearance FY2015 Guidance].

138. *See, e.g.*, Agreement Amending the Agreement Between the Government of the United States of America and the Government of the Ireland on Air Transport Preclearance art. IX(f), Ir.-U.S., Mar. 12, 2019, T.I.A.S. No. 19-905 (entered into force Sept. 5, 2019) (providing a cost contribution provision for "new or additional services"); *CBP, Ireland Ink New Preclearance Agreement*, U.S. CUSTOMS & BORDER PROT. (Mar. 18, 2019),

For its five-year strategic initiative of "targeting and vetting," CBP aims to achieve the desired outcomes of "identif[ying] bad actors before arrival at or between Ports of Entry" and "coordinating . . . with [the United States'] international partners . . . and proactively surfacing threats before they ever arrive."[140] In essence, CBP Preclearance, having denied entry to more than 9,000 inadmissible individuals to "address[] international threats at the earliest possible opportunity,"[141] embodies a security imperative.[142] Recent service expansions in Ireland and Bermuda have explicitly been identified as CBP's security efforts.[143] However, as discussed in Part I.A.2, civil forfeiture both as a general practice and in the airport context has not

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https://www.cbp.gov/newsroom/spotlights/cbp-ireland-ink-new-preclearance-agreement [https://perma.cc/W4YS-M8P5] (listing "extended service hours, increased staffing, cost recovery, and improved officer safety" as expansions in Ireland); *Secretary Napolitano Signs Agreement on Aviation Preclearance Security Operations with Bermuda*, U.S. DEP'T OF HOMELAND SEC. (Apr. 23, 2009), https://www.dhs.gov/news/2009/04/23/us-bermuda-sign-agreement-aviation-preclearance-security-operations [https://perma.cc/8XES-UBRY] (expanding preclearance services in Bermuda from commercial aircraft to include private aircraft).

139. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., PRECLEARANCE AUTHORIZATION ACT OF 2015, S. REP. NO. 114-180, at 5–6 (2015) (adding new congressional notification requirements before entering into or amending preclearance agreements in order to improve oversight of the expansion process as well as security measures); *see, e.g.*, *Agreement Between the Kingdom of the Netherlands, on Behalf of Aruba, and the United States of America on the Safety of Civil Aviation for Pre-Inspection Operations at Queen Beatrix International Airport in Aruba* art. V, § A, OVERHEID (Mar. 19, 2017), https://wetten.overheid.nl/BWBV0006593/2017-03-19/0/Verdrag_1 [https://perma.cc/E5WV-5PXR] (implementing new passenger and property screening standards comparable to those at U.S. commercial airports).

140. U.S. CUSTOMS & BORDER PROT., STRATEGY 2020–2025, at 12 (Apr. 17, 2019).

141. Copeland, *supra* note 19.

142. *See* Nixon, *supra* note 18 (attributing the DHS' recent selections for preclearance of Brussels and Turkey to the earlier terrorist attacks, respectively, in March and June of 2016).

143. *CBP, Ireland Ink New Preclearance Agreement*, *supra* note 138 (identifying the continued expansion of Ireland's preclearance services as "directly improv[ing]" CBP's strategic plan of "tackl[ing] the continually evolving security threat posed by high-risk air travelers"); *Secretary Napolitano Signs Agreement on Aviation Preclearance Security Operations with Bermuda*, *supra* note 138 (identifying the new screening facilities as a part of DHS' "long-term strategy for bolstering aviation security" to provide advance traveler notification and mitigate threats pre-arrival).

proven effective in crime prevention despite the government's rationale.

2. Uncovering Currency Forfeitures at Preclearance Facilities

While CBP's intrusive domestic enforcement practices gradually came to light, the details of its preclearance seizures and forfeitures are still little known. Currently, CBP only reports the most general and sometimes inconsistent seizure data, such as $4.9 million in undeclared currency in the fiscal year of 2019.[144] Despite several publicized stories of justified convictions and currency forfeitures at preclearance facilities for *knowing* violations of the reporting requirement,[145] there are neither stories involving innocent travelers nor cases challenging preclearance forfeitures, unlike in the domestic context. Thus, do Anthonia's preclearance counterparts exist?

Though the IJ Report only analyzed seizure and forfeiture data concerning *domestic* airports, the same SEACATS database obtained through FOIA negotiations substantiates the comparable seizure and forfeiture practices conducted at preclearance facilities in foreign countries and U.S. territories.[146] Between 2000 and 2016,

144. *See* Copeland, *supra* note 19 (stating that in the fiscal year of 2019, "the Preclearance Field Office has seized $4,887,383 in undeclared currency"). *But see CBP Preclearance Breaks Bulk Cash Smuggling Attempt*, U.S. CUSTOMS & BORDER PROT. (Feb. 20, 2019), https://www.cbp.gov/newsroom/local-media-release/cbp-preclearance-breaks-bulk-cash-smuggling-attempt [https://perma.cc/Q9F3-P47F] (stating that "[i]n FY 2019, CBP Preclearance has seized nearly $2 million in unreported currency from travelers refusing to provide a truthful declaration").

145. For the requisite knowledge element, see *infra* Part II.A.1. The publicized stories involve travelers who were informed of the requirement, thus satisfying the requisite knowledge and notice elements for their convictions. *See CBP Preclearance Breaks Bulk Cash Smuggling Attempt*, *supra* note 144 (documenting a couple's untruthful currency declaration after being informed by officers and given multiple opportunities to provide an accurate report at Abu Dhabi Preclearance); Jason P. Wapiennik, *U.S. Customs Seizes $69,000 in Cash at Preclearance Station from Traveler*, GREAT LAKES CUSTOMS L. (Dec. 4, 2014), https://greatlakescustomslaw.com/u-s-customs-seizes-69000-cash-preclearance-station-traveler/ [https://perma.cc/JY3H-GEDX] (documenting a traveler's untruthful currency declaration after being questioned and given multiple opportunities to provide an accurate report at Nassau Preclearance).

146. All Preclearance Currency Forfeiture Data (on file with the *Columbia Human Rights Law Review*).

there were 2,170 currency seizure incidents in thirteen airports with preclearance facilities in five foreign countries and one U.S. territory, 62% of which were not accompanied by arrests.[147] All those incidents were sorted in order to identify a narrower subset relevant to this Note.[148] The data revealed that customs officers seized currency from preclearance travelers as a result of mere reporting violations in 559 incidents without accompanying arrests, [149] resulting in likely forfeitures of $8,083,445.[150]

Just as in the domestic context, comparable incidents—where large numbers of unsuspecting travelers merely failed to complete the requisite paperwork but had all their money forfeited—have long occurred at airports in foreign countries and U.S. territories under the purview of U.S. laws. The difference is that these incidents of preclearance currency forfeitures, unlike their domestic counterparts, remained hidden from public scrutiny due to a lack of publicly available information, whether it be concrete data, anecdotal stories, or judicial cases. These prevalent extraterritorial practices also uniquely present constitutional concerns and raise questions of governmental authority and legitimacy that the next Part explores.

147. *Id.* Of the fifteen total foreign preclearance facilities, three (Abu Dhabi, Halifax, and Winnipeg) do not have currency seizures listed, and one (Shannon) does not have any data for the 2000–2016 period. Two additional preclearance facilities are St. Thomas and St. Croix airports in the Virgin Islands.

148. For a detailed methodology for sorting through all incidents, see *supra* notes 26–27. For the limitations related to the design of the database, see *supra* notes 83, 86.

149. Sorted Preclearance Currency Forfeiture Data (on file with the *Columbia Human Rights Law Review*). The breakdown for the seizure incidents is: 382 in six Canadian airports, 90 in two Bahamas airports, 58 in the Bermuda airport, 21 in two Virgin Islands airports, 7 in the Aruba airport, and 1 in the Dublin airport.

150. Though $722,788 from 22 incidents indicated "administratively forfeiture" ("AF") as their legal status, the great majority of the relevant incidents merely indicated "seized" ("SZ") as the "legal status" of the property. For the methodological choice of using "physical status" to identify likely incidents of forfeiture, see *supra* notes 26, 83.

II. Enforcing Reporting Requirement Overseas

Among the myriad of problems with the CBP currency seizure and forfeiture practices,[151] this Part focuses on the potential constitutional violations of the Fifth Amendment Due Process Clause and the Eighth Amendment Excessive Fines Clause related to imposing the penalties of failure to report.[152] Part II.A.1 examines the Due Process concerns that arise when travelers subject to forfeiture of their currency received insufficient notice of the reporting requirement.[153] As many courts have held, actual or constructive knowledge is a required element for Due Process purposes to uphold reporting violations in the domestic airport forfeiture context.[154] Unfortunately, the government has often failed to make the requirement known.[155] The Excessive Fines question is the topic of Part II.A.2, relevant in situations where the currency forfeiture is at least partially punitive due to its large sum that is disproportionate to the culpability and actual harm.[156] Despite an absence of conclusive guidance from the Supreme Court on the exact analysis of excessiveness, the civil forfeiture jurisprudence witnessed significant

151. The problems identified in earlier Parts related to the general civil forfeiture practice are not discussed more in depth here, including perverse incentives, government overreach, and procedural irregularities. Some of the other problems of airport forfeiture that this Note does not address include the valid scope of search under the Fourth Amendment, and targeting of certain geographic areas and populations at designated ports. *See* John Aaron, *Behind the Invisible Wall: On the Trail of Cash Coming Through Dulles*, WTOPNEWS (Mar. 23, 2018), https://wtop.com/local/2018/03/behind-invisible-wall-trail-cash-coming-dulles/ [https://perma.cc/4Q9Q-HNZP] (describing seizures of Ghana-connected cash at the Dulles airport).

152. As Part I.A.3 noted, the use of administrative proceeding is prevalent, especially in the airport currency forfeiture context, substituting judicial review of potential constitutional claims. A necessary reform of the administrative forfeiture practices is an important separate question beyond the scope of this Note.

153. The unawareness or misunderstanding of the relevant customs requirements especially poses a problem to the inexperienced travelers in airports with little sign notice or agents' advisement. Some of the other Due Process problems that this Note does not address include inadequate notice regarding the forfeiture and remission proceedings, and problems of seeking judicial remedy in the United States as foreign travelers.

154. *See infra* notes 172–173 and accompanying text.

155. *See infra* notes 181–182 and accompanying text.

156. *See infra* notes 193–195 and accompanying text.

developments in recent years, including strengthened judicial scrutiny.[157]

Such constitutional implications of airport forfeiture practices apply to Anthonia's preclearance counterparts subject to CBP's extraterritorial enforcement activities. Part II.B.1 examines evolving territorial conceptions pertinent to both assertions of authority and applications of protections. Despite the paradigm of territorial states, strict territoriality—whereby territorial borders define the scope of a sovereign's authority—has undergone substantial erosion.[158] The rise and modern transformation of extraterritoriality are manifested in the expansive enforcement powers that the U.S. agents exercise beyond borders.[159] As discussed in Part II.B.2, various bilateral agreements provide for either broad application of U.S. laws or specified powers of currency forfeiture and penalties.[160] Unfortunately, CBP Preclearance's operations embody one end of extraterritoriality—to assert control that transcends traditional boundaries—but overlook the competing end of extending constitutional protections that constrain governmental actions.[161] As the exact geographic scope of constitutional guarantees remains contested to date, the United States' expansive assertion of extraterritorial authority is at risk of being mismatched with a limited strict territorial conception of constitutional protections afforded to Anthonia's counterparts.

A. Constitutional Implications of Customs Currency Reporting Provisions

1. Due Process: Knowledge and Notice

Travelers who "knowingly" transport[162] over $10,000 (formerly $5,000) into or out of the United States must file the

157. *See infra* notes 197–199 and accompanying text.
158. *See infra* notes 202–207 and accompanying text.
159. *See infra* notes 208–217, 238–237 and accompanying text.
160. *See infra* notes 243–245 and accompanying text.
161. *See infra* notes 218–222 and accompanying text.
162. There is a distinction between the failure-to-report cases in violation of § 5316(a) containing the knowledge element, and the material-misstatement cases in violation of § 5317(a), without specifying whether the error must be intentional or advertent in order to be subject to forfeiture. *See* United States v. $173,081.04 in U.S. Currency, 835 F.2d 1141, 1143 (5th Cir. 1988). The reporting

requisite currency reporting and customs declaration forms under 31 U.S.C. § 5316(a), [163] and unreported currency is subject to forfeiture under 31 U.S.C. § 5317(c)(2)(A). Currently, the overwhelming majority of the travelers whose money are subject to civil forfeiture solely violate the currency reporting requirement without other illegal activities, rather than deliberately circumventing the customs or criminal laws.[164] This is because the reporting requirement is often unknown [165] and confusing to the travelers,[166] as the government "does very little to notify people of this [requirement] or publicize it."[167] One major source of confusion is what[168] and whose[169] monetary instruments should be counted and reported.

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violation relevant to this Note is the former failure-to-report case governed by § 5316(a), but § 5317(c) governs the forfeiture of currency in such a case.

163. *See supra* notes 87–91.

164. IJ Report, *supra* note 1, at 15 (analyzing the SEACATS database and finding that 90% of the currency seizure cases were based on mere reporting violations and lacked any link to criminal activity); *cf.* Jason P. Wapiennik, *CBP Seizes Currency After Admission of Structuring Violations*, GREAT LAKES CUSTOMS L. (Dec. 16, 2014), https://greatlakescustomslaw.com/cbp-seizes-currency-admission-structuring-violations/ [https://perma.cc/R8LZ-45GZ] (where a circumventing passenger, who knowingly divided up his money to avoid filing a currency report, committed illegal structuring and was arrested for local prosecution); United States v. Dichne, 612 F.2d 632, 637–38 (2d Cir. 1979) (where the defendant deliberately circumvented the law and falsely claimed ignorance of the reporting contrary to taped evidence).

165. *See, e.g.*, Complaint at 11–12, Nwaorie v. U.S. Customs & Border Prot., 395 F. Supp. 3d 821 (S.D. Tex. May 3, 2018) (where the traveler did not previously have knowledge nor see any airport notices about the requirement); United States v. $359,500 in U.S. Currency, 25 F. Supp. 2d 140 (W.D.N.Y. 1998) (same); United States v. Warren, 612 F.2d 887 (5th Cir. 1980) (where the traveler was not informed by the customs agents of the requirement).

166. *See, e.g.*, United States v. $48,595, 705 F.2d 909, 914 (7th Cir. 1983) (finding the "phraseology of the pertinent question on Customs Form 6059–B misleading," which contains "ambiguous wording").

167. Masood Farivar, *Customs Agency Cash Seizures at Airports Cost Travelers Millions*, VOA (July 3, 2019), https://www.voanews.com/usa/customs-agency-cash-seizures-airports-cost-travelers-millions [https://perma.cc/6BAX-TAMR] (quoting an attorney).

168. 31 C.F.R. § 1010.100(dd) (2019) (listing the various categories and definitions of "monetary instrument"); *cf. CBP Form 6059B English*, *supra* note 91 (listing only the broad categories without any further clarification).

169. 31 U.S.C. § 5316(d) (only stating that the Secretary of the Treasury may determine how to cumulate and collectively consider "closely related events" for purposes of the $10,000 reporting requirement); *see* Members of a Family for

Legislative history indicates that Congress took notice of the far-reaching implications of the reporting requirement, namely, the impediment to free flow of international trade and commerce.[170] Acknowledging such legislative intent,[171] many U.S. Circuits held that knowledge, whether actual[172] or constructive,[173] is a required element for Due Process purposes[174] to uphold convictions for knowing failure to report prior to international travel in domestic forfeiture cases.

Arguably, the government's official publication serves as one source of such knowledge.[175] However, one district court rejected that official publication provided sufficient constructive notice, as it would be "extremely unfair to deprive [the defendant] of his property based only on the publication of the statute and related regulations in the

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Purpose of Filing CBP Family Declaration, 78 Fed. Reg. 76,529, 76,530 (Dec. 18, 2013) (to be codified at 19 C.F.R. pt. 148) (emphasizing the relevance of financial interdependency to domestic partnership as a part of the definition of "family"); *Sample Customs Declaration Instructions*, OFF. OF INFO & REGUL. AFFS. (Jan. 30, 2013), https://reginfo.gov/public/do/DownloadDocument?objectID=37850801 [https://perma.cc/9YYH-HQBG] (showing that the previous form states "only ONE written declaration per family is required" without any further clarification).

170. H. REP. NO. 91-975, at 13 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4394, 4398 (considering it "of high importance" "not to create obstacles to the free flow of legitimate international trade and commerce"); S. REP. NO. 91-1139, 91st Cong., at 7–8 (1970) (emphasizing that the regulation's purpose is "not to limit or impede the free flow of currency in international commerce").

171. *See, e.g.*, United States v. $359,500 in U.S. Currency, 828 F.2d 930, 935 (2d Cir .1987) (citing the Senate Report); United States v. One Lot of $24,900 in U.S. Currency, 770 F.2d 1530, 1534–35 (11th Cir. 1985) (citing both reports); United States v. Warren, 612 F.2d 887, 891 n.5 (5th Cir. 1980) (citing the House Report).

172. *See, e.g.*, United States v. Granda, 565 F.2d 922 (5th Cir. 1978) (requiring proof of the defendant's knowledge of the requirement and specific intent to commit the crime); *One Lot of $24,900*, 770 F.2d 1530 (same).

173. *See, e.g.*, *$359,500*, 828 F.2d 930 (holding that both due process and basic fairness demand that the government provide reasonable notice so that the defendant had constructive knowledge); United States v. Alzate-Restreppo, 890 F.2d 1061 (9th Cir. 1989) (finding that the defendant, having heard the airport announcement and signed the declaration form had sufficient knowledge of the currency reporting requirement).

174. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

175. *See supra* notes 168–169 and accompanying text.

Federal Register." [176] Similarly, several versions of the currency reporting form have been found to fall short of clarifying their legal obligations for travelers as well as the legality of transporting the currency, in order to encourage compliance.[177] Admittedly, there have been increasing clarity and publicity surrounding the currency reporting requirement for international air travel, including from announcements of travelers' obligations and penalties,[178] as well as the new customs declaration form CF 6059B that expands and elaborates on the definition of "family" as a unit for declaration.[179] Nevertheless, such minimal additional guidance standing alone—absent adequate advisement from the customs agents—fails to provide sufficient notice to travelers.

Indeed, courts have repeatedly urged the government to take "affirmative steps" to make the requirement known. [180] Customs

176. United States v. $359,500 in U.S. Currency, 25 F. Supp. 2d 140, 147 (W.D.N.Y. 1998).

177. *Compare Granda*, 565 F.2d at 926–27 (suggesting the addition of clarifying texts that travelers are required to fill out the additional form CF 4790 and that it is not illegal to transport currency), *with* United States v. Rodriguez, 592 F.2d 553, 557 (9th Cir. 1979) (suggesting as a "good policy" to further clarify on the modified form, with the requirement to fill out CF 4790, that transportation of currency is not illegal), *and* United States v. $48,595, 705 F.2d 909, 914 (7th Cir. 1983) (reasoning that the 1978 revised form, with the additional text that currency transportation is not illegal but must be reported, strengthens the defendant's argument that the original wording did not sufficiently trigger legal obligations).

178. *CBP Reminds Travelers of the Currency Reporting Requirement*, U.S. CUSTOMS & BORDER PROT. (Dec. 19, 2014), https://www.cbp.gov/newsroom/local-media-release/cbp-reminds-travelers-currency-reporting-requirement [https://perma.cc/XX78-V2BM] (explaining that travelers must file a currency report for the entire amount when they "have someone else carry the currency or monetary instrument for them"); *US Pre-Clearance Declaration Requirement*, BAHAMAS HOTEL & TOURISM ASS'N (Feb. 15, 2012), https://www.bhahotels.com/2012/02/us-pre-clearance-declaration-requirement/ [https://perma.cc/PGE6-5HFB] (informing travelers that "[f]ailure to comply with these requirements may result in civil and criminal penalties and may lead to forfeiture of your monetary instrument(s)").

179. *CBP Form 6059B English*, *supra* note 91; *see CBP Customs Declaration (CBP Form 6059B) Transition to New 04 14 Version and Use of Fillable Format Form*, Doc. No. 18122815, AM. IMMIGR. LAWS. ASS'N (June 23, 2014), https://www.aila.org/infonet/cbp-customs-declaration-cbp-form-6059b [https://perma.cc/ZS7W-N5BY] (discussing the transition to the new version of the form).

180. *Granda*, 565 F.2d at 926; United States v. One Lot of $24,900 in U.S. Currency, 770 F.2d 1530, 1536 (11th Cir. 1985); *$359,500*, 25 F. Supp. 2d at 147;

advisement at airports is one example. Unfortunately, many courts have found such advisement to be inadequate, by means of CBP agents[181] as well as airport announcements or signs,[182] and have struck down the travelers' convictions in these contexts of unknowing violations.[183] Notably, the Second Circuit reasoned that the willfulness element in the violation of failure to report necessitates that the government make effort to bring the reporting requirement to travelers' attention.[184] The Eleventh Circuit also cautioned against the implications of "booby-traps that spring without warning to grab the currency of unsuspecting travelers."[185] Courts' repeated urging has apparently gone unheard.

2. Excessive Fines: Proportionality

The jurisprudence of the Excessive Fines Clause—stating that excessive fines shall not be imposed—witnessed significant developments in the past few decades.[186] In 1993, the Supreme Court held for the first time in *Austin v. United States* that civil forfeiture—partially punitive in purpose—fell under the protection of the

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see also United States v. San Juan, 545 F.2d 314, 319 (2d Cir. 1976); United States v. Bareno-Burgos, 739 F. Supp. 772, 783 (E.D.N.Y. 1990).

181. *See* United States v. Warren, 612 F.2d 887, 890 n.3 (5th Cir. 1980) (where the officer failed to specifically or adequately warn the travelers of the requirement); *Granda*, 565 F.2d at 926 (where the officer's questioning failed to convey the requirement).

182. *See $359,500*, 25 F. Supp. 2d at 143 (where there was no sign or notice to inform travelers); *Bareno-Burgos*, 739 F. Supp. at 783 (where there was no notice or announcement that is standard procedure elsewhere).

183. On the other hand, courts have found convictions justifiable in contexts of knowing violations by travelers who have been adequately informed of their legal obligations to truthfully report, by means of customs advisement from the agents, the form, or airport signs and announcements. *See* United States v. Alzate-Restreppo, 890 F.2d 1061, 1064 (9th Cir. 1989); United States v. $47,980 in Canadian Currency, 804 F.2d 1085, 1087 (9th Cir. 1986); United States v. $122,043 in U.S. Currency, 792 F.2d 1470, 1472 (9th Cir. 1986); United States v. $6,250 in U.S. Currency, 706 F.2d 1195, 1196 (11th Cir. 1983); United States v. Dichne, 612 F.2d 632, 636 (2d Cir. 1979).

184. *San Juan*, 545 F.2d at 319.

185. *One Lot of $24,900*, 770 F.2d at 1535.

186. U.S. CONST. amend. VIII ("[N]or [shall] excessive fines [be] imposed . . . ."); Johnson, *supra* note 55, at 468–71 (arguing that before 1993 the Excessive Fines Clause was "almost completely ignored" as a potential constraint on forfeitures).

Excessive Fines Clause.[187] Scholars regard the *Austin* holding as a significant shift in the Court's approach to civil forfeiture.[188] The exact test for excessiveness, however, was left to the lower courts,[189] resulting in muddled analyses and varying levels of constitutional constraints on overzealous forfeitures.[190]

A few years later, the Supreme Court reaffirmed its role of judicial review in limiting potential forfeiture abuses in *United States v. Bajakajian*.[191] The case involved the forfeiture of unreported currency in a violation of § 5316 at a domestic airport.[192] The Court found that forfeiture of the entire $357,144, which the defendant had legally obtained but failed to declare, would be "grossly disproportional" to the low levels of culpability and social harm associated with "solely" a reporting offense.[193] Rejecting the government's argument that such forfeiture was remedial rather than punitive and thus fell outside of *Austin*, the majority clarified that remedial purposes were limited to compensation for actual damages associated with the offense.[194] By contrast, the currency at issue bore "no articulable correlation to any injury suffered by the

187. Austin v. United States, 509 U.S. 602, 621–22 (1993).

188. LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 202–03 (1996) (characterizing *Austin* as an important shift in the judicial approach to forfeitures); Sarah N. Welling & Medrith L. Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After* Austin v. United States, 83 KY. L.J. 835, 839 (1995) (same); Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 19 (1994) (same).

189. *Austin*, 509 U.S. at 622–23 (allowing the lower courts to consider the proper test for constitutional excessiveness in the first instance).

190. Johnson, *supra* note 55, at 475–78.

191. 524 U.S. 321 (1998).

192. *Id.* at 324–25.

193. *Id.* at 337–40; *see also* United States v. $69,292.00 in U.S. Currency, 62 F.3d 1161, 1167 (9th Cir. 1995) (emphasizing the legality of possession and transportation of money and the mere deprivation of information on the Government's end).

194. *Bajakajian*, 524 U.S. at 329; *see Remedial Action*, BLACK'S LAW DICTIONARY 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity."); *cf.* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) (characterizing the relevant forfeiture provision as remedial and nonpunitive because it "provide[d] a reasonable form of liquidated damages" to the Government).

Government."[195] The *Bajakajian*'s proportionality analysis has offered additional instruction to the lower courts beyond the *Austin* decision.[196]

The emerging Excessive Fines jurisprudence has arguably strengthened judicial scrutiny of unconstitutional excessive forfeitures over time.[197] CAFRA codified the important holding in *Bajakajian*, providing travelers subject to currency forfeiture with avenues to petition for an excessiveness determination.[198] Most recently in *Timbs v. Indiana*, the Supreme Court newly incorporated the Excessive Fines through the Fourteenth Amendment against the states,[199] marking another milestone for the jurisprudence. However, the Court there refused to expand or reformulate the question presented for review, once again leaving unanswered the exact definition of excessiveness or proportionality.[200]

B. Extraterritorial Application of, But Not Protections from U.S. Laws

1. Conceptions of Territoriality

The territorial nature of sovereignty serves as the organizing principle of international systems.[201] A European invention animated

195. *Bajakajian*, 524 U.S. at 340; *see also* United States v. $273,969.04 U.S. Currency, 164 F.3d 462, 466 (9th Cir. 1999) (concluding that forfeiture of undeclared currency under §§ 5316, 5317(c) was punitive because it was without regard to and not limited by the Government's cost or loss); *$69,292.00*, 62 F.3d at 1164–65 (same).

196. *$273,969.04*, 164 F.3d at 466 (remanding for whether the forfeiture would be grossly disproportional to the gravity of the reporting offense); *$69,292.00*, 62 F.3d at 1167 (remanding for the excessiveness determination including the proportionality between the value of the property and the owner's culpability).

197. Johnson, *supra* note 55, at 464 n.21 (arguing the adoption of proportionality test amongst the alternative tests to the excessive determination embodies heightened judicial scrutiny); *cf. id.* at 465, 483 (noting that the majority in *Bajakajian* potentially accorded too much judicial deference to the legislature in rejecting the particular interpretation that requires strict proportionality between the offense's gravity and the punishment's severity).

198. Pimentel, *Forfeitures Revisited*, *supra* note 48, at 44.

199. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).

200. *Id.* at 690.

201. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 9 (2009) (citations omitted).

by goals of stability and peace, Westphalian, or strict territoriality is the conception that territorial borders define the scope of a sovereign's authority.[202] Strict territoriality is also said to be "deeply rooted" in the American constitutional history.[203] As early as the nineteenth century, the U.S. Supreme Court held as an "axiom of international jurisprudence" that laws of a country have no extraterritorial force,[204] and in a specific case, declared that the Constitution "can have no operation in another country."[205]

With the advent of embassies and consuls and the development of extraterritorial jurisdictions, strict territoriality has loosened its grip across the globe.[206] In the age of imperial expansion, the United States manipulated territoriality by governing conquered territories without being itself governed by the Constitution.[207] Modern realities of globalization and the new international order[208] further transformed and expanded territorial concepts of jurisdictional boundaries in a contemporary extraterritorial age.[209] As one scholar characterized, the reach of U.S. powers transcends traditionally bounded jurisdictions given its "quasi-monopoly on the use of force internationally," and its growing assertions of authority

202. *Id.* at 9–11 (tracing the rise of the sovereign territorial state at the end of the Thirty Years' War that marked the shift in world history from the earlier Medieval order whereby laws were tied to persons); *see also* John H. Herz, *Rise and Demise of the Territorial State*, 9 WORLD POL. 473, 480–81 (1957) (arguing that the mutually exclusive territorial control helps avoid strife over the implementations of independence).

203. Lawrence Preuss, *American Conception of Jurisdiction with Respect to Conflicts of Law on Crime*, 30 TRANSACTIONS OF THE GROTIUS SOC'Y 184, 193 (1944); *see also* NEUMAN, STRANGERS, *supra* note 20, at 7 (arguing that strict territoriality "prevailed as dogma" for most of the American constitutionalism).

204. Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 536 (1883); *cf.* The Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812) (taking note of the sovereigns' relaxation of the "absolute and complete jurisdiction within their respective territories which sovereignty confers").

205. In re Ross, 140 U.S. 453, 464 (1891).

206. RAUSTIALA, *supra* note 201, at 13–14; *see also* Reid v. Covert, 354 U.S. 1, 59–60 (1957) (Frankfurter, J., concurring) (describing the historical context of extraterritoriality surrounding the consuls).

207. RAUSTIALA, *supra* note 201, at 52; *see infra* notes 225–226, 232–233 and accompanying text.

208. *See* KENICHI OHMAE, THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY (1999); Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

209. RAUSTIALA, *supra* note 201, at 241–42.

in other countries even flip the traditional notion of Westphalian territoriality on its head.[210]

Such an evolution of territoriality indicates one important end of extraterritoriality, namely, assertion of control[211] through the dramatically growing policing activities[212] and the fictional projection of the domestic territory.[213] The preclearance facilities at foreign airports embody the U.S. exercise of extraterritoriality to assert control through such policing and projecting functions. Unfortunately, the creation and reception of CBP's preclearance programs across the globe are "shrouded in secrecy."[214] There exists little comprehensive research on the bilateral agreements—the "principal instruments" for international air transportation regulations[215]—that establish and regulate preclearance enforcement activities. As elaborated in Part II.B.2, such agreements, to varying degrees, grant expansive extraterritorial enforcement powers to customs agents[216] within CBP's Office of Field Operations ("OFO"), the entity overseeing the preclearance facilities and enforcing U.S. laws.[217]

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210. John Ikenberry, *A Liberal Leviathan*, PROSPECT (Oct. 23, 2004), https://www.prospectmagazine.co.uk/magazine/aliberalleviathan [https://perma.cc/WV64-V8J9]; *see* CHARLES MAIER, AMONG EMPIRES: AMERICAN ASCENDENCY AND ITS PREDECESSORS 101 (2006).

211. RAUSTIALA, *supra* note 201, at 5–6.

212. *See id.* at 161–69.

213. *Id.* at 14.

214. AIRLINE LEADER, *supra* note 18, at 56.

215. PAUL S. DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 657 (2008) (citing the difficulties of a "comprehensive multilateral aviation agreement" as the reason for the dominance of bilateral agreements); *see also* AIRLINE LEADER, *supra* note 18, at 59 (stating that the absence of a "generic existing treaty that provides the framework" necessitates the signing of bilateral treaties for implementations of CBP preclearance).

216. 19 U.S.C. § 1629(b) (allowing U.S. officers to exercise "such functions and perform such duties—including inspections, searches, seizures and arrests—as may be permitted by treaty, agreement, or law of the country in which they are stationed").

217. CBP Performance and Accountability Report, *supra* note 75, at 11 (stating that the Office of Field Operations (OFO) "enforces customs, immigration, and agriculture laws and regulations at U.S. borders," "maintains programs at . . . 16 preclearance stations," and "ensur[es] the safe and efficient flow of goods and people through ports of entry"); Karas, *supra* note 17, at 144 (discussing the abilities of the U.S. Federal Inspection Services, a part of CBP, to "examine and seize goods" and to "administer certain monetary penalties under U.S. border control statutes").

Especially given its expansive reach of powers beyond borders, the United States must grapple with the reach of its fundamental legal commitments.[218] Against asserting governmental control, extraterritoriality has a competing end of extending protections, thereby constraining governmental actions.[219] Focused on the former end, however, the U.S. use of extraterritoriality often manifests its "unilateral[] manipulat[ion]" of legal differences amongst sovereigns as well as territories in order to serve its own interests.[220] The CBP Preclearance's ambitious expansion, both in terms of its geographic reach and legal impositions, indeed manifests the U.S. strategy of border relocation and outwards expansion to further national interests.[221] As one scholar argued, potential human rights concerns arise when the government attempts to evade rights protections or confine them to the classic boundaries based on an outdated strict territorial interpretation.[222]

Currently, conflicting conceptions of the geographic reach of constitutional rights constitute a "confused mélange of doctrine," leading to "serious indeterminacy" without consensus to date.[223] Among the sources of such confusions is a series of rulings in the early twentieth century, the *Insular Cases*.[224] Starting with *Downes v. Bidwell*, [225] the Supreme Court newly articulated a view on constitutional dimensions, whereby the Congress had discretion over

218. RAUSTIALA, *supra* note 201, at 30.

219. *Id.* at 5–6.

220. Raustiala distinguished between two types of extraterritoriality and termed the type related to U.S. territories "intraterritoriality," which serves to establish rather than minimize legal differences as in the foreign context. *Id.* at 7. For a detailed tracing of a unilateral approach to extraterritoriality in the context of postwar American hegemony, see *id.* at 95–124.

221. Shachar, *Bordering Migration*, *supra* note 17, at 109; *see supra* Part I.B.1.

222. Shachar, *Bordering Migration*, *supra* note 17, at 113.

223. RAUSTIALA, *supra* note 201, at 185–86; NEUMAN, STRANGERS, *supra* note 20, at 97.

224. Despite some scholarly differences, there is "nearly universal consensus" that the series of cases begins with Downes v. Bidwell, 182 U.S. 244 (1901) and culminates with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Christina Duffy Burnett [Ponsa-Kraus], *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389–390 (Christina Duffy Burnett & Burke Marshall eds., 2001).

225. 182 U.S. 244, 302–03 (1901).

the Constitution's reach and could grant to the conquered a lesser set of rights.[226]

The general *Insular Cases* holding that the United States could acquire governing powers and exert sovereignty in new territories but deny certain constitutional rights to their populations has been criticized as "grievously wrong"[227] and an "odd and unstable marriage of imperialism and constitutionalism." [228] Based on an understanding of territoriality whereby affording rights is a prerequisite and justification for imposing legal obligations, one can question the legitimacy of U.S. exercise of power.[229] The expansion ambitions are difficult to square with American constitutional jurisprudence, as the *Insular Cases* created an odd category of territories that fall within the confines of U.S. sovereignty but out of the narrower confines of U.S. constitutional guarantees.[230]

In the aftermath of the *Insular Cases*, conflicting interpretations proliferated; notably, it was the arguably oversimplified and draconian account—overstating and decrying the creation of an extraconstitutional zone [231] —that stuck among scholars[232] and judges.[233] Nevertheless, the exact geographic scope of

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226. The Court articulated its view in reliance of Abbott Lowell, *The Status of Our New Possessions – A Third View*, 13 HARV. L. REV. 155 (1899).

227. NEUMAN, STRANGERS, *supra* note 20, at 100.

228. RAUSTIALA, *supra* note 201, at 223.

229. NEUMAN, STRANGERS, *supra* note 20, at 8, 100.

230. RAUSTIALA, *supra* note 201, at 84; *see* BARTHOLOMEW SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 51 (2006) (citing Senator Vest who rejected that the European colonial system could be established under the U.S. Constitution).

231. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 984–94 (explaining and tracing the controversies and overheated rhetoric surrounding these cases that help explain their worse reputation than their limited implications warrant); *see also* Christina Duffy Ponsa-Kraus, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 814–53 (2005) [hereinafter Ponsa-Kraus, *Untied States*] (criticizing the traditional account that the *Insular Cases* created an extraconstitutional zone).

232. For examples of scholarship that interpreted the *Insular Cases* as relegating unincorporated territories to a largely extraconstitutional zone, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 224 (2002); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449 (1992); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 781–82 (1992); David K.

constitutional rights has been uncertain for decades, and even after several Supreme Court cases on constitutional extraterritoriality,[234] it remains contested to date.

2. Expansive Grant of Extraterritorial Enforcement Powers

"[A]s may be permitted by the treaty [or] agreement," [235] federal regulations subject preclearance travelers to U.S. customs, civil, and criminal laws, and confer inspection, seizure, and forfeiture authority on U.S. customs officers. [236] CBP's official preclearance expansion guidance requires that host governments afford CBP agents "full law enforcement authorities" in designated preclearance areas and "the same level of immunities" as U.S. diplomatic personnel.[237]

Currently, several bilateral agreements with foreign countries authorize vast extraterritorial enforcement powers to inspect, detain, seize, and forfeit goods in preclearance facilities according to U.S. laws, [238] including articles or currency related to reporting

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Watson, *Acquisition and Government of National Domain*, 41 AM. L. REV. 239, 253 (1907).

233. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 268–69 (1990) (citing the *Insular Cases* in holding that rights against unreasonable search and seizure did not extend beyond the U.S. borders); Wabol v. Villacrusis, 908 F.2d 411, 421–24 (9th Cir. 1990) (citing the *Insular Cases* in upholding the race-based land alienation restrictions in the Northern Mariana Islands ("NMI")); Banks v. American Samoa, 4 Am. Samoa 2d 113, 124–28 (1987) (citing the *Insular Cases* in upholding race-based employment discrimination in American Samoa); Northern Mariana Islands v. Atalig, 723 F.2d 682, 688–89 (9th Cir. 1984) (citing the *Insular Cases* in holding the right to a jury trial inapplicable to NMI).

234. The two main cases are *Boumediene v. Bush*, 553 U.S. 723 (2008) and *Reid v. Covert*, 354 U.S. 1 (1957), discussed in Parts III.A.1–2.

235. 19 U.S.C. § 1629(b).

236. 19 U.S.C. § 1629(d) (allowing for seizures in foreign countries, subsequent transportation to the customs territory, and forfeiture proceedings under the customs law); 19 C.F.R. § 148.22 (1990) (specifying baggage inspections and examinations authority at foreign CBP stations, "as if the passengers were arriving at an airport within the Customs territory"); 19 C.F.R. § 162.21 (2008) (specifying CBP officers' seizure and forfeiture authority, sometimes even when the original seizure was by non-customs officers such as local officials).

237. CBP Preclearance FY2015 Guidance, *supra* note 137, at 3, 12.

238. Agreement on Land, Rail, Marine, and Air Transport Preclearance Between the Government of the United States of America and the Government of Canada art. VI, §§ 10(b), 26, Can.-U.S., Mar. 16, 2015, T.I.A.S. No. 19-815.1

violations,[239] to impose monetary penalties,[240] to prosecute reporting violations,[241] and even to carry weapons.[242] Underpinning such

(entered into force Aug. 15, 2019) [hereinafter Canada Agreement] (allowing U.S. officers to inspect, examine, search, detain, seize, and forfeit goods, and requiring the "prompt[] transfer" of goods to U.S. officers for seizure and forfeiture); Agreement Between the Government of the United States of America and the Government of Sweden on Air Transport Preclearance, art. VII, § 10, Swed.-U.S., Nov. 4, 2016, 2016 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 11, § A(3) [hereinafter Sweden Agreement] (allowing U.S. officers to "expeditiously seize, and cause the forfeiture" of goods under U.S. laws); Agreement Between the Government of the United States of America and the Government of the United Arab Emirates on Air Transport Preclearance, art. VIII, § 8, U.A.E.-U.S., Apr. 15, 2013, T.I.A.S. No. 13-1208 (entered into force Dec. 8, 2013) [hereinafter UAE Agreement] (allowing U.S. officers to "expeditiously seize goods" under U.S. laws).

239. Agreement Between the Government of the United States of America and the Government of the Ireland on Air Transport Preclearance art. IV, § 1(d)(i)–(iii), Ir.-U.S., Nov. 17, 2008, T.I.A.S. No. 09-804 (entered into force Aug. 4, 2009) [hereinafter Ireland Agreement] (allowing U.S. officers to possess and request to transfer the currency falsely or not declared); Agreement Between the Government of the United States of America and the Government of the Kingdom of the Netherlands in Respect of Aruba on Preclearance, art. IV, § g, Neth.-U.S., May 22, 2008, T.I.A.S. No. 96-304 (entered into force Jan. 7, 2009) [hereinafter Netherlands Agreement] (allowing U.S. officers to seize and forfeit articles or merchandise falsely or not declared); Preclearance Act, S.C. 1999, c.20, §§ 27(1)–(2), 33(1) (June 17, 1999) (*replaced by* S.C. 2017, c.27) [hereinafter 1999 Canadian Act] (allowing U.S. officers to seize goods related to false or deceptive statement regarding their preclearance entry); *United States of America and The Bahamas Preclearance Agreement Act*, §§ 3(3)(a)–(b), (ii), BAHAMAS CUSTOMS & EXCISE DEP'T (May 24, 1978) (allowing U.S. officers to forfeit "all currency the subject matter of the false statement or declaration to which the offence relates").

240. Canada Agreement, *supra* note 238, art. II, § 3 (allowing U.S. officers to "administer its fees as well as civil fines and monetary penalties"); Preclearance Act, 2016, S.C. 2017, c.27, § 12(2) (Dec. 12, 2017) [hereinafter 2016 Canadian Act] (allowing U.S. officers to "impose administrative monetary penalties or other civil sanctions in accordance with [U.S.] laws"); Ireland Agreement, *supra* note 239, art. IV, § 1(d)(v) (allowing U.S. officers to require "as a pre-condition to the grant of Preclearance" payments of duty, tax, or penalty, or voluntary surrender of goods).

241. Agreement Between the Government of the United States of America and the Government of the Commonwealth of the Bahamas on Preclearance, art. III, § f(ii), Bah.-U.S., Apr. 23, 1974, T.I.A.S. No. 7816 [hereinafter Bahamas Agreement] (submitting alleged offenders who possess or export "articles or merchandise falsely declared or not declared" to "prosecution within [the U.S.] Constitutional authority"); Agreement Between the Government of the United States of America and the Government of Bermuda on Preclearance, art. I, § e(ii),

expansive powers is the extraterritorial application of U.S. laws. Some countries explicitly extend U.S. customs laws to their airports for purposes of "establishing and enforcing penalties, *forfeiture*, and other sanctions" for violations.[243] Only Ireland's and Canada's agreements place substantial limits on the extraterritorial scope and content of U.S. laws, by generally applying local laws in preclearance areas,[244] while granting U.S. officers[245] specified powers with various exceptions, especially upon contraventions of local laws and prosecutions.[246]

Berm.-U.S., Jan. 15, 1974, T.I.A.S. No. 7801 [hereinafter Bermuda Agreement] (same).

242. 2016 Canadian Act, *supra* note 240, § 61 (amending the criminal code to exempt U.S. officers from firearm possession liabilities); Sweden Agreement, *supra* note 238, art. III, § 1(b) (permitting U.S. officers to "access and use firearms"); *United States and Canada Sign Preclearance Agreement*, U.S. DEP'T OF HOMELAND SEC. (Mar. 16, 2015), https://www.dhs.gov/news/2015/03/16/united-states-and-canada-sign-preclearance-agreement [https://perma.cc/LEP6-5ACL] (listing U.S. officers' "enhanced authorities" to "carry firearms, defensive tools, and restraint devices").

243. Sweden Agreement, *supra* note 238, art. VII, § 1 (emphasis added); UAE Agreement, *supra* note 238, art. VIII, § 1 (emphasis added). However, several agreements do provide for exceptions to the U.S. enforcement powers. Sweden Agreement, *supra* note 238, art. VII, § 10 (conditioning seizure and forfeiture on the lack of local initiation of enforcement action against the same goods); UAE Agreement, *supra* note 238, art. VIII, § 8 (same); Bahamas Agreement, *supra* note 241, art. III, § f(ii) (conditioning prosecution on the non-contravention of local laws by the reporting violation); Bermuda Agreement, *supra* note 241, art. I, § e(ii) (same).

244. Canada Agreement, *supra* note 238, art. II, § 2; Ireland Agreement, *supra* note 239, art. II, § 5.

245. Canada Agreement, *supra* note 238, art. VI; Ireland Agreement, *supra* note 239, art. IV, § 1; *see also* 1999 Canadian Act, *supra* note 239, §§ 2, 6(1) (stating that the administration of U.S. customs laws is "subject to the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights and the Canadian Human Rights Act").

246. For example, Canada disallows U.S. imposition of monetary penalties on actions against which Canadian prosecutions are instituted. Canada Agreement, *supra* note 238, art. II, § 3; 2016 Canadian Act, *supra* note 240, § 12(3). Canada also disallows U.S. seizure and forfeiture of goods which contravene Canadian laws and are not abandoned or returned due to a lack of Canadian administrative or judicial action. Canada Agreement, *supra* note 238, art. VI, §§ 25–26; 2016 Canadian Act, *supra* note 240, § 34(2)–(3). Meanwhile, Ireland requires delivery of seized items to an Irish officer "for the purpose of seizure in accordance with Irish law," and provides "in law for a right . . . to

Foreign government officials have had mixed reactions to such a far-reaching U.S. domain on their lands, and have resisted the growing scale of U.S. extraterritorial law enforcement.[247] An Irish Deputy cautioned in a legislative session that "[s]urrendering some of our airport and our soil to the United States comes with a risk," such as that of "complicity in contravention of international law" from Donald Trump's Muslim travel ban in 2017.[248] The German government was also "very cautious" of the CBP Preclearance proposals, and "cannot accept US [sic] authorities obtaining quasi-operative competences at European airports."[249] In turn, CBP's marketing pitch for the preclearance facilities, perhaps understandably, eclipses its underlying security imperative by overwhelmingly employing rhetoric of economic growth and travel convenience[250] that appeals to prospective foreign airports and officials.[251] In fact, DHS Secretary Johnson's remarks plainly

challenge the seizure of Goods" falsely or not declared. Ireland Agreement, *supra* note 239, art. IV, §§ 1(d)(i), 5.

247. *See, e.g.*, Dáil Éireann Debates, 32nd Dáil vol. 982, no.1, at 79–81 (Apr. 16, 2019) [hereinafter Dáil Éireann Debates], https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2019-04-16/debate/mul@/main.pdf [https://perma.cc/J43L-5UAN] (quoting Deputies McGrath and Daly that allowing CBP agents to prevent potentially high-risk travelers from boarding is "setting a very dangerous precedent," citing "many stories, verified, of passengers selected for detention and interrogation by [CBP] agents . . . to the extent that they missed their flights"); Nixon, *supra* note 18 (citing European lawmakers who were "uncomfortable with having American law enforcement officers operating in their countries").

248. Dáil Éireann Debates, *supra* note 247, at 80; *see Timeline of the Muslim Ban*, AM. C.L. UNION – WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban [https://perma.cc/B82U-ENKC].

249. AIRLINE LEADER, *supra* note 18, at 56.

250. CBP Preclearance FY2015 Guidance, *supra* note 137, at 5–6 (comprehensively listing seven types of benefits to travelers including convenience and efficiency, twelve types of benefits to airports and air carriers, and seven types of benefits to the U.S. and global economy, while briefly mentioning the U.S. security imperative in only three of the twenty-nine total benefits); *cf. DHS Announces 11 New Airports*, *supra* note 136 (identifying both "greatest potential to support security and travel facilitation" as the criteria for the selections and prioritizations). However, the two approaches stressing efficiency and precaution are arguably contradictory. Côté-Boucher, *supra* note 17, at 45.

251. *See, e.g.*, Dáil Éireann Debates, *supra* note 247, at 78, 82 (quoting Deputies Troy and Griffin that preclearance facilities play a "central role" in supporting the Irish economy and attracting flight links between Ireland and the United States, and have great potential to generate employment and further airport growth); *United States, Sweden Sign Agreement to Open Preclearance*

indicated that counter-terrorism needs were driving the process more than airport queues.[252]

Practitioners are largely critical of the intrusive extraterritorial reach of CBP Preclearance, from airline executives "robustly sceptical [sic]" of its implementation,[253] to lawyers and advocacy groups concerned about the "serious abrogation of the rights of travellers [sic] on [foreign] soil" and "considerable intrusion upon [foreign] sovereignty."[254] Two Canadian immigration lawyers pointed out that "[the U.S. agents] are operating on our soil, so they do need to respect our rights in doing so," and wryly characterized the "troubling aspects" of the preclearance law as "the price Canadians have to pay to keep their uniquely privileged status when entering the [United States]."[255] One notable problem is CBP's restriction on voluntary withdrawal from preclearance operations on foreign soil[256] that can "work against" U.S. citizens unable to "opt out."[257]

Facility at Stockholm Arlanda Airport, U.S. CUSTOMS & BORDER PROT. (Nov. 4, 2016), https://www.cbp.gov/newsroom/national-media-release/united-states-sweden-sign-agreement-open-preclearance-facility [https://perma.cc/D8J3-5Q3H] (quoting the Swedish Minister of Home Affairs Ygeman that "[w]e expect benefits for the trade between the United States and Sweden"); Vazquez-Azpiri & Horne, *supra* note 17, at 546 (explaining that foreign countries regard the presence of preclearance stations as "enhanc[ing] the status of [their] airports as hubs for U.S.-bound air traffic"); U.S. Immigration Pre-Clearance Negotiations, 139 Seanad Éireann (20th Seanad) (Mar. 2, 1994) (emphasizing the importance of the "transatlantic status" to the Shannon Airport).

252. AIRLINE LEADER, *supra* note 18, at 55 ("I regard it as a homeland security imperative to build more (pre-clearance stations) . . . . I want to take every opportunity we have to expand homeland security beyond our borders.").

253. *Id.* at 61–62 (discussing the doubts and skepticisms voiced by both Emirates' and Qatar Airways' CEOs).

254. Karas, *supra* note 17, at 144–45.

255. Evan Dyer, *Pre-clearance Bill Would Give U.S. Border Agents in Canada New Powers*, CBC (Feb. 12, 2017), https://www.cbc.ca/news/politics/pre-clearance-border-canada-us-1.3976123 [https://perma.cc/K3QM-TLY2].

256. *Your Privacy at Airports and Borders*, OFF. OF PRIV. COMM'R OF CAN. (Dec. 2018), https://www.priv.gc.ca/en/privacy-topics/airports-and-borders/your-privacy-at-airports-and-borders/ [https://perma.cc/X33B-Z43E] (noting that individuals' decision to withdraw from the preclearance facility and forego their wish to enter the United States "may be recorded and that could impact future travel"); Dyer, *supra* note 254 (criticizing the prospect of a resident "being arrested simply for deciding he or she has had enough with a certain line of questioning" on one's own country's soil).

257. AIRLINE LEADER, *supra* note 18, at 59.

Despite criticisms of the program, a growing number of international travelers are subject to the same reporting requirement and penalties for violations at preclearance facilities as if they were on U.S. soil. In light of the government's assertion of power beyond borders, its observance of constitutional guarantees overseas is essential to prevent a disconnect between the legal obligations of and protections for Anthonia's preclearance counterparts. An important question thus arises: how can the United States ensure an adequate level of constitutional protection that matches the extraterritorial reach of its enforcement powers? The next Part examines the current legal framework for extraterritorial constitutionality and proposes a modified solution.

III. Extending Extraterritorial Constitutional Protections

To contextualize constitutional extraterritoriality as a solution to inadequate protections for Anthonia's counterparts, Part III.A.1 begins by examining the erosion and repudiation of a strictly territorial approach to constitutional guarantees beyond borders. In the watershed case of *Reid v. Covert*, the Supreme Court provided, for the first time, constitutional protections to constrain governmental powers overseas, which was reaffirmed half a century later in *Boumediene v. Bush*.[258] However, the rise of the functional test of extraterritoriality—originating from Justice Harlan's concurrence in *Reid* that rests constitutional applicability on whether it would be impracticable and anomalous—threatens to smuggle strict territoriality through the back door.[259] Part III.A.2 critiques the functional test hinged on adaptable measures of practicality as often applied, which results in the excessive emphasis on the feasibility of governmental operations in structuring the scope of constitutional guarantees, and the contemplation of an extraordinary degree of judicial discretion and deference.[260] In the preclearance context, as examined in III.A.3, a malleable test of constitutional applicability might displace tenets of constitutional interpretation and be prone to unbridled extraterritorial enforcement and inadequate rights protections.[261]

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258. *See infra* notes 274–276, 282 and accompanying text.
259. *See infra* notes 284–286, 299 and accompanying text.
260. *See infra* notes 294–297, 301–302 and accompanying text.
261. *See infra* notes 304–307 and accompanying text.

There have been several scholarly discussions on the parallel between the issues of Fourteenth Amendment incorporation and constitutional extraterritoriality.[262] However, the courts' approach to the scope of constitutional guarantees marks a sharp break at the border of a narrowly defined "United States."[263] The question of constitutional applicability pertains to domestic and extraterritorial contexts alike, but only the former employs an analysis anchored in established elements of constitutional text and structure,[264] as distinct from the functional test applied to the latter. To rectify the doctrinal incoherence and prejudicial results in extraterritorial cases, Part III.B.1 draws on insights from the incorporation doctrine, and proposes a modified account of constitutional extraterritoriality mirroring the framework of its domestic counterpart, bifurcating (1) scope or applicability of rights (*whether* constitutional guarantees apply), and (2) content or enforceability of rights (*how* constitutional guarantees apply).[265] Part III.B.2 applies the modified account to preclearance currency forfeiture and highlights its strengths. Extraterritorial applications of fundamental protections of Due

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262. *See* Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1022–31 (exploring the resonance between the Justices' positions on the incorporation doctrine and their views on constitutional extraterritoriality, and proposing an alternative extraterritoriality approach to the functional test mirroring incorporation); NEUMAN, STRANGERS, *supra* note 20, at 100–03 (examining the resemblance between the fundamental rights approach of the *Insular Cases*, enforcing fundamental guarantees in territories, and Fourteenth Amendment incorporation applying fundamental provisions of the Bill of Rights to the states); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 19–34 (2001) (comparing the territorial incorporation and the Fourteenth Amendment incorporation cases with strong links between the two debates). Interestingly, the *Reid* concurrences known for their endorsement of the functional test implicitly raised the analogy to incorporation. Reid v. Covert, 354 U.S. 1, 44 (1957) (Frankfurter, J., concurring) (noting the extraterritorial issue involves "considerations not dissimilar to those involved in a determination under the Due Process Clause"); *id.* at 75 (Harlan, J., concurring) (noting the extraterritorial question before the court as "analogous, ultimately, to issues of due process").

263. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1021.

264. *See infra* notes 315–322 and accompanying text.

265. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1027; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 540 (1986) (referring to the second enforceability stage with the different terminology of "scope or extent of [the right's] application"); *see infra* Part III.B.1.

Process and Excessive Fines against governmental actions overseas—whose exact manner of application in particular circumstances would depend on the existing jurisprudence—would serve a critical separation of powers function.[266]

A. Development of Constitutional Extraterritoriality

1. Constitutional and Judicial Restraints on Extraterritorial Enforcement

Numerous Supreme Court opinions stated the arguably unremarkable proposition that the Constitution is always operative everywhere with respect to the federal government's actions, even though it does not necessarily apply at all times in all places.[267] At first blush, therefore, travelers passing through CBP Preclearance—subject to U.S. laws and governmental actions—should be afforded with constitutional protections, despite being outside of U.S. soil. However, the apparent rejection of a strictly territorial view of constitutional guarantees embodied in the aforementioned proposition has failed to settle the continuing scholarly and judicial debates. The exact reach of constitutional protections still awaits a firm answer.

A watershed case in this jurisprudence is *Reid v. Covert* ("*Reid II*").[268] The Supreme Court reheard the appeals of widows of service members, from *Reid I*,[269] who were charged with murdering their husbands and criminally prosecuted by court martial in

266. *See infra* notes 344–347 and accompanying text.

267. Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring) ("[T]he question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."); Boumediene v. Bush, 553 U.S. 723, 758 (2008) ("[T]he real issue in the *Insular Cases* was not whether the Constitution extended [to the territories], but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power . . . ." (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922))); Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."); United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.").

268. 354 U.S. 1 (1957).

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

England and Japan subject to the U.S. exclusive jurisdiction due to foreign agreements and without Article III judges or jury trial.[270] The question, as the petitioner sharply framed it, was what in the Constitution permitted the withdrawal of constitutional protections from these women simply because they were overseas with their husbands in the Armed Forces.[271] In arguing for the proper use of court martial of civilians, the government emphasized that its extraterritorial jurisdiction was important to the success of military missions,[272] and even flatly declared that the Constitution "does not go overseas" in affording protections in such extraterritorial enforcement context.[273]

In a plurality opinion, the *Reid II* Court held that Sixth Amendment rights applied to the widows, reversing and repudiating strict territorial constitutionalism.[274] Establishing, for the first time, that the Bill of Rights had some global reach,[275] the Court rejected the idea that the Constitution constrains the government only when it acts within its borders.[276]

The Court undertook the task to square the U.S. commitments to constitutional traditions with its global ambitions—just as in the *Insular Cases*—but this time it was more cautious of granting the executive branch "maximum flexibility." [277] Notably, several Justices carefully articulated the limits on governmental

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270. For the agreement in question, the Visiting Force Act with the Britain of 1942, see Norman Bentwich, *The U.S.A. Visiting Forces Act, 1942*, 6 MODERN L. REV 68 (Dec. 1942).

271. Transcript of Oral Argument, Reid v. Covert, 354 U.S. 1 (1957), *in* 52 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 855 (Philip B. Kurland & Gerhard Casper eds., 1975).

272. Government Reply Brief at 5, Reid v. Covert, 354 U.S. 1 (1957), 1956 WL 89113 (1956).

273. Transcript of Oral Argument, *supra* note 271, at 779.

274. Reid v. Covert, 354 U.S. 1, 18–19 (1957); RAUSTIALA, *supra* note 201, at 144–45; NEUMAN, STRANGERS, *supra* note 20, at 93–94.

275. RAUSTIALA, *supra* note 201, at 184. Arguably, a few earlier cases suggested that the Constitution did have extraterritorial reach and were not strictly limited by the sovereign borders. *See* Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (applying the takings clause to military actions abroad); Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953) (same).

276. NEUMAN, STRANGERS, *supra* note 20, at 7.

277. RAUSTIALA, *supra* note 201, at 155.

actions abroad despite agreements with foreign sovereigns,[278] marking a rejection of the "long-standing view" that such agreements could determine the powers that the United States wielded as well as the rights that it was bound to respect.[279] The Court maintained that an exercise of power under international agreements without observing constitutional prohibitions would be "alien to our entire constitutional history and tradition."[280] This reasoning is in stark contrast with *Reid I*, which granted significant discretion to the government's choice of the legal system overseas, and upheld court martial as reasonable given the practical necessities.[281] Half a century later, the *Boumediene* Court granted the habeas corpus right to foreigners detained in Guantanamo Bay, and subjected governmental acts overseas to constitutional restrictions,[282] further eroding strict territoriality.

2. Functional Test: A Return to Strict Territoriality?

Against the general trend away from a strictly territorial view of constitutional protections, an extraterritoriality approach with a practical bite rose up to prominence—albeit lacking in doctrinal support[283]—from its associated concurring opinions in the twentieth

278. Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion) (rejecting that any agreement with a foreign nation "can confer power on . . . any [] branch of Government, which is free from the restraints of the Constitution"); *id.* at 56 (Frankfurter, J., concurring) (requiring that governmental actions abroad be "performed under both the authority and the restrictions of the Constitution").

279. RAUSTIALA, *supra* note 201, at 242.

280. *Reid*, 354 U.S. at 17.

281. Reid v. Covert, 351 U.S. 487, 491 (1956).

282. Boumediene v. Bush, 553 U.S. 723, 724, 765 (2008).

283. The conflicting and confusing interpretations of the *Insular Cases*' approach to territoriality have led to not only the debate on the extent to which these decisions license an extraconstitutional zone, but also to which they emphasize practical factors in determining applicability of constitutional guarantees. *See* Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1016, 1018 (criticizing the *Verdugo* and *Reid* Court's dubious readings that ascribe to practical considerations and cultural imperatives—the purported basis for the *Insular Cases*—a more exalted role than they warrant). The arguably more essential element of the *Insular Cases* is the fundamentality of individual rights. *Id.* at 1012–13; *see also* Reid v. Covert, 354 U.S. 1, 53 (1957) (Frankfurter, J., concurring) (reading the long series of *Insular Cases* as "consistently enunciat[ing]" the fundamental right test). Fundamentality was held to derive from the "general spirit" of the Constitution and "principle which are the basis of

century to the *Boumediene* majority opinion in 2008.[284] It is known as the "impracticable and anomalous" test, or the functional test, and is often attributed to Justice Harlan's concurrence in *Reid*.[285] Harlan claimed that the Constitution does not apply if the conditions would make "adherence to a specific guarantee altogether impracticable and anomalous."[286] However, such a claim is entirely different from the self-evident proposition discussed in Part III.A.1—which Harlan himself endorsed in the same concurrence—that the Constitution, though generally operative everywhere, does not apply in all circumstances,[287] true for foreign, territorial, *and domestic* places alike.[288] That the functional test only applies to extraterritorial contexts departs from and even undermines that basic proposition.[289]

Harlan argued for "weighing the competing considerations" to determine whether and which constitutional safeguards should apply extraterritorially, which he characterized as a "question of judgment."[290] Emphasizing the practicality of the government's overseas military jurisdiction, Harlan's test was manifestly *not* focused on what process was due—contrary to his claim[291]—but rather on what process could be provided with little difficulty to the government.[292] This is arguably incongruent with the *Reid II* holding that practical security considerations should not determine the contours of American constitutionalism.[293]

Courts applying the functional approach have employed a wide range of malleable and elusive considerations, including the government's policy and practical concerns,[294] reasons of cultural

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all free government," and to place "restrictions so fundamental a nature" on the government. Downes v. Bidwell, 182 U.S. 244, 268, 291 (1901).

284. *See* Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1018–19 (tracing the development of the practical test).

285. *Id.* at 996.

286. *Reid*, 354 U.S. at 74 (Harlan, J., concurring).

287. *Id.*

288. *See* Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 999.

289. *Id.* at 1018.

290. *Reid*, 354 U.S. at 75, 77.

291. *Id.* at 75.

292. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1000–01.

293. *Reid*, 354 U.S. at 16–17 (plurality opinion); *see* RAUSTIALA, *supra* note 201, at 147.

294. *Reid*, 354 U.S. at 75 (Harlan, J., concurring) (conditioning the availability of a jury trial overseas on the "particular local setting, practical necessities, and possible alternatives" without further explication).

accommodation and protection,[295] and cultural differences associated with the infeasibility of constitutional applications.[296] Such an "alarmingly adaptable" test invariably involves a "moving target" of the measure of practicality in the eyes of the beholder.[297] Landmark opinions employing the functional approach, like Harlan's concurrence in *Reid*, explicitly endorsed the basic proposition that rejects the strictly territorial view of constitutional protections.[298] But meanwhile, they structured the scope of constitutional guarantees with the feasibility of governmental operations, and thus smuggled the Westphalian vision of territoriality through the back door.[299] Over the course of fifty years, Harlan's functional test attracted few advocates, but solidified its status after garnering the majority votes in *Boumediene*.[300]

3. Inadequate Protections Against Unbridled Enforcement Powers

The touchstone of the functional approach is government flexibility, enabled by courts' discretionary and deferential inquiry into the political branches' choices, and a low threshold of the impracticability of constitutional guarantees.[301] Courts' excessive attention to considerations of governmental interests and convenience risks selectively diluting or even eliminating rights by means of judicial evaluations of practicality.[302] Scholars have argued that

295. King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (emphasizing a "solid understanding of the present legal and cultural development of [the territory]" in determining the applicability of the jury system in American Samoa); King v. Andrus, 452 F. Supp. 11, 15 (D.D.C. 1977) (analyzing and rejecting the "foreseeable impact on [the territory's] system" to uphold the jury system in American Samoa); Wabol v. Villacrusis, 958 F.2d 1450, 1460–61 (9th Cir. 1992) (employing the "shared beliefs of diverse cultures" and "preservation of [the territory's] social and cultural stability" as the limiting principles of applying equal protection to NMI's land alienation restrictions).

296. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990).

297. RAUSTIALA, *supra* note 201, at 216.

298. Boumediene v. Bush, 553 U.S. 723, 758 (2008); *Verdugo-Urquidez*, 494 U.S. at 277.

299. RAUSTIALA, *supra* note 201, at 175; Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1019.

300. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 995–96.

301. NEUMAN, STRANGERS, *supra* note 20, at 103, 114.

302. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1013, 1018; *see also* NEUMAN, STRANGERS, *supra* note 20, at 93.

which constitutional constraints would present problems of practicality is a "wrong question" to ask,[303] as it is freed of the constitutional text and natural law as either benchmarks or justifications,[304] and empowers judges to potentially displace tenets of constitutional interpretation with their factors of choice.[305]

Additionally, a limited and territorial conception of constitutional protections is "prone to stimulate the offshore use of executive power."[306] The applicability of constitutional guarantees, intended as a constraint upon the government, ironically turns into a function of governmental policies and interests, thereby empowering the government with greater freedom of action.[307] Judicial constraints on unbridled extraterritorial enforcement activities can take the form of an unequivocal holding that the Constitution follows the flag, or at least the badge.[308] However, against the backdrop of transnational security implications, courts continued to substantially defer to the executive branch's view of national security and extraterritorial enforcement activities.[309]

Thus, in a potential challenge to CBP officers' extraterritorial activities at a preclearance facility, a widely flexible contextual analysis of practicality is likely to result in inadequate Fifth and Eighth Amendment protections. An excessively practical analysis of governmental interests and policies is likely to emphasize the security imperatives as the underlying motivations and goals behind the preclearance programs,[310] thus categorically finding inapplicable constitutional guarantees to preclearance forfeitures. The problem is

303. NEUMAN, STRANGERS, *supra* note 20, at 116.

304. *Id*. at 93; *see also* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914–20 (1991); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2076 (2005).

305. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1018.

306. RAUSTIALA, *supra* note 201, at 185

307. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1019.

308. RAUSTIALA, *supra* note 201, at 185; *see also* United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978), *overruled by* United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983).

309. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 259 (1990) (situating the case in the broader environment of international drug trafficking); RAUSTIALA, *supra* note 201, at 174–76.

310. *See supra* Part I.B.1.

not necessarily the result itself, but rather the test, which is prone to excessive judicial discretion and government flexibility.[311]

The key to addressing the problem is understanding a fundamental defect of the functional test, namely, its unexamined assumption that the extraterritorial context has a "monopoly" on the question of constitutional applicability as well as the open-ended criteria of "impractical and anomalous."[312] Contrary to the received wisdom, a domestic counterpart exists to the extraterritorial jurisprudence on the scope and content of constitutional guarantees, as evident in the Fourteenth Amendment incorporation debate.[313] Thus, the use of the functional test in the overseas context only yielding unbounded judicial discretion and unconstrained governmental action is arguably prejudicial.[314] A rethinking and modification of the extraterritoriality test is in order.

B. Exporting Incorporation Insights into Extraterritoriality

1. Bifurcating the Whether and How Questions

Fourteenth Amendment incorporation involves both inquiries of which provisions of the Bill of Rights are applicable to the states, and the extent to which they are applicable.[315] Courts in domestic incorporation cases conduct contextual analyses of the precise contours of rights, distinct from and after the a priori determination of the rights' applicability.[316] However, the courts' identification of applicable constitutional provisions in extraterritorial locations has not kept pace with that in the states.[317] Such distinct practices are based on an unjustifiable presumption of a difference in kind between

311. *See supra* note 335 and accompanying text.

312. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 977.

313. *Id.* at 1020–21. For a list of existing scholarships both explicitly and implicitly arguing for the opposite view, see *id.* at 1020 n.171 and Ponsa-Kraus, *Untied States*, *supra* note 231, at 808 nn.39–40.

314. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1026.

315. *Id.* at 1022–25.

316. For example, a series of cases, including Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), decided the precise content of the right to a jury trial as a separate question from and after the assumed applicability of the right in states.

317. NEUMAN, STRANGERS, *supra* note 20, at 101.

constitutional interpretations for states and for territories or foreign countries.[318]

In the domestic context, it is often the fundamentality of rights that centrally bears on the applicability question in the first stage.[319] A constitutional protection is incorporated against the states through the Due Process Clause[320] "if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[321] Such an analysis is anchored in established elements of constitutional interpretation, including the constitutional text and structure, and the history of the rights' application.[322] Most recently in 2019, the Supreme Court incorporated the Excessive Fines Clause against the states.[323] Notably, the Court clarified the nature of the incorporation inquiry: it should be focused on the fundamentality of the constitutional guarantee rather than the "novel applications of rights *already deemed incorporated*."[324]

By contrast, courts employ the functional test in the extraterritorial context, basing the applicability inquiry on malleable and adaptable measures of practicality and governmental interests.[325] Essentially, this test enables the courts to create a new universe for extraterritorial locations by treating them as *sui generis* and operating under an adaptable framework—unmoored from the constitutional anchors in place for domestic contexts—that asks whether it would be impracticable to afford even *fundamental* rights. Scholars have argued that it is unjustifiable for courts to employ differential concepts of fundamentality in a partial manner in

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318. *Id.* at 1018.

319. In contrast, scholars have argued that when a constitutional provision, such as the Citizenship Clause, defines its own geographic scope, the question is whether the case falls within the scope based on the court's interpretation. Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees with Respect to the *Insular Cases* at 16, Fitisemanu v. United States, No. 20-4017 (10th Cir. May 12, 2020).

320. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quotation omitted) (holding that the "Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'").

321. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quotation omitted).

322. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1030.

323. *Timbs*, 139 S. Ct. at 684.

324. *Id.* at 690 (emphasis added).

325. *See supra* Part III.A.2.

choosing the rights deserving of protection in the two contexts,[326] and to smuggle the separate inquiry of *how* into the *whether* stage, which adds an "unnecessary layer" of the alarmingly malleable choice of factors.[327]

After the applicability stage, courts in the domestic incorporation cases employ contextual analyses.[328] Practical considerations enter the enforceability stage to determine the substantive contours of the applicable rights, or how they are given effect in specific circumstances.[329] Without ousting the right altogether at the initial stage, the accommodation by a contextual assessment—reserved for the enforceability inquiry—ensures that the government will not be bound by truly impractical restraints, whether in domestic or extraterritorial situations.[330]

2. Modified Approach to Preclearance Currency Forfeiture

Mirroring the incorporation inquiry, an extraterritoriality case involving preclearance forfeiture would proceed as follows. To determine the right's applicability, courts should only ask whether the right guaranteed, "not each and every particular application of that right," is fundamental or deeply rooted, just as in the domestic context.[331] Based on the established framework of constitutional interpretation, the Due Process and Excessive Fines protections are fundamental.[332] Thus, courts should answer affirmatively to the *whether* question, thereby finding applicable the relevant constitutional guarantees to extraterritorial activities at preclearance facilities. *After* finding applicable these guarantees, courts would then engage in a fine-tuning analysis of the *how* question. To determine the extent of the rights' effects and the exact manner in which they should be enforced, courts should accordingly assess the relevant practical consequences of the Due Process and Excessive Fines

326. NEUMAN, STRANGERS, *supra* note 20, at 101.
327. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1033.
328. *See supra* note 316 and accompanying text.
329. Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1029.
330. NEUMAN, STRANGERS, *supra* note 20, at 115.
331. Timbs v. Indiana, 139 S. Ct. 682, 690 (2019).
332. *Id.* at 686–87 (holding the excessive fines safeguard fundamental with deep roots in the U.S. history and tradition); U.S. CONST. amend. XIV, § 1 (incorporating the due process rights against the federal government to apply against the states as a fundamental safeguard).

protections in particular extraterritorial locations and circumstances.[333] The assessment would be grounded in the existing jurisprudence, respectively involving the adequacy of customs advisement affecting travelers' subjective knowledge, and the proportionality between the forfeited amount and culpability or social harm.[334]

Notably, courts would no longer at the outset dispose of constitutional claims by Anthonia's counterparts of extraterritorial violations by declaring fundamental guarantees impracticable and thus inapplicable. Exporting the incorporation doctrine with the anchor of fundamentality helps protect the integrity of constitutional interpretation and preclude excessively discretionary and deferential analyses that play fast and loose with judges' choice of practical factors, at the risk of eclipsing the fundamentality of rights. Admittedly, judicial discretion and government flexibility—the touchstone of the functional test—are still present, and this approach might not yield different results as the functional test. [335] Nevertheless, by folding the content of the rights into the relevant jurisprudence, the resulting contextual analysis is likely more principled. Thus, the modified approach promotes both the coherence of the doctrine and the care with which judges approach constitutional extraterritoriality that parallels the domestic incorporation analysis.

Indeed, separation of powers concerns underpinning the *Boumediene* opinion should animate judicial review of executive abuses and require the application of fundamental rights designed to check the government's arbitrary exercise of power.[336] Echoing the

333. NEUMAN, STRANGERS, *supra* note 20, at 103.

334. *See supra* Parts II.A.1–2 (analyzing the Due Process knowledge and the Excessive Fines proportionality elements).

335. *See* Ponsa-Kraus, *A Convenient Constitution*, *supra* note 29, at 1032–33 (explaining how the *Boumediene* Court's reasoning would be different despite the same result under the modified approach, focused on the text of the Suspension Clause and wartime powers, and the historical evidence of the extension of the writ), *cf. id.* at 1035–36 (explaining how the *Verdugo* Court's reasoning as well as result might be different under the modified approach, focused on the text of the Fourth Amendment and historical protections against unreasonable governmental intrusion).

336. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1650 (2013) (noting that structural concerns about the role of the judiciary underlay the *Boumediene* opinion, which ensures the courts' role in curbing "the political branches' power to act

Reid Court's rejection of the limited territorial conceptions of constitutional guarantees, the *Boumediene* Court notably urged a balance between according proper deference to the political branches and consulting the established legal doctrines.[337] The Court held that "[t]he test for determining the scope of [the constitutional guarantee] must not be subject to manipulation by those whose power it is designed to restrain."[338] Other than the government's intelligence apparatus, "[s]ecurity subsists, too, in fidelity to freedom's first principles," including individual rights and liberties against the government's "arbitrary and unlawful restraint."[339]

Scholars have also examined the intricate balance between governmental freedom and restraints in various extraterritorial contexts as well as its implications of separation of powers.[340] Those proposing an expanded scope of constitutional protections often emphasize the important function of individual rights in constraining governmental power, which are coextensive with obligations in American constitutionalism.[341] The courts' role in monitoring governmental actions is especially salient in circumstances involving

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arbitrarily"); Chimène Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 76–78 (2011) (noting that against concerns of excessive judicial interference with governmental overseas operations, judicial review is especially salient where the relevant constitutional provisions were designed as a "check on the arbitrary exercise of executive power," as in *Boumediene*).

337. Boumediene v. Bush, 553 U.S. 723, 796–97 (2008) (citations omitted).

338. *Id.* at 765–66.

339. *Id.* at 797.

340. *See generally* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751 (2020) (addressing the interaction between the plenary power doctrine and the judicial extraterritoriality jurisprudence situated within the extraterritorial issues of asylum seekers, expedited removal, and use of force); Shawn E. Fields, *From Guantánamo to Syria: The Extraterritorial Constitution in the Age of "Extreme Vetting*,*"* 39 CARDOZO L. REV. 1123 (2018) (addressing the interaction between practical foreign policy considerations and structural restraints on governmental power situated within the constitutional extraterritoriality of immigration law).

341. NEUMAN, STRANGERS, *supra* note 20, at 97–98 (proposing the mutuality of obligation approach, which extends full protection to citizens wherever they may be and aliens subject to U.S. laws, based on the premise that rights and obligations are coextensive); Fields, *supra* note 340, at 1182–88 (proposing a unified theory, similar to Professor Ponsa-Kraus' modified approach, which extends fundamental rights protections as structural restraints on governmental power, moderated by the second stage of functional case-by-case determinations of contours of rights).

"novel and extreme" manipulations of the border as a legal construct and of national security concerns,[342] and creations of "law-free" zones, which pose threats to the fundamental separation of powers principles.[343]

Adopting the modified approach in the context of airport currency forfeiture helps preserve adherence to judicial review and separation of powers. The relevant individual rights protections of Due Process [344] and Excessive Fines, [345] whose extraterritorial applications importantly limit the government's improper exercise of power, serve a critical separation of powers function. Travelers unaware of the reporting requirement or subject to excessive forfeitures should be afforded with fundamental constitutional rights, and courts should adequately monitor governmental actions for potential abuse. Despite the government's rhetoric of great "practical necessity" and "slight encroachments" associated with its jurisdictional expansion to foreign airports, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments." [346] Otherwise, a grant of expansive license to the political branches to "switch the Constitution on or off at will" would "permit a striking anomaly in our tripartite system of government." [347] The modified approach strikes a better balance between judicial deference to and constraint on executive actions, especially potentially manipulative ones that evade and withhold fundamental protections beyond borders, thus safeguarding separation of powers principles.

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342. Marouf, *supra* note 340, at 839–55 (arguing for both legislative and judicial constraints to protect against executive abuses and highlighting the importance of judicial review when fundamental rights are at stake).

343. Keitner, *supra* note 336, at 111 (explaining the conscience-based approach where courts, perceiving unchecked manipulative executive behaviors, apply domestic rights provisions to extraterritorial actions).

344. Fields, *supra* note 340, at 1186–88 (imposing structural governmental restraints by means of substantive and procedural Due Process, though granting deference to courts in the extraterritorial and domestic contexts alike where rights are susceptible to contextual considerations in the second stage).

345. Pimentel, *Forfeitures Revisited*, *supra* note 48, at 53 n.301, 59 (2012) (noting the importance of Excessive Fines as a constitutional safeguard to curb abuses of government power and proposing concrete mechanisms for Excessive Fines analysis that can guide and rein in the temptations and incentives for governmental overreach).

346. Reid v. Covert, 354 U.S. 1, 39–40 (1957).

347. Boumediene v. Bush, 553 U.S. 723, 765 (2008).

CONCLUSION

This Note uncovers the phenomenon of CBP's preclearance currency forfeitures for mere paperwork violations, using a government database that has yet to see the public light of day. Amidst persistent criticisms of the civil asset forfeiture system and growing awareness of the domestic airport forfeiture industry, preclearance currency forfeiture has not been previously explored. An ambitious security program extending the U.S. border, CBP Preclearance has been rapidly expanding and affords vast extraterritorial enforcement powers. This Note examines the constitutional implications of penalizing preclearance travelers for U.S. customs reporting violations who are inadequately informed of the requirement or subject to excessive forfeitures.

On the flip side of imposing legal obligations overseas is affording rights protections, as conceptions of territoriality underlie both the government's assertion of authority and extension of fundamental constitutional guarantees. Despite the repudiation of a limited territorial view of constitutional applicability, the functional test of extraterritoriality enabled its return, resulting in excessive judicial discretion and deference to governmental interests. Given that the question of constitutional applicability arises in domestic and extraterritorial contexts alike, this Note proposes a modified extraterritoriality approach mirroring the incorporation doctrine. *Whether* the relevant rights apply hinges on textual and structural factors that play a central role in the incorporation inquiry; *how* they apply looks to practical factors based on the existing jurisprudence.

This modified approach preserves in the enforceability stage elements of government flexibility and judicial discretion arguably important for extraterritorial enforcement activities. By employing this approach in preclearance currency forfeiture, courts would retain meaningful review of governmental actions beyond borders, promote coherence and integrity of constitutional interpretation, and embody respect for fundamental rights and separation of powers principles.