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FOREIGN NATIONALS AND PRINCIPLES OF EXTRATERRITORIALITY: WHY ATAMIRZAYEVA V. UNITED STATES WAS DECIDED INCORRECTLY

Andrea Paraud*

Owning a business is a demanding job. It requires dedication, substantial economic contributions, and major sacrifices. It is a labor of love. Imagine that you own such a business. What would you do if someone demolished it, rendering all of your hard work and sacrifice worthless? Most people would expect some kind of compensation from the person or entity at fault. But what happens when there is no remedy for the wrong?

On May 7, 2008, the United States Court of Appeals for the Federal Circuit made a landmark decision, holding that the appellant, an Uzbek citizen, lacked a sufficient connection to the United States to receive compensation under the Takings Clause of the Fifth Amendment.¹ In so doing, the Federal Circuit abandoned precedent and defeated the purpose of the Takings Clause.

Since 1994, Zoya Atamirzayeva, an Uzbek citizen, owned a cafeteria called "Feruza," which was located next to the U.S. Embassy in the city of Tashkent, Uzbekistan.² At the Embassy’s request, and under its oversight, local Uzbek authorities seized and destroyed Ms. Atamirzayeva’s cafeteria in December 1999.³ Embassy officials made this request in an effort to increase security.⁴ After unsuccessfully seeking relief from local Uzbek authorities and Embassy officials, Ms. Atamirzayeva brought her claim before the United States Court of Federal Claims.⁵ Relying on United States v. Verdugo-Urquidez, among

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¹ Atamirzayeva v. United States, 524 F.3d 1320, 1321 (Fed. Cir. 2008).
² Id.; Atamirzayeva v. United States, 77 Fed. Cl. 378, 379 (Fed. Cl. 2007).
³ Atamirzayeva, 77 Fed. Cl. at 379.
⁴ Atamirzayeva, 524 F.3d at 1321. According to Ms. Atamirzayeva’s original complaint, a U.S. Embassy security checkpoint now stands where her cafeteria was located. Complaint at 5, Atamirzayeva, 77 Fed. Cl. 378 (No. 05-1245L). In response to the 1998 terrorist bombings of U.S. Embassies in Kenya and Tanzania, Congress enacted the Secure Embassy Construction and Counterterrorism Act of 1999, making $6.4 billion available to the U.S. Department of State to buy or lease property adjacent to diplomatic facilities for the purpose of improving security. Atamirzayeva, 77 Fed. Cl. at 379. In addition, Ms. Atamirzayeva provided the Court of Federal Claims with a letter from a local Uzbek official, stating that the U.S. demanded that local officials destroy her cafeteria for security purposes. Id.
⁵ Complaint, supra note 4, at 7.
other cases, the Court of Federal Claims held that Ms. Atamirzayeva lacked standing to invoke the Takings Clause because she had not demonstrated a substantial connection to the United States. 6 The Federal Circuit affirmed, also basing its decision on the substantial-connection test established by Verdugo-Urquidez. 7 Although Ms. Atamirzayeva relied on Turney v. United States—a case in which the Court of Claims upheld a foreign corporation’s takings claim against the U.S. government 8—the Federal Circuit distinguished Turney from Ms. Atamirzayeva’s case based on the Turney corporation’s substantial connections to the United States. 9 However, the court in Turney never relied on a substantial-connection test in reaching its conclusion. 10

In general, three types of property are subject to foreign takings: (1) “American-owned property located abroad”; (2) “alien-owned property located

8. Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953). Turney involved a Filipino corporation’s takings claim against the United States. Id. at 458–60. Two former U.S. Air Force members purchased an air depot that had been transferred to the Philippines by the United States, and subsequently assigned the property to a corporation they formed. Id. at 458–59. Soon after, the corporation’s employees discovered classified military radar equipment among the supplies at the depot. Id. at 459. After notifying U.S. military authorities, the U.S. military attempted to repossess the property. Id. The parties eventually agreed to segregate the classified equipment from the other supplies. Id. at 460. After segregating the equipment, the plaintiffs agreed to return the radar equipment and the U.S. government agreed to give full receipt to the corporation. Id. In addition, however, the corporation stated in the agreement that it planned to bring a claim against the U.S. government. Id.
9. Atamirzayeva, 524 F.3d at 1326–28. Specifically, the Federal Circuit pointed to three connections to the United States that were present in Turney and absent in Atamirzayeva: (1) the corporation in Turney was formed by two U.S. citizens; (2) these two citizens assigned the corporation its ownership interest in the disputed property; and (3) after the corporation was liquidated, a U.S. citizen, who was also a plaintiff in the case, was designated as the liquidating trustee. Id. Ms. Atamirzayeva argued, however, that “it is well-established that ‘regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or the laws under which it was organized, determines its national character.’” Plaintiff-Appellant Mrs. Zoya Atamirzayeva’s Petition for Rehearing En Banc at 5, Atamirzayeva, 77 Fed. Cl. 378 (No. 07-5159) [hereinafter Petition for Rehearing] (quoting 17 Fletcher Cyclopedia of the Law of Private Corporations § 8298 (perm. ed., rev. vol. 2006)). Furthermore, the Turney plaintiff sued on behalf of the corporation, not on his own behalf as a U.S. citizen. Turney, 115 F. Supp. at 460–61. Therefore, Ms. Atamirzayeva argued, the nationality of the liquidating trustee in Turney was irrelevant. Petition for Rehearing, supra, at 7.
10. Atamirzayeva, 524 F.3d at 1328; Turney, 115 F. Supp. at 463–64; see also Petition for Rehearing, supra note 9, at 4 (quoting Atamirzayeva, 524 F.3d at 1328) (explaining that even the Federal Circuit in Atamirzayeva noted that the court in Turney did not expressly state that a plaintiff must demonstrate a substantial connection to the United States in order to seek relief under the Fifth Amendment).
within the United States;"; and (3) “alien-owned property located abroad.”11 Vagueness and confusion surround this topic, particularly with respect to the third category, because the United States Supreme Court has never clearly decided whether the Fifth Amendment Takings Clause applies extraterritorially to non-enemy, or friendly, foreign nationals.12 Instead of providing clarification, the Federal Circuit's holding furthers the confusion regarding the third type of foreign taking—the taking of alien-owned property located abroad.

Although both the Court of Federal Claims and the Federal Circuit relied on the substantial-connection test in ruling against Ms. Atamirzayeva,13 new developments show that Verdugo-Urquidez's substantial-connection test is not the appropriate approach for courts to follow.14 A vast body of case law also indicates that the Court of Claims and the Federal Circuit should not have used the substantial-connection test to decide Atamirzayeva.15 The Federal Circuit erred when it applied this test and, in the process, essentially overturned Turney,16 one of the most important cases regarding the extraterritorial application of the Fifth Amendment Takings Clause.17

This Comment will examine longstanding precedent and new developments regarding the application of the Fifth Amendment Takings Clause to friendly aliens whose property is located in a foreign territory to show that the Federal Circuit erred when it held that Ms. Atamirzayeva lacked standing to bring her Fifth Amendment Takings Clause claim. First, this Comment will explore Fifth Amendment jurisprudence and the extraterritorial application of the U.S. Constitution generally. Next, this Comment will specifically examine the extraterritorial application of the Fifth Amendment Takings Clause and the various approaches courts have taken in its application. This Comment will

15. See, e.g., Langenegger v. United States, 756 F.2d 1565, 1572 (Fed. Cir. 1985) ("[P]recedents clearly establish that in determining whether a taking exists where a foreign government's actions are involved, the focus of the inquiry is the same as that undertaken in a domestic taking case: the court must consider whether the United States' involvement was sufficiently direct and substantial to warrant its responsibility under the fifth amendment."); Turney, 115 F. Supp. at 464; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1930) (holding that "alien friends are embraced within the terms of the Fifth Amendment" where the alien and the property taken are located within the United States).
16. See Petition for Rehearing, supra note 9, at 3 (describing Turney as a "landmark decision" which has yet to be overruled en banc and, therefore is binding on the Federal Circuit).
17. See id. (describing Turney as a "landmark decision").
analyze these approaches and show that the Federal Circuit’s reliance upon the substantial-connection test is unfounded and contradictory to precedent. Finally, this Comment argues that courts must abandon the substantial-connection test to eliminate the tension between recent developments and the cases that precede its adoption. Specifically, this Comment will conclude that the substantial-connection test contradicts the purpose of the Fifth Amendment Takings Clause, and that courts must respect the property rights of friendly aliens to the same degree as that of American citizens, regardless of where the alien and the property are located.

I. A CLOSER LOOK AT INTERNATIONAL-TAKINGS JURISPRUDENCE

A. The Fifth Amendment

The Fifth Amendment Takings Clause, ratified in 1791, states: “nor shall private property be taken for public use, without just compensation.” The framers of the Constitution adopted this language “as a constraint on the Government’s power of eminent domain, defined as its power to force transfers of property from owners to itself.” To effectively control such power, the Takings Clause imposes on the government two distinct requirements: (1) the property must be taken for a public use; and (2) the government must pay just compensation to the owner. Together, these two

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18. John R. Vile, Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002, at 190 (2d ed. 2003). Unlike the other provisions of the Fifth Amendment that deal with the rights of suspected criminals, the Takings Clause states that the government cannot take private property for public use without providing compensation to the property owners. Id. at 191. The Takings Clause was also the first provision of the Fifth Amendment to be applied to the states through the Due Process Clause of the Fourteenth Amendment. Id.

19. U.S. Const. amend. V. Courts have recognized the well-established principle that “[e]very civilized State recognizes its obligation to make compensation for private property taken under pressure of State necessity, and for the public good.” Grant v. United States, 1 Ct. Cl. 41, 43 (Ct. Cl. 1863). Despite its simple language, the Takings Clause has produced convoluted and esoteric Supreme Court precedent. See Richard G. Wilkins, The Takings Clause: A Modern Plot for an Old Constitutional Tale, 64 Notre Dame L. Rev. 1, 1 (1989).

20. Jon A. Stanley, Comment, Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence, 15 Emory Int’l L. Rev. 349, 353 (2001) (citing Jesse Dukeminier & James E. Krier, Property 1102 (4th ed. 1998) (explaining the purpose and principles of the Fifth Amendment Takings Clause). Although the rationale behind the Takings Clause “originated in ancient Rome,” it was the English concept of eminent domain that significantly influenced American takings jurisprudence. See id. at 353–54. Originally, compensation for takings was not commonplace, but legislation incrementally incorporated the notion of compensation, so that most states required compensation for such takings by the time the Framers drafted the Constitution. Id. at 354.

conditions “ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power.” 22

Under the natural-rights theory, this clause is necessary because every person’s right to hold property is inalienable. 23 Thus, when the government

472. As part of the plan, the City purchased from private real estate owners most of the property necessary for the project, but when negotiations with other property owners failed, the City initiated condemnation proceedings. Id. at 475. In response, the hold-out owners brought a state-court action asserting that the taking of their property would violate the “public use” requirement of the Fifth Amendment’s Taking Clause. Id. The trial court prohibited the City from taking certain property, but the Supreme Court of Connecticut upheld all of the proposed takings as constitutionally valid. Id. at 476. Ultimately, the United States Supreme Court affirmed, finding that the term “public use” is not defined as property that must be intended only for use by the public, but “public use” simply requires that the taking serve a public purpose. Id. at 479–80. The Court reasoned that because the City of New London approved the development plan to promote the local economy and the public welfare, it served a public purpose. Id. at 483–84. Additionally, the Court held that the City’s determination that the area in question needed economic revitalization was entitled to deference. Id. at 483.

Kelo is one of the most hated, but also most important, takings cases decided by the Supreme Court. See Abraham Bell & Gideon Parchomovsky, The Uselessness of Public Use, 106 COLUM. L. REV. 1412, 1413 (2006); Associated Press, Homes May be ‘Taken’ for Private Projects, MSNBC, June 23, 2005, www.msnbc.msn.com/id/8331097/hs/us news. According to Bell and Parchomovsky, libertarians hate Kelo because it grants “excessive deference to state actions that impair private property rights.” Bell & Parchomovsky, supra. They argue that Kelo invites the government to take private property whenever it determines that the state has a better use for the property. Id. Liberals also hate Kelo because it allows large corporations to receive from the government the private property of individual owners without their consent, thus placing the Court’s “imprimatur . . . on state victimization of the poorest property owners.” Id. Overall, Kelo has become a “lightning rod” for criticism of government abuse of eminent domain. Id. at 1414.

The text of the Takings Clause does not indicate that the property taken must be located in the United States, or that the clause is only applicable to citizens of the United States. EI-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1351 (Fed. Cir. 2004). Therefore, whether a claimant is entitled to just compensation under the Fifth Amendment is dependent upon the “particular circumstances of each case.” Tabacinic, supra note 12, at 604 (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

22. Kelo, 545 U.S. at 496 (O’Connor, J., dissenting).

23. See Stanley, supra note 20, at 352 (stating that governmental takings undercut the principles of individual rights). Natural-rights theory propounds that every person has certain fundamental rights that cannot be surrendered. Id. English political theorist John Locke contended that because private property has its foundation in natural law, which preceded the creation of government, the primary purpose of government is to protect property rights. MELVIN UROFSKY, RIGHTS OF THE PEOPLE: INDIVIDUAL FREEDOM AND THE BILL OF RIGHTS ch. 9 (2003), available at http://usinfo.org/zhtw/docs/RightsPeople/property.html; see also RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10 (1985) (explaining Locke’s view that individual natural rights are the “common gift of mankind” and “are not derived from the sovereign”). According to John Locke:

The supreme power cannot take away from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by
takes a person's property without just compensation it "deprive[s] him of his right, and . . . abrogate[s] the laws of nature." For this reason, when courts adjudicate takings claims, they should respect this restraint on government power. To understand why the Takings Clause is applicable extraterritorially to foreign nationals, it is important to first examine the rationale for extending the Constitution's protections to foreign territories generally.

B. Extraterritoriality: The Constitution in Foreign Territories

When the states adopted the Fifth Amendment, the framers of the Constitution took into consideration the United States' continuing expansion. Traditionally, when discerning the reach of the Constitution, courts had to consider whether constitutional limitations were relevant to government acts overseas, and whether these limitations were applicable to acts performed in U.S. territories that were not yet states. As the country expanded, the

entering into society, which was the end for which they entered into it, too gross an absurdity for any man to own.

EPSTEIN, supra, at 14 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

Sir William Blackstone once stated: \\
"[s]o great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

Jon Stanley suggests that principles of human rights require greater emphasis on private-property rights, regardless of state sovereignty. Stanley, supra note 20, at 389.

25. Kelo, 545 U.S. at 507 (Thomas, J., dissenting).
26. See Boumediene v. Bush, 128 S. Ct. 2229, 2253 (2008). Article IV, Section 3 of the Constitution confers upon Congress the power to admit new states and to create all necessary rules for U.S. territories:

New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3, cl. 1–2. In Boumediene v. Bush, Justice Kennedy provided a detailed account of how the Constitution came to be applied extraterritorially. 128 S. Ct. at 2253–57. He explained that questions of extraterritorial application were of little issue for most of U.S. history, but "fundamental questions" arose when the United States "acquired noncontiguous Territories" at the beginning of the twentieth century. Id. at 2253.

27. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72 (1996). Because the boundaries of the Constitution have been pushed outward throughout history, the evolution of its extraterritorial application can be analogized to a series of "concentric circles": (1) U.S. "citizens living within the [United] States"; (2) "aliens living within the United States"; (3) territories acquired by the United States; (4) territories where the United States exercised significant, but not sovereign, control and authority; and (5) citizens in foreign territories acting against the United States. Elizabeth A. Wilson, The
Supreme Court viewed the Constitution as "a law for rulers and people, equally in war and in peace, [that] covers with the shield of its protection all classes of men, at all times, and under all circumstances." Furthermore, the Court has held that the Constitution is applicable to the U.S. government any time and at any place it exercises its power. Thus, when the United States acts outside of its territorial boundaries, its power is not limitless.

1. Mutuality of Obligation

One theory that assists in understanding why the Constitution is applied extraterritorially is the concept of mutuality of obligation. Inherent in the theory of mutuality is the notion that constitutional rights and obedience to American law are intertwined. In other words, the Constitution and its provisions are applicable to those who are required to obey the laws of the United States. Moreover, if the United States expects other countries to

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29. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted."); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 285-86 (1990) (Brennan, J., dissenting) (expressing the idea that the Constitution applies to federal action abroad, including acts toward foreign nationals). Accordingly, many academics argue for the internationalization of the Constitution to serve as an external check on the United States because, in their view, the United States is often a bad actor when it acts abroad. LaFata, supra note 11, at 363. Arguments that the Constitution should be internationalized are grounded in natural-rights theory, or in the theory that the government is universally bound by the Constitution. Id. at 364; see supra note 23 and accompanying text.
30. Boumediene, 128 S. Ct. at 2259 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)); Wilson, supra note 27, at 180 (discussing the two dissents in Verdugo-Urquidez and explaining Justice Brennan's view). Gerald Neuman states that the "legacy of the Alien Act debates includes the fundamental rejection of the claim that citizenship is the key to rights-bearing capacity under the Constitution. Moreover, not even the Insular Cases relied on a distinction between the rights of American citizens and the rights of subject peoples in the territories." Neuman, supra note 27, at 103. Thus, the U.S. government must act according to the Constitution at all times, even when acting upon aliens.
31. Neuman, supra note 27, at 98.
32. Id. According to Justice Brennan's dissent in Verdugo-Urquidez, "[m]utuality is essential to ensure the fundamental fairness that underlies our Bill of Rights." Verdugo-Urquidez, 494 U.S. at 284 (Brennan, J., dissenting). Prior to this statement, Justice Brennan quoted James Madison, stating, "[a]liens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage." Id. (quoting JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 556 (2d ed. 1836)).
respect the rights of its citizens, then in turn, the United States must respect the rights of the citizens of those other countries.  

Justice Hugo Black's opinion for a plurality of the Court in *Reid v. Covert* explained the importance of mutuality and resurrected mutuality as a basis for determining the scope of the Constitution's application. *Reid* involved the habeas corpus proceedings of two women who were tried by military authorities for murdering their husbands, both of whom were military officers, while they were stationed at foreign bases. Although *Reid* included two American citizens abroad, and is distinct from *Atamirzayeva* in that respect, it is significant because it re-established the concept of mutuality and abolished the strict territorial approach previously embraced by the Supreme Court.

In his plurality opinion in *Reid*, Justice Black rejected the notion that the United States can disregard the Bill of Rights when it acts against its citizens overseas, explicitly stating that "[t]he United States is entirely a creature of the Constitution," and that "[i]ts power and authority have no other source." Justice Black examined the language of Article III, Section 2 of the Constitution and concluded that it was designed, in part, to control the government, even when it acts outside of the boundaries of the United States.

33. *Verdugo-Urquidez*, 494 U.S. at 285–86 (Brennan, J., dissenting). When the United States enforces its laws in foreign territories without the safeguards of the Constitution, it encourages other nations to treat U.S. citizens living abroad with less respect than they treat their own citizens. *Id.*; *LaFata*, *supra* note 11, at 348.  


35. *Neuman*, *supra* note 27, at 89. The strict territorial approach, formerly the dominant approach throughout most of U.S. history, states that the reach of the Constitution extends no further than the "the water's edge" of U.S. sovereign territory. *Wilson*, *supra* note 27, at 168. For example, in *United States v. Curtiss-Wright Export Corp.*, the Court invoked the strict territorial approach stating that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This approach is based upon the notion that each state occupies a certain area on earth, and only that state can exercise jurisdiction over that land's people and property. *See Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). This approach is derived from the international law "principle of territoriality." *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) cmt. c.* (1987). In addition to public international law, the presumption of territoriality in the United States was derived from the belief that Congress was not concerned with international matters. *See Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). However, the modern globalization of economic, political, and social issues belies the traditional presumption of territoriality. *See Brief for the Lawyers' Committee for Civil Rights Under Law as Amici Curiae Supporting Petitioners at 3–4, 17–18, EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (Nos. 89-1838, 89-1845).

An example of the abandonment of strict territoriality is found in the *Third Restatement of Foreign Relations Law*, which replaced the strict territoriality approach for prescribing jurisdiction with a "reasonableness" approach. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS: LAW OF THE UNITED STATES* (1987) (Introductory Note). The Restatement explains that "[t]erritoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria." *Id.*


37. *Id.* at 7.
 Justice Black distinguished cases such as In re Ross\textsuperscript{38} and the Insular Cases\textsuperscript{39} in concluding that the respondents had to be released from custody because court-martial jurisdiction cannot be constitutionally applied to trials of civilian dependents of military members.\textsuperscript{40}

When the parties originally argued Reid before the Court, the majority found that the military trials of the respondents were constitutional.\textsuperscript{41} In that opinion, the majority relied on Ross in holding that Article III, Section 2 and the Fifth and Sixth Amendments did not apply abroad.\textsuperscript{42} However, after the Court granted the petition for rehearing, Justice Black stated that Ross "is one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today."\textsuperscript{43} More importantly, Justice Black repudiated the Court's assertion in Ross that the Constitution had no effect abroad and noted that many cases have since resisted this approach as flawed.\textsuperscript{44}

The Insular Cases, on the other hand, involved newly acquired and culturally different U.S. territories.\textsuperscript{45} Unlike Ross, the plurality in the Insular

\textsuperscript{38} In re Ross, 140 U.S. 453 (1891).  
\textsuperscript{39} E.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).  
\textsuperscript{40} See Reid, 354 U.S. at 40–41 (plurality opinion). Justice Black distinguished military tribunals and the trials of civilians in federal courts by pointing to the differences in values and attitudes between military and civilian society. \textit{Id.} at 39 ("In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual."). Justice Black rejected the government's argument that the expansion of military jurisdiction over the civilians at issue was slight, while the practical necessity was great, stating that "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture" and further noting that the encroachment in Reid was not slight. \textit{Id.} at 39–40.  
\textsuperscript{41} \textit{Id.} at 5.  
\textsuperscript{42} \textit{Id.} at 10.  
\textsuperscript{43} \textit{Id.} The plaintiff in Ross was a British subject, enlisted as an American seaman on an American ship, who was tried and convicted before a U.S. consular court in Japan for murdering an officer on the ship while it was in Japanese waters. Ross, 140 U.S. at 454–55, 458. Statutes at the time authorized American consuls to try American citizens who were accused of committing crimes in Japan and other "non-Christian" countries. Reid, 354 U.S. at 10. According to Justice Black, this consular power was "extreme and absolute." \textit{Id.} at 11. Although Ross's conviction was upheld under U.S. statutes, the Court declared that the Constitution did not apply abroad. \textit{Id.} at 12.  
\textsuperscript{44} Reid, 354 U.S. at 12.  
\textsuperscript{45} \textit{Id.} at 13. Because the territories involved in the Insular Cases had been acquired by the United States, they were governed by Congress pursuant to Article IV, Section 3 of the Constitution. \textit{Id.} The Supreme Court, in the Insular Cases, held that certain constitutional provisions did not apply to these territories because "they had not been 'expressly or impliedly incorporated' in the Union by Congress." \textit{Id.; see also infr}a note 46 and accompanying text. While the Court noted that fundamental constitutional rights apply everywhere, it found that it would be inefficient to require a jury trial in the insular territories. Reid, 354 U.S. at 13 (plurality opinion).  

Cases held that although fundamental constitutional rights were applicable to these territories, certain constitutional guarantees did not apply to them because Congress had not incorporated them into the Union. However, Justice Black writing for a plurality of the Court in Reid, stated that the Court’s initial reliance on the Insular Cases was “misplaced.” Justice Black duly noted that the Insular Cases dealt with Congress’s power to regulate territories.

80 (2006). The importance of Downes is that it “brought the constitutional question of congressional authority into sharp relief.” Id. In Downes, the Court had to differentiate between domestic and foreign products shipped into the United States from one of its territories for purposes of the Dingley Tariff, which regulated the duties for all articles imported from foreign countries. Id. Downes involved a claim by a New York merchant for the recovery of the duties that he paid on oranges he received from the newly acquired territory of Puerto Rico. Downes, 182 U.S. at 247. The Foraker Act, also known as the Organic Act of 1900, established for Puerto Rico a civil government, including a governor, an executive council, a House of Representatives, a judicial system, and a non-voting Resident Commissioner in Congress. Foraker Act, ch. 1919, 33 Stat. 77, 81-85 (1900); Foraker Act (Organic Act of 1900), http://www.loc.gov/rr/hispanic/1898/foraker.html (last visited Feb. 22, 2010). Ultimately, the Court reached its conclusion based on the consequence of its holding: if Congress could tax the oranges in Downes, Puerto Rico would be considered a foreign country, otherwise, Puerto Rico would be considered part of the United States and the Foraker Act would have to be struck down as unconstitutional. Sparrow, supra, at 86. The Court split five to four in favor of Congress’s power to impose the duties and issued five separate opinions. Id. at 87. The majority held that while Puerto Rico was a territory that belonged to the United States, it was “not a part of the United States within the revenue clauses of the Constitution,” and therefore declared the Foraker Act constitutionally valid. Downes, 182 U.S. at 287.

In a concurring opinion, Justice Edward Douglass White did not focus on the applicability of the Constitution as a whole, but rather on which particular constitutional provisions were effective in territories such as Puerto Rico. Id. at 342–43 (White, J., concurring). Specifically, Justice White stated that “the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.” Id. at 293.

46. See Reid, 354 U.S. at 13 (plurality opinion). The Territorial Incorporation Doctrine distinguishes between incorporated and unincorporated territories. Alan Tauber, The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories, 57 CASE W. RES. L. REV. 147, 158 (2006). “An incorporated territory is one destined to become a state from the time of its acquisition.” 86 C.J.S. Territories § 4 (2008). “A territory may become incorporated only through the express or implied consent of Congress, and once incorporated, the federal constitution fully applies to it.” Id. Justice White’s concurring opinion in Downes is often credited with the creation of this doctrine. Tauber, supra, at 158. Justice White relied on the Treaty of Paris to conclude that Congress did not intend to incorporate Puerto Rico. Downes, 182 U.S. at 339–40 (White, J., concurring). More importantly, he stated that while Puerto Rico was not foreign in the sense that it was owned by the United States and thus subject to its sovereignty, it was foreign in a domestic sense because Congress never incorporated it. Id. at 341–42; Tabor, supra, at 162–63.

Dorr v. United States, another Insular Case that involved the right to a jury trial, was also important because “it was the first time the Court addressed the application of the Bill of Rights to the territories of the United States,” and held that procedural rights do not extend to unincorporated territories. Tabor, supra, at 163 (citing Dorr v. United States, 195 U.S. 138, 143 (1904)). Further, in the last Insular Case, Balzac v. Porto Rico, the Court adopted the Territorial Incorporation Doctrine. Id.

47. Reid, 354 U.S. at 13–14.
with dissimilar customs and traditions, while *Reid* addressed the basis for the government’s power to try U.S. civilians in military trials.\(^{48}\) By establishing that the Bill of Rights follows every citizen regardless of his location, Justice Black reinvigorated the concept of mutuality as a basis for determining the scope of the Constitution’s application.\(^{49}\)

Therefore, the theory of mutuality requires that two factors must be taken into account when determining which constitutional provisions apply in specific circumstances: (1) the status of the territory; and (2) the specific power the United States attempts to exercise.\(^{50}\) Under mutuality, “both aliens and citizens living in unincorporated territories are entitled to the same (reduced) constitutional protection.”\(^{51}\)

2. Practical Considerations in Applying the Constitution Abroad

The feasibility and consequences of applying the Constitution abroad have also been important considerations when determining whether particular constitutional provisions apply abroad. In *Boumediene v. Bush*, for example, the Supreme Court held that the constitutional privilege of habeas corpus applied to alien enemy combatants detained at Guantanamo Bay, Cuba.\(^{52}\) To reach this monumental decision, the Court analyzed numerous cases that established the geographic scope of constitutional guarantees.\(^{53}\) In particular, the Court discussed the practical considerations that influenced the Court’s analysis of the Constitution’s limits in the *Insular Cases*, *Reid*, and *Johnson v. Eisentrager*.\(^{54}\)

The *Insular Cases* Court held that certain provisions of the Constitution were applicable to unincorporated territories, but also expressed its reluctance to implement a rule that abrogated the existing legal systems in newly acquired territories out of fear of causing instability.\(^{55}\) This concern led to the doctrine

\(^{48}\) *Id.*

\(^{49}\) *See id.* at 5–6.

\(^{50}\) *See Wilson, supra* note 27, at 185 (explaining that although the mutuality approach could be interpreted as a bright-line rule, courts typically apply it in the context of balancing “the status of the territory and the particular power being applied”).

\(^{51}\) *Id.* (emphasis added). Wilson further argues that although the Supreme Court has traditionally applied the mutuality-of-obligation approach to sovereign territories of the United States, the rationale of this approach would allow courts to apply it extraterritorially. *Id.* at 186.


\(^{53}\) *Id.* at 2253–59; *see also*, e.g., *Reid*, 354 U.S. at 18–20; *Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950); *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922); *Downes v. Birdwell*, 182 U.S. 244, 286–87 (1901); *In re Ross*, 140 U.S. 453, 464 (1891).

\(^{54}\) *Boumediene*, 128 S. Ct. at 2256–57.

\(^{55}\) *Id.* at 2254 (citing *Downes*, 182 U.S. at 282). One such consideration pertained to the type of legal system adopted by former Spanish colonies. *Id.* These colonies were governed by a civil-law system, whereas the states were under a common-law system. *Id.* The Court noted that its holding in the *Insular Cases* had the possibility of substantially disrupting civil-law territories by imposing on them the U.S. common law. *Id.* Additionally, such a change would have been
of territorial incorporation, under which the Constitution is fully applicable to incorporated territories but only applies in part to unincorporated territories. Thus, according to the Boumediene Court, the practical difficulties associated with applying the Constitution at all times to all areas led the Court to develop a system under which the power of the Constitution would be used “sparingly and where it would be most needed.”

While the petitioners’ citizenship was an essential aspect of Reid, “practical considerations, related . . . to the place of their confinement and trial, were relevant to each member of the Reid majority.” Specifically, Justice John Marshall Harlan II’s and Justice Felix Frankfurter’s concurring opinions in Reid distinguished the case from Ross based on “practical considerations.” In other words, a jury trial was more feasible for the petitioners in Reid than it was for the petitioner in Ross.

Finally, the Boumediene Court analyzed the practical considerations contemplated in Eisenbarger. The Eisenbarger Court, in its determination that the writ of habeas corpus did not apply to enemy prisoners held and tried by the U.S. Army abroad, noted the practical difficulties in granting the writ. Such considerations included Army transportation for the prisoners and their witnesses overseas, security, and living expenses. Furthermore, the Court held that granting the requested “trials would hamper the war effort and bring aid and comfort to the enemy.” By considering these practical aspects, “the

unnecessary because the United States intended to grant independence to certain colonies, such as the Philippines. Id.

56. Id.; see supra note 46 and accompanying text.
57. Boumediene, 128 S. Ct. at 2255.
58. Id. at 2256.
59. Id. at 2257.
60. Id. According to Justice Harlan, “Ross and the Insular Cases hold . . . that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress’ power to provide for the trial of Americans overseas.” Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring). In Ross, the citizenship of the British subject convicted by the American consular court in Japan, see supra note 43, was not determinate in the Court’s holding that the Constitution did not apply to him. In re Ross, 140 U.S. 453, 464, 479 (1891). In fact, the Court treated him as if he was an American citizen that violated U.S. law because it was the “simplest rule” to do so. Id. at 479. This consideration led the concurring Justices in Reid to distinguish Ross from other cases on the basis of practicality. See Boumediene, 128 S. Ct. at 2257.
62. Eisenbarger, 339 U.S. at 779; see also Boumediene, 128 S. Ct. at 2257.
63. Eisenbarger, 339 U.S. at 779.
64. Id.
Court sought to balance the constraints of military occupation with constitutional necessities.\textsuperscript{65}

3. United States v. Verdugo-Urquidez: The Substantial-Connection Test

Ignoring these previous considerations, the Supreme Court held in United States v. Verdugo-Urquidez, and the Federal Circuit agreed in Atamirzayeva, that the Constitution does not apply to a foreign national, unless he has a substantial voluntary connection to the United States.\textsuperscript{66} However, the Court in Verdugo-Urquidez established this substantial-connection test in determining the reach of the Fourth Amendment, not the Fifth Amendment Takings Clause.\textsuperscript{67} The respondent in Verdugo-Urquidez was a Mexican citizen and resident, assumed to be involved in a drug-smuggling organization.\textsuperscript{68} After the U.S. government obtained an arrest warrant, local Mexican police apprehended the respondent and sent him to the United States, where he was formally arrested.\textsuperscript{69} After his arrest, U.S. Drug Enforcement Administration (DEA) agents seized incriminating evidence during searches of the respondent’s Mexican residences.\textsuperscript{70}

Verdugo-Urquidez, pursuant to the Fourth Amendment, filed a motion to suppress the evidence seized during the searches.\textsuperscript{71} Citing Reid and relying on INS v. Lopez-Mendoza,\textsuperscript{72} the Ninth Circuit affirmed the district court’s order granting the motion to suppress.\textsuperscript{73} However, the Supreme Court reversed and

\textsuperscript{65.} Boumediene, 128 S. Ct. at 2257.
\textsuperscript{67.} See Verdugo-Urquidez, 494 U.S. at 265.
\textsuperscript{68.} Id. at 262.
\textsuperscript{69.} Id.
\textsuperscript{70.} Id. at 262–63. A DEA agent requested the searches because he believed that they would provide evidence of the respondent’s narcotics trafficking activities, as well as his involvement in the kidnapping and murder of a DEA Special Agent. Id. at 262. A search of one of the respondent’s residences revealed a tally sheet that the government believed was a record of marijuana smuggled into the United States. Id. at 262–63.
\textsuperscript{71.} See id. at 263. The Fourth Amendment states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
\textsuperscript{72.} 468 U.S. 1032 (1984).
\textsuperscript{73.} Verdugo-Urquidez, 494 U.S. at 263. The Ninth Circuit relied on the Court’s holding in Reid that American citizens tried by military authorities abroad are entitled to the safeguards of the Fifth and Sixth Amendments in reaching its conclusion that the federal government is constrained by the Constitution when it acts abroad. Id. Additionally, because the majority in Lopez-Mendoza found that illegal aliens in the United States are entitled to the protections of the Fourth Amendment, the Ninth Circuit determined that the respondent was entitled to the same protections. Id. In particular, the Ninth Circuit stated that “[i]t would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to
held that, because Verdugo-Urquidez “had no previous significant voluntary connection with the United States,” he did not develop a substantial connection with the United States and, therefore, had no Fourth Amendment rights.\(^{74}\) Chief Justice William Rehnquist, writing for the majority, based the rationale behind this substantial-connection test, in part, upon the language of the Fourth Amendment.\(^{75}\) He found that the phrase “the people” in the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”\(^{76}\) Therefore, Chief Justice Rehnquist concluded that Verdugo-Urquidez’s involuntary presence in the United States at the time of the search was insufficient to establish a substantial connection to the United States, thus excluding him from “the people” to whom the Fourth Amendment applies.\(^{77}\) In reaching this conclusion, Chief Justice Rehnquist distinguished Lopez-Mendoza on the basis that the illegal aliens in Lopez-Mendoza “were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with a fair trial under the sixth amendment, . . . and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment.” United States v. Verdugo-Urquidez, 856 F.2d 1214, 1224 (9th Cir. 1988). However, the Lopez-Mendoza decision was limited to the Fourth Amendment’s exclusionary rule in civil deportations and not dispositive of whether the Fourth Amendment would apply to all illegal aliens in the United States. Verdugo-Urquidez, 494 U.S. at 272.\(^{78}\) Verdugo-Urquidez, 494 U.S. at 271. This holding marked the end of the “post-Reid phase of expansion in the extraterritorial application of the Constitution.” Wilson, supra note 27, at 188–89.\(^{79}\) Verdugo-Urquidez, 494 U.S. at 265.\(^{80}\) Id. This approach is known as the “membership” approach, as distinguished from the “mutuality of obligation” approach, discussed above. Wilson, supra note 27, at 182; supra Part I.B.1. These two approaches are fundamentally distinct because “the ‘membership’ approach looks for indicia of belonging, such as citizenship and sovereignty, whereas the ‘mutuality of obligation’ approach sees control or jurisdiction as a trigger of rights necessary to temper authority within the rule of law.” Wilson, supra note 27, at 182. The membership approach applies the Constitution to an exclusive class of persons who belong to the “club.” Id. at 184. These “members” have a special relationship with the Constitution due to their status or the location of where they live. Id.\(^{81}\) Conversely, Justice Anthony Kennedy disregards the reference to “the people” in the Fourth Amendment and, instead, focuses his analysis on the reasoning in Reid, Ross, and the Insular Cases to reach the conclusion that the Fourth Amendment’s protections do not extend to Verdugo-Urquidez. Verdugo-Urquidez, 494 U.S. at 276–77 (Kennedy, J., concurring); see also supra Part I.B.1. Under Justice Kennedy’s interpretation of these cases, the reach of the constitutional protections is limited by considerations of the U.S. power and authority to act abroad. Verdugo-Urquidez, 494 U.S. at 277–78 (Kennedy, J., concurring). This approach provides that “rights flow to individuals as the necessary correlates of the government’s exercise of political or legal power over them.” Wilson, supra note 27, at 184.\(^{82}\) Verdugo-Urquidez, 494 U.S. at 273.
this country that might place him among 'the people' of the United States.\textsuperscript{78} Therefore, the Court held that the Fourth Amendment was inapplicable to Verdugo-Urquidez.\textsuperscript{79}

C. The Takings Clause on an International Level

After considering the extraterritorial application of the Constitution generally, and the underlying rationale for this application, the next question pertains to the particular constitutional provision at issue; specifically, whether the Fifth Amendment Takings Clause applies to foreign citizens abroad.\textsuperscript{80} In general, takings claims involving American-owned property located in a foreign territory and alien-owned property located in the United States are valid, but the constitutional validity of claims involving alien-owned property located in a foreign territory have been the subject of much debate.\textsuperscript{81}

1. When Is the United States Liable for an International Taking?

\textit{Wiggins v. United States}, which involved the property of an American citizen, was one of the first cases to address the issue of international takings by the U.S. government.\textsuperscript{82} In \textit{Wiggins}, the Court of Claims found that a compensable taking occurred when a U.S. naval commander destroyed gun powder owned by U.S. citizens and stored in Costa Rica for sale to Nicaragua.\textsuperscript{83}

Several years later in \textit{Turney v. United States}, a case relied on by Ms. Atamirzayeva,\textsuperscript{84} the Court of Claims upheld a claim for just compensation under the Fifth Amendment with respect to property held abroad and, therefore, found that the Takings Clause applied extraterritorially.\textsuperscript{85} \textit{Turney} involved the U.S. government's taking of classified military radar equipment that was purchased at a surplus sale and located in the Philippines.\textsuperscript{86} Neither

\textsuperscript{78. Id. Chief Justice Rehnquist made this distinction assuming, but not holding, that the Fourth Amendment is applicable to illegal aliens within the United States. Id. at 272–73; see supra note 73 and accompanying text.}

\textsuperscript{79. Verdugo-Urquidez, 494 U.S. at 273–74.}

\textsuperscript{80. See id. at 277 (Kennedy, J., concurring); Reid v. Covert, 354 U.S. 1, 74 (1957).}

\textsuperscript{81. See Tabinicin, supra note 12, at 620–21.}

\textsuperscript{82. See Wiggins v. United States, 3 Ct. Cl. 412, 420–22 (Ct. Cl. 1867).}

\textsuperscript{83. Id. at 413–14, 421–22. In a similar case, in which a private citizen asserted a trespass claim against a military officer, Chief Justice Roger B. Taney stated: "Where the owner has done nothing to forfeit his [property] rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own." Mitchell v. Harmony, 54 U.S. (13 How.) 115, 128, 133 (1851).}

\textsuperscript{84. Atamirzayeva v. United States, 77 Fed. Cl. 378, 380 (Fed. Cl. 2007).}

\textsuperscript{85. Turney v. United States, 115 F. Supp. 457, 463–64 (Ct. Cl. 1953).}

\textsuperscript{86. Id. at 458–60. The Leyte Air Depot, where the radar equipment in question was located, was established to support American forces in their efforts to free the Philippines from Japanese occupation. Id. at 458. Upon the release of the Philippines at the end of World War II, the United States enacted the Philippine Rehabilitation Act on April 30, 1946, which authorized the}
party to the sale was aware that it included classified military radar equipment. Upon learning this, the U.S. Air Force offered to trade commercial communications equipment for the military radar equipment, but the buyers refused. After rejecting a counter-offer, the Commanding General of the Fourth Air Depot told the plaintiff that the United States was going to repossess the radar equipment, either by negotiation or by force with the assistance of the Philippine government.

The buyers notified the U.S. government that any attempted seizure would be resisted. In response, the President of the Philippines, in cooperation with the United States, placed an embargo on the exportation of equipment stored at the Leyte Air Depot. The Philippine government subsequently lifted the embargo when the buyers gave the U.S. government written assurance that the radar equipment would be segregated from the other Leyte Air Depot surplus property. Upon segregating the radar equipment, the buyers entered into a written agreement with the U.S. government, pursuant to which the buyers would return the radar equipment to the U.S. government in exchange for a written receipt for the equipment and the right "to make a claim against the U.S. Government for losses in connection with the equipment."

The Court of Claims ultimately determined that the repossession was a compensable taking under the Fifth Amendment. In reaching this conclusion, the court considered the close relationship between the United

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87. Id. at 459.
88. Id.
89. Id. The U.S. government's use of the Philippine government to repossess the radar equipment did not affect the court's analysis. Id. Specifically, it stated "[t]hat aid would have been necessary because the materials were located on soil under the sovereignty of the Philippine government." Id.
90. Id. at 460.
91. Id.
92. Id. Later, an agreement was made that an Army member would be designated as an agent of the Philippine government in supervising such segregation. Id.
93. Id.
94. Id. at 463–64.
States and the Philippines, including the recent liberation of the Philippines from Japanese occupation, the gift of millions of dollars in equipment at the Leyte Air Depot, and the Philippine government’s cooperation in helping the United States recover its radar equipment.95 Because the Philippine-imposed embargo “put irresistible pressure upon the corporation to come to terms with the U.S. Army,”96 the court rejected the government’s argument that the Fifth Amendment’s Takings Clause is inapplicable in foreign countries.97

Two years later in Seery v. United States, the Court of Claims, citing Turney, again rejected the government’s argument that the Takings Clause is inapplicable in foreign countries.98 In fact, the Court of Claims specifically relied on Turney to support its conclusion that although there was little case law regarding the extraterritorial application of the Fifth Amendment, the Takings Clause applies extraterritorially when it may be applied “without inconvenience.”99 Thus, the court viewed practical considerations as dispositive in determining whether the Fifth Amendment’s Takings Clause applies abroad.100

Three years later, in Langenegger v. United States, the Federal Circuit held that foreign takings claims were justiciable and established a test for foreign takings, ultimately concluding that the plaintiff failed to allege a compensable taking.101 The test applied by the Federal Circuit focused not on the acts of all

95. Id. at 463.
96. Id. at 463–64.
97. Id. at 464. The court determined that although some constitutional provisions cannot be applied extraterritorially, that does not dictate that the Takings Clause is automatically excluded from extraterritorial application. Id.
98. Seery v. United States, 127 F. Supp. 601, 603 (Ct. Cl. 1955) (citing Turney, 115 F. Supp. at 215). The Seery plaintiff, a naturalized U.S. citizen, owned property in Austria that the U.S. Army seized and converted into an officers’ club. Id. at 602–03. When the plaintiff returned to her property, “she found that the real property had been greatly damaged and practically all of the personal property had disappeared.” Id. at 603. As a result, she filed a claim that the United States took her property for public use without just compensation. Id.
99. Id. Acknowledging that the court had previously noted in Turney that there were no precedents directly addressing the issue, the court explained that it seemed to us that, since the Constitutional provision could be applied, without inconvenience, to such a situation, it ought to be so applied. In the Turney case the plaintiff was an alien corporation, whereas the instant plaintiff is an American citizen. If that fact is material, it is to her advantage. Id. (citation omitted).
100. See id.; see also supra Part I.B.2.
101. Langenegger v. United States, 756 F.2d 1565, 1569, 1571 (Fed. Cir. 1985). The Court of Claims held that Langenegger was nonjusticiable under the “political question” doctrine, but the Federal Circuit disagreed and explained that “[c]onsideration of land taking claims is clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of ‘just compensation’ is a judicial function.” Langenegger, 756 F.2d at 1569; Langenegger v. United States, 5 Cl. Ct. 229, 235–36 (Cl. Ct. 1984). The political-question doctrine was established in the case of Marbury v. Madison, when Chief Justice John Marshall stated that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can
parties involved, but rather turned on whether the United States was directly and substantially involved in the alleged taking to trigger Fifth Amendment protections. When, as in *Atamirzayeva*, the United States and another sovereign have both acted to effectuate an alleged taking of private property under the Fifth Amendment, the Federal Circuit provided two factors for determining whether the United States’ involvement was sufficiently direct and substantial to require just compensation: (1) “the nature of the United States’ activity,” and (2) “the level of the benefit the United States has derived.”

2. “Friendly Aliens”

The status of the foreign national who brings a Fifth Amendment takings claim against the United States is a dispositive factor. Specifically, under the “enemy property doctrine,” the Fifth Amendment’s Takings Clause does not apply to enemy aliens. However, it does protect friendly aliens against

never be made in this court.” Marbury v. Madison, 5 U.S. 137, 170 (1803). There are two types of cases that courts decline to adjudicate under the political-question doctrine: (1) cases that are exclusively reviewable by the political branches, and (2) cases that should be left to the discretion of the political branches “as a matter of prudence.” KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 49 (16th ed. 2007). Therefore, courts cannot intervene in political issues that only the political branches are entitled to decide under the Constitution, and courts should not intervene in political issues that the other branches of government are better able to resolve. *Id.*

In *Baker v. Carr*, Justice William Brennan reformulated the political-question doctrine and proposed a six-part test, consistent with Justice Thurgood Marshall’s approach, to determine whether a matter is a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.


102. *Langenegger*, 756 F.2d at 1571–72 (“[I]n determining whether a taking exists where a foreign government’s actions are involved, the focus of the inquiry is the same as that undertaken in a domestic taking case: the court must consider whether the United States’ involvement was sufficiently direct and substantial to warrant its responsibility under the fifth amendment.”).

103. *Id.* at 1572. The court also differentiated between “‘friendly’ persuasion regarding general policy” by a country, and an actual taking. *Id.* In particular, the Court stated that it would not hold the United States liable for a foreign sovereign’s expropriation when the United States simply recommended the action, as is a common practice between friendly allies. *Id.* Additionally, the United States is not responsible for such a taking because the only benefit it derives is the political stability of neighboring countries. *Id.*


105. See *id.* (“[T]he United States does not have to answer under the Takings Clause for the destruction of enemy property.”); see also Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 986 (2007). The “enemy property...
takings of private property by the United States without just compensation, in
the same way it protects U.S. citizens, regardless of whether the property is
located in the United States or abroad.\textsuperscript{106}

The Takings Clause’s extension to friendly aliens was established by the
Supreme Court in \textit{Russian Volunteer Fleet v. United States}.\textsuperscript{107} In \textit{Russian
Volunteer Fleet}, the U.S. government, through the U.S. Shipping Board
Emergency Fleet Corporation,\textsuperscript{108} requisitioned contracts for building ships, and
ships already under construction, from a Russian corporation, which then sued
the U.S. government for just compensation.\textsuperscript{109} The Supreme Court identified
the Russian corporation as “an alien friend” that “was entitled to the protection
of the Fifth Amendment.”\textsuperscript{110} The Court further held that because the United
States exercised its “power of eminent domain in taking the [Russian
corporation’s] property, the United States became bound to pay just
compensation.”\textsuperscript{111}

Similarly, in \textit{Seery}, the Court of Claims rejected the government’s argument
that the property of a U.S. citizen located in a foreign territory was enemy
property and therefore not protected by the Fifth Amendment’s Takings Clause
because the property “was not a product of enemy soil,” nor considered
“hostile property” even though the court assumed that Austria—where the
doctrine” is derived from the military-necessity doctrine and the alien-enemy-disability rule.
Vladeck, supra, at 987. The military-necessity doctrine provides that a government may take or
destroy property to “prevent it from falling into enemy hands,” to “protect the state or its
citizens,” or to secure the ends of war. Tabacinic, supra note 12, at 606. Similarly, the alien-
enemy-disability rule provides that the Takings Clause does not protect the property interests of
aliens serving a country at war with the United States. \textit{Id.} at 615.


\textsuperscript{107} \textit{Id.}

\textsuperscript{108} In an effort to remedy the “severe shortage of ocean-shipping services” caused by World
War I, Congress enacted the Shipping Act of 1916, which was signed into law on September 7,
Shipping Act “created the U.S. Shipping Board, and empowered it to regulate the rates and
practices of waterborne common carriers in foreign and interstate commerce.” \textit{Id.} The U.S.
Shipping Board also had the power, through the Emergency Fleet Corporation, to acquire, build,
own, and operate merchant vessels for the U.S. government. \textit{Id.}

\textsuperscript{109} Russian Volunteer Fleet, 282 U.S. at 486–87.

\textsuperscript{110} \textit{Id.} at 489.

\textsuperscript{111} \textit{Id.} The Court explained:

As alien friends are embraced within the terms of the Fifth Amendment, it cannot be
said that their property is subject to confiscation here because the property of our
citizens may be confiscated in the alien’s country. The provision that private property
shall not be taken for public use without just compensation establishes a standard for
our Government which the Constitution does not make dependent upon the standards of
other governments.

\textit{Id.} at 491–92.
property was located—was “enemy territory.”\textsuperscript{112} The court also noted that the plaintiff did not reside in enemy territory.\textsuperscript{113}

3. The Substantial-Connection Test and the International Application of the Fifth Amendment Takings Clause

Although Verdugo-Urquidez established the substantial-connection test relied upon by the Federal Circuit in Atamirzayeva,\textsuperscript{114} not all courts have been willing to apply this test, particularly in the context of international takings.\textsuperscript{115} In El-Shifa Pharmaceutical Industries Co. v. United States, the appellant, a Sudanese corporation, sued for just compensation under the Fifth Amendment after the U.S. military destroyed its manufacturing facility in Sudan during operations that President Clinton deemed necessary to prevent an imminent terrorist attack against the United States.\textsuperscript{116} The U.S. government moved to dismiss the takings claim on the grounds that, among other things, El-Shifa lacked standing because the Fifth Amendment’s Takings Clause does not apply to foreign nationals who lack a substantial and voluntary connection to the United States.\textsuperscript{117} The Court of Federal Claims rejected this argument, instead relying on Turney to conclude that El-Shifa had standing to sue the United States.\textsuperscript{118} However, the Court of Federal Claims ultimately granted the government’s motion to dismiss on the merits, holding that “the right to compensation for a taking under the Fifth Amendment does not extend to the destruction of property designated by the President as enemy war-making property.”\textsuperscript{119} The Federal Circuit affirmed, finding that the appellant’s takings claim presented a nonjusticiable political question and not a standing issue as in Atamirzayeva.\textsuperscript{120} This holding required the Federal Circuit in El-Shifa “to reach the reviewability of the takings claim, rather than hold[] that no such

\begin{enumerate}
\item Seery v. United States, 127 F. Supp. 601, 605 (Ct. Cl. 1955); see also Vladeck, supra note 105, at 986.
\item Seery, 127 F. Supp. at 605.
\item Atamirzayeva v. United States, 524 F.3d 1320, 1328–29 (Fed. Cir. 2008); see supra Part I.B.3.
\item See, e.g., El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1352 (Fed. Cir. 2004).
\item Id. at 1348–49. The United States destroyed El-Shifa’s manufacturing facility because it was believed that the facility was being used by Osama bin Laden to produce the ingredients for nerve gas. Id. at 1349.
\item Id. at 1349–50.
\item Id. at 771, 774.
\item El-Shifa, 378 F.3d at 1352, 1354–55, 1370 (“[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens whose property is located in a foreign country unless they can demonstrate substantial voluntary connections to the United States.”). Specifically, the court held that the appellant was precluded from seeking judicial review of President Bill Clinton’s designation of their plant as enemy property. Id. at 1365.
\end{enumerate}
claim was protected by the Takings Clause.”\footnote{121} In affirming the Court of Claims’ holding of lack of standing, the Federal Circuit emphasized that absent an overruling case, it was bound by the holding in \textit{Turney} that the Takings Clause applies to non-American citizens.\footnote{122}

The Federal Circuit’s decision to follow \textit{Turney}, and reject the substantial and voluntary connection test laid out in \textit{Verdugo-Urquidez}, is consistent with the Supreme Court’s subsequent decision in \textit{Boumediene v. Bush}. Although not an international takings case, \textit{Boumediene}, which the Supreme Court decided eighteen years after \textit{Verdugo-Urquidez}, did not mention a substantial-connection test and explicitly rejected a rigid rule for determining the extraterritorial applicability of the Constitution, stating that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”\footnote{123} These statements in \textit{Boumediene} seem incongruous with \textit{Verdugo-Urquidez}; while \textit{Verdugo-Urquidez} establishes a bright-line rule for the extraterritorial application of constitutional provisions, the Court in \textit{Boumediene} rejected such formal requirements in favor of other prudential considerations.\footnote{124}

4. \textbf{The International Application of the Fifth Amendment Takings Clause Today: Atamirzayeva}

The precedents discussed above, though relevant to resolving Ms. Atamirzayeva’s Fifth Amendment takings claim, do not fully resolve the issue. Ms. Atamirzayeva sought compensation for the destruction of her cafeteria at the U.S. government’s request.\footnote{125} However, the Court of Federal Claims rejected her claim, ignoring practical considerations in favor of the rigid substantial-connection test.\footnote{126} Ms. Atamirzayeva then appealed to the Federal Circuit, which affirmed, also relying on the substantial-connection test.\footnote{127} Thus, Ms. Atamirzayeva was never compensated for the United States’ seizure of her property, notwithstanding Supreme Court precedent indicating that she was entitled to relief.\footnote{128}

\begin{footnotes}
\item[121] Vladeck, supra note 105, at 991.
\item[122] \textit{El-Shifa}, 378 F.3d at 1351–52. Although the continuing validity of \textit{Turney} has been questioned in light of \textit{Verdugo-Urquidez}, the Federal Circuit concluded that it was bound by principles of stare decisis to follow \textit{Turney}. \textit{Id.} at 1352.
\item[123] \textit{Boumediene v. Bush}, 128 S. Ct. 2229, 2258 (2008) (describing the common thread between the \textit{Insular Cases}, \textit{Eisentrager}, and \textit{Reid}). The Court further stated that “[t]he test for determining the scope of [a constitutional] provision must not be subject to manipulation by those whose power it is designed to restrain.” \textit{Id.} at 2259. The Court also rejected the argument that “the Constitution necessarily stops where \textit{de jure} sovereignty ends” with respect to foreign nationals. \textit{Id.} at 2253.
\item[124] See supra notes 65 & 74 and accompanying text.
\item[125] Atamirzayeva v. United States, 77 Fed. Cl. 378, 379 (Fed. Cl. 2007).
\item[126] \textit{Id.} at 387.
\item[127] Atamirzayeva v. United States, 524 F.3d 1320, 1324 (Fed. Cir. 2008).
\item[128] See supra Part I.C.1.
\end{footnotes}
II. GOING IN A NEW DIRECTION

A. The U.S. Constitution: To Infinity and Beyond

Precedent clearly provides that the U.S. Constitution applies extraterritorially. However, application of the Constitution to foreign nationals "requires a fusion of 'one line of Supreme Court cases establishing that American citizens have constitutional rights abroad with another line holding that aliens in the United States are entitled to constitutional safeguards." As discussed above, courts prefer a practical, function-based approach to ascertaining the Constitution's extraterritorial reach rather than a "rigid and abstract" rule. However, the majority in Verdugo-Urquidez adopted, and the government in Boumediene advocated, a formalistic approach to the application of constitutional provisions abroad. While the government in Boumediene attempted to advance its position that Eisentrager promoted the adoption of a formalistic test for determining the reach of the Suspension Clause, the Court rejected this approach and explained that if it were to accept the government's argument, it would represent a "complete repudiation" of the functional approach used in the Insular Cases and Reid, and it would overlook the fact that all three cases express the idea that extraterritoriality should rely on practicality rather than formalism—requiring a provision-by-provision analysis of extraterritorial constitutional application.

B. Foreign National, Foreign Property, Domestic Constitutional Provision

Because it is well-settled that the Constitution, and specifically the Fifth Amendment, applies beyond the United States' borders, courts have begun to focus their inquiry on what constitutes a compensable taking when the alleged taking occurs abroad and on who may bring such a claim. The purpose of the Fifth Amendment Takings Clause is to limit the government’s power and

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129. See, e.g., Boumediene, 128 S. Ct. at 2259 (stating that when the United States acts outside of its borders, it is still subject to the provisions of the Constitution); see also supra Part I.B.


131. See supra Parts I.B.2, I.C.3.


133. Boumediene, 128 S. Ct. at 2257–58. The Suspension Clause states: "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." U.S. CONST. art. I, § 9, cl. 2.


135. Kinne, supra note 130, at 221–22 (proposing that courts no longer question the applicability of the Takings Clause abroad since Reid).
protect an individual’s inalienable right to own property. A determination of whether the Fifth Amendment is applicable to the United States that is based on a person’s citizenship and location is incompatible with the clause’s purpose. For this reason, a foreign national’s takings claim for property located abroad should be cognizable under the Fifth Amendment.

1. Hiding Behind Foreign Sovereigns

Cases such as *Turney* and *Langenegger* demonstrate that the United States can “take” personal property under the Fifth Amendment indirectly by causing a third-party sovereign to expropriate the property. Although *Turney* and *Langenegger* reached different conclusions regarding whether there was a compensable taking, the court in both cases employed similar reasoning to determine that, even when a foreign sovereign performs the expropriation, the United States may be held liable for just compensation under the Fifth Amendment, depending on its level of involvement. In *Turney*, the Court of Claims relied on the close relationship between the United States and the Philippines to hold that the Philippine embargo on the classified radar equipment was the result of pressure by the United States, and therefore the United States could be held liable for just compensation under the Fifth Amendment. Similarly, the *Langenegger* court relied on the relationship between the U.S. and El Salvadoran governments in its analysis, but ultimately distinguished “friendly persuasion” from “direct and substantial” involvement, holding that the United States employed the former and, therefore, was not liable for the taking.

2. Distinguishing Friendly and Non-Friendly Aliens

In *Russian Volunteer Fleet*, the Supreme Court held that the Fifth Amendment protects the property of friendly aliens in the same way it protects the property of U.S. citizens. Conversely, the Court in *Eisentrager* held that alien enemies should be treated differently, and thus denied them use of the writ of habeas corpus. However, *Eisentrager* provided little guidance for courts to determine how friendly aliens should be treated under the Fifth Amendment.

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136. See *Reid v. Covert*, 354 U.S. 1, 7 (1957); *Stanley*, supra note 20, at 253; *supra* text accompanying notes 20–23.

137. See *Kinne*, supra note 130, at 226–27.

138. See *id.* at 231–35 (determining that international taking claims are not affected by the political-question doctrine).


Amendment.\textsuperscript{145} Taken together, the relevant precedents counsel in favor of permitting friendly aliens to bring Fifth Amendment takings claims against the United States for just compensation.\textsuperscript{146}

\textbf{C. The Substantial-Connection Test: The End of Mutuality?}

In addition, when the United States acts outside of its jurisdiction, "its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'\textsuperscript{147} However, the Court in \textit{Verdugo-Urquidez} seemed to implicitly disclaim this statement.\textsuperscript{148} Loosening the reins placed on the United States' power, \textit{Verdugo-Urquidez} disregarded the concept of mutuality.\textsuperscript{149} Justice William Brennan, in his dissent, stated: "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution . . . ."\textsuperscript{150} Thus, by setting a higher, and almost impossible, standard for aliens who reside outside of the United States, the Court essentially allowed the United States to exercise the Constitution's limitations and repudiate the established concept of mutuality.\textsuperscript{151} In the words of Justice Brennan: "If we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness."\textsuperscript{152}

Furthermore, Fifth Amendment Takings Clause cases that address whether foreign nationals who reside abroad may bring takings claims do not mention substantial connections to the United States.\textsuperscript{153} Instead, in \textit{Turney—upheld in El-Shifa}\textsuperscript{154} and decided eighteen years after \textit{Verdugo-Urquidez}—the Court of Claims examined the nature of the relationship between the two sovereigns.\textsuperscript{155} Indeed, both the Court of Federal Claims and the Federal Circuit in \textit{El-Shifa}
applied *Turney* instead of the substantial-connection test to hold that the claimant had standing to bring its claim in federal court.\(^{156}\)

### III. THE ARBITRARY APPLICATION OF THE SUBSTANTIAL-CONNECTION TEST

#### A. The Federal Circuit's Departure from Takings Jurisprudence

By dismissing Ms. Atamirzayeva’s takings claim under the Fifth Amendment Takings Clause because she lacked a substantial connection with the United States, the Federal Circuit disregarded prior case law and the principle that the right to own property is fundamental and inalienable and extends to property possessed by aliens abroad.\(^{157}\) In addition, the court relied on *Verdugo-Urquidez* and ignored the essential concept of mutuality.\(^{158}\) Rather than looking to “objective factors and practical considerations,”\(^{159}\) the court adopted *Verdugo-Urquidez’s* “rigid and abstract”\(^{160}\) test for the extraterritorial application of the Fifth Amendment Takings Clause, effectively overturning *Turney*.\(^{161}\)

Ms. Atamirzayeva, although a citizen and resident of Uzbekistan, is a friendly alien whose property was taken during a time of peace between the United States and Uzbekistan.\(^{162}\) The established case law regarding friendly aliens should have protected Ms. Atamirzayeva’s property to the same degree as that of an American citizen.\(^{163}\) One could argue that the Federal Circuit’s decision was appropriate because the United States played a minor and indirect

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156. Vladeck, *supra* note 105, at 994. Even during times of war, there is nothing to prevent aliens from going to court to redress a grievance, including when the question is whether the individual is, in fact, an enemy. *Id.* at 965. Because alien enemies are not barred from going to court while their government is at war with the United States, parity of reasoning would suggest that friendly aliens may also come to court in times of peace.


158. See *Atamirzayeva*, 524 F.3d at 1327–29; see also *Reid* v. Covert, 354 U.S. 1, 5–8 (1957) (discussing the concept of mutuality).


162. See *U.S. Values Uzbekistan but Urges Rights Reform*, CNN.COM, May 14, 2005, http://edition.cnn.com/2005/WORLD/asiapcf/05/14/uzbeck.US/index.html; Ann Scott Tyson & Robin Wright, *Crackdown Muddies U.S.-Uzbek Relations*, WASH. POST, June 4, 2005, at A1. These articles show that, generally, the United States and Uzbekistan have enjoyed a solid relationship. Specifically, “[t]he U.S. military has relied heavily on Uzbekistan since 2001 in operations in Afghanistan.” *Id.* However, the Uzbekistan government’s suppression of the turmoil in the Uzbek city of Andijan, described as the use of an unjustified level of force, did sour the relationship. *Id.* Nevertheless, the United States continues to maintain a relatively friendly relationship with Uzbekistan. *Id.*

163. See Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (“The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment.”).
role in the incident and local Uzbek officials were responsible for the demolition of her cafeteria.\textsuperscript{164} However, this is not a case of mere "friendly persuasion."\textsuperscript{165} Just as the United States requested that the Philippine government place an embargo on the equipment at the air depot in \textit{Turney}, the U.S. Embassy officials asked local Uzbek officials to remove Ms. Atamirzayeva from her cafeteria, a request with which Uzbek officials readily complied.\textsuperscript{166} But for the United States' request, Ms. Atamirzayeva would still have her cafeteria.

Unlike the request for systemic reform in \textit{Langenegger}, the United States' request in \textit{Atamirzayeva} was to take Ms. Atamirzayeva's property.\textsuperscript{167} More specifically, \textit{Atamirzayeva} satisfied the two conditions established in \textit{Langenegger} to determine "direct and substantial involvement," and trigger extraterritorial application of the Fifth Amendment: (1) the U.S. Embassy officials directly asked the local officials to remove Ms. Atamirzayeva from her cafeteria, and (2) the United States derived a significant benefit from the taking of her property in the form of increased security.\textsuperscript{168} Although Ms. Atamirzayeva failed to plead a voluntary substantial connection to the United States, the United States clearly connected itself to her by urging the Uzbek government to take her property.\textsuperscript{169} This is precisely the type of action \textit{Langenegger} proscribed.\textsuperscript{170} After \textit{Langenegger}, the United States may no longer hide behind the actions of a foreign sovereign when the United States is the catalyst behind the sovereign's actions.

\textbf{B. Impracticality of the Substantial-Connection Test}

The substantial connection as applied to Fifth Amendment takings claims is nonsensical and contrary to precedent. First, it is nonsensical because there will always be a substantial connection between a Fifth Amendment takings claimant and the U.S. government. Assuming the claim is legitimate, the connection between the claimant and the government is established when the

\begin{itemize}
\item\textsuperscript{164} See supra notes 102-03 and accompanying text.
\item\textsuperscript{165} Cf. \textit{Langenegger v. United States}, 756 F.2d 1565, 1572 (Fed. Cir. 1985) ("[T]he United States cannot be held responsible merely because its activity is that of 'friendly' persuasion regarding general policy . . . .").
\item\textsuperscript{166} Compare \textit{Atamirzayeva v. United States}, 524 F.3d 1320, 1321 (Fed. Cir. 2008), with \textit{Turney v. United States}, 115 F. Supp. 457, 460 (Ct. Cl. 1953).
\item\textsuperscript{167} Compare \textit{Atamirzayeva}, 524 F.3d at 1321, with \textit{Langenegger}, 756 F.2d at 1567. In \textit{Langenegger}, the United States prompted El Salvador to propose reform that mandated the expropriation of all agricultural properties over five hundred hectares. \textit{Langenegger}, 756 F.2d at 1567. Once these estates were expropriated, they were converted into cooperatives. \textit{Id.} El Salvador compensated the owners with nonnegotiable bonds that were less valuable than the seized land. \textit{Id.}
\item\textsuperscript{168} \textit{Atamirzayeva}, 524 F.3d at 1321; \textit{Langenegger}, 756 F.2d at 1572.
\item\textsuperscript{169} \textit{Atamirzayeva}, 524 F.3d at 1321 (noting that U.S. officials demanded that local police destroy Ms. Atamirzayeva's cafeteria).
\item\textsuperscript{170} See \textit{Langenegger}, 756 F.2d at 1572.
\end{itemize}
government takes, or causes another sovereign to take, the claimant’s property. Moreover, as Atamirzayeva illustrates, the substantial-connection test would allow the U.S. government to act contrary to the Constitution just because the government acted beyond U.S. borders. The Fifth Amendment expressly constrains the U.S. government’s power to take private property for public use without just compensation and unlike the Fourth Amendment, the Fifth Amendment provides no textual limitation on the extraterritorial application of its provisions.171

Second, the substantial-connection test does not apply to the Fifth Amendment’s Takings Clause. The substantial-connection test articulated in Verdugo-Urquidez was based on a “textual exegesis” of the phrase “the people,” which does not appear in the Takings Clause.172 Thus, the application of the substantial-connection test to Takings Clause claims defeats the purpose of the Clause and is antithetical to the underlying basis for the test, essentially allowing the U.S. government to freely take private property for public use notwithstanding the express constitutional limitation on such takings.

C. A Return to Mutuality and Practicality

The result achieved in Atamirzayeva by applying the substantial-connection test could undermine the rights of U.S. citizens abroad. If the United States does not respect the constitutional restraints on its power, and the rights of others abroad, then it cannot expect other countries to respect the rights of U.S. citizens abroad.

Moreover, in Atamirzayeva, none of the practical considerations present in Eisentrager counsel against allowing Ms. Atamirzayeva from bringing her claim: the U.S. government was not obligated to transport her witnesses to the United States; the trial would have been held in the United States; and the government would not have had to pay for her living expenses.173 Instead, the Federal Circuit, like the Supreme Court in Boumediene, should have based its decision and analysis on practical considerations, objective factors, and established principles of extraterritorial application of the Constitution, and, more specifically, the Takings Clause.174

171. See supra note 76 and accompanying text.
172. See U.S. CONST. amend. V; Ashkir v. United States, 46 Fed. Cl. 438, 443 (Fed. Cl. 2000) (noting that Verdugo-Urquidez focused on the phrase “the people” in the Fourth Amendment, which is not found in the Fifth Amendment Takings Clause).
173. Johnson v. Eisentrager, 339 U.S. 763, 778–79 (1950). Unlike habeas corpus claims, the Takings Clause can be applied and “enforced without inconvenience or political difficulty.” Tabacinic, supra note 12, at 620. One of the factors in Turney that led the court to find a compensable taking was the lack of “inconvenience or practical difficulty” in granting judicial relief. Turney v. United States, 115 F. Supp. 457, 464 (Cl. Ct. Cl. 1953); see also supra note 99 and accompanying text.
174. See supra note 123 and accompanying text.
IV. CONCLUSION

The Supreme Court has recognized the extraterritorial applicability of the Constitution and the protections that friendly aliens are entitled to under the Takings Clause. However, the Court has not determined guidelines for when a friendly alien can bring such a claim before a United States court. The Federal Circuit has only added to the confusion surrounding this issue. Rather than following established precedent, the Federal Circuit digressed and took a formal, stricter approach. Just as the United States respects the property rights of its citizens within its boundaries, it must respect the property rights of aliens outside of its borders. Instead of applying the substantial-connection test to Fifth Amendment Takings Clause claims, especially those involving friendly foreign nationals, courts should once again consider the notions of mutuality and practicality. Until this happens, the United States will continue to harm friendly aliens such as Ms. Atamirzayeva, and no remedy will be available to them.

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175. See, e.g., Tabacinic, supra note 12, at 621 (stating that the Federal Circuit's decision in El-Shifa demonstrates the inherent conflict between Verdugo-Urquidez and Turney).