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Campbell's Soup: Due Process Concerns in Applying the Federal Anti-Bribery Statute to Noncitizen Government Contractors Overseas

Cara Chomski†

INTRODUCTION

Federally-funded international aid and development contracting is a multibillion-dollar industry suffering from fraud, corruption, and systemic mismanagement.¹ The United States relies heavily upon local employees and third-country nationals to implement its contracting objectives overseas.² In the case of the United States Agency for International Development (USAID), local and third-country nationals outnumber United States citizen contractor employees roughly 100 to 1.³ Although the Military Extraterritorial Jurisdiction Act (MEJA)⁴ extends criminal liability to all contractors whose employment supports the mission of the Department of Defense overseas, no comparable statute exists for civilian agency contractors.⁵ As a result, employees of contractors supporting agencies such as the State

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² Id at 20 (citations omitted).

³ Id.


⁵ See Civilian Extraterritorial Jurisdiction Act of 2011, Hearing on S 1145 before the Senate Judiciary Committee, Executive Business Meeting, 112th Cong, 1st Sess (June 23, 2011) (statement of Senator Leahy), online at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=3d9031b47812de2592c3baeba601239f&wit_id=3d9031b47812de2592c3baeba601239f-0-1 (visited Sept 10, 2012) (“Leahy Statement”). Although versions of the Civilian Extraterritorial Jurisdiction Act were introduced in the House and Senate in both 2010 and 2011, all were either tabled or are awaiting committee action.
Department and USAID fall into a jurisdictional gap.\textsuperscript{6} It is uncertain whether the United States has the authority to prosecute the non-US citizen employees of civilian agency contractors for fraud, corruption, and other criminal conduct abroad.\textsuperscript{7}

Recently, federal prosecutors have begun to apply domestic criminal statutes to noncitizen contractor employees to combat corruption in overseas government contracting.\textsuperscript{8} One such statute is the Federal Anti-Bribery Statute.\textsuperscript{9} In July of 2011, the District Court for the District of Columbia heard a case involving an Australian contracts manager indicted under this statute after offering to steer $14 million in business to an Afghani construction company in exchange for a $190,000 cash bribe.\textsuperscript{10} Among other things, the district court considered the issue of what due process standard should apply to noncitizens prosecuted for criminal acts committed entirely outside of the United States and its territories.\textsuperscript{11}

Six circuit courts have considered this issue and are split into two camps. The Second, Fourth, and Ninth Circuits have held that the Due Process Clause requires a "sufficient nexus" between the defendant and the United States before a noncitizen can be haled into federal courts for acts committed abroad.\textsuperscript{12}

\begin{footnotes}
\footnote{7}{See Final Report at 30 (cited in note 1) (noting that "jurisdiction over contractors is ambiguous, legal accountability is uncertain, and a clear command-and-control structure is absent"). See also id at 157–59.}
\footnote{8}{For a list of recent convictions for corruption in Iraq following investigation by the Office of the Special Investigator General for Iraq Reconstruction (SIGIR), see Commission on Wartime Contracting in Iraq and Afghanistan, \textit{Hearing on Implementing Improvements to Defense Wartime Contracting}, 9, Appendix (Apr 25, 2011) (statement of Stuart W. Boden Jr, Office of the Special Inspector General for Iraq Reconstruction), online at http://www.wartimecontracting.gov/docs/hearing2011-04-25_testimony-Bowen.pdf (visited Sept 10, 2012) ("SIGIR Hearing"). See also, \textit{United States v Carson}, 2011 WL 5101701, *7–8 (CD Cal) (finding that whether foreign corporations should be considered an "instrumentality" of a state under the Foreign Corrupt Practices Act (FCPA) is a factual question; finding further that since the FCPA applies only to the bribery of foreign officials, instrumentalities, and government entities, expanding this to include state-sponsored corporations or corporations with significant state investment would allow the United States to prosecute commercial bribery under the FCPA); \textit{United States v Ayesh}, 762 F Supp 2d 832, 841–42 (ED Va 2011) (finding that the exercise of extraterritorial jurisdiction was proper in the instance of a Jordanian resident and United States Embassy—Baghdad employee indicted for embezzlement).}
\footnote{9}{See 18 USC § 666.}
\footnote{10}{See \textit{United States v Campbell}, 798 F Supp 2d 293, 297 (DDC 2011).}
\footnote{11}{Id at 306–08.}
\footnote{12}{US Const Amend V. See \textit{United States v Yousef}, 327 F3d 56, 111 (2d Cir 2003);}\end{footnotes}
Conversely, the First, Third, and Fifth Circuits find that the Due Process Clause only requires that the prosecution was neither arbitrary nor fundamentally unfair.¹³

This Comment argues that this circuit split is illusory because courts apply the same criteria to determine whether a “sufficient nexus” exists or whether the prosecution is “neither arbitrary nor fundamentally unfair.” Moreover, even if these standards were meaningfully different, the Supreme Court has found that the Federal Anti-Bribery Statute does not contain a nexus requirement between the federal funding and alleged criminal conduct.¹⁴ In many cases of government contract fraud overseas, the only link between the defendant and the United States is the federal money funding the contract or grant.¹⁵ Applying a “sufficient nexus” standard to extraterritorial applications of the Federal Anti-Bribery Statute is inconsistent with the Supreme Court’s decision that no such nexus is necessary.¹⁶ Therefore, due process only requires that the prosecution be “neither arbitrary nor fundamentally unfair.”¹⁷

The Federal Anti-Bribery Statute remains troubling from a due process standpoint because this statute is both broadly written and broadly interpreted by United States federal courts.¹⁸


¹⁵ See Final Report at 81–85 (cited in note 1) (discussing the problem of underfinatized task orders and systemic shortfalls in project management and oversight in Iraq and Afghanistan). Also consider United States Agency for International Development (USAID), Fiscal Year 2011 Agency Financial Report, 5 (Nov 15, 2011), online at http://transition.usaid.gov/performance/afr/af11.pdf?111811 (visited Sept 10, 2012) (“2011 USAID AFR”) (discussing USAID’s strategies and methods for collaborating with NGO sector groups to achieve the United States' strategic goals). Compare these methods of distribution and collaboration to United States v Hines, 541 F3d 833, 837 (8th Cir 2008) (finding that a police officer with no direct connection to a federal grant could still be held liable under § 666 for accepting bribes or gratuities in exchange for timely performance of official duties). If courts were to apply the Hines standard internationally, a staff member of a host-country NGO who accepted gifts or bribes could be haled into court in the United States if his employer received United States federal funds.

¹⁶ See Sabri, 541 US at 604.

¹⁷ See id.

¹⁸ See 18 USC § 666. Consider Hines, 541 F3d at 836–37 (finding that gratuities paid to a police officer in exchange for timely performance of official duties qualified as a bribe under § 666 because these transactions were worth more than $5,000 to the persons paying these bribes). See also United States v Kranovich, 401 F3d 1107, 1112 (9th Cir 2005) (finding that an agency did not actually have to receive the minimum federal funding prescribed by the statute, but merely have this money available to it at will); United
The Federal Anti-Bribery Statute is so expansive that it could implicate low-level employees of foreign subcontracting companies engaging in business practices that are legal in the local jurisdiction. To prevent this kind of overreach, courts considering international bribery cases involving the employees of federal civilian aid contractors should use a minimum contacts analysis similar to that outlined in *World-Wide Volkswagen Corporation v Woodson* to determine that the prosecution is neither arbitrary nor fundamentally unfair. Incorporating a minimum contacts analysis will satisfy the United States' interest that its contracting dollars are not misspent, while at the same time ensuring that it will only assert jurisdiction over defendants who should reasonably anticipate being haled into court in the United States.

Part I of this Comment reviews the current challenges in combating corruption in federal contracting abroad, especially for contracts administered through civilian agencies. Part I also describes the extent of government contracting fraud and the Department of Justice's recent use of the Federal Anti-Bribery Statute in *United States v Campbell* to hold a foreign national accountable for bribery and solicitation.

Part II examines the circuit split over which due process standard should apply to noncitizens prosecuted under United States criminal law for acts committed entirely outside of the United States and its territories. Part II concludes that this circuit split is illusory because courts on both sides of the split use nearly identical criteria to determine whether a prosecution satisfies the Due Process Clause of the Fifth Amendment.

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19. See 18 USC § 666(d)(1) (defining "agent" for purposes of the statute to include "a servant or employee, and a partner, director, officer, manager, and representative" of the qualifying agency). See also *United States v Ollison*, 555 F3d 152, 160 (5th Cir 2009) (finding that "[t]he statute itself does not distinguish between 'high-level' and 'low-level' employees"). In light of this expansive construction, consider Final Report at 79 (cited in note 1) (noting that "key subcontractors came from cultures in which bribes and kickbacks are common"). This issue is not unique to subcontracting in Iraq and Afghanistan, and it extends to economic development and disaster relief initiatives as well. See 2011 USAID AFR at 123–26 (cited in note 15) (discussing "widespread corruption" that hindered efforts to deliver program goals in Afghanistan, Iraq, Sudan, and Haiti in Fiscal Year 2010).


21. Id at 291.

22. 798 F Supp 2d 293 (DDC 2011).
Part III argues that even if this circuit split is not illusory, it does not apply to the Federal Anti-Bribery Statute because the Supreme Court has held that the statute does not require a nexus between the federal funding provided to the agency or organization and the bribe solicited or received.\textsuperscript{23} As such, requiring a nexus between the defendant and the United States through federally-funded contracting monies would compensate for a flaw in the statute, which the Supreme Court has found does not exist.

Although the circuit split is either illusory or inapplicable in this context, Part IV argues that courts should adopt a minimum contacts standard to determine whether an extraterritorial prosecution under § 666 is consistent with due process. Applying a minimum contacts test would ensure that a defendant has sufficient contacts with the United States to reasonably anticipate being haled into federal court, while still allowing prosecutors to use § 666 to combat corruption in overseas government contracting.

I. FEDERAL CONTRACTING ABROAD: FRAUD, JURISDICTIONAL GAPS, AND PROSECUTORIAL CREATIVITY

A. Fraud in Government Contracts Abroad: A Brief Overview

International aid and development contracting is a multibillion-dollar industry suffering from endemic corruption, fraud, and mismanagement.\textsuperscript{24} Recently, the Commission on Wartime Contracting in Iraq and Afghanistan found that at least $31 billion—and possibly as much as $60 billion—in contracting funds had been lost to waste and fraud in Iraq and Afghanistan between 2002 and the end of 2011.\textsuperscript{25} The Commission reported that, at the mid-range of its estimates, the United States has lost $12 million per day to contract waste and fraud for the past ten years.\textsuperscript{26}

The United States relies heavily upon contractor personnel to carry out essential security and rebuilding functions in Iraq and Afghanistan.\textsuperscript{27} Many of these contractors are not United

\textsuperscript{23} See \textit{Sabri}, 541 US at 604.
\textsuperscript{24} See generally \textit{Final Report} (cited in note 1); \textit{Second Interim Report} (cited in note 6).
\textsuperscript{25} \textit{Final Report} at 5 (cited in note 1). Note that this report used fiscal years, not calendar years.
\textsuperscript{26} Id at 32, 68.
\textsuperscript{27} Id at 20.
States citizens. In 2010, the Department of Defense, the State Department, and USAID employed over 260,000 contractor-employees. Most of these contractor-employees are local and third-country nationals: of the approximately 260,000 contractors employed in Iraq and Afghanistan in 2010, only about 46,000 were United States nationals.

Although over 80 percent of contractors employed in Iraq and Afghanistan work for the Department of Defense, the State Department and USAID together employed over 55,000 contractors as of March 31, 2010. Nearly 49,000 of these civilian agency contractors were either local or third-country nationals. The number of contractors and grantee employees supporting the State Department and USAID projects in Afghanistan exceeds the number of agency employees by a ratio of 18:1 for the State Department and 100:1 for USAID. These ratios indicate that the State Department and USAID rely heavily upon contractors to execute, rather than support, their missions in Iraq and Afghanistan. At the same time, this skew in favor of non-US nationals raises questions regarding whether the State Department and USAID have the capacity to effectively monitor and evaluate noncitizen employees and the programs they carry out.

B. Jurisdictional Gaps Exacerbate Fraud in Government Contracts Abroad Because the United States is Unable to Effectively Prosecute Noncitizens for Acts Committed Outside the United States and its Territories

In addition to a general lack of oversight, there is no clear way to assert personal jurisdiction over many employees of United States civilian agency contractors. For military contractors, the MEJA extends criminal liability to any person, regardless of citizenship, who “engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the United States.”

28 See id.
29 Final Report at 20 (cited in note 1).
30 Id.
31 Id.
32 Id.
33 Final Report at 20 (cited in note 1).
34 See id at 21.
35 See id.
36 See id at 157–59 (cited in note 1); Leahy Statement, 112th Cong, 1st Sess (cited in note 5); Second Interim Report at 52–53 (cited in note 6).
special maritime and territorial jurisdiction of the United States" if that person is "employed by or accompanying the Armed Forces outside the United States." Although MEJA originally did not apply to civilians working for United States agencies other than the Department of Defense, Congress amended MEJA in 2004 to include contractors of "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas."38

Despite this seemingly broad grant of jurisdiction, the United States remains unable to effectively prosecute civilian contractors under federal criminal law.39 Despite the extensive involvement of contractor employees in the Abu Ghraib scandal and dozens of sexual assault claims filed against the employees of contractors such as Kellogg, Brown & Root, the Department of Justice prosecuted a total of twelve cases under MEJA between 2000 and 2008.40 Many scholars argue that the small number of cases brought under MEJA shows that the statute has been a failure.41

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37 18 USC § 3261(a).
39 See Leahy Statement, 112th Cong, 1st Sess (cited in note 5) ("Currently, criminal jurisdiction over atrocious crimes like that committed abroad is complicated and depends too greatly on the specific location of the crime which makes prosecutions inconsistent and sometimes impossible. We must fix the law to help ensure that victims will not see the perpetrators escape accountability."). See also Final Report at 158–59 (cited in note 1).
41 See, for example, Williams, 44 U Mich J L Reform at 65 (cited in note 38) ("[U]nless the civilian population serving in Iraq and other overseas locations are substantially more law-abiding than members of the [general civilian] population, MEJA has been a failure."); Geoffrey S. Corn, Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Ju-
Although the efficacy of MEJA remains controversial, there is no comparable statute extending criminal liability to civilian agency contractors whose employment does not “relate[,] to supporting the mission of the Department of Defense overseas.” In response to a recent push for increased oversight and investigation of fraud in government contracts, federal investigators have begun to reinterpret existing federal statutes to apply to government contractors engaged in questionable conduct abroad. Setting aside the controversy over whether it is appropriate to enforce domestic criminal statutes extraterritorially,

risdiction over Civilian Augmentees, 62 U Miami L Rev 491, 513 (2008) (noting that “[s]ince enactment, MEJA has not been particularly effective”); William C. Peters, On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq, 2006 BYU L Rev 367, 385 (2006) (“[T]he tens of thousands of contractors who have served or are currently serving in the Iraqi campaign have either scrupulously avoided any meaningful misconduct, or government efforts to address those crimes are either lacking or simply ineffective in practice.”).


See SIGIR Hearing (cited in note 8). See also Final Report at 91–92 (cited in note 1). This second report noted that the International Contract Corruption Task Force has opened 876 cases related to wartime contracting; however, of these, only 150 have actually been charged. It is uncertain how many have been tried and convicted. See generally note 8.

In Morrison v National Australia Bank Ltd, 130 S Ct 2869 (2010), the Supreme Court reiterated its presumption against the extraterritorial application of a federal statute absent clear congressional intent. Id at 2877. Specifically, the Court found that “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.” Id (quotation marks omitted). For this reason, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” Id at 2878. The seemingly unequivocal language in Morrison would suggest that 18 USC § 666, passed in 1984 to combat domestic corruption, is not properly applied extraterritorially. Despite the Court’s recent pronouncement in Morrison, the district court in Campbell found an earlier Supreme Court case, Bowman v United States, 260 US 94 (1922), controlling. See Campbell, 798 F Supp 2d at 304–05. The district court reasoned that since the Supreme Court has not overruled Bowman and since § 666 “falls precisely in line with the limited type of criminal statutes addressed in Bowman”—that is, statutes enacted because of the Government’s right to defend itself against obstruction or fraud wherever perpetrated, and therefore not dependent upon their locality for the Government’s jurisdiction—the Federal Anti-Bribery Statute “falls squarely within Bowman’s holding.” Id at 304. Whether the district court properly concluded that the government’s right to defend itself against fraud constitutes a “clear indication of extraterritorial application” is debatable, and could form the basis for another Comment or Article entirely. See generally Zachary D. Clopton, Bowman Lives: The Extraterritorial Application of US Criminal Law After Morrison v. National Australia Bank, 67 NYU Ann Surv Am L 137 (2011).
prosecuting foreign nationals under United States criminal law for acts committed abroad presents troubling due process concerns. Specifically, extraterritorial prosecution presents the question of how and under what circumstances federal criminal laws may be applied to comport with the Due Process Clause.

C. Campbell's Soup: Applying the Federal Anti-Bribery Statute to Combat Corruption Overseas

In 2011, the District Court for the District of Columbia applied the Federal Anti-Bribery Statute to prosecute an Australian national who allegedly attempted to solicit a bribe from a USAID subcontractor in Afghanistan. United States v Campbell addressed the indictment of Neil Campbell, an Australian contracts manager serving on a panel that selected subcontractors for various USAID-sponsored rebuilding projects in Afghanistan. Campbell was indicted under the Federal Anti-Bribery Act after allegedly attempting to solicit a $190,000 cash bribe from a federal agent posing as the representative of an Afghani construction company. The indictment charged that Campbell promised to provide the Afghani construction company with more than $14 million in USAID-funded subcontracts in exchange for the bribe.

The district court found that prosecuting Campbell extraterritorially did not violate his due process rights under the Fifth Amendment. In its analysis, the court analyzed a twenty-year-old circuit split regarding whether the test for due process in extraterritorial prosecutions under United States criminal law requires a "sufficient nexus" with the United States—a standard that the court defined as "commonly understood as real effects or consequences accruing in this country"—or whether due process requires the lesser standard that the prosecution be neither arbitrary nor fundamentally unfair. Ultimately, the Campbell court declined to weigh in on which test more appropriately protects the due process rights of foreign nationals prosecuted under United States criminal law for acts committed entirely abroad.

46 See Campbell, 798 F Supp 2d 293.
47 Id.
48 Id at 297–98.
49 Id at 297.
50 Campbell, 798 F Supp 2d at 297.
51 Id at 308.
52 Id at 306–07.
The court found instead that the specific facts of this case satisfied the Due Process Clause under either standard.\textsuperscript{53}

The district court considered each element of Campbell’s indictment, holding that Campbell should have reasonably anticipated being haled into court in the United States.\textsuperscript{54} The court identified four factors behind this finding. First, Campbell was an agent of a federally-funded organization in a position to determine project awards of USAID money to rebuild Afghanistan.\textsuperscript{55} Second, Campbell used this position to attempt to bribe a potential award recipient with over $14 million of future business in exchange for $190,000 in cash.\textsuperscript{56} Third, Campbell spoke frankly that he risked prosecution and incarceration because of the transaction, and “clearly understood the link between the contracts and United States financing.”\textsuperscript{57} Finally, Campbell’s actions directly affected the United States’ interests in Afghanistan and defrauded American taxpayers.\textsuperscript{58}

Taking the facts alleged in the indictment to be true, the district court found that Campbell’s “actions directly implicated American interests in preserving the integrity of its vast sums of donated monies to be free from corruption, bribery and fraud.”\textsuperscript{59} Further, in addition to “hold[ing] the United States up to opprobrium in Afghanistan, every instance of such connivance robs USAID money from its intended purpose, hinders the United States’s substantial efforts in Afghanistan, and also robs USAID of support for its effort from the U.S. taxpayer.”\textsuperscript{60} Based on these findings, the court concluded that Campbell had abused his position to knowingly and intentionally defraud the United States for the purpose of personal enrichment, hindering American interests in rebuilding Afghanistan.\textsuperscript{61} As such, the court found no violation of Campbell’s due process rights under either the “sufficient nexus” or the “neither arbitrary nor fundamentally unfair” standard.\textsuperscript{62}

\textsuperscript{53} Id at 307.
\textsuperscript{54} Campbell, 798 F Supp 2d at 307.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Campbell, 798 F Supp 2d at 307–08.
\textsuperscript{59} Id at 307.
\textsuperscript{60} Id at 307–08.
\textsuperscript{61} Id at 308.
\textsuperscript{62} Campbell, 798 F Supp 2d at 307–08.
II. THE CIRCUIT SPLIT DISCUSSING THE APPROPRIATE DUE PROCESS STANDARD FOR EXTRATERRITORIAL PROSECUTION IS ILLUSORY BECAUSE COURTS USE THE SAME CRITERIA UNDER EITHER STANDARD TO DETERMINE WHETHER A PROSECUTION IS CONSISTENT WITH DUE PROCESS

As the district court noted in *Campbell*, circuit courts currently disagree as to whether the Due Process Clause requires a “sufficient nexus” between the defendant and the United States or whether the looser “neither arbitrary nor fundamentally unfair” standard is sufficient.63 Despite the existence of a twenty-year-old circuit split, it is unclear whether the “sufficient nexus” and “neither arbitrary nor fundamentally unfair” standards produce different results. For that reason, this Comment argues that the circuit split is illusory because the two standards require courts to consider the same criteria to determine whether an extraterritorial prosecution satisfies the Due Process Clause.

A. The Second, Fourth, and Ninth Circuits Find That a “Sufficient Nexus” Must Exist Between a Defendant and the United States in Extraterritorial Prosecutions to Ensure Due Process of Law

The Second, Fourth, and Ninth Circuits find that the extraterritorial prosecution of foreign nationals under United States criminal law requires the existence of a sufficient nexus between the defendant and the United States to satisfy the Due Process Clause. In *United States v Davis*,64 the Ninth Circuit held that applying a federal criminal statute extraterritorially requires the existence of a sufficient nexus with the United States to ensure that the application of United States law is neither arbitrary nor fundamentally unfair.65 In a later case, *United States v Klimavicis-Viloria*,66 the Ninth Circuit clarified its decision of what constitutes a “sufficient nexus,” holding that “[t]here is a sufficient nexus where an attempted transaction is aimed at causing criminal acts within the United States. Specifically, there is a sufficient nexus where the plan for shipping the drugs was likely to have effects in the United States.”67 This suggests that the

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63 Id at 306–07.
64 905 F2d 245 (9th Cir 1990).
65 Id at 248–49 (citations omitted).
66 144 F3d 1249 (9th Cir 1998).
67 Id at 1257 (citations and quotation marks omitted).
Ninth Circuit’s formulation of “sufficient nexus” requires that the criminal activity must have a likely—but not actual or demonstrated—effect in the United States. The language of Klimavicius-Viloria implies that a sufficient nexus exists when a defendant’s plan would likely have caused harm to the United States, whether or not it actually did so.

The Second and Fourth Circuits adopted the Ninth Circuit’s sufficient nexus standard and applied it in novel contexts. For example, in United States v Yousef, the Second Circuit used the sufficient nexus standard to allow a terrorism prosecution to proceed despite the fact that it did not involve the Maritime Drug Law Enforcement Act (MDLEA), the law underlying the prosecutions in both Davis and Klimavicius-Viloria. Unlike the drug smugglers in both Davis and Klimavicius-Viloria, the defendants in Yousef conspired to attack US-flag aircraft carrying United States citizens in an effort to harm them and influence United States foreign policy. Although the criminal acts in Yousef took place in the Philippines, the Second Circuit found that a sufficient nexus existed because the defendants “conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy.” As such, it “cannot be argued seriously that defendants’ conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair.” In Yousef, the Second Circuit found that the Due Process Clause allowed the United States to assert jurisdiction over foreign nationals conducting criminal acts outside of the United States and its territories because the defendants intended to affect the United States and its interests abroad. This is similar to the standard employed in Campbell, where the district court found that the defendant’s actions satisfied both the sufficient nexus and “neither arbitrary nor fundamentally unfair” due

\[\text{References:} \]

68 327 F3d 56 (2d Cir 2003).
69 46 USC § 70501 et seq.
70 Compare Davis, 905 F2d at 247 (discussing the defendant appealing his conviction for violations of the MDLEA) and Klimavicius-Viloria, 144 F3d at 1256 (stating that the convictions on appeal stem from violations of the MDLEA), with Yousef, 327 F3d at 82–85 (discussing the counts of the indictments of various defendants in Yousef).
71 Yousef, 327 F3d at 111–12.
72 Id at 112.
73 Id.
74 Id.
process standards because they compromised American interests in Afghanistan.\(^7\)

Like the Second Circuit, the Fourth Circuit applied the sufficient nexus test to nonmaritime criminal conduct. In *United States v Mohammad-Omar*,\(^6\) the Fourth Circuit applied the sufficient nexus standard from *Davis* to prosecute a Yemeni citizen for his participation in an international drug trafficking ring.\(^7\) Mohammad-Omar was charged for participating in a sophisticated drug trafficking scheme to transport heroin from Afghanistan to Ghana and Dubai for eventual distribution in the United States.\(^7\) Although he committed no crime within the United States, the Fourth Circuit found that the actions underlying Mohammad-Omar’s multiple convictions for conspiracy satisfied the nexus requirement because Mohammad-Omar’s business partner knew that the heroin they sold was destined for the United States and imputed that knowledge to Mohammad-Omar.\(^7\) Because Mohammad-Omar knew the full details and scope of his business partner’s transactions, he “had ample reason to anticipate being haled into court in the United States.”\(^8\) As the Ninth Circuit had reasoned in *Klimavicius-Viloria*, the Fourth Circuit likened the sufficient nexus test to the minimum contacts test required to assert personal jurisdiction over a defendant within the United States.\(^6\) The Fourth Circuit noted that “[t]he nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country.”\(^6\) This definition of “sufficient nexus” implies a subjective standard. That is, a sufficient nexus exists when the defendant knew or should have known that his conduct could affect the United States, its interests, or its citizens.

\(^7\) *Campbell*, 798 F Supp 2d at 307–08.
\(^7\) Id at 261.
\(^8\) Id at 260. For more specific information on the events underlying this case, see generally, Brief of the United States, *United States v Mohammad-Omar*, No 08-4586 (4th Cir filed Oct 10, 2008) (available on Westlaw at 2008 WL 4734904).
\(^9\) Mohammad-Omar, 323 Fed Appx at 262.
\(^8\) Id.
\(^1\) Id at 261.
\(^1\) Id, quoting *Klimavicius-Viloria*, 144 F3d at 1257.
B. The First, Third, and Fifth Circuits Hold That Due Process Requires Only That the Prosecution Is “Neither Arbitrary Nor Fundamentally Unfair”

In contrast to the Second, Fourth, and Ninth Circuits, the First, Third, and Fifth Circuits have held that the Due Process Clause does not require a nexus between the defendant and the United States in extraterritorial prosecutions. These three circuits find that the Due Process Clause requires only that the relevant criminal statute is not applied in a way that is “arbitrary or fundamentally unfair.”

Although the Third Circuit rejected the Ninth Circuit’s conclusion in *Davis* that due process requires a sufficient nexus between the defendant and the United States, it appears to confine its analysis to cases brought under the MDLEA. In *United States v Martinez-Hidalgo*, the Third Circuit rejected the Ninth Circuit’s conclusion in *Davis*, holding, “[w]e decline to follow *Davis* as we see nothing fundamentally unfair in applying [the MDLEA] exactly as Congress intended—extraterritorially without regard for a nexus between the defendant’s conduct and the United States.” The Third Circuit found nothing unfair in Congress’s decision to “provide for the punishment of persons apprehended with narcotics on the high seas” because narcotics trafficking is “condemned universally by law-abiding nations.” As such, the Third Circuit held that no nexus is required for MDLEA prosecutions because the Piracies and Felonies Clause grants Congress the power to define and punish felonies committed upon the high seas and offenses against the law of nations.

Like the Third Circuit, the First Circuit found that “due process does not require the government to prove a nexus between a defendant’s criminal conduct and the United States” in an MDLEA prosecution if the flag nation of the captured vessel consented to the application of United States criminal law to the
vessel and its passengers and crew. Unlike the Third Circuit, though, the First Circuit grounded its reasoning in principles of international law. Specifically, the “territorial principle” of international law permits a state to board a vessel and apply United States criminal law to those aboard if the flag state authorizes it to do so. Similarly, under the “protective principle,” a nation is permitted to assert jurisdiction over a person whose conduct outside the nation’s territory threatens that nation’s security. Taken together, the Third Circuit reasoned that the territorial and protective principles allow the United States to assert jurisdiction over persons aboard a foreign vessel suspected of drug trafficking if the flag nation consents to the application of United States law. Although the protective principle may allow the United States to assert jurisdiction where its security is threatened, securing the flag nation’s consent eliminates “any concern” that application of United States law may be arbitrary or fundamentally unfair under both the Due Process Clause and customary principles of international law.

The Fifth Circuit also found that the extraterritorial application of the MDLEA to non-US nationals does not require a nexus with the United States. In United States v Suerte, the Fifth Circuit held “that, for the MDLEA issue at hand, and to the extent that the Due Process Clause may constrain the MDLEA’s extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause of the Constitution.”

The Suerte court grounded its reasoning in the history of the Piracies and Felonies Clause of the Constitution, which grants Congress the power to “define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of

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89 Cardales, 168 F3d at 553.
90 Id (citations omitted).
91 Id.
92 Id. In Cardales, the United States Coast Guard boarded and searched the ship after receiving express authorization from the government of Venezuela. Id at 552. Under the MDLEA, a vessel becomes subject to the jurisdiction of the United States if the flag nation either consents or waives objection to the enforcement of United States law by the United States. Id, citing 46 USC § 70502(c)(1)(C). This consent “may be obtained by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.” 46 USC § 70502(c)(2)(A).
93 Cardales, 168 F3d at 553.
94 291 F3d 366 (5th Cir 2002).
95 Id at 375.
Because the same Congress that passed the Piracies and Felonies Clause also passed the Fifth Amendment, the Fifth Circuit concluded that the Due Process Clause does not impose a nexus requirement where Congress has acted pursuant to the Piracies and Felonies Clause of the Constitution.97

C. The Distinction Between “Sufficient Nexus” and “Neither Arbitrary Nor Fundamentally Unfair” Is Illusory Because Courts on Both Sides of the Split Consider the Same Factors in Determining Whether a Case Satisfies the Due Process Clause of the Fifth Amendment

The Campbell court’s decision not to weigh in on the appropriate due process standard for government contractor employees prosecuted under the Federal Anti-Bribery Statute highlights a timely and unsettled issue of law. Despite the existence of a longstanding circuit split, it is unclear how the “sufficient nexus” and “neither arbitrary nor fundamentally unfair” standards differ in application.

In Campbell, the district court found that courts requiring a sufficient nexus “look for real effects or consequences accruing in the United States” to determine whether a nexus exists.98 In a similar case, United States v Brehm,99 the Eastern District of Virginia noted that courts imposing a nexus requirement typically look to four factors to identify whether a nexus exists between the defendant’s conduct and the United States.100 The Brehm court observed that courts generally consider a wide range of factors including: (1) the defendant’s actual contacts with the United States, including his citizenship or residency; (2) the location of the acts allegedly giving rise to the alleged offense; (3) the intended effect a defendant’s conduct has on or within the United States; and (4) the impact on significant United States interests.101 Although the circuit courts differ in their reasoning behind imposing a nexus requirement and definitions of what a nexus entails, the four factors identified in Brehm provide a general overview of how courts on both sides of the circuit split ana-

96 US Const Art I, § 8, cl 10. See also Suerte, 291 F3d at 372–76.
97 Suerte, 291 F3d at 375.
98 Campbell, 798 F Supp 2d at 306.
99 2011 WL 1226088 (ED Va).
100 Id at *4.
101 Id.
lyze whether an extraterritorial prosecution satisfies the Due Process Clause.

The Ninth Circuit, which generally requires the existence of a sufficient nexus in MDLEA prosecutions, likened the sufficient nexus standard to the minimum contacts test for personal jurisdiction established in *World-Wide Volkswagen v Woodson*, 102 Specifically, “[t]he nexus requirement serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction. It ensures that a United States court will assert jurisdiction over a defendant who ‘should reasonably anticipate being haled into court’ in this country.” 103 The Fourth Circuit quoted this same analogy in *Mohammad-Omar*, finding that sufficient contacts existed where an international narcotics trafficker knew or should have known that his drugs would ultimately arrive in the United States. 104

Although the Fourth and Ninth Circuits generally rely upon a subjective ‘minimum contacts’ analogy, other opinions in these same circuits adopt an objective approach by looking to principles of international law to determine whether a nexus exists between the defendant’s conduct and the United States. In *United States v Caicedo*, 105 the Ninth Circuit declined to extend Davis’s nexus requirement to include stateless vessels. 106 Like its later decision in *Klimavicius-Viloria*, the Ninth Circuit emphasized in *Caicedo* the importance of the defendant’s legitimate expectations of being haled into court in the United States. 107 However, the *Caicedo* court based its decision not to impose a nexus requirement to MDLEA defendants aboard stateless vessels upon principles of state sovereignty and international law. 108 In *Caicedo*, the Ninth Circuit distinguished its reasoning from its

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103 *Klimavicius-Viloria*, 144 F3d at 1257.
105 47 F3d 370 (9th Cir 1995).
106 Id at 372 (“We decline the defendant’s invitation to extend Davis and its progeny to a stateless vessel on the high seas.”).
107 Id at 373. The court reasoned as follows:

The defendants do not point to any jurisdiction where the conduct they are alleged to have been engaged in was legal, nor are we aware of any... These defendants should therefore have been on notice that the United States or any other nation concerned with drug trafficking could subject their vessel to its jurisdiction.

108 Id at 372–73.
earlier decision in *Davis*, noting that a nexus requirement "makes sense" when corresponding international law would also require the existence of such a nexus:

A defendant would have a legitimate expectation that because he has subjected himself to the laws of one nation, other nations will not be entitled to exercise jurisdiction without some nexus. Punishing crimes committed on a foreign flag ship is like punishing a crime committed on foreign soil; it is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests.\(^{109}\)

Here, the Ninth Circuit analyzed the nexus requirement through the lens of state sovereignty. Where a defendant subjects himself to the laws of one nation, punishing that person under United States criminal law for a crime committed on foreign soil is an intrusion onto that nation's sovereign territory.\(^{110}\) As such, principles of comity and fairness dictate that nations not undertake this type of intrusion absent a nexus between the defendant's criminal conduct and the United States.\(^{111}\) A nexus exists where "there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests."\(^{112}\) Under this analysis, the test for a sufficient nexus is not whether the defendant has a reasonable expectation of being haled into court in the United States, but whether an objective connection exists between the criminal acts and the United States that is strong enough to justify intruding upon another nation's sovereign territory.

The Ninth Circuit's decision not to extend the sufficient nexus requirement to defendants aboard stateless vessels implies that the intrusion-upon-state-sovereignty rationale behind the sufficient nexus requirement may be stronger than the minimum contacts analysis, which turns upon an analysis of a defendant's reasonable—but nonetheless subjective—expectations. In *Caicedo*, the Ninth Circuit found that, unlike crimes committed

\(^{109}\) *Caicedo*, 47 F3d at 372.

\(^{110}\) Id at 373.

\(^{111}\) Id at 372.

\(^{112}\) Id.
on land or aboard a foreign flagship, stateless vessels “do not fall within the veil of another sovereign's territorial protection” such that “all nations can treat them as their own territory and subject them to their laws.” Since no nexus is required for a nation to prosecute individuals within its own territory (indeed, requiring a nexus in this instance would be redundant), it follows that no nexus is required to prosecute persons aboard stateless vessels since a nation may treat a stateless vessel as its own. Furthermore, when an individual sails aboard a stateless vessel, he reasonably expects that any nation may treat him as though he were a local national; as such, he should reasonably anticipate being haled into court in the United States—or anywhere else, for that matter.

In a later decision, the Ninth Circuit clarified its refusal to extend the nexus requirement to stateless vessels. In United States v Moreno-Morillo, the Ninth Circuit noted that “[t]he act of sailing aboard a stateless vessel . . . is tantamount to a knowing waiver of personal jurisdiction.” Persons aboard stateless vessels should reasonably anticipate being haled into court in the United States because they have knowingly waived personal jurisdiction by defying international maritime law.

For the purposes of the MDLEA, a government may generally establish that a vessel is without nationality by: (1) proving that the claimed nation denied a vessel's claim of registry; (2) proving that the master or person in charge failed to make a claim of nationality or registry when asked to do so; or (3) proving that the master or person in charge made a claim of registry,

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113 Caicedo, 47 F3d at 373 (citations omitted).
114 Id at 272–73. The court reasoned:

A defendant would have a legitimate expectation that because he has subjected himself to the laws of one nation, other nations will not be entitled to exercise jurisdiction without some nexus. . . . But where a defendant attempts to avoid the law of all nations by travelling on a stateless vessel, he has forfeited these protections of international law and can be charged with the knowledge that he has done so.

Id.
115 Id at 373 (“Because stateless vessels do not fall within the veil of another sovereign's territorial protection, all nations can treat them as their own territory and subject them to their laws.”). See also United States v Moreno-Morillo, 334 F3d 819, 829 (9th Cir 2003) (“If a vessel is deemed stateless, there is no requirement that the government demonstrate a nexus between those on board and the United States before exercising jurisdiction over them.”).
116 334 F3d 819 (9th Cir 2003).
117 Id at 828 n 7.
118 Id at 828.
but that the claimed nation did not affirmatively and unequivocally confirm the vessel’s nationality. The stateless vessels exception to the sufficient nexus requirement discussed by the Ninth Circuit in *Caicedo* and *Moreno-Morillo* is therefore likely confined to cases grounded in the MDLEA because even the most determined investigator cannot establish that a human being in Afghanistan falls under maritime law as a stateless vessel upon the high seas.

D. Courts Use the Same Criteria to Determine the Existence of a Sufficient Nexus and to Determine Whether a Prosecution is Arbitrary or Fundamentally Unfair

Although the state sovereignty rationale may clarify the purpose of the sufficient nexus requirement, it does little to differentiate the sufficient nexus requirement from the putatively looser standard that the prosecution be neither arbitrary nor fundamentally unfair. As the Eastern District of Virginia noted, the difference between the two standards “is less real than apparent; the existence of a nexus is what makes the prosecution neither arbitrary nor fundamentally unfair.” For this reason, the circuit split is largely illusory because courts use the same criteria to determine both the existence of a nexus and the prosecution’s fundamental fairness.

In *Martinez-Hidalgo*, the Third Circuit rejected the Ninth Circuit’s decision in *Davis* that due process required the existence of a nexus between the defendant’s conduct and the United States in extraterritorial prosecutions brought under the MDLEA. However, the reasoning in *Martinez-Hidalgo* does not differ from the Ninth Circuit’s later decisions in *Caicedo* and *Moreno-Morillo*. Like *Caicedo* and *Moreno-Morillo*, the facts of *Martinez-Hidalgo* involved the seizure of a stateless vessel on the high seas carrying large quantities of illegal drugs. As in the later Ninth Circuit cases, the Third Circuit reasoned that the United States has the “authority to treat stateless vessels as if they were its own,” and therefore has jurisdiction to prosecute drug offenders on stateless vessels upon the high seas as a mat-

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119 46 USC § 70502(d)(1)(A)-(C). See also *United States v Perlaza*, 439 F3d 1149, 1165 (9th Cir 2006).
120 *United States v Shahani-Jahromi*, 286 F Supp 2d 723, 728 n 9 (ED Va 2003).
121 *Martinez-Hidalgo*, 993 F3d at 1056.
122 Id at 1053–54.
ter of international law. Because both international law and the Piracies and Felonies Clause grant the United States jurisdiction to apprehend stateless vessels, the Third Circuit found that it is not "fundamentally unfair" for the United States to prosecute drug traffickers aboard stateless vessels in the absence of a nexus with the United States. The Third Circuit's conclusion in *Martinez-Hidalgo* that the Due Process Clause does not require the existence of a nexus between the United States and the unlawful acts committed by persons aboard stateless vessels parallels the Ninth Circuit's analysis of the same issue.

Although ostensibly differing on the issue of whether the Due Process Clause requires a nexus between the defendant and the United States, the First, Second, and Fifth Circuits each found that a nexus is unnecessary where the host nation consents to the exercise of jurisdiction over its citizens. The courts also noted an exception in cases where a foreign citizen's actions threaten a nation's security—the precise instances in which courts requiring a nexus have found one to exist. Although the Second, Fourth, and Ninth Circuits each require the existence of a nexus of contacts with the United States, these courts employ the same criteria to determine the existence of a nexus that the First, Second, and Fifth Circuits have used to determine that a nexus is unnecessary. More specifically, courts consider the

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123 Id at 1055 (quotation marks omitted).
124 Id at 1056.
125 Compare *Martinez-Hidalgo*, 993 F3d at 1056 with *Caicedo*, 47 F3d at 372–73.
126 See, for example, *Cardales*, 168 F3d at 553 (finding that a host nation may either consent to the exercise of jurisdiction over its citizens under the "territorial principle" of international law or assert jurisdiction over a person whose actions threaten its security under the "protective principle") (citations and quotation marks omitted); *Yousef*, 327 F3d at 96–97. The *Yousef* court noted:

[J]urisdiction over [a terrorism prosecution] is consistent with the "passive personality principle" of customary international jurisdiction because each of these counts involved a plot to bomb United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States. Moreover, assertion of jurisdiction is appropriate under the "objective territorial principle" because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect—in this case, a devastating effect—on and within the United States. Finally, there is no doubt that jurisdiction is proper under the "protective principle" because the planned attacks were intended to affect the United States and to alter its foreign policy.

Id. See also *Suerte*, 291 F3d at 370–72.
127 See, for example, *Davis*, 905 F3d at 249 (finding that a nexus existed between the defendants and the United States because the "attempted transaction [was] aimed at causing criminal acts within the United States") (citations omitted); *Yousef*, 327 F3d at 112 (holding that a nexus existed because the defendant's conduct intended to harm
offender's contacts with the United States; the impact of the alleged conduct with the United States, its interests, and its citizens; and whether the host nation consents to the exercise of jurisdiction over its citizens to determine both whether a sufficient nexus exists and whether a prosecution is neither arbitrary nor fundamentally unfair. 128 As such, this circuit split is illusory.

Campbell further illustrates this point. In Campbell, the district court found that “[w]hether a 'sufficient nexus' or 'arbitrary or fundamentally unfair' test is used on these facts, Mr. Campbell's prosecution [met] the requirements of the Due Process Clause.” 129 Specifically, Campbell's decision to abuse his position by allocating USAID development monies in exchange for a bribe directly “hinder[ed] the United States's substantial efforts in Afghanistan,” and directly “implicated American interests in preserving the integrity of its vast sums of donated monies to be free from corruption, bribery and fraud.” 130 In addition, Campbell “frankly spoke of his risks of prosecution and incarceration, and . . . clearly understood the link between the contracts and United States financing.” 131 Therefore, “Campbell reasonably should have anticipated being haled into a court in the United States.” 132

Here, the court invoked many of the same principles discussed in earlier circuit court opinions. Like the Ninth Circuit in Klimavicius-Viloria and the Fourth Circuit in Mohammad-Omar, the district court invoked the World-Wide Volkswagen minimum contacts test to determine that the defendant should reasonably anticipate being haled into court in the United

128 See Klimavicius-Viloria, 144 F3d at 1257 (discussing how the nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction); Mohammad-Omar, 323 Fed Appx at 262 (finding that a nexus existed in the form of sufficient contacts with the United States because Omar knew that the heroin he sold was destined for the United States and he knew that his business partner had met with an undercover agent posing as an American heroin distributor).

129 Campbell, 798 F Supp 2d at 307.

130 Id at 307–08.

131 Id at 307.

132 Id.
States. In addition to this subjective standard, the district court's focus on the effect of Campbell's alleged bribery upon the United States' interests in Afghanistan recalls the First and Second Circuits' determinations that due process does not bar extraterritorial prosecutions of noncitizens where the defendant's conduct jeopardizes the nation's security. Ultimately, the Campbell court borrowed from both sides of the circuit split to conclude that the facts of the indictment were sufficient to satisfy due process under either the "sufficient nexus" or the "neither arbitrary nor fundamentally unfair" standard.

The district court's conclusion in Campbell indicates that the two standards are not meaningfully different because both tests tend to produce the same results. Moreover, because the two tests are couched in general terms, they both allow federal courts to choose from a menu of rationales to determine that nearly any exercise of extraterritorial jurisdiction satisfies the Due Process Clause. While it is a small comfort that only the most egregious cases of government contracts fraud are investigated at all, much less brought to trial, the lack of a clear standard for when due process allows the United States to prosecute a noncitizen for his conduct abroad presents a concerning jurisprudential gap—especially as the Department of Justice increases the number and scope of prosecutions for contracting fraud in Iraq and Afghanistan.

III. EVEN IF THIS CIRCUIT SPLIT IS NOT ILLUSORY, IT DOES NOT APPLY TO THE FEDERAL ANTI-BRIBERY STATUTE BECAUSE THE SUPREME COURT HAS HELD EXPLICITLY THAT § 666 DOES NOT CONTAIN A NEXUS REQUIREMENT

Imposing a nexus requirement for extraterritorial prosecutions brought under the Federal Anti-Bribery Statute is inconsistent with how § 666 is applied within the United States. Since the only tie between the defendant in an extraterritorial prosecution for government contracting fraud and the United States is

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133 Campbell, 798 F Supp 2d at 306-07, citing World-Wide Volkswagen, 444 US at 297.
134 See, for example, Cardales, 168 F3d at 553; Yousef, 327 F3d at 112. See also Klimavicius-Viloria, 144 F3d at 1257.
135 Campbell, 798 F Supp 2d at 307.
136 See Final Report at 159, 161-63 (cited in note 1) ("Investigative agencies are often unable to access information, physical evidence, and witnesses in a timely manner.").
137 See SIGIR Hearing, Appendix (cited in note 8) (discussing and charting recent criminal convictions and investigations into contracts fraud).
the federal funding at issue, the sufficient nexus test would effectively require the government to demonstrate the existence of a nexus between the federal funding and the bribe solicited or received. The Supreme Court expressly rejected this type of nexus requirement in *Sabri v United States*. While evidentiary constraints will likely limit viable extraterritorial prosecutions for noncitizens to cases where a clear nexus exists, *Sabri* forecloses the ability of courts to impose this requirement directly. Since courts may not impose a sufficient nexus standard, the appropriate due process standard must be that the prosecution was neither arbitrary nor fundamentally unfair.

A. The Federal Anti-Bribery Statute

Congress enacted the Federal Anti-Bribery Statute as part of Title XI of the Comprehensive Crime Control Act of 1984 to prevent the loss of federal funds to bribery and theft by officers and employees of government agencies and organizations receiving federal funds. In passing § 666, Congress sought to plug a regulatory gap by extending federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds.

138 See, for example, Final Report at 71–72 (cited in note 1) (discussing host-nation challenges in dispensing and monitoring waste in development contracting).

139 541 US 600 (2004).

140 See, for example, Final Report at 92 (cited in note 1). The report notes:

The sheer number of contracts for Iraq and Afghanistan points to a high potential for fraud. However, of the 332 cases that the task force reported as being closed, the Department of Justice told the Commission that it charged only 150 individuals and companies. Few cases of wartime-contracting fraud are actually prosecuted. Many of the cases are closed for a variety of reasons including a lack of evidence, the difficulty of investigating them, and the cost of prosecution.

Id.

141 *Sabri*, 541 US at 605.

142 18 USC § 666.


144 See *United States v Westmoreland*, 841 F2d 572, 576 (5th Cir 1988).


In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds.

Id.
The Federal Anti-Bribery Statute prohibits the agents of federally-funded organizations from soliciting, accepting, or giving bribes connected to that organization's business activities.\textsuperscript{146} In § 666(a)(2), the statute criminalizes: (1) the corrupt offering or solicitation of anything of value; (2) to or by the agent of any; (3) agency or organization which receives at least $10,000 of benefits under a Federal program; (4) in connection with a transaction or the business of the organization; (5) involving anything of value of $5,000 or more.\textsuperscript{147}

B. The Supreme Court and Subsequent Circuit Court Holdings Make Clear That § 666 Does Not Contain a Nexus Requirement

The Federal Anti-Bribery Statute does not require a nexus between the federal funding received and the agent's illegal conduct. In \textit{Sabri}, the Supreme Court dismissed the argument that a statute must require proof of a connection between a bribe or kickback and the federal funding as an element of the offense.\textsuperscript{148}

\textsuperscript{146} See generally, 18 USC § 666(a)-(b). In relevant part, § 666 provides:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

\textsuperscript{147} 18 USC § 666(a)(2).

\textsuperscript{148} 541 US at 604.
After *Sabri*, circuit courts expanded upon the Supreme Court’s finding that § 666 does not require a nexus between the federal funding and the bribe solicited or received. In *United States v Guishard*, the Third Circuit applied *Sabri* to find that the government was not required to prove a connection between a case-specific federal interest and the bribe itself. Similarly, the Eighth Circuit found that *Sabri* “lessen[ed] the burden of federal prosecutors to prove what may be an impossible-to-trace, but very real, impact of local corruption on federal funds.” In *United States v Hines*, the Eighth Circuit concluded that a police officer could be convicted of violating § 666 or accepting cash payments from property owners in exchange for performing evictions, even if prosecutors could not demonstrate that these payments affected federal funds.

In the instance of government contracts abroad, the lack of a nexus requirement is potentially troubling because corruption and financial mismanagement are endemic in many nations in which the United States distributes aid monies and engages in economic development contracts. If applied extraterritorially, § 666 could theoretically make every employee of a contracting company or government agency receiving federal funding who engages in conduct considered fraudulent in the United States criminally liable under the Federal Anti-Bribery Statute. However, although *Sabri* indicates that adopting a sufficient nexus standard would be inappropriate in extraterritorial prosecutions brought under § 666, the fundamental fairness standard can, and should, incorporate elements from the sufficient nexus test to preserve the due process rights of noncitizens and comply with principles of state sovereignty and international law.

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150 Id at 118 (finding that in *Sabri*, “the Supreme Court recently held there was no need to prove a connection between a case-specific federal interest—or, more narrowly, federal funds—and the bribe itself”).
151 *United States v Hines*, 541 F3d 833, 836 (8th Cir 2008).
152 541 F3d 833 (8th Cir 2008).
153 Id at 835–37.
154 See generally 2011 USAID AFR at 133–36 (cited in note 15). See also Final Report at 146 (cited in note 1) (noting that “[a]udits and investigations oversight requirements in Afghanistan and Iraq are mission-critical, given the scope, scale, and impact of waste and corruption in the two theaters and their pernicious effects on the U.S. mission”).
C. Without Some Due Process Limitation, Applying § 666 Extraterritorially Could Criminalize Every Part-Time Employee of Every Company in Afghanistan

The broad language and expansive judicial interpretation of the Federal Anti-Bribery Statute indicate that due process requires some connection between the foreign defendant and the United States to ensure that a prosecution is neither arbitrary nor fundamentally unfair. Without such a nexus, the inclusive definitions of “qualifying agency” and “agent” under § 666 could, in theory, allow absurdly tangential prosecutions.\(^{155}\) Under some interpretations, a taxi driver for a subcontractor for a firm receiving USAID contracting funds could face corruption charges in the United States for accepting gratuities totaling more than $5,000 in a calendar year.\(^{156}\)

Although the practical constraints associated with extraterritorial prosecution make the subcontractor’s taxi driver scenario unlikely, this hypothetical illustrates the importance of adopting some kind of minimum contacts standard into courts’ evaluation of whether a prosecution is consistent with due process. The

\(^{155}\) But see Williams, 44 U Mich J L Reform at 65 (cited in note 38); Corn, 62 U Miami L Rev at 513 (cited in note 41); Peters, 2006 BYU L Rev at 385 (cited in note 41). Despite MEJA’s apparently unlimited grant of jurisdiction over noncitizens working abroad, it is generally considered to be a failure because of the institutional and structural barriers to effective investigation and prosecution of government contractors working in conflict zones. Even in egregious cases such as the Abu Ghraib scandal, few if any government contractor employees have been indicted—let alone tried and convicted—for their involvement in violent felonies. See, for example, Keith Rothman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 Penn St Intl L Rev 1, 13 n 75 (2009) (discussing the lack of any systemic Department of Defense investigation of private contractors in prisoner abuse scandals, despite extensive evidence that these contractors played a significant role in running the prison and abusing detainees). As such, while the indiscriminate application of § 666 could technically implicate a subcontractor’s taxi driver given a loose interpretation of the statute, such scenarios are unlikely.

\(^{156}\) See Hines, 541 F3d at 836–37 (finding that gratuities paid to police officers in exchange for timely performance of official duties qualified as a bribe under § 666). Because these transactions were worth more than $5,000 to the persons paying this bribe, § 666 applied even where the bribes themselves did not meet the statutory threshold of $5,000. Id. The issue of whether a bribe or series of bribes must exceed the statutory threshold of $5,000 is the subject of a circuit split. See also, for example, *United States v Abbey*, 560 F3d 513, 521 (6th Cir 2009) (stating in dicta that § 666 contains a “requirement that the illegal gift or bribe be worth over $5,000”). Some circuits have found that the “thing of value” at stake in the bribery transaction could be nonmonetary. See *United States v Marmolejo*, 89 F3d 1185, 1191, 1191–92 (5th Cir 1996) (finding that conjugal visits constituted a thing of value worth more than $5,000); *United States v Fernandez*, 272 F3d 938, 944 (7th Cir 2001) (finding that § 666 applied to a prosecutor receiving multiple bribes from multiple people totaling $5,000 in exchange for expunging motorists’ DUI convictions).
Federal Anti-Bribery Statute is broad, and courts read the terms "qualifying agency" and "agent" expansively. Under the plain language of § 666(b), an "agency" is any "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." Generally, courts read this statute to include almost all payments of federal monies—even when those monies were not actually received.

In Fischer v United States, the Supreme Court found that a hospital that received payments under Medicare received benefits "under a Federal Program" for the purpose of the statute—even though the patients, not the hospital, benefited from the federal program. Fischer clarified that agencies receiving benefits in excess of $10,000 under a federal program do not need to be the direct beneficiary of that program to qualify as an agency for the purposes of § 666. Carrying this further, in United States v Kranovich, the Ninth Circuit found that the requirement that an agency receive benefits of $10,000 under a federal program was satisfied where amounts in excess of $10,000 were available to the agency, even where less money was actually received.

Following Kranovich, a government contractor with at-will access to more than $10,000 in federal funds that does not actually receive this money could still qualify as an organization subject to the Federal Anti-Bribery Statute. This is especially troubling for contractors operating in contract zones, where many transactions are conducted in cash or with minimal formality.

As in the case of "qualifying agency," courts have usually read the Federal Anti-Bribery Statute's definition of "agent" broadly. Under § 666(d)(1), "the term 'agent' means a person au-

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157 18 USC § 666(b).
159 Id at 669.
160 Id.
161 401 F3d 1107 (9th Cir 2005).
162 Id at 1112 ("[T]here is no reason to distinguish between access to guaranteed grant funds that are available upon request.").
Authorized on behalf of another person or a government, and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.”164 As the language of the statute suggests, courts typically apply the antibribery provisions of § 666 to both low-level employees and those with power or control over the organization’s activities and operations.

In United States v Sotomayor-Vazquez,165 the First Circuit noted that § 666 “has been given a wide scope, to include all employees from the lowest clerk to the highest administrator.”166 More recently, the Fifth Circuit found in United States v Ollison167 that “[t]he statute itself does not distinguish between ‘high level’ and ‘low level’ employees. When construing § 666 in the past, we have consistently applied the statute in accordance with its plain language.”168 Since courts typically apply the Federal Anti-Bribery Statute to all employees without regard to their position within a qualifying agency, applying § 666 extraterritorially could subject any member of an international organization receiving United States foreign aid funding to United States criminal jurisdiction—even if the employee’s conduct was legal or customary in the country where the transaction took place.169

IV. COURTS APPLYING THE FEDERAL ANTI-BRIBERY STATUTE TO COMBAT CORRUPTION IN OVERSEAS GOVERNMENT CONTRACTING SHOULD APPLY A MINIMUM CONTACTS ANALYSIS TO ENSURE THAT THE PROSECUTION IS FUNDAMENTALLY FAIR

Courts should consider a foreign defendant’s minimum contacts with the United States in deciding whether the Due Process Clause permits asserting jurisdiction over a foreign defendant accused of violating the Federal Anti-Bribery Statute in theaters such as Iraq and Afghanistan. A minimum contacts standard is consistent with how courts functionally apply both the “sufficient nexus” and the “neither arbitrary nor fundamentally unfair” due process standards. At the same time, this standard reconciles the

164 18 USC § 666(d)(1).
165 249 F3d 1 (1st Cir 2001).
166 Id at 10 (citations and quotation marks omitted).
167 555 F3d 152 (5th Cir 2009).
168 Id at 160 (citations and quotation marks omitted).
169 See, for example, Final Report at 91 (cited in note 1) (“In Iraq and Afghanistan, bribery and kickbacks are a way of doing business.”).
broad language of the Federal Anti-Bribery Statute with notions of due process and fundamental fairness.

In *World-Wide Volkswagen*, the Supreme Court established that a state “may exercise personal jurisdiction over a nonresident defendant only so long as there exists ‘minimum contacts’ between the defendant and the forum State.” In judging whether minimum contacts exist, a court “focuses on the relationship among the defendant, the forum, and the litigation.”71 The contacts between the defendant and the forum state “must be such that it is ‘fair’ to compel the defendant to defend a lawsuit in that state.”72 In *Keeton v Hustler Magazine*,73 the Supreme Court found that the ‘fairness’ of haling a defendant into court in a forum state “depends to some extent on whether” the defendant’s activities relating to that state “are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities.”74 A state’s specific jurisdiction over a defendant “depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”75

In many circuits, the criteria for determining whether minimum contacts exist are not dissimilar to the factors that courts consider when determining whether an extraterritorial prosecution is consistent with due process. In civil cases, many federal courts employ a three-part test to determine whether minimum contacts exist to establish specific jurisdiction.76 In the Sixth Circuit, for example, finding that the exercise of jurisdiction was proper requires: (1) that the defendant purposely availed himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) that the cause of action arises out of the defendant’s contacts with the forum state; and (3) that the defendant have a “sufficiently substantial connection to the forum such that the exercise of jurisdiction is not unreasonable.”77

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70 444 US at 291.
72 Id.
74 Id at 776.
75 *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846, 2851 (2011) (quotation marks omitted).
76 See, for example, *United States v Swiss American Bank, Ltd*, 191 F3d 30, 36 (1st Cir 1999); *Carefirst of Maryland, Inc v Carefirst Pregnancy Centers, Inc*, 335 F3d 390, 397 (4th Cir 2003); *Schneider v Hardesty*, 669 F3d 693, 701 (6th Cir 2012).
77 *Schneider*, 669 F3d at 701–03.
Similarly, courts determining whether an extraterritorial prosecution comports with due process under both the “sufficient nexus” and the “neither arbitrary nor fundamentally unfair” standards consider three factors: the nature and extent of a defendant’s contacts with the United States; how the alleged conduct affects the United States, its interests, and its citizens; and whether the host nation consents to the exercise of jurisdiction over its citizens.\textsuperscript{178}

Although the last point is exclusive to the exercise of extraterritorial jurisdiction,\textsuperscript{179} the extraterritorial due process analysis mirrors the minimum contacts test used in domestic civil cases. While the minimum contacts standard would not be a jarring change, requiring courts to consider this test would allow them to look to well-developed precedent handed down by the Supreme Court and administered through individual circuits rather than compelling district courts to engage in a largely ad hoc inquiry. Most importantly, using the civil procedure minimum contacts test for extraterritorial criminal corruption imports the flexible yet stringent standard necessary to administer a broadly-written and interpreted law such as the Federal Anti-Bribery Statute in a manner consistent with due process and international law.

Applying a minimum contacts standard to the facts in \textit{Campbell} illustrates how a court might apply this test to determine whether the exercise of extraterritorial jurisdiction is proper under the Due Process Clause. Taking the fact pattern from \textit{Campbell}, a minimum contacts analysis similar to the test used by the Sixth Circuit would require the court to first evaluate whether Campbell purposely availed himself of the United States. Second, the court would consider whether the cause of action arose out of Campbell’s contacts with the United States. Third, the court would analyze whether Campbell had a sufficiently substantial connection to the United States so that haling him into federal court would not be unreasonable. Here, Camp-

\textsuperscript{178} See \textit{Klimavicius-Viloria}, 144 F3d at 1257 (discussing how the nexus requirement serves the same purpose as the minimum contacts test in personal jurisdiction); \textit{Mohammad-Omar}, 323 Fed Appx at 261–62 (finding sufficient contacts where a drug trafficker knew his heroin would ultimately arrive in the United States, harming United States interests and United States citizens); \textit{Yousef}, 327 F3d at 97–98 (noting that asserting jurisdiction was appropriate because the intended conduct meant to affect United States foreign policy and kill United States citizens); \textit{Davis}, 905 F3d at 249 (finding that a nexus existed because the intended transaction meant to cause criminal acts within the United States); \textit{Cardales}, 168 F3d at 553 (discussing consent to jurisdiction).

\textsuperscript{179} For example, the state of Virginia cannot grant the state of Maryland the authority to exercise jurisdiction over its citizens.
bell purposely availed himself of the United States because he worked as part of a contracting board allocating USAID contracts. This likely satisfies the first prong of the minimum contacts test. Second, Campbell used his position on the contracting board corruptly by offering to steer $14 million in USAID funding to a federal agent posing as the representative of an Afghani subcontracting company in exchange for $190,000 in cash. As such, Campbell's prosecution under the Federal Anti-Bribery Statute stems directly from his connection to the United States. Finally, Campbell openly and knowingly attempted to misallocate federal money for federal gain. Therefore, a court would likely find that haling him into federal court would be reasonable and fair because Campbell had a sufficiently substantial connection to the United States. A minimum contacts analysis would therefore allow courts to find that the extraterritorial prosecution of contract fraud under circumstances similar to those in Campbell satisfies due process.

Adopting a minimum contacts analysis would also guard against overzealous prosecutions. Although a subcontractor's taxi driver could technically be found liable under the Federal Anti-Bribery Statute for accepting gratuities in excess of $5,000 over the course of a year, a minimum contacts analysis would preclude this type of prosecutorial overreach. The taxi driver scenario would fail under the minimum contacts test for three reasons. First, the taxi driver never purposely availed himself of the United States by working with a US-funded entity. Second, the taxi driver's indictment did not result from his contacts with the United States; rather, the conduct at issue was directed toward and contained within a foreign nation. Third, the taxi driver does not have a sufficiently substantial connection to the United States to justify the exercise of extraterritorial jurisdiction under the Due Process Clause.

These examples show how a minimum contacts standard would limit extraterritorial prosecutions under § 666 to egregious cases with clear connections to the United States, without violating Sabri by requiring a nexus between the federal funding and the bribe solicited or received. By focusing on the conduct, connections, knowledge, and intent of the offender, the minimum contacts test ensures that this broad statute will be applied in a manner consistent with due process and fundamental fairness while allowing government investigators to use this statute to combat corruption in overseas government contracts.
V. CONCLUSION

The United States has lost billions of dollars to fraud, corruption, and waste in overseas government contracts in theaters such as Iraq and Afghanistan. To combat corruption in government contracts, the United States has begun prosecuting local and third-country nationals working as contractor employees under United States criminal laws in a manner that may conflict with the Due Process Clause. The Federal Anti-Bribery Statute is one such law. Although the Supreme Court found that the Federal Anti-Bribery Statute does not require a nexus between the defendant and the federal funds received, the statute's expansive language and broad interpretation by the courts creates the potential for prosecutorial overreach. Courts considering extraterritorial prosecutions brought under the Federal Anti-Bribery Statute should therefore consider factors similar to the minimum contacts test for personal jurisdiction established in *World-Wide Volkswagen v Woodson* in their analyses of whether a prosecution is arbitrary or fundamentally unfair.