THE SUPREME COURT AND FOREIGN POLICY

TOPIC PAPER

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INTRODUCTION

International legal issues have come before the Supreme Court of the United States several times. The Supreme Court’s decisions in those cases have had a substantial impact on United States foreign policy and relationships with other nations. In particular, Supreme Court decisions on whether the United States must follow international law, proper treatment of enemy combatants in wartime, actions of United States agents outside of the United States, and whether the Supreme Court should review foreign policy decisions have been important. The proposed topic will include debates about whether international law and customary international law are good mechanisms and should be followed, whether the United States should continue to detain alleged enemy combatants without trial, whether courts should be able to review the legality of United States military action and the scope of executive power over foreign policy.

The proposed topic is timely. *Ex Parte Quirin*, 317 U.S. 1 (1942) authorizes detaining persons identified as unlawful combatants without trial. The Trump Administration has designated at least one person as an enemy combatant and is holding that person without trial.¹ The President Trump issued an Executive Order to keep the Guantanamo Bay detention center open.² The issues surrounding detention without trial of persons designated as unlawful combatants will continue to be important as the Trump Administration maintains the Guantanamo detention center and continues to designate persons as unlawful combatants.³

*Zivotofsky v. Kerry*, 576 U.S. ___ (2015) (*Zivotosky II*) addresses executive power to recognize nations. In particular, *Zivotosky II* addresses United States executive authority to recognize the capital of another nation. *Zivotosky II* held that only the President, and not Congress, has the authority to recognize Jerusalem as the capital of Israel. This is timely because of the issues raised by President Trump’s decision to move the United States embassy in Israel to Jerusalem. The debate about and fallout from that decision are continuing. That debate remains viable because *Zivotovsky II* prevents the current or any future Congress from addressing any issue of recognizing other nations. In addition, *Zivotosky II* addresses the power of the president in foreign policy. The issues about executive flexibility in foreign policy raised by *Zivotosky II*’s holding that Congress does not have the authority to regulate whether the President can recognize nations will continue even if the specific issues about recognition of Jerusalem as Israel’s capital are mooted by subsequent events. This issue of executive flexibility in foreign policy is particularly relevant in the era of the Trump presidency.

*Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (*Zivotovsky I*) is the most recent case addressing the political question doctrine. The Supreme Court, and lower courts following the Supreme Court, have chosen not to review executive actions regarding foreign policy because
courts deem the legality of those actions to be political questions. See e.g. *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990) (legality of the first Gulf War is a political question that the courts would not review). Whether courts should review the legality of foreign policy actions is timely because of the Trump Administration’s two recent military actions in Syria. Several commentators and legislators have suggested serious legal issues following the second set of bombings by the United States in Syria. Under the current political question doctrine jurisprudence, courts would not review whether such action is lawful. Whether courts should review such actions is an ongoing controversy that impacts the heart of United States foreign policy. The standard for when the Supreme Court can or should review foreign policy actions will remain an important issue, particularly in the era of the Trump presidency when the court may be called upon to be a check on presidential actions.

*Medellín v. Texas*, 552 U.S. 491 (2008) addresses whether the United States, and individual states in the United States, are legally required to follow treaties that the United States signs. *Medellín* concerns whether states must advise foreign nationals arrested in the United States of their right to consult with their nation’s consulate upon arrest as required by the Vienna Convention on Consular Relations (Vienna Convention). The Supreme Court held that states are not required to follow the Vienna Convention because specific legislation was required before states could be compelled to follow the Vienna Convention and that legislation was not passed by Congress. The Supreme Court also refused to follow a contrary decision from the International Court of Justice.

*Medellín* allows for several important areas of debate. First are international relations implications of treaties signed by the United States not being followed in the United States. This raises questions about whether or not international law and treaties are good mechanisms
international order, establishing international norms, and international problem solving. Second are specific issues about the international relations implications of foreign nationals being arrested in the United States and not being advised of their right to consult with their nation’s consulate. In addition, Medellín raises whether the United States should follow decisions of the International Court of Justice.

*United States v. Alvarez-Machain*, 504 U.S. 655 (1992) and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) are related cases that raise issues of United States intervention in other nations and whether the United States must follow customary international law. In *United States v. Alvarez-Machain*, a Mexican national, Humberto Alvarez-Machin, was kidnapped by United States agents in Mexico and brought to the United States and then arrested on charges of allegedly assisting in the torture of a United States Drug Enforcement Agency agent. The United States Supreme Court held that United States courts had jurisdiction over Alvarez-Machin because courts would not review how a defendant came before the court.

Following the decision in *United States v. Alvarez-Machain*, Alvarez-Machin was put on trial. He was acquitted of all charges. Following his acquittal, he sued the United States under the Alien Tort Claims Act. Alvarez-Machin alleged that his kidnapping by United States agents violated several tenants of customary international law. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that Alvarez-Machin did not have a claim because the United States is not bound by customary international law and there is no claim under United States law for violating customary international law.

The two *Alvarez-Machin* decisions allow for debates about the scope of United States intervention in other nations and judicial review of such actions, and about whether the United
States should follow or be bound by customary international law or whether customary international law should be enforceable in United States courts. The vitality and importance of customary international law are ongoing issues that are constantly being debated in various contexts.

The issues raised by the various areas of this topic address problems that are significant in all sectors of the United States. Questions about international law and customary international law affect the entirety of United States foreign policy at both philosophical and practical levels. Detention of unlawful enemy combatants is a national issue. Questions about the legality of United States foreign policy actions and executive power over foreign policy are also national issues. These issues are particularly important in the Trump era when the president has taken several unilateral actions in the area of foreign policy.

The proposed topic will be accessible to a wide range of skill levels. Novices will have several core topic areas that are easy to understand including international law, relocation of the United States embassy to Israel, and due process and international relations implications of treatment of alleged enemy combatants and whether the United States should follow decisions of the International Court of Justice. Varsity debaters will have many possible approaches including disadvantages based on both international implications and court action, counterplans, and critical approaches including criticisms of international relations theory and using the legal system.

The topic will enable high quality debates. The issues are engaging. Whether the United States should follow international law in general, customary international law, decisions of the International Court of Justice, treaties in general and specific treaties are rich and controversial
areas with both policy and critical implications. The location of the United States embassy to Israel and treatment of alleged unlawful enemy combatants are significant current issues. The legality of United States foreign policy action, particularly military action, how much power the executive branch should have over foreign policy, and whether executive foreign policy action can be reviewed by courts, has been an issue since the Vietnam War and will continue to be debated whenever the United States takes military action. The availability of both policy and critical approaches to these areas will facilitate high quality debates.

There is a wealth of material about the topic. There is substantial material about the merits of international law. There has been substantial commentary and argument about the move of the United States embassy to Jerusalem. Although some of the literature about other portions of the topic is law review articles, many law reviews are now available online for free. The combination of political commentary, law review and scholarly international relations literature will give debaters a wide range of literature for the topic.

The topic will generate interest. Debates about international law have been at the edge of several topics but have not been the center of any topic. The debate about the move of the United States embassy is a contemporary topic with multiple international implications. The political question doctrine and its relationship to war power of the executive has also been at the edge of high school topics but has not been the center of a topic and is both timely and interesting. Debates about treaties in general, the Vienna Convention specifically, and other treaties that may need to be enforced in United States courts are also timely and interesting because of the multiple directions those debate go. Debates about executive power over foreign policy are particularly timely for the Trump presidency.
Debates on the topic will be balanced. There are multiple arguments and impact areas whether international law is good or bad and multiple arguments whether the United States embassy move to Jerusalem is good or bad. Treaties and executive flexibility in foreign policy also provide multiple argument areas with good division of ground.

Examples of possible affirmatives are that United States courts should follow international law, United States courts should follow customary international law, treaties should be binding on the states, the United States should follow decisions of the International Court of Justice, the Supreme Court should reject the political question doctrine, courts should hold that future strikes in Syria are illegal without Congressional authorization, the United States should not be allowed to kidnap foreign nationals, the Supreme Court should require that alleged unlawful enemy combatants be tried in United States courts, and the United States and the states should follow the Vienna Convention. Affirmatives can also use overturning Medellín or Sosa to argue that particular treaties should be binding, particular aspects of international law or customary international law should be binding in United States courts or that the United States should follow decisions of the International Court of Justice. Examples of particular affirmatives include portions of the Law of the Sea that have reached the status of customary international law and various rules of war. Advantage areas include United States/Arab world relations, due process, terrorism, checking executive war power, United States/Europe relations, United States/Mexico relations, and various advantage areas for international law including world peace, dispute resolution and international business transactions.

Negative positions include terrorism, United States/Israel relations, separation of powers, court legitimacy, court stripping, international law enforcement, and executive flexibility for war fighting. Counterplans include Congress or the State Department doing the plan, doing the plan
by executive order, or states following international law either by state legislation or state court decision. Critiques include decoloniality, settlerism, various legalism criticisms, feminist international relations, and various other critical international relations arguments. In addition, negatives can argue the capitalism critique with the link that international law is capitalist, and anti-blackness with the link that international law or international relations are continuations of civil society.

PROPOSED RESOLUTIONS

Potential topic wordings are:


This wording includes all of the proposed areas of Supreme Court involvement in foreign policy.


This wording includes all of the proposed areas of Supreme Court involvement in foreign policy except for detention of unlawful enemy combatants. The reason to exclude unlawful
enemy combatants is because it was the subject of somewhat recent high school and college resolutions.


This wording includes all of the proposed areas of Supreme Court involvement in foreign policy except for jurisdiction over kidnapped foreign nationals.


This wording includes all of the proposed areas of Supreme Court involvement in foreign policy except for recognition of foreign nations, which would exclude the debate about moving the United States embassy to Jerusalem by executive order from the topic.


This wording includes all of the proposed areas of Supreme Court involvement in foreign policy except for the political question doctrine.
6. The Supreme Court of the United States should overturn one or more of its decisions in one or more of the following areas: unlawful enemy combatants, enforcement of treaties, customary international law, political question doctrine, extraterritorial application of United States law.

By focusing on areas instead of specific cases, this alternative wording is a larger but less defined topic. This wording includes the area of extraterritorial application of United States law which is not specifically addressed in the proposed resolutions with a specific case list. Extraterritorial application of United States law is not included in the proposed resolution with a specific case list because there are not one or two cases that define the area. The cases are varied and somewhat contradictory. However, this can be an interesting area of debate where there has been substantial recent activity and controversy.

7. The Supreme Court of the United States should overturn one or more of its decisions in one or more of the following areas: unlawful enemy combatants, enforcement of treaties, customary international law, political question doctrine.

Same as wording 6 but without the area of extraterritorial application of United States law.

8. The Supreme Court of the United States should overturn one or more of its decisions in one or more of the following areas: unlawful enemy combatants, enforcement of treaties, customary international law, political question doctrine, Alien Tort Statutes.

Same wording as 6 but substituting Alien Tort Statutes for extraterritorial application of United States law.
The Alien Tort Statutes states “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350. There has been substantial litigation about the scope of the Alien Tort Statutes attempting to apply it to actions of non-United States corporations and to actions outside of the United States. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) the Supreme Court held that United States courts do not have jurisdiction under the Alien Tort Statutes over claims of violations of human rights laws that occurred outside the United States. In *Jesner v. Arab Bank PC*, 138 S.Ct. 1386 (2018), the Supreme Court held that foreign corporations cannot be sued under the Alien Tort Statutes.

The scope of the Alien Tort Statutes can be an interesting area of debate because it includes discussions of both the reach of United States law to foreign corporations and United States enforcement of international human rights standards. Cases about the scope and reach of Alien Tort Statutes are not included in the in the proposed resolution with a specific case list because the cases build on each other making identifying one particular case in the area problematic. *Sosa v. Alvarez-Machin* is also an Alien Tort Statutes case. It is included in proposed resolutions with a specific case list because it can be isolated as involving whether United States court should follow customary international law.

**DEFINITIONS**

Alien Tort Statute: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350.

customary international law:
“Customary law is the idea that law not codified, but that has been in practice for a long period of time can become binding law. Malcolm N. Shaw defines customary international law as the following: “Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties.” InternationalRelations.org, “Customary International Law” 2015 http://internationalrelations.org/customary-international-law/.


*Ex Parte Quirin*, 317 U.S. 1 (1942): A United States Supreme Court decision that authorizes detaining persons identified as unlawful combatants without trial.

Extraterritorial:

“Traditionally, the United States has combated some forms of international conduct by giving extraterritorial effect to some federal laws. Extraterritoriality, the exercise of enforcing a law beyond national boundaries, is by no means a new issue; however, it is one that has garnered some attention as of late. In the last twenty years, the world has become more global, and it is common for the substance of many crimes to have connections in more than one country. However, extraterritoriality regularly results in an encroachment upon another nation's sovereignty.” Walsh, Ryan, “Extraterritorial Confusion: The Complex Relationship Between

“This Article defines a nation-state's law to be territorial if it prohibits or regulates a human act or conduct that occurs within the nation-state's borders.53 By contrast, a law is extraterritorial if it governs acts that occur outside the nation-state's borders, even if committed by the nation's own citizens.54 The territorial/extraterritorial distinction in the law focuses on the location of the acts or conduct that a law explicitly controls, regardless of where any effects or consequences of such acts might be felt and regardless of any purpose, intent, or motive of the regulation to influence second-order conduct.55 If, for example, a U.S. law prohibits consumers in the United States from purchasing African elephant tusks, this is a territorial regulation of consumer conduct within the United States, despite its apparent purpose or effect in part to discourage killing of endangered elephants in Africa.56 By contrast, if a U.S. law were to expressly prohibit people in Canada from firing guns, this would be an extraterritorial law, whether applied to a polar bear hunter at the Arctic Circle or to an assassin in Canada who aims across the border to murder someone in the United States.” Meyer, Jeffrey A., “Dual Illegality and Geoambiguous Laws: A New Rule for Extraterritorial Application of United States Law” University of Minnesota Law Review, vol. 95, November 2010.

Medellín v. Texas, 552 U.S. 491 (2008): A United States Supreme Court decision holding that the Vienna Convention on Consular Relations was not self-executing and as a result states are not bound to follow its requirement that arrested foreign nationals be advised of their right under the Convention to consult with their consulate. The decision also held that the United States is not required to follow decisions of the International Court of Justice interpreting treaties that the United States has signed.
political question doctrine

“Federal courts will refuse to hear a case if they find that it presents a political question. This doctrine refers to the idea that an issue is so politically charged that federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue. The doctrine is also referred to as the justiciability doctrine or the nonjusticiability doctrine.” Legal Information Institute, https://www.law.cornell.edu/wex/political_question_doctrine.

“An issue that the federal courts refuse to decide because it properly belongs to the decision-making authority of elected officials.

Political questions include such areas as the conduct of foreign policy, the ratification of constitutional amendments, and the organization of each state's government as defined in its own constitution. The rule preventing federal courts from deciding such cases is called the political question doctrine. Its purpose is to distinguish the role of the federal judiciary from those of the legislature and the executive, preventing the former from encroaching on either of the latter. Under the rule, courts may choose to dismiss cases even if they have jurisdiction over them. However, the rule has no precise formulation, and its development since the 1960s has sometimes been unpredictable.” The Free Dictionary, https://legal-dictionary.thefreedictionary.com/Political+question+doctrine.

*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004): A United States Supreme Court decision holding that Alvarez-Machin did not have a cause of action against the United States under the Alien Tort Claims Act for violating customary international law by kidnapping him and bringing him to the United States because customary international law is not enforceable in United States courts.
unlawful enemy combatants:

“The full term in relation to this case is unlawful enemy combatant. (More on lawful enemy combatants below.) An unlawful enemy combatant is some one authorities believe is connected with a terrorist group, whether through funding or direct orders or association, among other connectors.” Cirilli, Kevin, “10 Facts About Enemy Combatants” Politico, 22 April 2013, https://www.politico.com/story/2013/04/what-is-an-enemy-combatant-090436

“For the purposes of this article the term “unlawful/unprivileged combatant/belligerent” is understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy. This seems to be the most commonly shared understanding.7 It would include for example civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps — including those of organized resistance movements — not being integrated in the regular armed forces but belonging to a party to conflict, provided that they do not comply with the conditions of Article 4A (2) of GC III. In the following text, for reasons of convenience, only the term “unlawful combatant” will be used.” Dormann, Knut, “The Legal Situation of ‘Unlawful/Unprivileged’ Combatants” IRRC vol. 85, March 2003, https://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf.

“In brief, unlawful combatants are either combatants who fail to follow the laws of war or civilians who take part directly in hostilities without being entitled to do so. It is most often the case that unlawful combatants disregard, in order to gain military advantage, the fundamental requirement that combatants distinguish themselves from civilians. Classic examples would be
spies and saboteurs who, wearing civilian clothing, infiltrate enemy territory to collect information or to destroy designated objects. In the recent war in Iraq, the Fedayeen fighters dressed in civilian clothing and used civilians as human shields to protect themselves from attack. Another more recent, but also more alarming, form of unlawful combatants is civilians who have organised themselves as self-styled paramilitary fighters (not belonging to a party to the armed conflict). The best known real-life examples would be al-Qaeda fighters who were not incorporated in Taliban military units as part of the Taliban armed forces according to Article 4 (A) (2) of the Third Convention (at least there is no evidence of such incorporation).*21 A person is not allowed to wear two hats simultaneously: that of a civilian and the helmet of a soldier. Therefore, a person who engages in military raids by night while purporting to be an innocent civilian by day is neither a combatant nor a civilian.*22 Such a person is a legitimate military target, but, once captured, an unlawful combatant is not entitled to prisoner-of-war status. Before the adoption of the Geneva Conventions, international law permitted armies to deal harshly with unlawful combatants, even allowing them to be shot after capture.*23” Vark, Rene, “The Status and Protection of Unlawful Combatants” Juridica International 2005, http://www.juridicainternational.eu/index.php?id=12632.

United States v. Alvarez-Machain, 504 U.S. 655 (1992): A United States Supreme Court decision holding that courts do not inquire how a criminal defendant comes before the court, and as a result it was irrelevant that the defendant was kidnapped in Mexico by United States agents and brought to the United States.

Zivotofsky v. Clinton, 566 U.S. 189 (2012): A United States Supreme Court decision applying the political question doctrine to whether the courts can adjudicate whether legislation that persons born in Jerusalem are citizens of Israel was within Congress’ power. The Supreme
Court defined the political question doctrine and held that whether the statute was constitutional was not a political question.

*Zivotofsky v. Kerry,* 576 U.S. ___ (2015): A United States Supreme Court decision holding that the President has authority to recognize nations. In particular, *Zivotofsky* held only the President has the authority to recognize Jerusalem as the capital of Israel and in doing so held that a statute requiring persons born in Jerusalem to be recognized as citizens of Israel was unconstitutional.

**SUMMARY**

Legal issues have a substantial influence on the conduct of foreign policy. The United States Supreme Court has issued several decisions that have had important effects on the conduct of foreign policy. These decisions include the areas of following international law, following treaties, following decisions of the international court of justice and the role of the courts in foreign policy. Supreme Court decisions also address several current issues including detention of unlawful enemy combatants, the status of Jerusalem and following the Vienna Convention on Consular Relations. The proposed topic brings these areas to the forefront. While several topics have had issues of international law and the role of the courts at the edge of the topic, none has had those issues as central to the topic. The actions of the current presidential administration, including missile strikes in Syria, moving the United States embassy to Israel to Jerusalem, and stating that it will hold alleged enemy combatants without trial make the issues raised by the topic particularly timely. The topic has substantial ground on both sides in a diversity of areas and approaches. The scope and timeliness of the topic will make it interesting for an entire year of debates.
Abebe, Daniel, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, 2012 Supreme Court Review 233 (2012).


Cabrana, Jose, “The Foreign Policy of Our Government’s ‘Least Dangerous Branch’” 41 Yale Journal of International Law 469 (Summer 2016).


Hardy, Colleen E., The Detention of Unlawful Enemy Combatants During the War on Terror, LFB Scholarly 2009.


Legal Information Institute, https://www.law.cornell.edu/wex/political_question_doctrine.


Quigley, John, “A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: Medellín v. Texas and Beyond” 45 Case Western Reserve Journal of International Law 403 (Fall, 2012).


Research guide for customary international law.


SUMMARY REPORT

Top Resolutions


4. The Supreme Court of the United States should overturn one or more its decisions in one or more of the following areas: unlawful enemy combatants, enforcement of treaties, customary international law, political question doctrine.
Affirmative case list

United States courts should follow international law

United States courts should follow customary international law

Treaties should be binding on the states

The United States should follow decisions of the International Court of Justice

The Supreme Court should reject the political question doctrine

Courts should hold that future strikes in Syria are illegal without Congressional authorization

The United States should not be allowed to kidnap foreign nationals

The Supreme Court should require that alleged unlawful enemy combatants be tried in United States courts

The United States and the states should follow the Vienna Convention.

Negative approaches

Terrorism disadvantage

United States/Israel relations disadvantage

Separation of powers disadvantage

Court legitimacy disadvantage

Court stripping disadvantage
International law enforcement disadvantage

Executive flexibility for war fighting disadvantage

Congress counterplan

State Department counterplan

Executive order counterplan

States following international law counterplan

Decoloniality critique

Settlerism critique

Various legalism critiques

Feminist international relations critique

Various other critical international relations arguments

Capitalism critique

Anti-blackness critique.

Debatability of the topic

The topic will be easily debatable. There are multiple arguments and impact areas whether international law is good or bad and multiple arguments whether the United States embassy move to Jerusalem is good or bad. Treaties and executive flexibility in foreign policy also provide multiple argument areas with good division of ground. There are multiple potential
advantages and disadvantages based on relations with various nations. There is also substantial ground for critical arguments based on both international relations theory and law.

**Summary**

Legal issues have a substantial influence on the conduct of foreign policy. The United States Supreme Court has issued several decisions that have had important effects on the conduct of foreign policy. These decisions include the areas of following international law, following treaties, following decisions of the international court of justice and the role of the courts in foreign policy. Supreme Court decisions also address several current issues including detention of unlawful enemy combatants, the status of Jerusalem and following the Vienna Convention on Consular Relations. The proposed topic brings these areas to the forefront. While several topics have had issues of international law and the role of the courts at the edge of the topic, none has had those issues as central to the topic. The actions of the current presidential administration, including missile strikes in Syria, moving the United States embassy to Israel to Jerusalem, and stating that it will hold alleged enemy combatants without trial make the issues raised by the topic particularly timely. The topic has substantial ground on both sides in a diversity of areas and approaches. The scope and timeliness of the topic will make it interesting for an entire year of debates.
The United States Supreme Court has decided four cases about detention at the Guantanamo Bay detention center and detention on enemy combatants in the War on Terrorism. *Boumendine v. Bush*, 553 U.S. 723 (2008), *Hamdan v. Rumsfeld*, 548 U.S. 57 (2006), *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). However, none of these cases challenged the underlying rule from *Quirin* that alleged unlawful enemy combatants can be detained without trial. Only overturning *Quirin* can change the legal authorization to hold alleged unlawful enemy combatants without trial.


*Medellín, Sanchez-Llamas,* and *Breard* each involved application of the death penalty to foreign nationals. Whether the death penalty should be applied to foreign nationals could be argued to be part of the topic.

outside of the United States). Although these cases held that United States law did not apply outside the United States, several earlier cases held that United States law could apply outside the United States. See e.g. United States v. Bowman, 260 U.S. 94 (1922).