Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, Case Note

Ariel Meyerstein, University of California, Berkeley

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as tribunals follow the lead of *National Grid*, they may find that the crisis has lowered the standard of fair and equitable treatment, thereby helping countries escape liability under their investment treaties.

The decision in *National Grid* to lower the standard of fair and equitable treatment may also end up influencing BIT disputes not arising from a country’s response to an economic crisis—in particular, BIT disputes involving developing countries. Until now, the impact of a country’s level of development on that standard has been uncertain. Whereas some tribunals have taken into account a country’s level of development when determining the fair and equitable treatment obligation has been violated, others have not. Future tribunals may hold that, if an economic crisis lowers the standard of fair and equitable treatment that a country is obligated to provide, then so, too, does a lower level of development.

**NICK GALLUS**

*Canadian Department of Foreign Affairs and International Trade*


Supreme Court of the United States, April 21, 2009.

In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, decided April 21, 2009, the U.S. Supreme Court addressed two questions on the Iran Ministry

16 See Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, paras. 278, 306, 335 (Sept. 11, 2007) (holding that the "equitable and reasonable" standard was the same as the fair and equitable treatment standard, and that Lithuania’s transition from Communism was relevant to determining if there had been a breach of the standard); Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, para. 348 (June 25, 2001); Eudoro Armando Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, para. 75 (July 26, 2001); see also Richard Kreindler, Perspectives on State Party Arbitration: The Future of BITs—The Practitioner’s Perspective, 23 ARB. INT’L 43, 53 (2007); IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 235 (2008); CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, para. 7.17 (2007) (drawing from Georg Schwarzenberger, The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary, 9 J. PUB. L. 147, 152 (1960), to conclude that the “inclusion of the reference to equitable treatment also provides a means by which an appropriate balance may be struck between the protection of the investor and the public interest which the host State may properly seek to protect in the light of the particular circumstances then prevailing”).

17 See Eastern Sugar B.V. (Netherlands) v. Czech Republic, Partial Award, para. 273 (Stockholm Chamber of Commerce Arb. Inst. Mar. 27, 2007) (stating that the tribunal ”does not believe that for historical reasons the Czech Republic should be held to a less stringent standard than other countries, say the Netherlands”); SwembAlt AB v. Republic of Latvia, Award (UNCITRAL Arb. Trib. Oct. 23, 2000), in 2004 STOCKHOLM ARB. REP. 97 (level of development not considered); Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008) (same). For a discussion of the influence of the host state’s stage of development on the fair and equitable treatment standard, see Nick Gallus, The Influence of the Host State’s Level of Development on International Investment Treaty Standards of Protection, 6 J. WORLD INVESTMENT & TRADE 711 (2005). It is worth noting, too, that in the only arbitration addressing the question of whether the customary international law minimum standard of treatment of aliens differs between countries, the tribunal in Glamis Gold, Ltd. v. United States, Award (NAFTA Ch. 11 Arb. Trib. June 8, 2009), at http://www.state.gov/s/l/c10986.htm, held that it does not.

* The views expressed here are those of the author and do not necessarily reflect the views of the government of Canada.

1 129 S.Ct. 1732 (2009).
of Defense’s appeal of a decision on remand by the Court of Appeals for the Ninth Circuit:

first, whether the Ninth Circuit was correct that the assets in which the ministry held an interest were the “blocked assets of a [a] terrorist party” such that Elahi could attach them under section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), and second, whether Elahi was prevented, in any case, from attaching the assets because he had waived his right to seek attachment after having received a pro rata payment of $2.3 million from a government compensation program created by the Victims of Trafficking and Violence Protection Act of 2000 (VPA). The Supreme Court reversed the Ninth Circuit on both questions, holding that the assets were not blocked and that Elahi had waived his right to attach.

The decision in Elahi represents the second time that Dariush Elahi’s dispute with Iran’s Ministry of Defense reached the Supreme Court. The origins of this appeal lie in Elahi’s efforts to enforce the default judgment of $11.7 million in compensatory damages and $300 million in punitive damages that he won in a wrongful death action against Iran for its responsibility in assassinating his brother, Cyrus Elahi, in Paris in 1990. Like most such claims, that of Elahi had weathered years of turbulent legislative sea changes caused by the three branches’ struggle to shape this sensitive area of law. Unlike most such suits, however, which are often no more than “exercises of judicial therapy,” Elahi located Iranian assets in U.S. jurisdiction to attach: the $2.8 judgment (Cubic judgment) that Iran had obtained in U.S. district court after Cubic Defense Systems failed to pay the damages that an International Chamber of Commerce arbitral tribunal had awarded Iran for the company’s breach of a 1977 contract between it and the ministry’s predecessor for the sale and service of a missile system, the Air Combat Maneuvering Range. The performance of that contract had been interrupted by the outbreak of the Iranian Revolution and by the hostage crisis at the American embassy (pp. 1735–38).

The revolution and the seizure of fifty-two hostages at the U.S. embassy in Tehran in November 1979 led President Jimmy Carter to issue executive orders blocking the export of a substantial number of weapons and other technology, including the Air Combat Maneuvering Range, supplied to Iran by the United States and private American contractors (p. 1735). Most of these assets, excluding military and dual-use items, remained “blocked” until January 1981, when the two governments reached an agreement, the Algiers Accords, that ended the hostage crisis. Under the Accords the United States pledged to “restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979.” Included in this context was a promise to “arrange, subject to the provisions of U.S. law applicable prior

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2 Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., 495 F.3d 1024 (9th Cir. 2007).
7 W. Michael Reisman & Monica Hakimi, 2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism, 54 ALA. L. REV. 561, 573 (2003). In fact, most of over $19 billion in damages remains uncollected. See ELSEA, supra note 6, at 2 (noting scarcity of assets and executive branch opposition to attachment of frozen assets and diplomatic property).
to November 4, 1979, for the transfer of all Iranian properties" back to Iran (p. 1736). Shortly thereafter, the Department of the Treasury issued a general license authorizing "[t]ransactions involving property in which Iran . . . has an interest' where '[t]he property comes within the jurisdiction of the United States . . . after January 19, 1981, or . . . the interest in the property . . . arises’ ” after that same date (id.).

The Algiers Accords also transferred all claims filed in United States courts by Iran against the United States and the private contractors to the jurisdiction of the Iran-U.S. Claims Tribunal (Tribunal) (p. 1736). Iran initially pursued its complaint against Cubic at the Tribunal in two different claims, Case Nos. B61 and B66. In Case No. B61, which is still pending before the Tribunal, Iran seeks compensation in the amount of $2.2 billion from the United States for losses that Iran alleges it suffered as a result of the United States’ refusal, in violation of the Algiers Accords, to issue export licenses for certain (mostly, but not exclusively, military) properties that Iran claims it owned and that were located in the United States when the Accords entered into force. The Tribunal dismissed Case No. B66 years ago because it lacks jurisdiction over claims filed by a sovereign against a private entity like Cubic—which prompted Iran to pursue its claims against Cubic in International Chamber of Commerce arbitration (pp. 1736-37).

The first issue addressed by the Supreme Court in Elahi was whether the property that Elahi sought to attach was a “blocked asset” under the terms of the TRIA. In a majority opinion by Justice Breyer, the Court concluded that the asset in which Iran held an interest—the Cubic judgment—was not “blocked” at the time of the Ninth Circuit’s decision (pp. 1738–40). The Court’s task on the blocking issue was simplified by the lack of controversy: neither of the parties defended the Ninth Circuit’s conclusion that the executive branch’s “unblocking” orders following the resolution of the hostage crisis had no impact on the Air Combat Maneuvering Range, with the consequence that it remained a “blocked asset” (pp. 1738–39). The Supreme Court took the view that in the language of TRIA, the “property in which Iran . . . has an interest” was not the Air Combat Maneuvering Range itself, but the $2.8 million Cubic judgment, in which Iran’s interests arose only sometime after January 19, 1981, thus putting it beyond the scope of the initial blocking orders (pp. 1739–40). After determining that under the VPA’s compensation scheme, Elahi had actually waived any future rights to attach Iranian assets “at issue” before an international tribunal, the Court declined to address the United States’ further contention, disputed by Iran, that the Cubic judgment had subsequently been blocked by the State Department’s 2007 designation of certain ministry components as proliferators of weapons of mass destruction (p. 1740).

The second issue before the Court—Elahi’s purported waiver under the amended provisions of the VPA—proved much more controversial. As it had in the Ninth Circuit, the waiver issue split the Court, with the consequence that three justices dissented. In 2000, Congress enacted the VPA, which offers compensation to certain individuals, which would include Elahi, who hold terrorism-related judgments against a “terrorist party.” Section 2002(a)(2)(D) of the act requires those who receive compensation to relinquish “all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal” (emphasis added). The majority reversed the Ninth Circuit’s determination, holding (along the same lines as Judge Fisher’s dissent in
the Ninth Circuit’s remand decision)\(^8\) that Elahi had waived his rights because, under the language of the VPA, Iran’s interest in the Cubic judgment was “property that is at issue” in Case No. B61; in particular, the disagreement between the United States and Iran regarding the availability of the Cubic judgment as a setoff against any potential U.S. liability put the Cubic judgment “at issue” in that case (p. 1742).

In so concluding, the majority dispensed with Elahi’s argument that the judgment did not appear on a list of property contained in Iran’s statement of claim in Case No. B61 and that it was not “the subject of any other claim before the Tribunal” (p. 1742). The majority noted that nothing about the judgment—its validity, ownership, or status following the U.S. blocking orders—was in dispute between the governments, with the consequence that “the judgment is not ‘at issue’ in any of these senses” (id.). The majority reasoned, however, that the determinative question was “whether, for purposes of the VPA, a judgment can nevertheless be ‘at issue’ before the Tribunal even when it will not be suspended or modified by the Tribunal and when it is not claimed by Iran from the United States” (id.). The majority noted that its conclusion was buttressed by the VPA’s simultaneous aims of compensating victims and preserving such property for use by the United States to satisfy judgments against it (p. 1743).

Under this analysis, the majority first confirmed that a “significant dispute” existed in Case No. B61 about the Cubic judgment’s availability as a setoff—which conflict, it concluded, sufficiently placed the property “at issue” as that term is typically defined (that is, “under dispute” or “in question,” according to Black’s Law Dictionary) (p. 1742). That conclusion, noted the majority, was reinforced by the statute’s plain meaning, which was more inclusive than Elahi suggested: under the VPA, “property at issue” includes not only property that is “at issue in a claim” in the sense that it is “the subject of a claim,” as Elahi argued, but also property “that is the subject of awards rendered by such a tribunal” (pp. 1742–43, quoting VPA §2002(a)(2)(D)). Finally, the majority characterized the VPA’s purposes as “leaning in the direction of a broader interpretation of the words ‘at issue’ than that proposed by Elahi,” who emphasized the statute’s facilitation of victims’ efforts to receive compensation (p. 1743). According to the majority, since Congress demanded, in return for compensation, a right of subrogation and the victim’s promise not to pursue the balance of the judgment by seeking to attach property “at issue” before the Tribunal, it was clear that a further purpose of the statute was to “protect[] property that the United States might use to satisfy its potential liability to Iran”—a category that included the Cubic judgment (id.).

The majority also dispensed with several of Elahi’s other arguments, dealing most substantially with the claim that the language in TRIA §201(a)—“notwithstanding any other provision of law,” the “blocked assets” of a state “shall be subject to . . . attachment in aid of execution” (emphasis added)—was evidence that he was permitted to attach blocked assets notwithstanding the waiver provision. Elahi argued that this conclusion was itself reinforced by VPA §2002(d)(4): “[N]othing in this subsection [which contains the relinquishment provision] shall bar . . . enforcement of any” terrorism-related “judgment . . . against assets otherwise available

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\(^8\) 495 F.3d at 1037, 1038–39 (explaining that “an issue is ‘in question’ or ‘at issue’ in a dispute even if it is not the subject of a merits determination. The effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property ‘in question.’”).
under this section or under any other provision of law" (emphasis added). In response, the majority emphasized that VPA §2002(d)(5) called for the relinquishment of “all rights” to attachment, which, it noted, several appellate courts had assumed to include the right to attach blocked assets (p. 1744). In conclusion, the majority stated that, contrary to the dissent’s suggestion, “there is nothing unfair about holding Elahi to the terms of his bargain” after he received $2.3 million in government compensation funds (p. 1743).

The dissent by Justice Kennedy, joined by Justices Souter and Ginsburg, argued that the majority’s decision departed from both the plain meaning and the purpose of the VPA. Since the Tribunal cannot “affect the ownership, disposition, or control of the property the [Cubic] judgment comprises,” that judgment was relegated to “simply an extrinsic fact beyond the Claims Tribunal’s power to affect” (p. 1746). Additionally, in the dissent’s view, the Tribunal’s merely potential use of the Cubic judgment as a setoff was insufficient to put “the judgment itself at issue” (id.). In rejecting the majority’s position that the VPA had dual purposes, the dissent argued that “Congress’s primary purpose was to compensate the victims of terrorism, not to secure from those victims a relinquishment of their claims” (pp. 1747–48). Moreover, the dissent criticized the “property preserving” governmental purpose forwarded by the majority as an “imagined purpose” for which the majority did not provide any evidence “aside from the text of the relinquishment provision itself,” which the dissent, in any event, read differently from the majority. To be consistent with Congress’s “protective purposes,” the dissent urged, the waiver should not be read as a “revenue-saving” device, but as a “way to foster compliance with the Government’s international obligations” (p. 1748).

The dissent’s final argument was that because the Cubic judgment was not blocked at the time of the Ninth Circuit’s decision, it could not have been among the properties that the United States had pledged to transfer back to Iran under the Algiers Accords. The majority therefore appeared to confuse the transfer obligations, which obligate “specific action in regard to specific properties,” with a more general “obligation to pay Iran money” (p. 1748, emphasis added). In the dissent’s view, “the practical effect of the Court’s ruling is to turn the purpose of the [VPA] on its head[,] set[ing] [Elahi] back half a million dollars” rather than facilitating his quest for compensation (p. 1749).

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This decision in Elahi culminates the plaintiff’s nearly decade-long vendetta against Iran—which, despite initial promise, now has followed the plot line of most cases made possible by the 1996 amendment of the Foreign Sovereign Immunities Act9 (FSIA) by the Anti-terrorism and Effective Death Penalty Act10 (AEDPA). Following a somewhat routine default judgment against the foreign sovereign, the subsequent litigation proved “contentious, . . . leading to the perception on the part of plaintiffs that the U.S. government is their most formidable adversary.”11

All three branches of government have expended great energy in defining the scope and practical operation of foreign sovereign immunities for state sponsors of terrorism, often in

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11 ELSEA, supra note 6, at 2.
opposing directions. Congress, while mindful of the delicate foreign relations that legislating in this field can threaten to disturb, has attempted to respond to citizen demand for generous remedial schemes. The courts then apply those schemes, awarding plaintiffs substantial sums in compensatory and punitive damages. Both of these gestures toward comprehensive tort relief are countered, however, by executive branch efforts to restrict the attachment of foreign assets and to limit the enforcement of the judiciary’s judgments, whether through presidential signing statements on legislation enacted to include specific victims and cases within the FSIA exception, or through intervention in lawsuits. All of these conflicting efforts have led Congress to draft a completely new section that incorporates all of the legislative and judicially crafted partial facelifts that have been made on the state-sponsor-of-terrorism exception to sovereign immunity over the last decade. The Elahi decision, however, does not even acknowledge this broader tug-of-war between the branches—which plays no role in the Court’s interpretation of these relevant statutes.

As should be clear from both the Ninth Circuit’s and the Supreme Court’s splits over the waiver issue, reasonable minds easily can differ over both the plain meaning and purposes of the waiver provisions, but what, then, actually tipped the balance? What I suggest is that an unacknowledged force—the precedent of Dames & Moore v. Regan—haunts this decision, perhaps influencing it in ways that the majority prefers to keep obscured. In Dames & Moore, the Supreme Court affirmed once again the preeminence of the executive in the realm of foreign relations both generally and, in particular, within the specific context of ensuring that the recently signed Algiers Accords, along with the executive orders implementing the commitments therein, would be executed promptly, thereby avoiding a violation of the executive agreement in the very hour of its inception.

This source of influence on the majority’s thinking is perhaps hinted at in the brief exchange over the interpretation of “at issue”: whereas the dissent argues that a “better reading” of the expression would limit it to the “fostering [of] compliance with the Government’s international obligations” (p. 1748), the majority notes that it agrees with that sentiment but fails to see how it adds anything but “new phraseology” to the dissent’s basic argument (p. 1743). In agreeing with the dissent’s sentiment, the majority seems to suggest that it has a broader interpretation in mind than it reveals, but we cannot know for sure since it does not elaborate at all and actually dismisses the dissent’s statement. Arguably, the majority’s terseness betrays an apparent (and peculiar) reluctance to press its views more forcefully (and perhaps, ultimately more persuasively), which could have been achieved by relying upon Dames & Moore and, indeed, upon a good portion of the canon of American foreign relations law. Most notable in this regard is the Murray v. The Charming Betsy approach to statutory construction, which urges the courts, whenever possible, to avoid interpreting congressional statutes in ways that would violate international law or U.S. treaty and other

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12 See id. at 26–32; see generally Roeder v. Islamic Republic of Iran, No. 1:00CV03110 (ESG) (D.D.C. filed Dec. 29, 2000).
13 See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008) (codified at 28 U.S.C. §1605A); see also ELSEA, supra note 6, at 48–62 (describing changes effected by section 1605A, signed into law only after it addressed the concerns about its predicted negative impact on Iraq’s reconstruction efforts (which motivated the presidential veto of the first version)).
commitments. The majority’s neglect of *Dames & Moore* is especially noteworthy since the VPA, the TRIA, and the various executive orders “at issue” here implicate many of the same powers that *Dames & Moore* addressed.

The explanation for the Court’s avoidance of *Dames & Moore* perhaps may be found in *Dames & Moore* itself. In that case the Court noted that “[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns” and that the presidential power to manage and resolve claims is “integrially connected with normalizing United States’ relations with a foreign state.” These passages are instructive: while Elahi’s courtroom vendetta against Iran seems insignificant in light of the billions “at issue” between the two governments at the Tribunal, not to mention other issues in the broader arena of global politics, Elahi nonetheless figures as a potent symbol in whom both governments have taken a keen interest. Indeed, since the amendment of FSIA in 1996, Elahi’s enforcement suit is the only one of the fifty-odd terrorism-related judgments issued against Iran in which Iran has made an appearance in U.S. courts. By not drawing undue attention to *Dames & Moore*, then, the majority performs a sleight-of-hand that distracts us from this broader conflict and from the actual stakes in play here.

*Dames & Moore*’s relevance, however, was not lost on the two governments. The United States’ amicus brief argues that “[w]hereas *Dames & Moore* discussed how attachments could frustrate the President’s ability to negotiate a resolution to the hostage crisis, TRIA reflects Congress’s understanding that they can also frustrate the implementation of that resolution.” The ministry’s brief makes a similar connection, noting that “as in *Dames & Moore*, it is difficult to accept [Elahi’s] argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this ‘bargaining chip’ [that is, disputed assets] through attachments, garnishments, or similar encumbrances on property.” The ministry adds that in including the relinquishment provision, Congress wanted to prevent judgment creditors from pursuing their claims too far, lest they “actually embarrass United States’ foreign policy objectives,” including “the ultimate normalization of relations with those nations.” Given that the waiver issue was so closely contested, it is surprising that the majority did not rely on these heavy-handed, seemingly persuasive arguments emphasizing the absolute necessity of not appearing to disturb any of the Algiers Accords obligations.

The majority’s reticence serves to obscure the influence exercised not only by *Dames & Moore*, but also by an additional pair of “invisible hands”: the governments of the United States and Iran. Thus, whether the majority acknowledges it or not, it is difficult to see how this decision could have gone any other way; after all, two governments that have been locked in a modern-day “Thirty Years War” fought on multiple fronts—legal, political, and (through

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17 See ELSEA, supra note 6, at 44.


20 Appellant-Petitioner’s Brief (No. 07-615) (Sept. 8, 2008), 2007 U.S. Briefs 615 at *25.
proxies, if not directly) military—both submitted to the Court that they actually agreed on something: Elahi had waived his right to attach the Cubic judgment.

ARIEL MEYERSTEIN*

Iran–United States Claims Tribunal


United States Court of Appeals for the Ninth Circuit, April 24, 2008.

In United States v. Shi,1 the U.S. Court of Appeals for the Ninth Circuit upheld the conviction of a Chinese national for acts of violence on board a Taiwanese-owned, Seychelles-flagged, Chinese-crewed vessel in the middle of the Pacific Ocean. This remarkable case is the first prosecution brought under the statute codifying U.S. obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation2 (SUA Convention) and perhaps the only case in the world brought under that treaty.3 The court of appeals held that the Convention, which was designed to counter international terrorism, can also be applied to ordinary crimes. Shi revives and shows the flexibility of that moribund treaty at a time when an epidemic of piracy makes it especially relevant.

Shi is the first time in nearly two hundred years that a U.S. court has invoked the doctrine of universal jurisdiction over piracy,4 and it is a rare assertion by U.S. courts of universal jurisdiction over any international crime.5 Ironically, the prosecution was not for the modern human rights offenses that have become most closely associated with universal jurisdiction, but for what the Court saw as old-fashioned piracy.6 To sharpen the irony, the offense was committed with edged weapons, like piracies of old. Yet contrary to the Court’s view, it did not amount to piracy under international law.7

* The views expressed here are those of the author and do not represent the views of the Iran-U.S. Claims Tribunal or any of its members.

2 Mar. 10, 1988, 1678 UNTS 201, reprinted in 27 ILM 668 (1988) (entered into force 1992; also known as the "Rome Convention").
3 See Martin Murphy, Piracy and UNCLOS, in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM 178 (Peter Lehr ed., 2007).
5 Though not the first modern use of universal jurisdiction, it is the first use of criminal universal jurisdiction over conduct that international law makes universally cognizable. Under the Maritime Drug Law Enforcement Act, 46 U.S.C.A. §§70501–70507 (2000 & Supp. V 2005), the United States regularly prosecutes foreign drug traffickers caught on the high seas in foreign-flagged vessels with no demonstrable connection to America. See Eugene Kontorovich, Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes, 93 MINN. L. REV. 1191 (2009). However, international law does not regard drug trafficking as universally cognizable, and the United States' treatment of it as such is idiosyncratic. See id.
7 See infra text accompanying notes 21–27.