PROCEDURAL DUE PROCESS: THE DISTINCTIONS BETWEEN AMERICA AND ABROAD

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I. INTRODUCTION

The Due Process Clause of the Fifth Amendment, made applicable to each and every state within the United States of America via the Fourteenth Amendment, provides that “‘No person shall . . . be deprived of life, liberty, or property, without due process of law.’”1 The United States Supreme Court, in determining the ultimate law of the land, has held that “government action[s that] deprive[e] a person of life, liberty, or property . . . must still be implemented in a fair manner. This requirement has traditionally been referred to as ‘procedural’ due process.”2

Out of the well-informed Americans that understand the concept of procedural due process, very few realize that it is a trait that differentiates our criminal legal system from several others around the globe. In appreciating what exactly makes legal treatment of alleged criminals here in the United States different than other countries of the world, it is important to first grasp what protections are encompassed within the American concept of procedural due process, as well as the events that often precede a person’s demand to be afforded these rights. When a crime is alleged to have been committed in America, a law enforcement

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2. Salerno, 481 U.S. at 746.

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agency associated with either a state or federal executive branch of government, will detain the individual for some period of time to either investigate or eventually prosecute the person for an alleged violation of the law.

However, both substantive and procedural due process must be provided throughout the duration of prosecution for an alleged offense, beginning with an apprehension, extending throughout detention, and up until the possible ultimate result of a conviction. It is here, via substantive due process, that the Constitution forbids prosecution for violation of a law of either state or federal statute, that in “its application ‘shocks the conscience’, offends ‘a sense of justice’ or runs counter to the ‘decencies of civilized conduct.’”3 Procedural due process, however, encompasses the “requirements that the government must satisfy to constitutionally invoke such detentions.”4 The following section of this Comment will go into detail as to what procedural due process guarantees exist, so as to ensure that irrespective of citizenship, any person that is arrested or accused of a crime in America will be provided with the several guarantees and protections procedural due process provides, both before and throughout government detention. Doing so will offer an understanding of what procedural due process guarantees are commonplace in this country, while also providing a benchmark of what rights are guaranteed to all persons in providing the utmost of legal protections of anywhere in the world.

In Section III, this Comment will contrast the differences in treatment traditionally provided to those accused of a crime, with the lessened guaranteed rights that are provided to identified enemies of the state, persons suspected of terrorist activity or any other people that are dangerous in nature. “In times of war or insurrection . . . the Government may detain individuals whom [are] believe[d] to be dangerous.”5 Further, in distinguishing what few guarantees are provided to people suspected of jeopardizing the safety of society, “due process of law has never been a term of fixed and invariable content,” and those suspected of such activity are subjected to procedural due process deprivations.6

5. Salerno, 481 U.S. at 748.
6. Fed. Commc’ns Comm’n v. WJR, Goodwill Station, 337 U.S. 265, 277 (1949) (clarifying that the Due Process Clause as applied to particular individuals and groups is flexible).
Section III will further address an interpretation of what Americans believe to be the proper method of prosecuting and detaining suspected terrorists and other dangerous criminals. This will be conveyed using a series of survey results conducted by World Public Opinion, establishing what Americans think of sometimes over-depriving drawbacks of our legal system, paired with reactions to the long-controversial topic of extended due process deprivations, such as those of the Guantanamo Bay detainees.

Shifting to an international standard, Section IV will delve into the minimum procedural due process requirements recognized by the rest of the world as stipulated by international organizations, particularly the United Nations (UN). In response to the Second World War, the UN was founded and shortly thereafter, the UN created the Universal Declaration of Human Rights (UDHR), which was established to “guarantee the rights of every individual everywhere.” Chair by Eleanor Roosevelt, widow of ex-President Franklin Delano Roosevelt, the UDHR was the first of its kind and was referred to as the International Bill of Human Rights. With Mrs. Roosevelt as the driving force of this first of its kind Declaration, in all, it was modeled by “18 members from various political, cultural and religious backgrounds” and less than two years later, it was adopted in December 1948. In this section, elaboration of the guarantees of the UDHR will entail what similarities and differences exist between America’s and the UN’s guarantees of procedural due process, that are to be provided to each and every person of the world. Doing so will establish the inference that although there are minimum guarantees of equal protection and due process under the overpowering laws of governments in the international scheme, there are long-lasting barriers of religion and culture that leave several countries subject to perpetually intruding upon the rights that are guaranteed to all.

Section V will elaborate on the stories of people that have suffered deprivations of procedural due process while arrested and detained during visits to countries other than their own. With the aid of National Geographic and other media sources, several of these stories have been documented, plastered throughout international news, and reaffirm a need for an international recognition of inalienable protections from particularly harsh legal systems worldwide. However, although the United

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8. Id.
States allows some alleged criminals to be detained without being afforded due process, countries discussed in this section, will be dissected in a manner showing that religion and tradition often makes such deprivations acceptable, even for less serious crimes that traditionally present less danger than other common severe crimes. If these subjects were actually provided the same guarantees of procedural due process that the United States or the UN demands, their unnecessary detentions may have ultimately been prevented. The detailed memoirs of these alleged international criminals help to suggest that the language and cultural barriers in existence attribute to some of the legally detached mindsets of some countries’ legal systems and their government officials hold towards international travelers. Further discussing these situations in detail suggests that if the countries examined indeed upheld the international guarantee of inalienable rights as provided by the UDHR, the procedural due process guarantees practiced in the United States may not be recognized as one of leniency, but instead of fairness and justice.

As a whole, by providing a perspective on the minimum protections from the laws that are in effect in the United States, this Comment will highlight some unnecessary consequences suffered by alleged criminals while detained abroad, that were not afforded the inalienable rights that are thoroughly intertwined throughout the UDHR and United States Constitution that the UDHR is modeled after. Further, as a country that has its history rooted in providing the same protections to all persons irrespective of differing characteristics, it is clear that there can never be too many legal protections offered from an all-powerful government. The legal guarantees that are afforded to nearly all those that step foot in this country make it clear that they are in fact not futile, but rather there is a core issue of the governmental tendency to abuse the power of its laws, the exact abuse that the framers of the Constitution sought to prevent.

II. WHAT DOES PROCEDURAL DUE PROCESS GUARANTEE?

Seated at the heart of procedural due process is a person’s “opportunity to be heard ‘at a meaningful time and in a meaningful manner’” as well as notice of the accusations against him or her. The due process analysis first considers whether there was some “liberty or property interest of which a person has been deprived, and if so . . . whether the pro-

/channel/locked-up-abroad/ (last visited Dec. 26, 2014) (providing examples of National Geographic’s coverage of stories).
procedures followed by the state were constitutionally sufficient.\textsuperscript{11} In this context, it is a person’s liberty, or bodily integrity, that must not be deprived without substantial justification.\textsuperscript{12} Justification is required to deprive personal liberty because the ability to move freely is paramount to the nature of an individual; the government can only deprive an accused’s status as a freely moving individual when the loss suffered is proportionate to the injury to be prevented, as well as the means used by the government to effectuate the deprivation.\textsuperscript{13}

Procedural due process can only be deprived from a person in extraordinary circumstances when certain procedures have been followed, and there has not been an abuse of governmental power.\textsuperscript{14} However, it is clear that no matter how grave the circumstances or how important the government’s interest, a person cannot be deprived of their protected interest of liberty before a hearing, thus providing an opportunity for the accused to be heard.\textsuperscript{15} Yet, similar to many of the intricacies and open interpretation of the Constitution, there is murkiness as to what exactly is meant by liberty. As discussed in Board of Regents State Colleges v. Roth, liberty is:

\begin{quote}
[\textit{A}mong the (g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . Without doubt, \textit{liberty} denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for free people, there can be no doubt that the meaning of liberty must be broad indeed.\textsuperscript{16}
\end{quote}

As the Supreme Court indicated, there is no rigid definition for the meaning of liberty; nor does the Court suggest that liberty is properly defined today as it will be one hundred years from now. What it does indicate rather, is that it is difficult to gauge the meaning of a word that was intentionally written to have a constantly evolving application; but the

\begin{itemize}
\item\textsuperscript{11} Swarthout v. Cooke, 131 S. Ct. 859, 861 (2011).
\item\textsuperscript{12} Wash. v. Glucksberg, 521 U.S. 702, 720 (1997).
\item\textsuperscript{14} See Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989).
\item\textsuperscript{15} James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (citing U.S. v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993)).
\item\textsuperscript{16} Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972) (internal quotation marks omitted).
\end{itemize}
concept of guaranteed liberty was not intended to provide infinite protections and safeguards.\textsuperscript{17} Although the Due Process Clause must provide the accused an opportunity to mount a meaningful defense before any final deprivation of liberty or property, “the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy.”\textsuperscript{18} Yet, it is clear that notwithstanding exceptions, “The procedural component of the Due Process Clause is intended to impose constraints on governmental decisions which deprive individuals of liberty or property interests.”\textsuperscript{19}

It must be recognized that the accused’s opportunity to be heard and notified of accusations before a deprivation of liberty occurs, reflects the principle that “fairness can rarely be obtained by secret, one-sided determination of facts . . . and no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”\textsuperscript{20} By allowing the accused to fairly confront his accuser, it comports with traditional justice and ensures him an opportunity to be fairly represented, rather than allowing the government to determine a person’s fate simultaneously with an accusation of violating the law, thus unfairly forcing the consequences that follow from such an allegation. The Constitution would not have given minimum protections to the people from government encroachment, if there were not also limits in place as to what was prohibited of government actions throughout his detention.

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual’s possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. “[The Supreme Court does not embrace] the general proposition that a wrong may be done if it can be undone.”\textsuperscript{21}

\textsuperscript{17} Id. at 570.
\textsuperscript{21} Id. at 81–82 (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972)).
This notion also reinforces the context of the Fourth Amendment of the Constitution, in which the people’s right to be secure in their persons, houses and effects against unreasonable searches and seizures shall not be violated.22 Thus, procedural due process goes further to effectuate the goal of the Fourth Amendment because here, it is the exact sort of either temporary or permanent deprivation of liberty and or property that is prohibited by the text of the Constitution. The government must be deterred from conducting general seizures without a basis of probable cause that a crime has been committed.23 As such, the Fourth Amendment goes so far as “to protect liberty and privacy from arbitrary and oppressive interference by government officials.”24 These principles of protection extend to brief detentions, mere questioning and restraint of persons against their will by government officials, and go so far as to prevent the government from using its enigma as a powerful figure to deprive people of their constitutionally protected freedoms.25

The Constitution has made it clear that without affording the accused a meaningful opportunity to fairly defend oneself of the allegations against him, the judgment or sentence that he or she is to serve as a consequence cannot be valid.26 Judgment rendered without the opportunity to be heard “wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.”27 At the hearing that the canons of procedural due process guarantee the accused, in order for the hearing to be justly administered, the accused must also be provided the opportunity to have an attorney to aid in his or her defense.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.28

Further, the Sixth Amendment of the Constitution assures “In all

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22. See U.S. CONST. amend. IV.
27. Id. (internal quotation marks omitted).
28. Id. at 68–69.
criminal prosecutions, the accused shall enjoy the . . . Assistance of Counsel for his defense,” but the importance of this guarantee has become clearer with modern interpretations of the law. 29 By providing the accused an opportunity to defend his case with the aid of counsel, one is assured the ability to effectively confront witnesses, challenge presentations of evidence, and make relevant objections. Doing so with counsel’s expertise allows the accused his or her opportunity to be heard, as emphasized by procedural due process, to be both effective and meaningful towards benefitting his or her cause. However, without such assistance of counsel, laypersons would again, often be subject to the consequences of the accusation against them because he or she cannot mount a meaningful defense against a trained and skilled prosecutor that holds the task of acquiring convictions. This concept strikes the same cord, with likely the same result, as if people were subject to face a penalty for a crime accused without first having been given the opportunity to be heard on the merits. If in any case, civil or criminal, a court were to refuse to hear a party via counsel, it would be a deprivation of the accused’s constitutionally ensured right to be heard, and he or she would be further deprived of procedural due process of law. 30 “The right of a person accused of crime to have counsel [is] perhaps his most important privilege.” 31

Procedural due process thus provides the accused with a fair opportunity to tell his or her side of the story before the consequence is meted out for a violation of the law, which may or may not have actually occurred. In these instances, being afforded an opportunity to be heard and provided with counsel are the clearest concepts to understand for obvious reasons; when the accused is not given a chance to be heard, the judiciary will base the accused’s punishment solely from one side of the story as presented to it by law enforcement. Additionally, by depriving the defendant of the ability to effectively be heard or notified of the charges against him significantly decreases his or her opportunity and ability to mount a defense against the accusations, and he is effectively stuck between a rock and a hard place. Furthermore, depriving the accused assistance of counsel at their hearing or trial would likely result in the same conclusion. There is little benefit the accused may have that would come of receiving a hearing if he or she is not also provided with the expertise that an attorney is likely to provide. In a proceeding that is as intimidating as it is complex, even an intelligent and knowledgeable layman

29. U.S. CONST. amend. VI.
31. Id. at 70.
would surely not receive a legally just outcome if he were to be forced to defend himself against a skilled and effective prosecutor trained in the law. Generally, these types of proceedings are avoided with caution when there is an important interest of the accused at stake. But, there is in fact leeway in situations when the accused will not be afforded the full protections of procedural due process of law. In instances when there is not a constitutionally guarded interest of the accused at stake (such as life, liberty, property), procedural due process protections will be lesser than they otherwise would be if grave consequences were likely to be suffered.

III. WHEN IS PROCEDURAL DUE PROCESS WITHHELD?

The maximum protections of procedural due process under American jurisprudence will only be provided in instances that are likely to produce an unfair outcome to the accused. However, in scenarios when it is uncertain what due process protections should be provided, a balancing test must be used in order to determine if the procedure followed by the judiciary justifies the ends sought to treat the accused fairly under the law. A determination must be made by weighing the following three factors before any right of fundamentally fair treatment under the law is deprived of a person: (1) the individual’s private interest to be affected by government action; (2) the risk of unnecessary deprivation of the individual’s interest that will be affected by government action; and (3) the government’s interest that would be affected by additional or lesser procedural requirements.32 This test is particularly applicable in dealing with dangerous or repeat offenders of the law. There is “no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings.”33 Additionally, “the government may detain mentally unstable individuals who present a danger to the public . . . and dangerous defendants who become incompetent to stand trial.”34 In cases such as these, it is the government’s reasoning that the added safety benefits which society gains as a whole, are of more import than the deprivation of any private interest suffered by the individually dangerous offender.

34. Id. at 748–49 (citing Addington v. Tex., 441 U.S. 418 (1979); Jackson v. Ind., 406 U.S. 715, 731–39 (1972)).
A rigid application of the protections that procedural due process provides has generally not been practical, because “the requirements of due process are flexible and call for such procedural protections as the particular situation demands.” In applying the first factor of the balancing test, there must be some atypical hardship suffered by the individual that has been accused that would give rise to the maximum protections that procedural due process has to offer. Such an atypical hardship must be a loss of a protected liberty interest that holds great enough weight to in turn, justify a need for greater due process protections. These alleged hardships do not apply to state-created liberty interests; but rather only the private liberty interests protected by the Constitution are of substantial weight to trigger the balancing test.

It is certain that the accused will almost always claim, out of self-interest, that he or she has a higher stake in exercising the personal protections of procedural due process that the Constitution provides, than any stake the government has in prosecuting him on the matter. When the first factor of the balancing test is satisfied because an important private interest of the accused is in jeopardy by government action, the remaining two factors seek to determine if in fact the government is justified in depriving a person of their protections under the law, as guaranteed to them by the Due Process Clause. This must be true because as the second factor suggests, the government must seek to avoid erroneous deprivations of an individual’s personal liberties by harsh government action, which would otherwise stem from unsubstantiated accusations of law enforcement. Erroneous deprivations of this type can be avoided by providing to the accused the guarantee that remains central to procedural due process: “Parties whose rights are to be affected are entitled to be heard.” Thus, this second factor of the balancing test guarantees procedural due process to the accused by ensuring that the criminal justice system provides the opportunity to be heard prior to either a permanent or temporary deprivation of liberty, to “further reduce[] the pos-

36. Id. at 225.
38. Wilkinson, 545 U.S. at 225 (citing Sandin v. Conner, 515 U.S. 472 (1995)) (establishing that state-created liberty interests, as discussed in Sandin, do not trigger Mathews balancing test so as to provide maximum constitutional protections of procedural due process).
39. Id. at 226 (quoting Baldwin v. Hale, 1 Wall. 223, 233 (1864)).
sibility of an erroneous deprivation.” Since procedural due process is not fixed, “its root requirement is that an individual be given an opportunity for a hearing before he is deprived of any significant liberty interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing.”

The third and perhaps most controversial factor of the balancing test deals with the inevitable circumstance of what governmental resources are at stake that will be lost or gained by affording or depriving the accused of his or her constitutional guarantees. Here, “[t]he problem of scarce resources is another component” that determines if the ends to conserve assets of economic and working capital of the judicial and executive branches, in fact justify a deprivation of the accused’s liberty, by withholding the maximum protections of procedural due process. By proper application of this balancing test in the American criminal justice system, both American and non-American citizens are afforded the appropriate protections of procedural due process, only when there is a possible deprivation of important personal liberties. Among others, deprivations of the following liberties are considered of adequate weight to afford procedural due process protections: freedom from incarceration, freedom to travel, and the freedom to not be subjected to physical violence or forced medical treatment. Thusly, procedural due process in action focuses on proactivity and prohibits even a temporary deprivation of an important individual liberty before the accused has the ability to be heard on the matter. As a distinguishing characteristic, these protections will only be provided for citizens of and visitors to the United States, so long as the accused has not given the government any inclination to believe that there is some reason that the balancing test should not apply by default. This would thus cause the accused to be afforded a much more stringent and less-forgiving set of protections from the law.

In the international venue, the President holds the distinct power to justify government action to deprive suspected terrorists, also dubbed as enemy combatants, “the constitutional rights to which they otherwise are entitled. Any such assertion of power by the government is rightfully

40. Id.
42. Wilkinson, 545 U.S. at 228.
viewed with a high degree of skepticism,"\textsuperscript{44} and thus the balancing test traditionally used in determining whether procedural due process guarantees in the criminal justice process, does not apply. Although the complexities of whether a person is deemed to be deserving of the particularized legal treatment as an enemy combatant is not within the scope of this Comment, what appears more pertinent are the actual deprivations of procedural due process suffered by those that are determined to fall within this narrow category and are consequentially deprived of procedural due process guarantees. Particularly, an enemy combatant detention involves the indefinite deprivation of physical liberty, and naturally flowing from such a detention are other egregious deprivations of constitutionally protected guarantees. “An enemy combatant detention deprives the [person] of the opportunity to contest the allegations against him in a criminal proceeding,” unless other extraordinary circumstances exist.\textsuperscript{45} It is the “opportunity to be heard at a meaningful time and in a meaningful manner” that American jurisprudence has determined to be the emphasis of the guarantees of procedural due process provided the accused.\textsuperscript{46}

However, in 2004, the United States Supreme Court stipulated in \textit{Hamdi v. Rumsfeld} that enemy combatants shall still receive the opportunity to contest his or her detention; but, the status as an enemy combatant will not entitle the accused to the same treatment as would typically be provided in criminal prosecution proceedings within the United States.\textsuperscript{47} In \textit{Hamdi}, the majority opinion of the Supreme Court rejected the dissent’s claim that criminal prosecution is the only constitutionally permissible procedure for dealing with enemy combatants in military custody, but instead further concluded that the indictment and prosecutorial process of these persons shall remain flexible.\textsuperscript{48} Thus in determining the treatment of alleged enemy combatants, Justice O’Connor delivered the majority opinion of the Court, making it permissible to deprive these persons of the rights to “a grand jury indictment, to a speedy and public trial, to the assistance of counsel, [and] to confront the government’s witnesses.”\textsuperscript{49} As a practical matter, indefinite incarceration in executive federal custody also attributes to deprivations of other constitutional liberties, such as the right to vote, First Amendment free speech rights to

\begin{itemize}
\item \textsuperscript{44} Priester, \textit{supra} note 4, at 80.
\item \textsuperscript{45} \textit{Id.} at 92.
\item \textsuperscript{46} Clark v. Kan. City Mo. Sch. Dist., 375 F.3d 698, 702 (8th Cir. 2004) (internal quotation marks omitted).
\item \textsuperscript{47} \textit{Hamdi} v. Rumsfeld, 542 U.S. 507 (2004).
\item \textsuperscript{48} \textit{Id.} at 558–61.
\item \textsuperscript{49} Priester, \textit{supra} note 4, at 93.
\end{itemize}
reach out to family members, and detained enemy combatants “are denied an opportunity to invoke the Fifth Amendment privilege against self-incrimination.”\textsuperscript{50} Thus, in reaction to the September 11 terrorist attacks, it is truly unfortunate that solely a designation as an enemy combatant, irrespective of American or non-American citizenship, will deprive the accused of constitutionally protected liberties and procedural due process guarantees which would otherwise be provided.

Yet, the bulk of the government’s reasoning “for detaining persons as enemy combatants is to interrogate them for information about terrorist activities.”\textsuperscript{51} The Due Process Clause was enacted to protect persons from the government’s invulnerability to the law, yet it unfortunately does not extend to protect enemy combatants in federal custody in the same manner that people are traditionally treated in the American criminal justice process. In the same way that the discussed procedural due process guarantees are deprived to those subjected to enemy combatant detentions, there would be a logical inference to be made that there exists a possibility that other constitutional rights are also infringed during these types of detentions, such as the right to be free from torture or coercive interrogation.\textsuperscript{52} Even though it is fact that incriminating information acquired via torture or deceit during any detention, either military or civilian, cannot be used as evidence against the detainee in a legal proceeding,\textsuperscript{53} there is a scintilla of truth that these tactics have been used at military facilities to instead gather information about possible future terrorist activities.\textsuperscript{54} Irrespective of whether these barbaric practices still exist “it is clear that a citizen detained as an enemy combatant has far less rights against government interrogation than a person questioned by civilian law enforcement.”\textsuperscript{55}

Contrary to what the United States government finds to be important protocol to ensure the safety of its citizens, a string of polls released in July 2006, revealed that irrespective of the accusations mounted against enemy combatants, “the American people support [providing] due-process and human rights for terrorism suspects.”\textsuperscript{56} An overwhelm-

\textsuperscript{50} Id. at 93–94.
\textsuperscript{51} Id. at 93.
\textsuperscript{52} See U.S. CONST. amend. VIII.
\textsuperscript{53} See U.S. CONST. amend. V.
\textsuperscript{55} Priester, supra note 4, at 94.
\textsuperscript{56} Americans Support Full Due-Process Rights for Terrorism Suspects, WORLD PUB. OP. (Jul. 17, 2006), http://www.worldpublicopinion.org/pipa/articles/home_page/228.php
ing majority of polled Americans believed that terrorism suspects held indefinitely under the executive power of the President should receive the same legal treatment as all others, either American or non-American, that are accused of a crime and arrested.\(^{57}\) This translates to more than seventy percent of those polled believing that there should not be particularized treatment of enemy combatants, acts that deprive those accused of the rights to receive assistance of counsel, to be free from self-incrimination, as well as freedom from torture.\(^{58}\) “Americans, whether Republican or Democrat, show high levels of support for giving detainees due-process protections.”\(^{59}\) Another aspect of the poll asked whether Americans think that the United States government should follow the UN Commission on Human Rights, regarding the status of enemy combatant detentions at Guantanamo Bay. Here, sixty-one percent of those polled stated that the United States should in fact change its procedures to follow UN international law protocol.\(^{60}\) However, with the United States as the driving force to establish the UN, it seems rather stereotypical that the United States does not follow the same guidelines of the worldwide organization it sought to establish, in dealing with its alleged enemy combatant detentions. The reason that indefinite deprivations of procedural due process are continuously able to constitutionally occur at Guantanamo Bay and Abu Ghraib-like military facilities, is due to the fact that these due process deprivations typically occur outside the borders of the United States, and are thought to be immune to United States jurisdiction.\(^{61}\)

Determinations gathered from these polls show that Americans truly disagree with the lack of due process protections provided to alleged terrorists. This determination stands for the fact that Americans believe that even a suspected terrorist, whose goal is to commit widespread panic upon civilians everywhere, should be afforded the benefits of American and international due process protections from the law when accusations are mounted against them.\(^{62}\) It is easy to see why Americans are sympathetic towards the mistreatment and misappropriation of legal rights that our government gears towards those that are alleged enemy combatants, for

\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{62}\) WORLD PUB. OP., supra note 56.
the simple fact that nobody wants to be in a position where their pleas of innocence go unheard. The criminal justice system in the United States is nearly unmatched in its offered protections from its legal processes that are in place to fairly administer justice. Yet, the United States guarantees these protections to not only its own citizens, but visitors from countries abroad are afforded the same protections of procedural due process. The right to a hearing, the ability to confront evidence against the accused, and the ability to have counsel present to assist in mounting a defense of innocence, are all guarantees that the Constitution has laid down as a list of minimum protections that must be afforded if the accused faces a possible deprivation of a protected liberty interest. Perhaps it is empathy that makes Americans believe that all persons were created equal. Maybe it is even the same feeling that drives those concerned in believing that all persons should be provided fair and equal protection from the laws. Yet what is certain is the fact that the legal field is a practice of exactitudes, and if not carried out precisely, there is chance that one’s ability to enjoy their personal liberties could escape them. In such a system, it is clear that in the unfortunate happenstance they themselves are accused of a crime, all persons would likely demand to be provided the maximum opportunity to prove their own innocence. Yet, although there is great variance in the procedures provided to enemy combatants, irrespective of the “nature of the case, . . . depending upon the importance of the interests involved and the nature of the subsequent proceedings . . . the Court has traditionally insisted that, whatever its form, opportunity for th[e] hearing must be provided before the deprivation at issue takes effect.”

IV. THE INTERNATIONAL SCHEME OF PROCEDURAL DUE PROCESS

The UN’s UDHR provides the minimum standards of protection due to any person accused of a violation of international or state law, that is to say if a state where the accused is detained is in fact a signatory of the UDHR. Several of the guarantees of the UDHR form a backbone of international law, so as to provide the accused with notice of the charges against him, assistance of counsel, and an ability to be heard by an impartial tribunal at a fair hearing. “[T]he Human Rights Commission [of the UN] composed two binding treaties to memorialize the non-binding

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64. International Law Guarantees the Right to Due Process of Law; DETENTION WATCH NETWORK (2012), http://www.detentionwatchnetwork.org/dueprocess.
principles of the Universal Declaration. The first, the ICCPR [International Covenant on Civil and Political Rights], embodied . . . the rights to life, a fair trial, and an effective remedy.”\(^65\) When the United States became a party to the ICCPR in 1992, the United States Senate stipulated that although it was signing the international treaty, it proactively reserved the right to modify the application and enforceability of certain provisions of the treaty within the United States.\(^66\) This meant that where the United States saw fit, it could offer lesser protections than what the ICCPR provided, and instead implement its own interpretations of what human civil rights were deserved to its accused. The provisions of the ICCPR that the United States withheld the ability to enforce applied to protections of law that were already provided for in the Constitution, including the right to free speech and the meaning of cruel and unusual punishment.\(^67\) The ICCPR contains a provision that all signatories must adopt all measures of the obligation and “provide a remedy for the violation of any of the rights guaranteed by the ICCPR,” and there are limited inconsistencies between the provisions of international law and the American criminal justice system regarding the detention of alleged criminals.\(^68\)

As far as procedural due process offered to the accused is concerned, the United States and the ICCPR implemented by the UN are rather aligned in its objectives. Particularly applying to this Comment, are the notions of procedural due process that must be provided to all persons by countries that are signatories to the treaty obligation. Article 9 of the ICCPR directly appertains to this subject of procedural due process by assuring prohibition against arbitrary detention, a requirement of proper notice to the accused of the crimes alleged, and the right to judicial review without unnecessary delay.\(^69\)

As made certainly clear by the preceding sections of this Comment, the right of personal liberty is never absolute. Yet, the ICCPR demands that “[n]o one shall be subjected to arbitrary arrest,” so as to say that the

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66. Id. at 577.


68. Kessler, supra note 65, at 578.

countries signing the Declaration shall not condone unsubstantiated detentions for alleged violations of the law.\textsuperscript{70} This requirement is parallel to the prerequisite requirement for probable cause in the United States as applying to all arrests.\textsuperscript{71} Article 9 of the ICCPR further states that all persons shall be promptly and properly informed of the charges against him, while also suggesting that if a language barrier exists between the accuser and the accused, an interpreter must be provided to ensure fair representation.\textsuperscript{72} Further guarantees are made to ensure that there shall be a fair trial on the merits as well as providing the accused an opportunity to be released while awaiting trial, if surrounding circumstances allow.\textsuperscript{73} Thus, the Human Rights Committee established by the ICCPR “has not established a bright-line rule, but generally . . . any detention longer than forty-eight hours, without access to judicial or other review, violates Article 9(4).”\textsuperscript{74}

By observing the requirements of minimum guarantees of procedural due process that are commanded in the international scheme, it appears as though the provisions of the ICCPR that apply to this Comment are closely in line with the guarantees that are given to the criminally accused in the United States. However, the application and enforcement of nearly the same guarantees offered by both American and international law leave out the fact that the international version of these guarantees are implemented by the UN in a significantly different manner. The international scheme of enforcing the laws as stipulated by the UN’s Human Rights Committee takes a rather sharp departure from what the United States follows and recognizes from the contents of its Constitution. Rather than acting as a set of limits on government action, as does the Constitution, the international system of laws recognized by the UN ensure that the states take positive and active measures to ensure the guaranteed practice of the international laws set forth. For example, in the international arena, “the right to be free from torture . . . requires that states institute systemic preventive measures against official misconduct—training, monitoring, and sanctions.”\textsuperscript{75} The American equivalent of this measure solely rests in the Eighth Amendment, by stating that

\textsuperscript{70} Id. at art. 9(1).
\textsuperscript{72} ICCPR, supra note 69, at art. 9(2); see also id. at art. 14(3)(f).
\textsuperscript{73} ICCPR, supra note 69, at art. 9(3)–(4).
\textsuperscript{74} Kessler, supra note 65, at 582.
cruel and unusual punishments shall not be inflicted as a post-conviction remedy.\textsuperscript{76} To be noted from this highlighted difference is the fact that the United States Constitution, and thus the judiciary’s application of the laws that are written by the legislature, are conducted in a preventative manner delineating what the government may not do in executing its powers. Contrastingly, the international model composed by the UN acts as an active set of guidelines that “binds states not only to ‘respect’ but to also ‘ensure’ the enjoyment” of the rights it provides to the people.\textsuperscript{77}

Yet, guarantees of procedural due process provisions within the ICCPR seem to be over encompassing and not subject to exceptions as they are applied in the United States. For example, Article 9(3) of the ICCPR requires that “release may be subject to guarantees to appear for trial.”\textsuperscript{78} As shown in the previous section, procedural due process may be lawfully deprived of those that achieve enemy combatant status or under other circumstances where interests of the government are of more import than providing the accused with the full ambit of procedural due process protections. With the aid of United States Supreme Court decisions, it has been established that a person representing a grave threat to society, whether a United States citizen or not, procedural due process is a concept that must remain fluid and does not carry the same weight for all those that demand it.\textsuperscript{79} The UN does not provide, however, a plain reading of the same intricacies that the United States takes in depriving protections of procedural due process from suspected enemy combatants, in an effort to ensure the safety of its citizens:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody.\textsuperscript{80}

By plainly stating that \textit{anyone} arrested is provided with the procedural due process guarantees of either release or a speedy trial, and otherwise not subject to being held indefinitely without proper cause, the ICCPR clearly does not take the same stance as the United States. Rather, the international model of procedural due process aims to provide to

\textsuperscript{76} Id. at 65; \textit{see also} U.S. CONST. amend. VIII.

\textsuperscript{77} Copelon, \textit{supra} note 75, at 65.

\textsuperscript{78} ICCPR, \textit{supra} note 69, at art. 9(3).


\textsuperscript{80} ICCPR, \textit{supra} note 69, at art. 9(3).
all those accused of a crime enforceable under international law the full protections from the law that procedural due process is meant to provide, no matter the circumstances. In a perfect world, countries that have agreed to provide such a broad guarantee of due process to the accused would provide it on their own accord. But, it is clearly an epidemic that people accused of a crime in countries outside the United States and thus not deemed as a potential terrorist, are indefinitely deprived of these rights that the UDHR so clearly casts forth. However, it would be blind to say that the United States does not hold individuals suspected of a crime without providing them due process, nor would it be accurate to claim that the United States is a model country in obeying the international guarantees provided to the accused. Thus, this leaves the following quandary open to interpretation: Is it more appropriate to only partly abide by an all-inclusive declaration of human rights (as does the United States) or should countries openly agree to provide procedural due process to the accused to only wholly withhold it behind closed doors (such as disobedient signatories of the UDHR)?

V. PROCEDURAL DUE PROCESS DEPRIVATIONS ABROAD

The guarantees of procedural due process within the United States have become commonplace through practice and often employment. As mentioned, such guarantees, however, can be unequivocally denied to a person that is suspected of gravely dangerous activity, irrespective of whether or not the accused is a citizen of the United States. Yet, many countries throughout the world will deprive an individual of the right to be heard or access to an attorney at a fair proceeding, for much less serious offenses than what would otherwise occur in the United States. Countries that consistently deprive the accused (specifically those of foreign citizenship) of procedural due process protections for breaking the law have been recognized, because vast differences in culture suggest that crimes certainly have varying degrees of seriousness, depending where in the world the act was committed. However, some cultures have traditionally treated women or minority races unequally not only in everyday practice, but also in its criminal justice system, thus depriving them of due process.81 For example, punishment under Islamic law “is unequal and biased against women, regardless of whether they are the

victims or the perpetrators of crimes. As victims, their perpetrators often go unpunished; yet as female perpetrators they are punished to the maximum, and without due process.”

Islamic law has traditionally been interpreted as hostile towards women and those visiting from Western cultures, but only recent decades have brought such focused attention to the differences between Western and Islamic societies. As popular of a topic that abuse by laws overseas has become in recent years, there has been an influx of stories about people that have actually suffered as a result of due process deprivations while visiting a country that was not their own.

In the summer of 1993, an American by the name of Cullen Thomas bought a one-way ticket to South Korea to find a job as an English teacher. While teaching abroad, he encountered a group of other Americans that led him to believe there was money to be made from smuggling drugs from the Philippines to South Korea. Unfortunately for Cullen, after spending only seven months as a teacher abroad, he was apprehended by South Korean authorities for smuggling narcotics into the country. While in custody following his arrest, Cullen was interrogated by a man of unknown authority and—before he had the opportunity to explain his side of the story—Cullen was subjected to electrocution for no apparent purpose, other than to serve as an outside-the-lines punishment. After his first month in custody, Cullen was not provided with a lawyer to act on his behalf by the South Korean legal system. Instead, Cullen was legally isolated and left to scramble “to find a good Korean criminal lawyer, one who could speak English and explain the charges, the possible sentence, [and] whether or not parole was an option.”

After Cullen was formally notified of the charges without the help of an appointed interpreter, visitors from the American embassy gave Cullen a pamphlet, entitled Legal Problems Encountered by American Citizens in the Republic of Korea, and further notified Cullen “[w]e will not intervene. . . . We cannot get you out.” Cullen was later given a forty-two month prison sentence. He served the sentence in a cell that was

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82. Id.
84. Id.
85. Id. at 5.
86. Id.
87. Id.
88. Id.
89. Id. at 6.
90. Id.
too small for him to stand in, a bucket to relieve himself with no place to dispose of it, and often spending “three or four days in a row locked in [his] cell[] with not a second outside [of it].”\textsuperscript{91} Contrary to American and international law, South Korea did not provide Cullen an opportunity to be heard at a meaningful time or in a meaningful manner, which is the central demand that procedural due process requires. In opposition to American and international due process provisions, Cullen was deprived of his ability “to have legal assistance assigned to him, in any case where the interests of justice so require[sl],”\textsuperscript{92} as well as his international right to have an interpreter available to inform him of the charges.\textsuperscript{93} The Constitution of the Republic of Korea, however, specifically provides that “[w]hen a criminal defendant is unable to secure counsel . . . the State shall assign counsel.”\textsuperscript{94} Thus, although Cullen admitted in his memoir of being guilty for having smuggled hashish to South Korea, his doing so is no excuse to justify the deprivation of rights that international law and South Korean law require to be afforded to all persons suspected of a crime.\textsuperscript{95}

In recent decades, the international relations between Iran and the United States have generally been strained for reasons involving Iran’s nuclear program and United States military involvement throughout the Middle East, but contrasting legal treatment has also fueled tension between the two nations.\textsuperscript{96} American journalist Roxana Saberi was arrested by the Iranian government in January 2009, for allegedly spying for foreigners.\textsuperscript{97} The Iranian government initially charged Ms. Saberi for allegedly buying alcohol, but she was later accused of working as a reporter with expired credentials and she was ultimately put on trial for spying against the Iranian government and reporting the information to the United States.\textsuperscript{98} For an entire month after she was arrested, she was deprived of the ability to call home and inform her family of the situation she was

\textsuperscript{91} Id.
\textsuperscript{92} ICCPR, supra note 69, at art. 14(3)(d); see also U.S. CONST. amend. VI.
\textsuperscript{93} ICCPR, supra note 69, at art. 14(3)(f).
\textsuperscript{94} DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 12(4) (S. Kor.).
\textsuperscript{95} Thomas, supra note 83, at 4.
in. Leading up to the trial, which occurred only two months after she was charged with espionage, Roxana was coerced into making incriminating statements with promises that if she made such statements, she would ultimately be freed. Unfortunately, the exact opposite occurred; shortly after her arrest, Roxana was sentenced in April 2009, to eight years in prison, which was to be served at the infamous Evin Prison in Tehran where “beatings, torture, mock executions and brutal interrogations are the norm.” After several pleadings of the United States to Iranian President Mahmoud Ahmadinejad to be fair in the review of Roxana’s case, she was released. Yet “American officials and outside analysts . . . believe that Ms. Saberi’s arrest was politically motivated, at a time when the Obama administration [reached] out to Iran after nearly three decades of hostility.” Although reports on the exact circumstances of Ms. Saberi’s treatment while in custody were kept to a minimum, confirmed reports stated that she was coerced into giving statements to substantiate her guilt, which is clearly against all international concepts of procedural due process, as well as running contrary to the Constitution of the Islamic Republic of Iran. The Constitution of Iran states that “[c]ompelling people to give evidence, or confess or take an oath is not allowed. Such evidence or confession or oath is null and void. Any person infringing this principle is to be punished in accordance with the law.” Thus, it is fair to say that the demand set forth in Iran’s Constitution was not the basis of Ms. Saberi’s release, but rather it likely came because President Ahmadinejad sought to improve ties with the United States before his re-election and releasing her would have been in his best political interest.

An imprisonment that is arbitrary and culturally or politically motivated, offends both the American and international concepts of procedur-
al due process. It has clearly been emphasized to this point that central to the purpose of procedural due process is that the accused must be permitted to fairly confront the accusation at a fair and impartial hearing. When a person is accused of violating the law in a country that is not their own, there are even more disadvantages that come into play than the mere fact that they have lost their personal liberty. Isolated time spent away from home, atrocious prison conditions, and mental anguish certainly play a part in how the accused can be negatively and permanently impacted following their release, as was Cullen Thomas when jailed in South Korea. His story is not told from a human rights activist’s perspective, but rather from a standpoint which claims he was irreparably changed by the circumstances he faced. Out of the 167 countries that are a party to the ICCPR, the well-documented stories of this Comment feature only a glimpse of procedural due process deprivations that occur in countries that have sworn to protect the “equal and inalienable rights of all members of the human family.” Thus, the guarantees that procedural due process provides are only afforded when the accused is actually provided with the opportunity and ability to invoke such protections in the course of their prosecution under the law. These protections of international law are otherwise superfluous and irrelevant promises that cannot and do not act to provide the accused with his or her ability to effectively represent their own innocence.

VI. CONCLUSION

Procedural due process guarantees in both the United States and in the international scheme act to serve as a minimum level of protection for the accused when their recognized personal liberty as a human is at stake. When there is an accusation against a person, it is pivotal to his or her well-being that they are afforded the protections that procedural due process was founded to provide. In instances when a person is wrongfully deprived of the guaranteed protections of due process, their personal liberty is also unnecessarily deprived of them. The ability of a person to be protected from unsubstantiated violations of the law is just as important as the enforcement of the body of laws itself. There remains a reality that although a person is innocent until proven guilty, the accused must always be provided his ability to fairly and effectively maintain his

108. ICCPR, supra note 69.
innocence until he is adequately tried on the matter. In the scenario when a person is accused of a crime and is able to maintain his innocence through the protections that procedural due process provides the utmost steps have been exercised to ensure that an unnecessary conviction has not occurred.

As has occurred throughout time, procedural process is an ever-evolving concept. There are rarely two situations that are exactly alike and thus it is important that the concept of procedural due process is aptly applied to the situation that calls for it. In the United States, it is important to uphold the concept that only the personal liberties, in time, have been continuously protected by the Constitution to receive the highest degree of protections. By using a balancing test to determine society’s need to be safe compared to the need of the individual to be free from unwarranted intrusions of the criminal justice system, there is a fluid scale that reasonably allows the degree of protections of procedural due process to fluctuate with the surrounding circumstances.

On a worldwide scale, the practice of providing procedural due process should be at its highest because cultural and language differences should not jade the fact that everyone is human and thus should be offered the same set of protections from the laws that everyone is expected to follow. When the accused is deprived of due process and left to the mercy of a legal system that is not his own, there is a much higher risk for unfairness and a miscarriage of justice. Thus, by offering the same degree of protections to people from everywhere, the United States is unparalleled in its fair protection from the laws, unless there are exigent circumstances that call for different treatment.