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Do the Fifth and Sixth Amendments Prohibit the Designation of U.S. Persons Under the International Emergency Economic Powers Act?

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**Do the Fifth and Sixth Amendments Prohibit the Designation of U.S. Persons
Under the International Emergency Economic Powers Act?**

Eric Sandberg-Zakian*

ABSTRACT: The International Emergency Economic Powers Act (IEEPA) empowers the executive branch to designate organizations and individuals “Specially Designated Global Terrorists.” Though IEEPA designation is used against both domestic and foreign entities, its consequences are most severe within the United States. The designee’s assets are frozen and transacting with the designee becomes a federal felony. For an American organization, IEEPA designation is a death sentence. For an American individual, it amounts to house arrest. This Article analyzes IEEPA using the *Mendoza-Martinez* test and concludes that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments by imposing punishment without providing the required procedural protections. This Article offers a new framework for evaluating preventive counterterrorism policies and provides clarity to a notoriously unclear area of our constitutional law—the jurisprudence of the civil/criminal divide.

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INTRODUCTION

In late 2001, the FBI raided the offices of the Illinois-based Global Relief Foundation, the second largest Islamic charity in the United States.¹ In less than a year, Global Relief had entirely disappeared. The government froze its assets, made transacting with it in any way a federal felony, and legally labeled it a “Specially Designated Global Terrorist,” all without a trial or even a hearing.² Under such circumstances, Global Relief was doomed. How could it survive, when employees accepting salaries, benefactors offering donations, and a landlord accepting rent all risked being prosecuted? Moreover, who wants to do business with a terrorist organization?

The speed and efficiency with which the government destroyed Global Relief Foundation and several other American Islamic charities³ is, depending on your perspective, either extremely frightening or greatly comforting. Are you disturbed by the executive branch deciding, in secret, to shut down a charity with no public legal process or judicial oversight?⁴ Or are you worried that terrorists may be infiltrating charities like Global Relief, raising cash to fund deadly attacks against American troops and civilians around the world, and receiving the protection of generous American criminal procedures that make prosecution of complex financial crimes costly and difficult for the government?⁵

Even more frightening—or more encouraging—is that the government is able to designate not just organizations but also individual Americans as Specially Designated Global Terrorists (SDGTs).⁶ Once designated, a person cannot even purchase groceries without a

¹ David B. Ottaway, *Groups, U.S. Battle Over ‘Global Terrorist’ Label*, WASH. POST, Nov. 14, 2004, at A1.

² *Id.*

³ See *infra* notes 32-39 and accompanying text

⁴ *Id.*

⁵ See *infra* notes 66-68.

⁶ See *infra* notes 17-29.

waiver from the Treasury Department. In fact, the designee cannot spend or receive any money, unless the government allows it.⁷ The designee is incapacitated with a targeted blockade, an ancient weapon of the state updated for the digital age, made adaptable, and efficient.

The International Emergency Economic Powers Act (IEEPA)⁸ authorizes the executive branch to use this awesome power against foreign persons and U.S. persons alike. The vast majority of IEEPA designees are not U.S. persons; the executive branch usually targets foreign individuals and organizations.⁹ Nonetheless, a number of Americans have been designated.¹⁰

There is no question that the use of the power against non-U.S. persons, who generally cannot claim any of the protections in the Bill of Rights,¹¹ does not violate the Constitution. But the designation of U.S. persons has drawn some serious challenges. American designees have claimed that the use of IEEPA deprived them of the right to free speech, the right to freedom of association, and the right to receive compensation in exchange for property taken by the government, but such challenges have failed.¹²

Although courts have rejected a variety of constitutional challenges to IEEPA designation, they have not yet considered the possibility that designation is a criminal punishment, rendering IEEPA unconstitutional on the grounds that it imposes a punitive deprivation of liberty without proving guilt beyond a reasonable doubt to a jury in a public trial, obtaining a grand jury indictment, giving the designee a chance to confront the government's

⁷ *Id.*

⁸ 50 U.S.C. § 1701-1707.

⁹ See Office of Foreign Assets Control, Specially Designated Nationals List (SDN), <http://www.ustreas.gov/offices/enforcement/ofac/sdn/index.shtml>.

¹⁰ *Id.*

¹¹ See sources cited *infra* note 31.

¹² See *infra* notes 26-29.

witnesses, or providing the other rights guaranteed by the Fifth and Sixth Amendments.¹³

However, as I will demonstrate in this Article, IEEPA designation of U.S. persons is unconstitutional for exactly that reason.

In order to judge whether a purportedly civil statute actually imposes criminal punishment, courts undertake a totality of the circumstances inquiry known as the *Mendoza-Martinez* test.¹⁴ The doctrine surrounding this test has been widely criticized as thoroughly and completely incoherent.¹⁵ Professor Aaron Fellmeth sums up the scholarly consensus when he asserts, “It is no exaggeration to rank the [Supreme Court’s doctrine of the civil/criminal] distinction among the least well-considered and principled in American legal theory.”¹⁶

In applying the *Mendoza-Martinez* test to IEEPA, we can work towards clarifying this area of doctrine. Thus, in this Article I identify some of the holes in the Supreme Court’s reasoning. In particular, I identify the Supreme Court’s refusal to articulate a conception of the purpose of punishment as the doctrine’s major problem, and I lay out the three possible theories proposed by scholars and judges that the Court could adopt. However, my central claim of this Article is that no matter which conception of punishment the Court favors, IEEPA designation of U.S. persons is unconstitutional because it imposes criminal punishment without providing the elevated procedural protections required by the Bill of Rights.

¹³ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”);

¹⁴ Or, occasionally, the *Kennedy-Ward* test. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 107 (2003) (Souter, J., concurring); *Hudson v. United States*, 522 U.S. 93, 112 (1997) (Souter, J., concurring); *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 806 (1994) (Scalia, J., dissenting).

¹⁵ *See infra* notes 41-51 and accompanying text.

¹⁶ Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO L.J. 1, 3 (2005).

In Part I of this Article, I describe IEEPA and its use against U.S. individuals and entities, noting that no court has yet considered whether such use violates the Fifth and Sixth Amendment by imposing criminal punishment without the requisite procedures.

In Parts II and III, I develop my main arguments. I evaluate IEEPA using the seven-factor *Mendoza-Martinez*, and demonstrate that each of the seven factors suggests IEEPA designation imposes criminal punishment. I conclude that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments by imposing punishment without providing the required procedural protections.

In Part IV, I briefly consider one potential counterargument that suggests IEEPA designation of U.S. persons is constitutional in a few, extremely rare cases. In particular, the Constitution may permit IEEPA designation of U.S. persons when an active war is being fought within the borders of the United States. I allow that this argument may be persuasive, but I suggest that we should not expect it to save the government's use of IEEPA against U.S. persons for counterterrorism purposes in the absence of any indication that the legal community is prepared to accept the premise that we are engaged in an infinite global war—unbounded by space and time—that is being waged everywhere and anywhere, including on our own soil.

In Part V, I offer a brief conclusion, reiterating that IEEPA designation of U.S. persons is unconstitutional, and I identify a few questions posed by the Article's arguments.

In this Article, I offer two unique contributions. First, I demonstrate that the Fifth and Sixth Amendments prohibit IEEPA designation of U.S. persons. Second, I help clarify our jurisprudence of the civil/criminal divide, an area of American constitutional law that desperately needs clarity. IEEPA is an obscure but sweeping statute that serves a number of different foreign policy functions with little judicial oversight. The doctrine of the civil/criminal divide is riddled

with unsolved problems and confused inconsistencies. I hope this Article will impose a modicum of restraint on the tactics authorized by IEEPA while contributing a bit of coherence to our jurisprudence of the civil/criminal divide.

I. THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA)

In essence, IEEPA empowers the President to institute targeted blockades against specific individuals or groups. While the act contemplates application mainly against foreign persons, it has been increasingly used against American citizens and organizations in recent years.¹⁷ Because it allows for the complete financial destruction of its target, IEEPA permits the executive branch to incapacitate suspected terrorists or terrorism financiers without having to build a criminal case against them.

The text of IEEPA empowers the President to declare a national emergency with respect to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”¹⁸ Once the President has declared a national emergency, he has the power to, *inter alia*, “prevent or prohibit” any “dealing in, or . . . transactions involving, any property in which any foreign country or a national thereof has any interest.”¹⁹

In practice, this authority is exercised by what can be roughly described as a three-step process. First, the President issues an executive order declaring a national emergency, describing the type of individuals who will be sanctioned, and delegating the task of implementing

¹⁷ Office of Foreign Assets Control, SDN List by Country, <http://www.ustreas.gov/offices/enforcement/ofac/sdn/ctrylst.txt>; see also OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR (2006), available at http://www.ombwatch.org/files/pdfs/muslim_charities.pdf; Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. TIMES, Dec. 12, 2006, at A1; David B. Ottaway, *Groups, U.S. Battle Over ‘Global Terrorist’ Label*, WASH. POST, Nov. 14, 2004, at A1.

¹⁸ 50 U.S.C. § 1701.

¹⁹ 50 U.S.C. § 1702.

sanctions to the Secretary of State or the Secretary of the Treasury.²⁰ Second, the cabinet member charged with implementation designates particular individuals (people or entities) as fitting the description in the Executive Order.²¹ Third, the Treasury’s Office of Foreign Asset Control (OFAC)—the executive entity charged with carrying out the sanctions—proceeds to block all property of and transactions involving the designated individuals. In some instances, federal law enforcement entities simultaneously proceed to investigate and prosecute U.S. persons who transact with designated individuals.²²

Courts have interpreted IEEPA to confer upon the President power over a broad range of property and transactions. In particular, the Federal Courts of Appeals are united in giving a broad construction to the words “any interest” in the phrase “any property in which any foreign country or national thereof has any interest.”²³ The Seventh Circuit opined that because “[t]he statute is designed to give the President means to control assets that *could* be used by enemy aliens,” IEEPA encompasses property that might be used to benefit foreign interests “even if a U.S. citizen is the legal owner.”²⁴ Thus, a U.S. person or entity may be designated under an order targeting a foreign threat, and may have all of her or its property entirely blocked.

Notably, IEEPA designation is especially harmful to a U.S. person. When designated, a foreign entity like Hezbollah or a foreign individual like Osama Bin Laden may lose important American revenue streams, contacts, or allies. American citizens, however, are completely

²⁰ See, e.g., Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001); Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 25, 1995).

²¹ See Office of Foreign Assets Control, Archive of SDN Changes, <http://www.ustreas.gov/offices/enforcement/ofac/sdn/archive.shtml> The President will usually include in the Executive Order an initial list of individuals designated under it, to be expanded by the particular cabinet member.

²² See DEPARTMENT OF JUSTICE, COUNTERTERRORISM SECTION, COUNTERTERRORISM WHITE PAPER UPDATE 14-16 (2007).

²³ See, e.g., Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 162-63 (D.C. Cir. 2003); Global Relief Foundation, Inc. v. O’Neil, 315 F.3d 748, 753 (7th Cir. 2002).

²⁴ *Global Relief Foundation*, 315 F.3d at 753 (emphasis added).

incapacitated—prohibited from working, banking, traveling, or buying groceries without the consent of OFAC. Even more severe is the fate of American organizations: it is the rare charity or company that can survive a prohibition on collecting revenue, paying creditors, compensating employees, and making purchases. The IEEPA designation of an American person thus amounts to total incapacitation, while the designation of an American company generally constitutes a death sentence.

Despite the dire consequences of the designation of an American person or entity, courts that have faced the question of the definition of “any property in which any foreign country or national thereof has any interest” have good reasons for favoring the broader construction. It is hard to imagine Congress having intended any other meaning. As the Seventh Circuit explained,

if al Qaeda incorporated a subsidiary in Delaware and transferred all of its funds to that corporation . . . [w]hat sense could it make to treat al Qaeda's funds as open to seizure if administered by a German bank but not if administered by a Delaware corporation under terrorist control? Nothing in the text of the IEEPA suggests that the United States' ability to respond to an external threat can be defeated so easily. Thus the focus must be on how assets could be controlled and used²⁵

The constitutionality of IEEPA designation of U.S. persons has been challenged, and upheld, repeatedly. Courts have rejected claims that designation unconstitutionally abridges the freedom of speech or association,²⁶ impermissibly delegates legislative power to the executive,²⁷

²⁵ *E.g.*, *Global Relief Foundation*, 315 F.3d at 753.

²⁶ *E.g.*, *Holy Land*, 333 F.3d at 161.

²⁷ *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993)

takes private property for public use without just compensation,²⁸ and fails to provide the requisite notice or hearing.²⁹

What IEEPA designees have yet to argue, and thus courts have yet to consider, is that designation unconstitutionally subjects U.S. persons to criminal punishment without providing the required procedural protections.³⁰ Clearly, that argument offers no chance of relief to prototypical IEEPA designees like Iran, al-Qaeda, or Osama Bin Laden, who generally cannot claim the protection of the Bill of Rights.³¹ Nonetheless, the theory's acceptance would carry substantial consequences. On the one hand, it would shield American individuals from harsh sanctions and save American entities from certain destruction. On the other, it might severely compromise the U.S. government's fight against terrorism and other national security threats. Thus, the question of whether IEEPA designation can constitutionally be used against U.S. persons is quite significant.

²⁸ *E.g.*, *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 39-40 (D.D.C. 2005).

²⁹ *E.g.*, *Holy Land*, 333 F.3d at 163.

³⁰ For example, the Holy Land foundation argued in the D.C. Circuit that designation unconstitutionally violated its rights to freedom of speech, association, and equal protection, and denied it procedural due process right to notice and a hearing. It did not put ask the Court of Appeals to invalidate the designation on the theory I suggest here. *See* Brief of Appellant, *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (No. 02-5307).

³¹ Alien citizens, by the policy and practice of the court of this country, are ordinarily permitted to resort to permitted to resort to the courts for the redress of wrongs and the protection of their rights," *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908), and the Constitution governs the actions of the American government no matter where it acts. *Reid v. Covert*, 354 U.S. 1, 6 (1957). But the Constitution's procedural protections have generally not been extended to aliens outside territory over which America has sovereignty. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Jackson, J.) (holding that the Bill of Rights does not protect non-resident aliens); *Kukatush Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962) (Burger, J.) (denying Canadian corporation with no assets in the United States standing to sue the United States for the denial of constitutionally guaranteed due process of law); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976) (denying a non-resident alien standing to sue U.S. military officials for harassment and intimidation); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 722 note 16 (1987). Of course, the recent counterterrorism effort has destabilized the law in this area, *see, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). For more on this subject, see José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 *YALE L.J.* 1660 (2009); Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 *YALE L.J.* 1762 (2009).

The rest of this Article explores that question, taking as a test case the Specially Designated Global Terrorist (SDGT) designation, the most publicly visible and the most immediately relevant of the IEEPA designations currently in use against U.S. persons. The SDGT designation was created in 2001, shortly after the September 11 attacks,³² and drew a great deal of publicity following the government's 2001 designation of the Holy Land Foundation for Relief and Development,³³ 2002 designation of the Global Relief Foundation³⁴ and Benevolence International Foundation,³⁵ and 2004 designation of the al-Haramain Foundation.³⁶ The designation and ensuing destruction of these charities, four of the largest and best-known Islamic charities in the United States, was covered extensively in the press.³⁷ The focus on the government's efforts to shut down these charities only grew more intense as a result of two somewhat embarrassing incidents. First, prosecutors accidentally revealed to the al-Haramain Foundation that phone conversations between the charity's Saudi Arabia-based director and its American citizen lawyers in Washington, D.C. had been eavesdropped upon by

³² Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

³³ Press Release, Office of Foreign Assets Control, OFAC Has Designated the Following Three Entities as Specially Designated Global Terrorists [SDGT] (Dec. 4, 2001), *available at* <http://www.treas.gov/offices/enforcement/ofac/actions/20011204.shtml>.

³⁴ Press Release, Office of Foreign Assets Control, Global Relief Foundation, Inc. Has Now Been Officially Listed as a "Specially Designated Global Terrorist" [SDGT] (Oct. 18, 2002), *available at* <http://www.treas.gov/offices/enforcement/ofac/actions/20021018.shtml>.

³⁵ Press Release, Office of Foreign Assets Control, Benevolence International Foundation Has Now Been Officially Listed as a "Specially Designated Global Terrorist" [SDGT] (Nov. 19, 2002), *available at* <http://www.treas.gov/offices/enforcement/ofac/actions/20021119.shtml>.

³⁶ Press Release, Office of Foreign Assets Control, The Following Entity Which Had Previously Been Listed as [BPI-PA] Has Now Been Listed as a Specially Designated Global Terrorist "[SDGT]", (Sept. 9, 2004), *available at* <http://www.treas.gov/offices/enforcement/ofac/actions/20040909.shtml>.

³⁷ *See, e.g.,* Alan Cooperman, *In U.S., Muslims Alter Their Giving*, WASH. POST, Dec. 7, 2002, at A1; John Mintz, *U.S. Labels Muslim Charity as Terrorist Group*, WASH. POST, Oct. 19, 2002, at A2; Hanna Rosin, *U.S. Raids Offices of 2 Muslim Charities*, WASH. POST, Dec. 16, 2001, at A28; Neely Tucker, *Muslim Charity's Lawsuit Raises 'Distressing' Issues, Judge Says*, WASH. POST, Apr. 23, 2002, at A4.

the NSA's warrantless wiretapping program.³⁸ Second, the Department of Justice struggled to obtain a guilty verdict in a criminal case against the Holy Land Foundation.³⁹

It is important to note that the government has used IEEPA designation against U.S. persons only rarely, and against U.S. individuals, as opposed to entities, even more rarely still.⁴⁰ Nonetheless, it has done so and will do so in the future. Much depends on whether the Constitution allows such use. IEEPA designation allows the government to incapacitate allegedly dangerous Americans without having to obtain admissible evidence that proves guilt beyond a reasonable doubt, and it prevents Americans accused of being dangerous from defending themselves against those accusations in a court of law. The liberty of individuals and the security of the United States hang in the balance.

II. THE *MENDOZA-MARTINEZ* TEST

A. *An Overview of the Test*

Since the 1963 *Kennedy v. Mendoza-Martinez*⁴¹ decision holding the revocation of draft evaders' citizenship unconstitutional because it was not accompanied by criminal procedural protections, the Supreme Court has employed a seven-factor totality-of-the-circumstances test to determine whether a putatively civil statute is in fact criminal. Despite having used it in a great many recent cases, however, the Court's application of the test remains deeply confused and the doctrine that has grown up around it is thoroughly incoherent.

³⁸ Carol D. Leonnig & Mary Beth Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, Mar. 2, 2006, at A1.

³⁹ Carrie Johnson & Walter Pincus, *Terrorism Financing Case Back in Court*, WASH. POST, Sept. 21, 2008, at A2.

⁴⁰ See Office of Foreign Assets Control, SDN List by Country, <http://www.ustreas.gov/offices/enforcement/ofac/sdn/ctrylst.txt>.

⁴¹ 372 U.S. 144 (1963)

This incoherence has been frequently noted by commentators. As Professor Aaron Fellmeth bluntly puts it, “It is no exaggeration to rank the [Court’s doctrine of the civil/criminal] distinction among the least well-considered and principled in American legal theory.”⁴² In 1998, Professor Wayne Logan observed that “[d]espite its importance, the Court’s numerous decisions in this area have amounted to an incoherent muddle. Indeed, one would be hard pressed to identify an area of constitutional law that betrays a greater conceptual incoherence.”⁴³ Now, more than a decade later, despite a number of intervening decisions, Professor Thomas Colby offers Logan’s derision as a still-accurate assessment of the current doctrine.⁴⁴

This incoherence stems not just from a fickle and unprincipled application of the test by the Court,⁴⁵ but also by the great degree of uncertainty inherent in the test itself.⁴⁶ To determine

⁴² Fellmeth, *supra* note 16, at 3.

⁴³ Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998); *see also id.* at 1281 (“[T]he Supreme Court’s case law on the punishment question in recent times has been so inconsistent that it borders on the unintelligible, evidencing a decidedly circular, at times patently result-driven effort to distinguish whether a sanction is ‘civil’ or ‘criminal,’ ‘preventive’ or ‘punitive,’ ‘regulatory’ or ‘retributive.’”).

⁴⁴ Thomas Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 447 (2008); *see also* Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 3 (1999) (“[B]y simply invoking historical precedent as a talismanic answer to today’s judicial riddles, the Court fails to provide any analysis of how that precedent might be justified.”).

⁴⁵ In cases implicating the civil/criminal divide, the Court tailors its opinions to the specific facts at issue to an extreme degree. For example in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court approved and labeled civil a broad interpretation of the statute, when faced with a rather extreme record; the Court noted that the respondent-defendant, Hendricks, had “explained that when he ‘gets stressed out,’ he ‘can’t control the urge’ to molest children . . . [and] he stated that the only sure way he could keep from sexually abusing children in the future was ‘to die.’” 521 U.S. at 355. Justice Thomas’s opinion for the Court did not rely on any of those facts in reaching the holding, however, ruling that the statute was constitutional even though it covered individuals with far more control over their behavior than Hendricks possessed. But Justice Kennedy wrote a short concurrence, indicating that his joined the majority only because of the particular facts of the case. 521 U.S. at 371-72 (Kennedy, J., concurring). He explicitly left open the possibility that examining the further application of the statute could lead him to conclude that it in fact imposed criminal punishment. *Id.* at 373. Sure enough, just five years later, in *Crane*, the same statute was once again before the Court. Justice Kennedy, along with Chief Justice Rehnquist and Justice O’Connor, combined with the four *Hendricks* dissenters to issue an opinion authored by Justice Breyer arguing that *Hendricks* had only approved the civil commitment of dangerous persons suffering from mental abnormalities who find it “difficult, if not impossible” to control their behavior, not the entire class of individuals with mental abnormalities or emotional disorders covered by the Kansas statute. *Crane*, 534 U.S. at 411-14. In short, *Crane* obscured any

whether a statute imposes criminal punishment, the *Mendoza-Martinez* test considers the following factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁴⁷

Yet, these factors “often point in differing directions”⁴⁸ and are regarded by the Court as “helpful” but “certainly neither exhaustive nor dispositive.”⁴⁹ Furthermore, though the Court stresses that “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,”⁵⁰ Justice Breyer has observed that “the limitation that the language suggests is not consistent with what the Court has actually done. Rather, in fact if not in theory, the Court has simply applied . . . [the *Mendoza-Martinez*] factors to the matter at hand.”⁵¹ Accordingly, it is impossible to predict with any certainty what the Court will find persuasive when evaluating a new statute.

clarity that a careful observer might have been able to draw out of *Hendricks* about the Court’s theory of the Constitution’s criminal procedure regime.

⁴⁶ See *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting in part and concurring in part) (“No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that . . . [the sanctions] are not . . . punishment.”)

⁴⁷ *Mendoza-Martinez*, 372 U.S. at 168-69.

⁴⁸ *Id.* at 169.

⁴⁹ *United States v. Ward*, 448 U.S. 242, 250 (1980)

⁵⁰ *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

⁵¹ *Hudson v. United States*, 522 U.S. 93 (1997) (Breyer, J., concurring in the judgment) (joined by Justice Ginsburg); see also *id.* at 112-14 (Souter, J., concurring). Moreover, several of the Court’s members have

Thus, we must approach the task of applying the *Mendoza-Martinez* test to IEEPA designation with some trepidation. The test simply cannot offer a clear answer. Nonetheless, considering each factor in turn suggests that, under *Mendoza-Martinez*, IEEPA designation is criminal punishment.

B. *The Test's First Five Factors*

The first five factors strongly suggest that designation is criminal punishment. First, designation is obviously an affirmative disability or restraint. The loss of the freedom to work, travel, enter into contracts, use a bank, or make purchases of any kind without specific government authorization is as disabling or restraining as any sanction short of incarceration. Indeed, the Supreme Court has identified a variety of far less restrictive measures affirmative disabilities or restraints, including moderate monetary penalties.⁵²

Second, IEEPA designation's constitutive elements are all paradigmatic historical punishments—the state seizes all of the designee's property, publicly labels her a “terrorist”, and casts her out of the community by forbidding all others from interacting with her.⁵³ Indeed, Justice Kennedy's opinion for the Court in *Smith v. Doe*⁵⁴ makes that abundantly clear. While rejecting the argument that sex-offender registration was similar to historical punishments, Justice Kennedy offered an account of historical punishment that reads like a description of IEEPA designation:

Some colonial punishments indeed were meant to inflict public disgrace.

Humiliated offenders were required to stand in public with signs cataloguing their

questioned the utility of following the “clearest proof” approach in all cases. *See Doe*, 538 U.S. at 107, 110 (Souter, J., concurring in the judgment); *Id.* at 114-15 (Ginsburg, J., dissenting) (joined by Justice Breyer).

⁵² *See, e.g.*, *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994).

⁵³ *See supra* notes 17-25 and accompanying text.

⁵⁴ *Smith v. Doe*, 538 U.S. 84 (2003).

offenses. . . . At times the labeling would be permanent: A murderer might be branded with an “M,” and a thief with a “T.” . . . The aim was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community. . . . The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one. . . . Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.⁵⁵

IEEPA designation is an updated version of such tactics—it brands a designee with the letters of shame “SDGT,” forbids members of the community from interacting with the designee and which stages a direct confrontation through press releases and office raids.⁵⁶

Third, while the Executive Order that creates the SDGT designation is unclear about whether it carries a scienter requirement,⁵⁷ it seems that in practice OFAC will only designate individuals after a finding of scienter. Certainly, the OFAC announcements announcing new designations suggest that designees are intentionally nefarious and treat a guilty mind as an

⁵⁵ 538 U.S. at 97-98 (internal citations and quotation marks omitted)

⁵⁶ See Ottaway, *supra* note 1.

⁵⁷ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (authorizing the designation of “foreign persons determined . . . to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economic of the United states; . . . persons determined . . . to assist in, sponsor, or provide . . . support . . . of, such act of terrorism . . . or . . . to be otherwise associated with those persons . . .”).

important component in the public explanation of a designation.⁵⁸ And for good reason—the intensive and costly process of designation would be a bizarrely inefficient solution to the problem of someone unknowingly or non-recklessly committing or supporting terrorist acts. Presumably, most Americans accidentally supporting terrorism would stop the behavior in question immediately when informed of its consequences. Accordingly, designation probably carries a scienter requirement in theory, and in any case certainly carries one in practice.

Fourth, designation will undoubtedly promote retribution and deterrence.⁵⁹ Whether or not it is intended primarily to achieve those aims, it furthers them both. As a publicly inflicted severe deprivation of the liberty of accused terrorists, it deters those who might consider participating in or supporting terrorism in the future and retributively imposes suffering upon those alleged to have done wrong. In particular, by making criminals out of all those who transact with an SDGT, IEEPA designation very clearly morally condemns designees. Indeed, the message is that they are moral outcasts, forbidden from participating in their normal community life.

Occasionally,⁶⁰ the Court has offered an alternative account of the “promotes retribution and deterrence” factor of the test, effectively treating the word “promotes” as if it were “intends”. Most notably, Justice Thomas’s opinion for the Court in *Kansas v. Hendricks*

⁵⁸ Office of Foreign Assets Control, 2009 OFAC Recent Actions, <http://www.ustreas.gov/offices/enforcement/ofac/actions/index.shtml>.

⁵⁹ In fact, more often than not affirmative disabilities or restraints serve both of these goals. Retribution or deterrence will not be promoted only in a minority of cases, such as when the targeted individual is incapable of being deterred, *see, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997) (“Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.”), or the penalty imposed is spread throughout society rather than aimed at a wrongdoer, as is the case, for example, for required contributions to worker’s compensation funds.

⁶⁰ *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, (2003); *Hendricks*, 521 U.S. at 361-363; *Hudson v. United States*, 522 U.S. 93, (1997).

upholding a sex-offender civil commitment statute suggested that the proper inquiry was whether the legislature “intended the act to function as a deterrent”⁶¹ or whether “the Act’s purpose was . . . retributive.”⁶²

This alternative formulation is entirely inconsistent with the test as a whole, however, which aims to discover whether a statute imposes criminal punishment even if Congress do not intend it to do so. Indeed, as *Hendricks* itself explained, the Court only turns to the *Mendoza-Martinez* test after deciding that the enacting legislature intended to establish civil proceedings⁶³ and employs the test to discover whether “‘the statutory scheme is so punitive either *in purpose or effect* as to negate the State’s intention’ to deem it ‘civil.’”⁶⁴ Thus, the *Mendoza-Martinez* test clearly must ask not just whether the legislature acted with a retributive or deterrence-focused *purpose*, but also whether the whether the sanction’s *effect* is to achieve retribution or deterrence. Accordingly, we should apply the broader version of the “promotes retribution and deterrence” factor that the Court usually employs,⁶⁵ asking whether a sanction *has the effect* of promoting retribution and deterrence. In this case, we have little direct evidence that Congress and the President intended retribution and deterrence, but it is undeniably clear that both are in fact affected by IEEPA designation.

Fifth, Congress has already criminalized terrorism and the provision of material support to terrorists.⁶⁶ This factor, in particular, ought to be afforded great weight in this case. The U.S. government has had considerable difficulty attempting to prosecute SDGTs.⁶⁷ Moreover, many

⁶¹ *Hendricks*, 521 U.S. at 362.

⁶² *Id.*

⁶³ *Id.* at 361.

⁶⁴ *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)) (emphasis added).

⁶⁵ *See, e.g.*, *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994); *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

⁶⁶ *See, e.g.*, 18 U.S.C. 2339a; 18 U.S.C. 2339b.

⁶⁷ *See, e.g.*, *Johnson & Pincus*, *supra* note 39.

policymakers and scholars have publicly expressed an unwillingness to prosecute terrorism crimes because they feel that the operation of the rules of evidence and Bill-of-Rights-mandated criminal procedures will compromise other government priorities. Specifically, they worry that public trials will reveal highly classified information, compromising intelligence sources and methods.⁶⁸ Accordingly, there is an elevated risk that the government will seek to impose criminal punishment without providing the required procedures.

III. THE TEST'S LAST TWO FACTORS AND THE UNREASONED TREATMENT OF ALTERNATIVE PURPOSE

The *Mendoza-Martinez* test's last two factors, alternative purpose and excessiveness in relation to that purpose, are always applied in tandem and are best treated together because of their necessary interdependence. Applying these two factors to IEEPA designation also suggests that designation is criminal punishment. In contrast to our relatively straight-forward examination of the first five factors, however, it takes a great deal of analysis and a willingness to step beyond the current case law to come to this conclusion, because the Court has failed to explain how to apply the last two factors of the test. Indeed, the incoherence that plagues our civil/criminal divide jurisprudence stems in large part from the Court's entirely unreasoned application of these two factors.⁶⁹

⁶⁸ See, e.g., John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227 (2006); George J. Terwilliger, III, "Domestic Unlawful Combatants": A Proposal to Adjudicate Constitutional Detentions, ENGAGE, Oct. 2006, at 55; Matthew Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y (forthcoming 2009); Neal Katyal & Jack Goldsmith, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

⁶⁹ The Court's confused treatment of these factors has an outsized effect on the incoherence of this area of doctrine because, in practice, the Court's final conclusion often hinges on whether the sanction is a non-excessive, rational means of achieving a sufficiently alternative purpose. See *Smith v. Doe*, 538 U.S. 84, 102 (2003) ("The Act's

A. *The Supreme Court's Under-Theorized View of the Purposes of Punishment*

When the Court asks for an “alternative purpose,” it means one that is “nonpunitive.”⁷⁰ In other words, if a statute serves a goal other than criminal punishment, that will suggest that the statute does not impose criminal punishment. While the circularity of that claim is frustrating, the inquiry to which it alludes does make some sense. If a judge cannot ascertain a goal that a statute furthers other than imposing criminal punishment, it is a good sign the statute imposes criminal punishment. Examining IEEPA designation in search of such a goal, however, reveals that the Court has never satisfactorily explained what constitutes a punitive purpose, or how to tell when a purpose is not punitive.

The arguably nonpunitive purpose of IEEPA designation is to protect public safety by incapacitating the designee and thereby preventing her from committing or supporting future terrorist acts. Does that purpose count as a non-punitive alternative? Initially, a quick glance at the case law seems to suggest that it does. The Court has stated on several occasions that “preventing danger to the community is a legitimate [nonpunitive] regulatory goal.”⁷¹ Thus, we might conclude, IEEPA designation has an alternative purpose other than inflicting punishment.

Yet, any further contemplation reveals the obvious problems in that logic. Nearly every criminal sanction seeks to prevent danger to the community. Indeed, many of the most paradigmatic criminal prohibitions—such as those against murder, rape, and burglary—prevent the exact same dangers as do the statutes upheld by some of the Court’s most prominent

rational connection to a nonpunitive purpose is a ‘most significant’ factor in our determination that the statute’s effects are not punitive.” (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996).)

⁷⁰ *Smith v. Doe*, 538 U.S. 84, 102-03 (2003)

⁷¹ *United States v. Salerno*, 481 U.S. 739, 748 (1987); *see also Doe*, 538 U.S. at 102-03 (2003); *Schall v. Martin*, 467 U.S. 253, 265 (1984).

Mendoza-Martinez-test cases, including sexual assault⁷² and violence by organized crime groups.⁷³

In the few cases in which it has held preventing danger to be an alternative purpose, the Court's ability to ignore this obvious flaw has bordered on absurdity. For example, *Doe* describes the alternative purpose as an exercise of "the State's power to protect the health and safety of its citizens,"⁷⁴ a power which so obviously includes the imposition of criminal sanctions that it is often termed *the police power*. *Salerno*, even more gratuitously, went so far as to hold that "crime prevention" is a regulatory, non-criminal goal.⁷⁵

Unfortunately, the Court has failed to elaborate further. Clearly, some restrictions on liberty that seek to prevent future danger to the community, like the execution of accused murders,⁷⁶ pursue the goal of criminal punishment, while others do not—for example, a quarantine preventing healthy individuals from entering a diseased town⁷⁷ or civil commitment forcing dangerously insane individuals to accept treatment.⁷⁸ Yet, the Court has not given us an explanation of how to distinguish the two. Indeed, the court has tended to pronounce that a particular statute's violence prevention purpose is a non-criminal regulatory goal with no justification or reasoning of any kind at all.

In *Salerno*, for example, the Court used only the following three sentences to decide the issue, even though it was the most important one in the case:

⁷² See *Doe*, 538 U.S. at ; *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986).

⁷³ See *Salerno*, 481 U.S. at 742-43.

⁷⁴ See *Doe*, 538 U.S. at 94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

⁷⁵ See *Salerno*, 481 U.S. at 750.

⁷⁶ E.g. 7 U.S.C. § 2146(b).

⁷⁷ E.g. *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902).

⁷⁸ E.g. *Allen v. Illinois*, 478 U.S. 364, 373 (1986) ("Here, by contrast, the state serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.").

The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. See S. Rep. No. 98-225. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. *Id.*, at 4-7. There is no doubt that preventing danger to the community is a legitimate regulatory goal. *Schall v. Martin, supra.*⁷⁹

Thus, the only reasoning or support the Court provides is a general citation to *Schall*⁸⁰ as a whole.

Schall, however, does not stand for the proposition that preventing danger is not a punitive goal. To the contrary, the alternative purpose recognized in *Schall* was the state's interest in protecting the community *and the juvenile herself* from the effects of juvenile crime, which the Court distinguished from criminal restrictions of liberty on the grounds that "the State must play its part as *parens patriae*" and "that juveniles, unlike adults, are always in some form of custody."⁸¹ Whether or not we find that reasoning persuasive, a quasi-parental interest in preventing juvenile delinquency is far different from the goal of preventing danger to the community posed by violent crime.

Even if *Schall* can be stretched to hold that protecting the community from danger, regardless of a perpetrator's age, is itself an alternative purpose, it hardly clarifies the situation. There is no reasoning or explanation accompanying the dicta in which *Schall* suggests danger prevention, in and of itself, might be an alternative purpose.⁸² Even worse, its citations suggest that there is no support in the Court's precedents for such a holding. The Court cites to just three

⁷⁹ *Salerno*, 481 U.S. at 747.

⁸⁰ *Schall v. Martin*, 467 U.S. 253 (1984).

⁸¹ *Schall*, 467 U.S. at 265.

⁸² *Id.* at 264-65.

cases, none of which support the proposition. The first two are *criminal prosecutions imposing criminal punishment* in which the defendant challenged the constitutionality of police investigatory actions meant to ascertain whether a crime was being committed.⁸³ The third citation is to dicta in a case about federal preemption of state union bargaining rules, which turns out not to offer anything at all that could possibly be useful in deciding whether prevention of crime is a regulatory goal distinct from punishment.⁸⁴

Other instances in which the Court has held that a statute's attempt at danger-prevention qualified as an alternative purpose suffer from equally vexing lack of reasoning or support. In *Doe*, for example, a convicted sex-offender alleging that a purportedly civil registration requirement imposed criminal punishment conceded that the goal promoting community safety by informing the population of the location of convicted sex offenders was a valid alternative purpose.⁸⁵ That proposition may feel intuitively correct, insofar as the goal of informing the public seems quite different from the purpose which criminal punishment is usually thought to serve, and conceding the point may well have been a wise strategic choice. Nonetheless, the concession allowed Justice Kennedy's majority opinion to leave unexplained exactly what about the statute's danger-prevention purpose distinguished it from criminal punishment aimed at danger prevention.⁸⁶

Faced with an acute absence of reasoning from the Court, how are we to apply the *Mendoza-Martinez* test's last two factors? The first step is to disaggregate the various purposes encompassed by the vague idea of preventing future danger to the community. Some restrictions

⁸³ *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *De Veau v. Braisted*, 363 U.S. 144 (1960).

⁸⁴ *Brown v. Texas*, 443 U.S. 47, 52 (1979)

⁸⁵ *Smith v. Doe*, 538 U.S. 84, 102-103 (2003) (“[T]he Act has a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their community’ responds concede, in turn, that ‘this alternative purpose is valid and rational.’” (internal citations omitted)).

⁸⁶ *Id.*

of liberty—such as quarantines⁸⁷ or evacuation orders designed to protect evacuees from hurricanes⁸⁸—prevent danger to the community caused not by individual wrongdoing but by natural or societal factors far outside of the private citizen’s control. Others, such as sex-offender registration requirements,⁸⁹ restrict the liberties of a few individuals in order to prepare or educate members of the community to protect themselves against potential wrongdoing. Some restrictions of liberty forcibly care for dangerous persons who are too young or too mentally incompetent to take care of themselves, and through such care prevent them from endangering themselves and others.⁹⁰ And of course, some restrictions of liberty prevent danger to the community by depriving wrongdoers of liberty and thereby accomplishing deterrence—frightening others who wish to avoid such sanctions—or retribution—by affirming that the community condemns certain acts and so strengthening citizens’ anti-wrongdoing values. Finally, some restrictions on liberty incapacitate dangerous individuals, making them unable to commit future violent acts and thereby preventing danger to the community.

We now have a list of specific purposes ranging from community education to incapacitation of dangerous individuals. Rather than focusing on danger prevention as such, a vague, general end which many different kinds of statutes hope to bring about, we can examine the exact outcomes a given policy is designed to produce.⁹¹

⁸⁷ See *supra* note 77 and accompanying text.

⁸⁸ See, e.g., La. Rev. Stat. Ann. § 29:727 (2008).

⁸⁹ See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003).

⁹⁰ This care may take the form of medical treatment for mental disorders, see *Allen v. Illinois*, 478 U.S. 364, 373 (1986), or detaining minors with the goal of “play[ing] the part of *parens patriae*” and “promoting the welfare of the child.” See *Schall v. Martin*, 467 U.S. 253, 265 (1984).

⁹¹ Such an inquiry was pursued by the Court in *Mendoza-Martinez* itself, when it noted that the sanction at issue was aimed at the general purpose of supporting the state’s ability to protect national security, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963), but nonetheless focused its inquiry on the specific purpose of exacting retribution from draft evaders. *Id.* at 180-84. Indeed, the Court used to explore the punitive/nonpunitive purpose question much more deeply. See *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (offering an account of pre-*Mendoza-Martinez* cases determining whether statutes were civil or criminal with a careful attention to the specific

Some specific purposes are obviously punitive, no matter what definition of punishment we are using. Consider, for example, deterrence—imprisoning individuals who have committed past crimes in order to threaten people contemplating future crimes. Conversely, some specific purposes are obviously nonpunitive; no reasonable definition of punishment encompasses removing people from harm’s way by requiring them to evacuate before a storm. But others are not so easy to categorize. What about IEEPA designation’s specific purpose—protecting public safety by incapacitating the designee and thereby preventing her from committing or supporting future terrorist acts? Deciding whether to categorize that purpose as punitive or nonpunitive requires a nuanced, thorough account of punishment.

The case law has yet to exhibit such nuance. On one hand, the Court has repeatedly asserted that incapacitation is a punitive purpose. For example, in the 1965 case *United States v. Brown*, the Court observed, “Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”⁹² Just three years later, Justice Black observed in a concurrence that “isolation of the dangerous has always been considered an important function of the criminal law.”⁹³

More recently, in *Foucha v. Louisiana*, the Court struck down a civil commitment statute it described as “only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated

alternative purpose identified in each case); *Cummings v. Missouri*, 71 U.S. 277, 319-20 (1866) (looking beyond the general purpose of maintain rigorous employment qualifications and asking whether the provision at issue set qualifications in order to obtain effective employees or to disfavor certain groups of potential applicants).

⁹² *United States v. Brown*, 381 U.S. 437, 458 (1965).

⁹³ *Powell v. Texas*, 392 U.S. 514, 539 (1968).

a criminal law.”⁹⁴ Justice Kennedy dissented in *Foucha* and would have upheld the statute, but he too observed that incapacitation is a common goal of criminal punishment,⁹⁵ a point he had made before.⁹⁶ And in 2002, in *Kansas v. Crane*, Justice Breyer wrote for a seven-member majority that in any civil commitment scheme “the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”⁹⁷ He went on to cite *Foucha* approvingly for the proposition that the Constitution does not “permit the indefinite confinement ‘of any convicted criminal’ after completion of a prison term.”⁹⁸

On the other hand, *Salerno* cuts very heavily in the opposite direction. There, the Court actually consciously and explicitly upheld a purportedly civil statute authorizing pretrial detention based on dangerousness.⁹⁹ However, the Court never sought a specific purpose and simply accepted “preventing danger to the community” as the detention’s alternative purpose.¹⁰⁰ As a result, *Salerno* does not actually hold that intending to incapacitate dangerous individuals is a nonpunitive purpose.¹⁰¹

In short, current jurisprudence offers no indication as to whether a deprivation of liberty serves a punitive or nonpunitive purpose if it seeks to incapacitate those likely to commit future acts of violence. Moreover, two additional aspects of the Court’s civil/criminal divide

⁹⁴ *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992).

⁹⁵ *Id.* at 99 (Kennedy, J., dissenting).

⁹⁶ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in the judgment) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”).

⁹⁷ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

⁹⁸ *Id.* (citing *Foucha*, 504 U.S. at 82-83).

⁹⁹ *United States v. Salerno*, 481 U.S. 739 (1987).

¹⁰⁰ *Salerno*, 481 U.S. at 747.

¹⁰¹ *See supra* notes 75-81 and accompanying text.

jurisprudence further reveal the degree to which this question remains unanswered. First, the Court has never considered an incapacitating deprivation of liberty like IEEPA designation which, though stunningly severe, falls short of incarceration. It is quite possible that, outside the imprisonment context, the Court might be more willing to consider incapacitation as a nonpunitive goal than *Brown*, *Foucha*, and *Crane* indicate. Second, the Court has never considered a deprivation of liberty justified purely on dangerousness grounds. In every *Mendoza-Martinez*-test case where incapacitation was a central purpose of the statute under view, the detainee was already restrained for some additional reason beyond dangerousness. Most often, that reason has been mental illness,¹⁰² though in *Schall* it was minor status¹⁰³ and in *Salerno* it was probable cause to believe the detainee had committed a crime.¹⁰⁴ Thus, it is possible the Court is less friendly to the idea that incapacitation purely for dangerousness might serve a nonpunitive purpose than *Salerno*, *Schall*, and some of the civil commitment cases would indicate.

The overarching point here is that a great deal of incoherence flows from the Court's failure to adopt some reasonably specific definition of punishment. The Court discusses the concept of a punitive purpose at such a high degree of generality that it is impossible to glean how we might determine whether a specific purpose—such as incapacitation of dangerous individuals—is punitive. Given the *Mendoza-Martinez* test's widely criticized shortcomings,¹⁰⁵ this utter incoherence is hardly surprising. So in order to determine whether IEEPA designation is criminal punishment, we will have to step beyond the current jurisprudence, and begin to consider different possible conceptions of punishment.

¹⁰² See *Smith v. Doe*, 538 U.S. 84 (2003); *Kansas v. Crane*, 534 U.S. 407, 413 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 362-63 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992); *Allen v. Illinois*, 478 U.S. 364, 373 (1986).

¹⁰³ *Schall v. Martin*, 467 U.S. 253 (1984).

¹⁰⁴ *United States v. Salerno*, 481 U.S. 739 (1987).

¹⁰⁵ See *supra* notes 42-44 and accompanying text.

B. *Three Conceptions of Punishment*

In the face of the Court's failure to articulate a sufficiently thorough conception of the purposes of punishment, especially with regard to violence prevention, scholars, and in one case a dissenting Supreme Court Justice, have offered a number of proposals.¹⁰⁶ Upon examination of this body of thought, three approaches to the relationship between incapacitation and punishment emerge.¹⁰⁷ These approaches differ from one another considerably, yet under each approach, IEEPA designation is unconstitutional.

i. *The Multipurpose View*

The first of the three theories is grounded in the belief that punishment is whatever judges and lawmakers have made it. This multipurpose approach seeks to understand what exactly our lived experience of punishment has been. It is informed by precedent, history, and close attention to the actual outcomes produced by the past decisions that, taken together, comprise judicial tradition.

¹⁰⁶ The last two decades have seen an increase in the amount of scholarship on this issue, following a sudden jump in the number of *Mendoza-Martinez*-test cases decided by the Supreme Court and a provocative article by Kenneth Mann calling for the end of the firm distinction between criminal and civil law. Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). Mann's perspective was subsequently echoed by other scholars, *see, e.g.*, Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999), and has recently been expanded upon by an even more radical call to abandon the distinction between the two forms of law altogether. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008) (proposing to end the civil/criminal divide by providing procedural protection based on the power balance or imbalance between the litigants and the severity of potential sanctions).

¹⁰⁷ For brevity's sake, I refer to these theories as conceptions of punishment. Of course, I am not suggesting that there are only three positions in the wide-ranging, and long-running debate about the proper role of punishment in a liberal democracy. However, when it comes to understanding the relationship between incapacitation and the purpose of punishment, there three theories predominate.

This account stresses the fact that the actual practice of Anglo-American criminal law has been marked by a heterogeneous conception of punishment that serves multiple goals. Those who ascribe to this perspective are wary of accounts of punishment that place special emphasis on retribution, warning that such emphasis indulges an unhealthy, inhumane urge for vengeance, and that the criminal law's other goals—including preventing violence by incapacitating those likely to commit it—establish a laudatory commitment to pursuing harmony rather than conflict. At the heart of this view is the contention that there is no single punitive purpose.

These days, this perspective is not very popular with scholars, who tend to favor a retribution-only view of punishment.¹⁰⁸ Indeed, one of the strongest contemporary advocates of the multipurpose approach, Christopher Slobogin, recognizes that he is very nearly alone in the legal academy.¹⁰⁹ It is telling that, just a few years ago, even Slobogin himself was one of the many scholars who believed retribution was the only permissible goal of criminal punishment.¹¹⁰ But what it lacks in contemporary support, the multipurpose approach makes up for with an impressive pedigree.¹¹¹ The list of past commentators who have argued some version of this position includes Oliver Wendell Holmes, John Hart Ely, and Sir William Blackstone. Holmes did so in *The Common Law*, writing that:

probably most English-speaking lawyers would accept the preventive theory without hesitation. . . . The considerations which answer the argument of equal rights also answer the objections to treating man as a thing, and the like. If a man lives in society, he is liable to find himself so treated. . . . [T]he affirmative

¹⁰⁸ See *infra* notes 123-124 and accompanying text.

¹⁰⁹ Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121, 126 (2005). For other, similar perspectives, see DAVID GARLAND, *THE CULTURE OF CONTROL* 9 (2001); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO L.J. 1 (2005).

¹¹⁰ Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. Rev. 1 (2003).

¹¹¹ See generally ALAN DERSHOWITZ, *PREEMPTION* 29-58 (2006).

argument in favor of the theory of retribution seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element, of punishment. . . . [T]here can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment. . . . Public policy sacrifices the individual to the general good.¹¹²

More than a century earlier, in his canonical *Commentaries*, Blackstone laid out almost exactly the same argument:

[P]reventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respect to punishing justice [I]ndeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past . . . all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example.¹¹³

John Hart Ely also shared this view. Writing considerably later, he had the opportunity to consider some of the Court's early insinuations that violence prevention was not a punitive purpose. He scoffed at that suggestion:

It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to

¹¹² OLIVER WENDELL HOLMES, *THE COMMON LAW* 43-48 (1881)

¹¹³ 4 WILLIAM BLACKSTONE, *COMMENTARIES* *248-49.

keep them from inflicting future harm, but that does not make imprisonment any the less punishment. To add prevention to the list is obviously to say that *any* law imposing a deprivation counts for constitutional purposes as punitive.¹¹⁴

Beyond its impressive pedigree, the multipurpose approach has a second and even more persuasive point in its favor. The idea that the criminal law may serve multiple goals seems to have quite a hold on the actual day-to-day operation of the criminal justice system. Over the course of the twentieth century and especially after the 1960s, the criminal justice system became increasingly focused on preventing serious crime before it happened, rather than ensuring violent offenders suffered retributive punishment.¹¹⁵ Penal codes increasingly employed possession offenses and inchoate offenses to permit the arrest, conviction, and incapacitation of individuals who might be predisposed to commit violent crimes.¹¹⁶ Courts developed search and seizure doctrines that encouraged investigatory police action targeted at preempting violence.¹¹⁷ “Dangerousness” became a crucial factor in sentencing¹¹⁸ while “three strikes” laws and convicted-sex-offender community notification statutes¹¹⁹ reinforced the idea that defendants were prosecuted to prevent them from committing further crimes. The Model

¹¹⁴ John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1311 n.324 (1970) (internal citations omitted). This approach to the question of punishment is a close relative of the argument most associated with Ely, that “judicial review under the Constitution’s open-ended provisions [should] . . . appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980). In other words, instead of attempting mandating a substantive goal of the criminal law, courts should leave such substantive choices the democratic majorities.

¹¹⁵ See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829 (2001); Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 Harv. J.L. & Pub. Pol’y 33 (2003); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429 (2001); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121 (2005); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775 (1997).

¹¹⁶ Dubber, *supra* note 115, at 855-927; Robinson, *supra* note 115, at 1447-48.

¹¹⁷ Dubber, *supra* note 115, at 875-901, 908-10.

¹¹⁸ *Id.* at 873; Slobogin, *supra* note 115, at 122.

¹¹⁹ Robinson, *supra* note 115, at 1430-31.

Penal Code formally embraced prevention as a basic goal of the criminal law in 1962.¹²⁰ The victims' rights movement¹²¹ and the so-called "War on Crime"¹²² helped to further move the system's focus from the moral culpability of individual wrongdoers onto the societal costs of crime.

In short, there is a very good argument to be made that incapacitation is not just a punitive purpose, but has increasingly become *the* punitive purpose. Certainly, the multipurpose approach offers a compelling account of punishment as driven by a multiplicity of purposes. Most relevant for our investigation, this account concludes that preventing violence by incapacitating dangerous individuals is a paradigmatically punitive purpose.

Returning to our original field of inquiry, under the multipurpose approach, IEEPA designation clearly cannot claim a nonpunitive alternative purpose. Incapacitating dangerous terrorists who are likely to commit or facilitate future acts of violence is exactly the sort of purpose that Holmes, Blackstone, and Ely saw as central to criminal punishment.

Accordingly, if we define punishment with an eye towards tradition and experience, IEEPA designation fails the final two factors of the *Mendoza-Martinez* test, just like it failed the first five. It is a rare thing when all seven factors of the test point in the same direction, but under this particular conception of punishment, all the *Mendoza-Martinez*-test elements require the conclusion that IEEPA designation unconstitutionally imposes criminal punishment without the requisite procedural protections.

¹²⁰ Dubber, *supra* note 115, at 970-991; Robinson, *supra* note 115, 1437, 1447-48, 1449.

¹²¹ Steiker, *supra* note 115, at 791-94; Robinson, *supra* note 115, at 1431. *But see* DAVID GARLAND, *THE CULTURE OF CONTROL* 9, 11-12 (2001) (suggesting that the victim's rights movements contributes to both the focus on prevention and the recent re-emphasizing of retribution, rather than just the former).

¹²² Dubber, *supra* note 115, at 839-855, 991-994; Huigens, *supra* note 115, at 39-40;

ii. *The Retributivist View*

In contrast to the multipurpose approach, the second theory, is highly popular among contemporary punishment scholars. Retributivism, advanced by Paul Robinson¹²³ and Carol Steiker,¹²⁴ among many others, argues that the process of imposing criminal punishment must be motivated *purely* by the goal of retribution. Thus, there is only one punitive purpose—imposition of a sanction upon someone in order to condemn or blame her for a bad act that she, as an autonomous actor, chose to commit. Under this view, the criminal law is to be used for the sole function of depriving someone of property or liberty in retaliation for a harmful act she has committed, and criminal sentences must be imposed in proportion to the degree of moral condemnation that such an act deserves. Thus, the criminal law may not be tailored to the goal of preventing violence by incapacitating dangerous individuals. Nor may government impose moral condemnation on wrongful acts without the application of criminal procedural protections. Under this view, deprivations of liberty that impose moral condemnation for past misdeeds are considered punitive, and those that do not are understood to be nonpunitive.

Retributivists reach this conclusion through different lines of reasoning. Some believe that the criminal process itself—with police, prosecutors, and the terminology of “crime”—constitutes a unique method for assigning blame and condemning immorality that is necessarily absent from action aimed at other purposes, such as incapacitation.¹²⁵ Others adopt the so-called “pathological perspective,” arguing that the criminal procedures laid out by the Constitution are safeguards intended to protect the constitutional order from subversion. These safeguards are

¹²³ Paul H Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. Cal. L. Rev. 1 (2007); Robinson, *supra* note 115; Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. Rev. 201 (1996).

¹²⁴ Steiker, *supra* note 115; Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. Crim. L. & Criminology 771 (1998).

¹²⁵ See, e.g., Steiker, *supra* note 115, at 800-809.

needed, the argument goes, to prevent government officials from using moral condemnation to scapegoat vulnerable minority groups¹²⁶ and from destroying dissent by labeling innocent political opponents criminals.¹²⁷ Thus, deprivations of liberty that truly seek incapacitation and are not accompanied by moral condemnation are judged nonpunitive. Still others assert that the criminal justice system's "moral credibility" will be lost if individuals are subject to arrest, prosecution, and sentencing on the basis of anything other than retribution. Without moral credibility, criminal statutes will no longer be respected or followed, and will lose their norm-shaping capacity.¹²⁸ Particular retributivist accounts may adopt one of these rationales¹²⁹ or many,¹³⁰ but all agree that the criminal punishment can only be used to exact retribution, and that any statute that does not do so is nonpunitive.

Accordingly, retributivists maintain that incapacitation of dangerous individuals is not a punitive purpose. As Steiker explains,

¹²⁶ See, e.g., Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, 7 J. Contemp. Legal Issues 199, 205-06 (1996) ("A government may have no fear of losing power and yet still desire the suffering of a scapegoat population. . . . [G]overnment will select members of unpopular groups as victims. Given a high demand that members of some unpopular group suffer, prevailing authority will be eager to find members of that group who may be characterized as criminal. I think of with trials and, especially, of lynching. . . . the ritual murder of victims to whom some blameworthy misconduct was attributed, whether deserving or not.").

¹²⁷ *Id.* at 204-05 ("The criminal justice system . . . connects the power of inflicting pain with the authority of moral judgment. . . . Restraining political opponents on purely political grounds is a sign of weakness. Punishing them for crimes enlists the community's moral sense in the cause of the incumbent government. . . . [D]ictators [have] found advantage in the accusation of criminality, an advantage that suggests the criminal law's special temptation to an oppressive government.").

¹²⁸ See, e.g., Robinson, *supra* note 115, at 1444 ("The strength of . . . criminal law is a function of the criminal law's moral credibility. . . . Requiring the criminal justice system to distribute punishment according to predictions of future dangerousness rather than blameworthiness for past crimes can only undercut the system's moral credibility.").

¹²⁹ *E.g.*, Dripps, *supra* note 126, at 201-02 (opining that the "pathological perspective" is the only theory that successfully defends the idea of a purely retributive criminal law).

¹³⁰ *E.g.*, Steiker, *supra* note 115, at 806-09 (arguing that "blaming implies the need for a special procedural regime within which punishment should be imposed, both to limit the state's ability to harness the power of blame" because the state may try to use blame to establish politically oppressive tyranny and because blame is so painful that it should not be imposed on innocents "and to preserve blaming as a social practice" because blaming is both useful for improving our lives and inherently valuable because "it is 'part of who we are'").

consider a scheme of “pure” preventive incarceration, based on predictions of future dangerousness but not predicated on the commission of particular bad acts in the past. Such a scheme could not plausibly be characterized as “punishment” because the state would not be imposing incarceration “for” a past offense nor acting “deliberately” in its infliction of unpleasantness. Blame is beside the point; prevention is everything.¹³¹

Returning once again to our analysis of the *Mendoza-Martinez* test, under the retributivist conception of criminal punishment, incapacitation of dangerous individuals counts as a nonpunitive alternative purpose. Even still, retributivism cannot save IEEPA designation. Note that what matters to a retributivist is retribution; a deprivation of liberty is punitive when it imposes moral condemnation for a past act and nonpunitive when it does not. Thus, adopting the retributivist theory of punishment negates the need for an alternative purpose inquiry entirely. The first *Mendoza-Martinez*-test factor—whether the sanction at issue imposes an affirmative disability or restraint—and the fourth factor—whether its operation will promote retribution—are together entirely determinative for a retributivist. The legislature’s primary and alternative purposes for enacting the statute are irrelevant; if it imposes a restriction of liberty and imposes moral condemnation, it constitutes criminal punishment.

¹³¹ Steiker, *supra* note 115, at 812; *see also* Robinson, *supra* note 115, at 1432; J. Schulhofer, *The Two Systems of Social Protection: Comments on the Civil-Criminal Distinction with Particular Reference to Sexually Violent Predator Laws*, 7 J. Contemp. Legal Issues 69 (1996). *But see* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings. L.J. 1325 (1991) (arguing that incarceration, execution, and revocation of citizenship are always acts of blaming and thus always punishment, no matter what their intended or purported function).

IEEPA designation, as we have already seen, is a deprivation of liberty and imposes moral condemnation for past acts.¹³² Accordingly, its nonpunitive alternative purpose notwithstanding, IEEPA designation is criminal punishment under retributivism.¹³³

iii. Justice Marshall's Modified Retributivism

IEEPA designation fares no better under the third and final theory of the purposes of criminal punishment. Like the multipurpose approach and the standard retributivist approach, adopting Justice Marshall's conception of punishment will also lead us to conclude that IEEPA designation unconstitutionally imposes criminal punishment without providing the protections required by the Fifth and Sixth Amendments.

Justice Marshall articulated his own take on retributivism in his *Salerno* dissent.¹³⁴ He described the statute the Court upheld, which authorized pretrial detention on dangerousness grounds, as

a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.¹³⁵

¹³² See *supra* note 59 and accompanying text. This is especially obvious if we understand punishment as a largely expressive act. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 Univ. Chi. L. Rev. 591 (1996). Then, we must place special emphasis on IEEPA designation's most communicative elements—its labeling of its targets as terrorists and its casting-out of designees from normal societal interaction, both acts that communicate moral condemnation above all.

¹³³ Of course, that is not true of all statutes that aim for incapacitation. If the government measure incapacitated a person through means that did not in fact impose moral condemnation, then a retributivist approach would not term the measure punitive.

¹³⁴ *United States v. Salerno*, 481 U.S. 739, 755-67 (1987) (Marshall, J. dissenting).

¹³⁵ *Salerno*, 481 U.S. at 755 (Marshall, J., dissenting).

To Marshall, the case turned simply on the undeniable proposition that “society’s belief . . . that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is . . . established beyond legislative contravention in the Due Process Clause.”¹³⁶ In his view, under the statute at issue, “an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional.”¹³⁷ Thus, “the conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else.”¹³⁸

Accordingly, Marshall concluded that the presumption of innocence and the proof-beyond-a-reasonable-doubt requirement together required the invalidation of the statute. Stated more broadly, Marshall’s theory understands the Constitution’s structuring of the criminal law, from the prohibition on excessive bail to the defendant’s right to be informed of the accusations against her, as a procedural roadmap for exercising the power to target individuals with severe sanctions. The guarantees in the Fifth, Sixth, and Eight Amendments would be empty promises, Marshall argues, if the government could simply invoke a regulatory goal to incapacitate¹³⁹ U.S. persons without trial, counsel, or the ability to confront the government’s witnesses.¹⁴⁰

¹³⁶ *Id.* at 763.

¹³⁷ *Id.* at 764.

¹³⁸ *Id.*

¹³⁹ Note also that Marshall does not restrict the theory to imprisonment but instead would invalidate any severe sanction aimed at incapacitating dangerous individuals not guilty of a crime. The example who uses that stretches beyond incarceration is a curfew for dangerous persons. Salerno, 481 U.S. at 760 (Marshall, J., dissenting).

¹⁴⁰ For other perspectives that share a similar approach, see Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235 (2006) Steven I Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 121-22 (1999) (“The lack of an effective limiting principle provided by the Court [in an opinion on sex offender civil commitment] appears to invite states to enact wide-ranging detention laws. . . . In short, the net cast by a state’s civil commitment statute may be wide enough to ensnare all recidivists. . . . to the point where, for an individual who has committed one prior crime, even the allegation of a second one could send the person to a lifetime of involuntary detention, albeit one labeled ‘civil.’”); Henry M. Hart, Jr., *The Aims of the Criminal Law*, in CRIME, LAW AND SOCIETY 61, 67 (Abraham S. Goldstein

Thus, Justice Marshall's approach sees retribution as the sole punitive purpose, in accord with the mainstream retributivist position. However, his theory sees the retributive nature of punishment as placing some nonpunitive purposes off limits entirely. Under this view, retribution is the constitutionally mandated purpose of criminal punishment, and any severe deprivation of liberty with incapacitation as its purpose is unconstitutional. In essence, Justice Marshall proposes we add a third category of specific purposes, punitive, nonpunitive, and forbidden.

Obviously, under this view, IEEPA designation's alternative purpose renders the actions unconstitutional. Intended to incapacitate dangerous designees to prevent them from committing future acts of terrorism, IEEPA designation is exactly the kind of deprivation of liberty that Marshall reads the Bill of Rights to prohibit. Neither a punitive purpose nor a nonpunitive alternative purpose, incapacitation of dangerous individuals is simply forbidden.

& Joseph Goldstein, eds. 1971) ("The danger [of the curative-rehabilitative theory of criminal justice] to the individual is that he will be punished, or treated, for what he is or is believed to be, rather than for what he has done. . . . The danger to society is that the effectiveness of the general commands of the criminal law as instruments for influencing behavior so as to avoid the necessity for enforcement proceedings will be weakened."); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 465-66 (1998) ("The logic of incapacitation behind the Kansas Act suggests an even grimmer and more dehumanizing view of sex offenders than does traditional punishment. Despite that, incapacitation showed up as unproblematic because Justice Thomas did not consider it punitive."). Interestingly, Justice Scalia has in one instance articulated a similar theory, based not on the Bill of Rights but the habeas corpus clause. *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting, joined by Stevens, J.) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ [of habeas corpus] can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though unavailable, unavailing. . . . If the Suspension Clause . . . merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed."). However, that view is not a theory of punishment, and is instead simply a theory of incarceration. Thus, Scalia rejects the idea that incapacitating imprisonment can ever be nonpunitive. However, his theory carries no significance for measures, like IEEPA designation, that fall short of incarceration. For the more general view that preemptive measures aim at incapacitation undermine the rule of law, see DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE* 33-34 (2007); Jules Lobel, *The Preventative Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407 (2007); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 781 (2002).

iv. *IEEPA Designation of U.S. Persons: Unconstitutional Under Any Theory of Punishment*

Under our existing jurisprudence, IEEPA designation of U.S. persons appears to be of questionable constitutionally. Five of the seven *Mendoza-Martinez*-test factors clearly suggest that IEEPA designation violates the Fifth and Sixth Amendments by imposing criminal punishment without providing the requisite heightened procedural protections, while the last two factors of the test are indeterminate because their proper application has yet to be sufficiently clarified in the case law. In particular, the Court's failure to consider which specific purposes are punitive leaves us without guidance as to whether incapacitation to prevent future violence is a punitive or nonpunitive purpose.

Once we examine possible theories of criminal punishment, however, it becomes clear that no matter which of the three major conceptions of punishment we favor, IEEPA designation thoroughly fails the *Mendoza-Martinez* test. Under the multipurpose approach, IEEPA designation has no nonpunitive alternative purpose, because incapacitation is seen as one of several paradigmatically punitive purposes.

Under the standard retributivist view, IEEPA does have an acceptable alternative purpose, because retributivism understands incapacitation, like all non-retributive purposes, to be nonpunitive. Nevertheless, retributivism treats the question of whether the sanction imposes moral condemnation as virtually determinative. IEEPA designation may not be primarily intended to impose moral condemnation, but it certainly does so. Thus, its imposition is regarded as criminal punishment under retributivism.

Finally, Justice Marshall's modified retributivism posits a constitutionally mandated definition of punishment that favors retribution and forbids the state from depriving individuals of liberty in order to prevent them from committing future misdeeds. Accordingly, this

alternative retributivist perspective also forbids the IEEPA designation of U.S. persons. In fact, under this view, IEEPA designation would be unconstitutional even if accompanied by criminal procedural protections, because incapacitation for dangerousness is considered a forbidden goal.

Only by refusing to adopt a more coherent, more fully theorized conception of punishment can we close our eyes to the fact that IEEPA designation imposes criminal punishment. Of course, it is possible simply to accept the absurd notion that every deprivation of liberty that prevents danger to the community serves a nonpunitive purpose. But any honest reflection on that proposition's implications renders it unsustainable.¹⁴¹ Assuming we are unwilling to accept a jurisprudence of incoherence and illogic, we must conclude that IEEPA designation of U.S. persons violates the Fifth and Sixth Amendments.

It seems that the multipurpose approach favored by Blackstone, Holmes, and Ely is most consistent with the current Court's self-professed adherence to history and tradition.¹⁴² Yet under any of the three mainstream conceptions of the relationship between incapacitation and criminal punishment, IEEPA designation fails the *Mendoza-Martinez* test.

IV. THE WAR POWERS ARGUMENT: IS SAVING IEEPA DESIGNATION OF U.S. PERSONS WORTH THE COST?

Before concluding, it is worth considering one potentially viable counterargument that suggests IEEPA designation of U.S. persons is constitutional in a few, extremely rare cases. It is possible that the Constitution permits IEEPA designation of U.S. persons when an active war is being fought within the borders of the United States. This argument may be persuasive, but we

¹⁴¹ See *supra* notes 71-75 and accompanying text.

¹⁴² See, e.g., *supra* notes 51-56 and accompanying text. See also *Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court of the U.S. Senate Judiciary Committee*, 109th Cong. (2005); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 195-96 (2008).

should not expect it to save the government's current use of IEEPA against U.S. persons for counterterrorism purposes.

Generally, the political branches are relatively free to use extrajudicial force against non-U.S. persons and they are usually forbidden from targeting U.S. persons with the same type of force. Consider, for example, the targeted killings of terrorists favored by the Bush and Obama Administrations.¹⁴³ No constitutional issues arise when committed abroad,¹⁴⁴ against foreign citizens, even when used outside of a war zone and in a friendly country, like Yemen.¹⁴⁵ But it is unthinkable to suggest that the Constitution allows President Obama to order the killing of someone in the United States in such non-combat circumstances. At the very least, such an extrajudicial execution would certainly fail the *Mendoza-Martinez* test.

There is, however, one situation in which, in order to prevent danger to the United States public,¹⁴⁶ the government may pursue a deliberate policy of capturing or killing U.S. persons outside of the criminal process. That situation is what the Constitution refers to as "Rebellion or

¹⁴³ See, e.g., Kenneth Anderson, Targeted Killing in U.S. Counterterrorism Strategy and Law, Brookings Institute, Working Paper (May 11, 2009), available at http://www.brookings.edu/papers/2009/0511_counterterrorism_anderson.aspx.

¹⁴⁴ See *id.* Whether they are legal is a slightly more contentious question. See, e.g., Jeffrey Addicott, *The Yemen Attack: Illegal Assassination or Lawful Killing?*, JURIST, Nov. 7, 2002, <http://jurist.law.pitt.edu/forum/forumnew68.php>, Anderson, *supra* note 143.

¹⁴⁵ See Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, WASH. POST, Nov. 5, 2002, at A1 (reporting the killing of an alleged high-ranking al-Qaeda member through a missile strike by a predator drone). Unfortunately, this real life example is not a perfect fit. On the one hand, despite the fact that Abu Ali al-Harithi was a private citizen living in a friendly country far from the battlefield, the Bush Administration still considered him a military target. On the other hand, one of the members of his entourage who died in the strike turns out to have been an American citizen. See Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1.

¹⁴⁶ One particular type of deprivation, which is outside the scope of this Article because it does not purport to prevent danger, is nonetheless worth mentioning. That deprivation is the deportation of immigrants alleged to be in the United States illegally. Recently, the Court has shown little interest in revisiting its century-old holding that deportation is nonpunitive, *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893), and, perhaps unsurprisingly, has failed to offer a thorough reasoning supporting that holding, though there are strong arguments that it may be worth reconsidering. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 298-307 (2008); see also *Fong Yue Ting*, 149 U.S. at 744 (Field, J. dissenting).

Invasion.”¹⁴⁷ During a war on American soil, Congress can suspend habeas corpus. The President may capture non-uniformed invading enemy operatives, try them in military courts, and execute them, with little or no supervision from Article III judges.¹⁴⁸ And, of course, when facing an actual military attack, government troops may shoot and kill their adversaries.

Under such circumstances, our constitutional calculus changes with regard to the permissibility of extrajudicial execution, the denial of habeas corpus, and, presumably, IEEPA designation of U.S. persons. Indeed, when considering a sanction somewhat similar to IEEPA, the Supreme Court made just such an adjustment.

In *Miller, v. United States*,¹⁴⁹ the Court reviewed the constitutionality of an 1862 statute authorizing the confiscation of all property belonging to anyone who had joined the Confederate government, served in the Confederate armed forces, or assisted the cause of the Confederacy in anyway.¹⁵⁰ In 1864, Samuel Miller, a Virginian who had served in the Confederate government and military, was labeled a rebel citizen under the act and had stock he owned in Michigan seized by a federal trial court judge in the Eastern District of Michigan at the request of the

¹⁴⁷ U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

¹⁴⁸ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁴⁹ 78 U.S. 268, 308-314 (1871).

¹⁵⁰ This statute was extremely similar to IEEPA, though there were four great differences. First, its subject matter was limited to Confederate supporters, while IEEPA may be put to use against infinite number of threats. Second, it required a U.S. Attorney to file a civil action in a federal trial court, while IEEPA leaves the decision of whether to designate an individual wholly within the executive branch. Third, rather than an indefinite and potentially unending asset freeze, the sanction took the form of a permanent seizure of property. Fourth, and perhaps most significantly, it did not impose criminal liability on individuals who transacted with people who, like Miller, were labeled public enemies by the statute. *See* 78 U.S. at 308-314. *See generally* LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 51-57 (1996); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941 1010-16 (2008).

District's U.S. Attorney.¹⁵¹ Miller argued that the seizure constituted criminal punishment and was unconstitutionally imposed without the requisite procedural protections.¹⁵²

Only Justices Field and Clifford agreed with Miller, concluding in dissent that “the provisions of the act were . . . [passed] in the exercise of the municipal power of the government to legislate for the punishment of offences against the United States. . . . [and] the forfeiture ordered was intended as a punishment for the offences.”¹⁵³

The Court, in contrast, found the statute in question to be a “legitimate exercise of the war power.”¹⁵⁴ The six-member majority,¹⁵⁵ speaking through Justice Strong, reasoned that in wartime the political branches have the power not just to seize the property of “all public enemies,” but also to decide who is a public enemy.¹⁵⁶ Certainly, the majority contended, the Fifth and Sixth Amendments did not require the Commander-in-Chief to prove the enemy status of every single rebel official or soldier beyond a reasonable doubt to the satisfaction of a judge and jury.

While the case turned primarily on whether Congress intended to exercise its power to create criminal law or its power to provide for the exercise of the war power,¹⁵⁷ the majority and the dissent also disagreed about the scope of the power to seize property. The Court opined that Congress could target anyone whose property could aid the enemy, “an alien or a friend, or even

¹⁵¹ *Id.* at 274-78.

¹⁵² *Id.* at 284-85.

¹⁵³ *Id.* at 310-20 (Field, J., dissenting).

¹⁵⁴ *Id.* at 305 (majority opinion).

¹⁵⁵ The Court's ninth member, Justice Davis, agreed with the majority on the constitutional question and dissented for other reasons. *Id.* at 328 (Davis, J., dissenting).

¹⁵⁶ *Id.* at 305-06. (majority opinion).

¹⁵⁷ The majority allowed that if the act were not an exercise of the war power “there would be force in the objection that Congress had disregarded the restrictions of the fifth and sixth amendments of the Constitution.” *Id.* at 304 (majority opinion). As for the dissent, it seems likely that because Miller was in fact a “permanent inhabitant[] of the enemy's country,” *id.* at 317 (Field, J., dissenting), if Field had been convinced that Congress intended to exercise its war power, he would have supported the majority's rejection of Miller's as-applied constitutional challenge.

a citizen or subject of the power that attempts to appropriate the property.”¹⁵⁸ In contrast, Justice Field saw the power to confiscate enemy property to be, by definition, the power to seize the property of “permanent inhabitants of the enemy’s country.”¹⁵⁹ “Their property is liable,” he contended, “not by reason of any hostile disposition manifested by them or hostile acts committed, or any violations of the laws of the United States, but solely from the fact that they are inhabitants of the hostile country, and thus in law are enemies.”¹⁶⁰

Recent litigation over a similar set of questions has created a role for Article III courts in determining the relationship between enemy forces and specific U.S. persons.¹⁶¹ But that litigation has generally affirmed Justice Strong’s assertion that courts will not impose substantive constitutional limits on the government’s ability to use war powers against U.S. persons, be they American citizens,¹⁶² residents of the United States,¹⁶³ or both.¹⁶⁴

Thus, a contemporary version of the Supreme Court’s reasoning in *Miller* may offer the best argument for defending the constitutionality of IEEPA designation of U.S. persons as SDGTs. As we have seen, IEEPA designation fails the *Mendoza-Martinez* test and cannot be

¹⁵⁸ *Id.* at 305-06 (majority opinion).

¹⁵⁹ *Id.* at 317 (Field, J., dissenting).

¹⁶⁰ *Id.* at 317-18.

¹⁶¹ *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *Al Odah v. United States*, 606 F. Supp. 2d 141 (D.D.C. 2009); *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).

¹⁶² *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding, *inter alia*, that an American citizen captured in Afghanistan could be an enemy combatant); *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that an American citizen member of Nazi Germany’s armed forces captured on American soil after infiltrating the United States, abandoning his uniform, and operating as an illegal combatant could be held as an enemy combatant).

¹⁶³ *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). In *al-Marri*, a minority of Fourth Circuit Court of Appeals judges believed an alleged al-Qaeda member arrested in Illinois and then transferred to military custody would not have been an enemy combatant even if all the allegations against him were true. Yet even they did not contend that the Constitution absolutely bars the capture and non-criminal detention of alleged enemy combatants within the United States. *al-Marri*, 534 F.3d at 228-31 (Motz, J., concurring in the judgment).

¹⁶⁴ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (dismissing for lack of jurisdiction the habeas corpus petition of an American citizen captured in the United States who was being held as an enemy combatant without reaching the legality of his detention).

considered run-of-the-mill nonpunitive regulatory action. Those who would preserve it are left with only a last-ditch appeal to the political branches' war powers.

Of course, defending IEEPA designation of U.S. persons on such grounds requires accepting the premise that an infinite global war—unbounded by space and time—is being waged everywhere and anywhere, including on our own soil. John Yoo argues the Supreme Court has implied approval of this dramatic conception of the relationship between the United States and al-Qaeda.¹⁶⁵ Other scholars fiercely disagree.¹⁶⁶ What is certain is that we would pay a steep price in surrendered liberties if we ask courts to conceptualize our homes as bunkers and our backyards as battlefields. It is difficult to imagine that the President's rarely utilized power to designate U.S. persons as SDGTs is truly worth such a tradeoff.

Moreover, even subscribing to such an argument does not preserve IEEPA designation as we know it. Terrorism is unique. It is the only national emergency U.S. presidents have declared under IEEPA that can be plausibly termed a war. The other declared "national emergenc[ies]" that pose "unusual and extraordinary threat[s] . . . to the national security, foreign policy, or economy of the United States"¹⁶⁷ do not create an immediate threat of catastrophic

¹⁶⁵ John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 576-77 (2006) ("America waged previous conflicts on foreign battlefields, while the home front remained safe behind the distances of two oceans. In the present conflict, the battlefield can exist anywhere, and there is no strict division between the front and home."); *Id.* at 580 ("If September 11, for example, merely constituted a criminal act rather than an act of war, then Hamdi's detention was illegal under the Fifth and Sixth Amendments . . .").

¹⁶⁶ For typical pieces debating the proposition that we are at war on our own soil, see Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002); Fiss, *supra* note 140, at 237 ("Padilla's habeas petition struck a note of urgency. The government held him as an enemy combatant, but the war that the government had in mind was not the kind that had been fought in Afghanistan, and for which international law allows the belligerents to detain enemy combatants. Rather, it was the vast, ill-defined, and never ending 'War Against Terrorism.'"); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 776-77 (2002) ("The war against terrorism threatens to form a backdrop to an increasing garrison state authority evoking the shadowy war that forms the background to George Orwell's novel, 1984. This new, low level, but always prevalent 'warm' war, has the potential to lead us back to the worst abuses of the Cold War.").

¹⁶⁷ 50 U.S.C. § 1701.

attack on the homeland, nor have they produced attacks on U.S. soil in the past.¹⁶⁸ Thus, even if we can spare the liberties we'd lose by accepting as law the claim that we are living in a war zone, IEEPA designation of U.S. persons would be available as a potential solution to far fewer problems.¹⁶⁹

Most importantly, the argument that IEEPA designation could be used against Americans during an armed conflict in the United States is entirely hypothetical. As the years without an al-Qaeda attack on the American homeland turn into a decade, and Federal prosecutors and FBI agents continue to disrupt terrorist plots,¹⁷⁰ the argument that we are fighting a war on our own soil becomes less and less persuasive. The continuing sacrifices of American soldiers in two foreign theaters of war only highlight the fact that the United States is not a war zone. In the absence of an increasingly unlikely judicial determination that we are fighting a war within our borders, IEEPA designation of U.S. persons as SDGTS is thoroughly unconstitutional.

¹⁶⁸ In practice, U.S. presidents have put IEEPA designation to use with great emphasis on “foreign policy” and relatively little attention to “emergency.” For example, international drug trafficking, Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995), and the repression of democratic politics by the governments of Belarus, Exec. Order No. 13,405, 71 Fed. Reg. 35,485 (June 20, 2006); and Zimbabwe, Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 10, 2003), are among the situations that presidents have declared national emergencies. All serious threats to American interests, to be sure, but not necessarily “state[s] of national crisis or . . . situation[s] requiring immediate and extraordinary national action,” BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “national emergency”), let alone wars being fought on American soil.

¹⁶⁹ The one currently declared national emergency beyond terrorism that might arguably rise to the level of a war occurring within American borders is “the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence corruption, and harm that they cause in the United States and abroad,” Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 24, 1995), given the incredible level of violence that plagues northern Mexico and the southwestern United States. See, e.g., Marc Lacey & Ginger Thompson, *Obama’s Next Foreign Crisis Could Be Next Door*, N.Y. TIMES, Mar. 25, 2009, at 1.

¹⁷⁰ See, e.g., Yoo, *supra* note 165, at 577 (“Law enforcement has uncovered al Qaeda cells in ciites such as Buffalo, New York and Portland, Oregon.”).

V. CONCLUSION

IEEPA designation's failure of the *Mendoza-Martinez* test is a reminder that our current constitutional law treats foreign entities much differently than it treats U.S. persons.¹⁷¹ Tactics that are unremarkable when employed abroad, such as the blockade, may be impermissible when used at home. Notably, the government's new focus on preempting terrorist acts has prompted a small step towards the destabilization of the strict boundary between the foreign and the domestic.¹⁷² Now that the most fear-inducing existential threat to the state is as likely to materialize from within our borders as from without, it may well be time to ask whether geographic and national distinctions still deserve their central place in our constitutional law. Until our jurisprudence abandons such distinctions, however, the Bill of Rights continues to constrain the state's ability to deprive U.S. persons of liberty in the name of our national security.

Whether the unconstitutionality IEEPA designation of U.S. persons is good or bad from a policy perspective is a different question entirely. Surely, IEEPA designation is an important tool in keeping Americans safe and furthering American interests. Yet the vast majority of IEEPA designees are not U.S. persons, and perhaps the relative lack of U.S. designees indicates that that IEEPA designation is not one of the President's critical tools. On the other hand, perhaps the rarity with which the Bush Administration employed IEEPA designation at home indicates that even the most aggressively counterterrorism-focused executive branch will not abuse the awesome power of IEEPA.

With so much ink spilled in the preceding pages on what is wrong with IEEPA, it is important to recognize the great good IEEPA has been used to support. Beyond terrorism,

¹⁷¹ See sources cited *supra* note 31.

¹⁷² See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

designation is used to fight narcotics trafficking,¹⁷³ nuclear proliferation,¹⁷⁴ and human rights abuses from Burma¹⁷⁵ to Liberia¹⁷⁶ and the Sudan.¹⁷⁷ The Constitution leaves most executive branch actions taken pursuant to IEEPA untouched, and no matter what the ultimate outcome of any future constitutional litigation, the Departments of Treasury, State, and Justice will continue to have the option of using IEEPA designation against non-U.S. persons.

That does not mean, however, that the development of a clearer *Mendoza-Martinez*-test is without broader implications for U.S. foreign policy and counterterrorism efforts. The natural question going forward is whether there are other preemptive counterterrorism measures currently in use that may skirt the edges of the civil/criminal divide. No fly lists and terrorist watch lists come to mind. The recent scholarly and policymaker enthusiasm for creating a preventive detention regime outside of the criminal process¹⁷⁸ worth also ought to be considered with an eye towards *Mendoza-Martinez*-test review. Of course, such measures differ from each other and IEEPA in substantial ways, but each would prove a fascinating and significant topic of study. Indeed, as we work towards a clearer conception of punishment and a more coherent

¹⁷³ Office of Foreign Assets Control, Counter Narcotics Trafficking Sanctions, <http://www.ustreas.gov/offices/enforcement/ofac/programs/narco/narco.shtml>.

¹⁷⁴ Office of Foreign Assets Control, Weapons of Mass Destruction/Non-Proliferation Sanctions, <http://www.ustreas.gov/offices/enforcement/ofac/programs/wmd/wmd.shtml>.

¹⁷⁵ Office of Foreign Assets Control, Burma Sanctions, <http://www.ustreas.gov/offices/enforcement/ofac/programs/burma/burma.shtml>.

¹⁷⁶ Office of Foreign Assets Control, Former Liberian Regime of Charles Taylor, <http://www.ustreas.gov/offices/enforcement/ofac/programs/liberia/liberia.shtml>.

¹⁷⁷ Office of Foreign Assets Control, Sudan Sanctions, <http://www.ustreas.gov/offices/enforcement/ofac/programs/sudan/sudan.shtml>.

¹⁷⁸ STEPHANIE COOPER BLUM, *THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR* (2008); ALAN DERSHOWITZ, *PREEMPTION* 121 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *YALE J. INT'L L.* 369 (2008); Eric Posner, *Destructive Technologies Require Us to Re-Assess Civil Liberties*, *BOSTON REV.*, Dec. 10, 2008, <http://bostonreview.net/BR34.1/posner.php>; sources cited *supra* note 68.

application of the *Mendoza-Martinez* test, there will be much more work to do as we consider the constitutionality of our government's efforts to keep us safe and free.