Does the Constitution Require Due Process Abroad?

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Do the rights protected by the Constitution constrain United States government actions outside our borders, especially those directed at noncitizens? The longstanding debate over this question has heated up again in recent years. It is one of the issues raised by the litigation over Donald Trump's travel ban executive order. It is also a key element of Hernandez v. Mesa, a case recently addressed by the Supreme Court that raises the question of whether the Fourth Amendment applies to a case where U.S. Border Patrol agents fatally shot a 15-year-old Mexican boy just across the border.[1]

Nathan Chapman's important new article on the application of the Due Process Clause of the Fifth Amendment abroad, is a timely and important contribution to this debate. It compiles extensive evidence indicating that the Clause was originally understood to constrain U.S. government actions outside our territory, regardless of whether the targets are American citizens or not. If so, it may be that other constitutional rights also apply in such situations.

Some scholars have argued that the Due Process Clause applies to U.S. government actions all over the world because the text is phrased in general terms, without territorial limitation. But Chapman is the first to systematically compile originalist evidence defending this position. He considers a variety of federal government law enforcement efforts beyond U.S. borders from the 1790s to the 1820s.

Most of these involved enforcement of federal laws authorized by Congress's Article I power to "define and punish Piracies and Felonies committed on the high Seas." They included efforts to suppress piracy and the slave trade, and catch violators of U.S. tariff and embargo policies. Some of these cases also came under Congress' authority to "define and punish" violations of "the Law of Nations," though Chapman's analysis does not indicate any major distinctions in the way the two types of legislation were treated under the Due Process Clause.

Pirates may seem quaint or even romantic today. But in the eighteenth and early nineteenth centuries, they were a serious threat to American and European commerce. Suppressing them was a major objective of early American foreign policy. Yet, as Chapman shows, both Congress and the executive branch consistently concluded that pirates could not be detained and punished without being afforded due process of law, including a trial in a regularly constituted federal court. This was consistent with pre-revolutionary British practice, with the major exception of trials of suspected pirates who were American colonists. The latter were often tried in special vice-admiralty courts. Americans vehemently objected to this practice and sought to put an end to it.

The same was true of the procedures for detaining and trying suspected slave traders and smugglers. They too were afforded the protection of the Due Process Clause. Such prominent jurists and statesmen as Supreme Court Justice James Iredell, Albert Gallatin (a leading Jeffersonian voice on constitutional issues), and John Quincy Adams argued that this was required by the Constitution.

Importantly, these policies made no distinction between suspected pirates, smugglers, and slave traders who were foreign nationals and those who were American citizens. As President John Adams' attorney general Charles Lee instructed in 1798, suspected pirates were to be tried in ordinary federal courts, "according to the law of the United States, without respect to the nation which each individual may belong, whether he be British, French, American, or of

any other nation." Similar principles applied to the seizure and condemnation of ships and property used by pirates and other criminals on the high seas.

Chapman shows that most of the contrary evidence cited by earlier scholars involved ships and prisoners taken in war or military operations, such as those against state-sponsored Barbary pirates. Just as we do today, Americans of the Founding era recognized that peacetime due process rules often do not apply in war.

While Chapman's analysis is wide-ranging and compelling, I wonder if more could be to consider alternative explanations for some of his findings. In some cases, for example, it is possible that U.S. officials were reluctant to detain or punish foreign citizens without due process for fear of alienating powerful European governments. The early United States was not the superpower of today, and sought to avoid the wrath of more potent states, particularly Britain and France. The latter might well retaliate for real and imagined abuses committed against their citizens. Still, this concern is partly obviated by the fact that many of the cases discussed by Chapman involved officials framing their concerns in explicitly constitutional terms.

At least for constitutional originalists, Chapman's findings have substantial implications for the present day. The Due Process Clause indicates that the government may not deprive individuals of "life, liberty, or property, without due process of law." A substantial range of federal government activities abroad do just that. As Chapman explains, they include extraterritorial kidnapping and detention of criminal suspects, shootings by law enforcement officers (including the one at issue in *Hernandez v. Mesa*), and searches and seizures of property abroad for the purposes of obtaining evidence for prosecution. Whether or not the Fourth Amendment or other parts of the Bill of Rights apply to these situations, they all involve the deprivation of "life, liberty, or property" without the process typically required inside the U.S.

Chapman's findings also have potential implications for extraterritorial application of other individual rights outlined in the Constitution. Like the Due Process Clause, most are phrased in general terms, without any territorial limitations, or constraints based on the citizenship of the individuals targeted.

If the Due Process Clause applies to U.S. actions abroad, why not the First Amendment and other parts of the Bill of Rights? If Congress's power to punish crimes on "the high seas" is constrained by individual rights, why not its power over immigration, its power to regulate international commerce, and so on?

The fact that pirates were violators of international, as well as American, law makes it all the more striking that they were nevertheless covered by the Due Process Clause. If even pirates were not beyond the reach of constitutional rights, it seems hard to argue that potential immigrants or foreign-based violators of purely American legislation should be.

Unlike the power to punish crimes on the high seas, federal power over immigration is not specifically enumerated in the Constitution. Such Founders as Thomas Jefferson and James Madison forcefully denied that Congress and the president had any general power to restrict peaceful migration, a view that ultimately prevailed in the struggle over the Alien and Sedition Acts of 1798. Chapman, in fact, briefly argues that the Due Process Clause restricts congressional power over immigration, preventing the federal government from stripping statutory immigration rights without due process.

If so, perhaps other constitutional rights restrict immigration policy, as well. If Congress cannot bar foreigners in ways that violate the Due Process Clause, perhaps it also cannot bar them on the basis of criteria that undermine First Amendment rights, such as freedom of speech, assembly, and religion.

Many object to such reasoning on the ground that the immigrants have no constitutional right to enter the United States in the first place. But, of course, suspected pirates had no constitutional right to engage in piracy, suspected smugglers had no right to smuggle, and so on. Still, they could not be targeted in ways that violated the Due Process Clause.

As I have pointed out elsewhere, there is no constitutional right to receive Social Security benefits. Yet it would surely be unconstitutional for the federal government to restrict them to people who practice a particular religion or refrain from criticizing the government. Similarly, it may be that potential immigrants cannot be barred for reasons that trench on other constitutional rights.

Chapman's argument does not definitively resolve the issue of which constitutional rights apply extraterritorially. Perhaps some rights simply have a different status from the Due Process Clause. A few are explicitly limited to citizens, such as the Privileges and Immunities Clause of the Fifth Amendment.

But Chapman's analysis does undercut oft-made claims that the original meaning of the Constitution implicitly embodies a general principle under which constitutional rights only constrain government actions on American soil or only those that target American citizens. At least with respect to the Due Process Clause, that simply is not true.

As Chapman recognizes, originalism is far from the only available constitutional theory. Restrictions on extraterritorial application of the Due Process Clause can still be defended on "living constitution" grounds. Later in the nineteenth century, he notes, American courts and government officials began to do just that: "Americans, faced with the challenges and prospects of a far-flung and culturally pluralistic empire, to some extent embraced the imperial logic of the British constitution that they had once repudiated."

Due Process Clause protections were often repudiated or watered down in cases dealing with immigrants, foreigners, Native Americans, and others not seen as fully American. Instead of defending these principles on the basis of text and history, judges and others appealed to the supposedly "inherent" powers of sovereign governments—the same theory ultimately used to justify "plenary" federal power over immigration. Such theories have major flaws from the standpoint of text and original meaning. But they can be defended on various other grounds.

Chapman's compelling article does not definitively resolve the debate over extraterritorial application of constitutional rights generally, or even the Due Process Clause specifically. But it is a major step forward in the literature. Few if any issues in constitutional law are more timely and relevant.

1. The Supreme Court remanded the case without reaching the issue of extraterritorial application of the Fourth Amendment. [?]

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